

HOW TO TREAT A PREGNANT EMPLOYEE OR JOB APPLICANT

By Karen Sutherland and Deric Martin

LEGAL BACKGROUND

State and federal laws have a variety of protections for pregnant or potentially pregnant employees and job applicants. Federal protections include the Pregnancy Discrimination Act, which prohibits discrimination based upon “pregnancy, childbirth, or related medical conditions;” and the Family Medical Leave Act (FMLA), which allows a new mother or father to take up to 12 weeks of time off after the birth or adoption of a child, or the placement of foster child. The FMLA covers employers with 50 or more employees in the same geographic area and all governmental employers. There are also some eligibility requirements for employees under the FMLA, such as a threshold minimum number of hours worked in the preceding year.

On the state level, Washington’s Law Against Discrimination (WLAD) also protects women from discrimination based upon pregnancy. The law requires an employer to offer the same benefits and opportunities to pregnant women that it offers to other employees. The WLAD applies not only to existing employees, but to job applicants as well. For example, an employer may not consider a woman’s pregnancy—or her potential to become pregnant—when deciding whether to hire, promote, demote, or terminate her. Also, the employer must allow leave for pregnancy-related absences and may not treat time off for such absences differently than it treats absences for any other short-term disability.

As drafted by the legislature, the WLAD applies only to businesses with eight or more employees. The Washington Supreme Court, however, has found that the law expresses a fundamental public policy of the state. As a result, most of its remedies apply to all employees and job applicants, regardless of the size of the employer.

Washington also has a Parental Leave Act (PLA). This law requires employers who have maternity policies for biological mothers to give the same benefits to fathers and to new adoptive parents and stepparents. The law applies to all Washington employers, both public and private, regardless of size. The PLA does not require employers to adopt a maternity policy, but it does require them to offer the same benefits to fathers, stepparents and adoptive parents as they offer to new mothers if they do have a maternity policy.

There are also laws related to using sick leave to care for a sick child (including a newborn) that apply to both parents. These laws, which are due to change in January, will be the subject of a later article.

PRACTICAL GUIDELINES

The gist of these laws is that pregnant women—or women who may become pregnant in the future—must be treated the same as other employees. The laws also place an affirmative burden upon employers to provide leave for women who are unable to work because of a disability

related to pregnancy or childbirth. The following tips should help to avoid lawsuits or claims of discrimination by employees and job applicants.

- Make your employees who have a role in hiring, promoting, disciplining, and terminating employees aware that pregnancy discrimination is unlawful, and be sensitive to situations in which claims of discrimination may arise.
- Review your policies regarding long- and short-term disability leave to confirm that pregnant employees who are disabled by pregnancy-related conditions or childbirth are treated the same as other disabled employees.
- If you have a maternity policy (such as a policy that allows for time off beyond the time that the employee is disabled by pregnancy or childbirth), make it available to fathers and to new adoptive parents and stepparents (both male and female).
- Most obstetricians or other care providers will certify a woman as being disabled for 4-6 weeks after giving birth. If you do not have the resources to provide for paternity leave or leave for adoptive parents and stepparents, you can establish a disability leave for pregnancy and childbirth that is based on the actual period of disability. That way, the woman who gives birth will still get some needed time off, and you will be in compliance with the law.
- Do not ask female employees or applicants whether they plan to get pregnant in the future. In a recent Washington case, an employee's supervisor asked this question, and the employee replied that she wanted to have a baby some time in the future. Two weeks later she was fired. Although the employer argued the termination was due to the employee's poor performance and the supervisor's question was the only "overt act" of discrimination by the employer, the court allowed the employee's discrimination claim to be decided by a jury.
- Do not restrict women from performing jobs just because they could injure their reproductive organs or the jobs could cause birth defects. There may be changes to the law on this in the future, but the law as it currently stands does not allow employers to limit women to performing work on these grounds.
- Do not assume that pregnant employees will not return to work after their pregnancies.
- Do not assume that pregnant employees will require special treatment after their babies are born. Handle each situation on a case-by-case basis, treating the employee's requests the same as you would for any other employee's requests. For example, if a woman requests accommodation of a pregnancy-related disability, treat it the same as any other disability.
- Do not respond negatively to requests related to childbirth, such as a request for a chair in the bathroom or other private place for expressing breast milk and a place to store it, or time off for doctor's appointments.
- When interviewing job applicants, do not ask questions about children or pregnancies, even if you suspect the woman is pregnant. Instead, you can ask whether there is anything that

would affect the applicant's ability to work the hours that you need (including overtime if that is part of the job) and whether the applicant has any anticipated needs for time off in the next X months. Ideally, all applicants should be asked these questions, not just women, in order to avoid a discrimination claim. These questions are also a good business practice to avoid any surprises, such as finding out that the applicant has a long-planned trip to Europe or upcoming surgery that would interfere with his ability to work.

- If you learn by asking the questions outlined above that an applicant is pregnant (or, for that matter, that a male applicant has surgery planned), this is not a sufficient reason to automatically forego hiring the applicant. Instead, you need to determine whether you can reasonably accommodate the anticipated disability and then document carefully the efforts you make or document why you are unable to make an accommodation.
- If you do not hire an applicant who has revealed to you that she is pregnant or that she plans to have children in the future, be very careful to document your reasons for hiring someone else instead.

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