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Blog Post

"When Do You Plan On Having A Baby?" And Other Questions Not To Ask

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Employers interviewing women of child-bearing age may be tempted to ask about plans for having a baby, but doing so poses risks. While an employer might be concerned about staffing coverage, the Pregnancy Discrimination Act prohibits employers with 15 or more employees from discriminating against a woman based on her potential or capacity to become pregnant. Taking adverse action against a pregnant employee because of her pregnancy is equally unlawful.

Nonetheless, a *New York Times* article in February this year bore the striking headline: "Pregnancy Discrimination Is Rampant Inside America's Biggest Companies." The article indicated that, notwithstanding the law, many pregnant women were either passed over for promotions or fired when they complained.

Yet another NYT headline focused on the failure of employers to provide light duty to pregnant women: "Miscarrying at Work: The Physical Toll of Pregnancy Discrimination."

The issues presented are frequently played out in administrative proceedings and lawsuits. Last year, the EEOC received nearly 3,000 charges alleging pregnancy discrimination, and the agency recently has brought a number of pregnancy discrimination actions. For example, the EEOC recently announced

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that it settled a pregnancy discrimination case involving an upscale retirement community in Sarasota, Florida. The EEOC took the position that a Sarasota, FL., retirement community violated the Pregnancy Discrimination Act by refusing to hire and promote Michelle Fredericks because of her potential to become pregnant. Fredericks began working in the community's dining department in 2007. In 2015, managers encouraged Fredericks to apply for an open position as a dining room supervisor. Before Fredericks applied, a manager texted her to ask when she planned on having another baby, explaining, "With this position it doesn't leave a lot of time off for long periods of time." The retirement community failed to interview Fredericks and offered the dining supervisor position to a female that it did not believe would become pregnant.

Just a few months before the Sarasota case, the EEOC settled a case against a Portland-based medical documentation service. There, a 28-year-old woman applied online for a scribe position, got an offer, and completed all pre-hiring screens. However, when she told the company she was expecting a baby several months later, the company's CEO called her and rescinded the offer. The CEO told the applicant that she should have notified the company about her pregnancy because it would not have hired her had it known.

That was a violation of the Pregnancy Discrimination Act. The PDA amended Title VII of the Civil Rights Act of 1964 to clarify that Title VII's longstanding prohibition of discrimination on the basis of sex includes a prohibition of discrimination on the basis of pregnancy, childbirth, and related medical conditions. The Glenridge case is a reminder that a 1991 United States Supreme Court case *International Union, United Automobile, Aerospace & Agricultural. Implement Workers of America, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991) which held that based on the clear language of the Pregnancy Discrimination Act, an "employer [is prohibited]

from discriminating against a woman because of her *capacity to become pregnant* unless her reproductive potential prevents her from performing the duties of her job."

Best Practices

Employers should not ask female applicants if or when they plan to conceive. While such questions by themselves, are not illegal per se, they can be used to establish animus towards pregnant women. An employer could still establish legitimate non-discriminatory reasons for not hiring the candidate, but it's best to avoid creating an issue by asking in the first place.

If an employer learns an applicant is or plans to become pregnant, the employer should not just discount her as a candidate for that reason. Rather, the employer should ask questions to evaluate her ability to perform the physical requirements of the job.

If a current employee becomes pregnant and needs accommodations, an employer should take special heed. The Pregnancy Discrimination Act, the Family and Medical Leave Act (applying to employers with 50 or more employees), and the Americans with Disabilities Amendments Act (also applying to employers with 15 or more employees) all impact pregnancy accommodation rights. In addition, some state and local governments have laws with even more expansive protections.

Employers should work through potential accommodations with a pregnant employee, not just assume that she cannot perform the job. That's what happened in the landmark 2015 United States Supreme Court case *Young v. UPS* that set the standard for accommodating pregnant employees. The employee in that case worked as a pickup and delivery driver. When she became pregnant, her doctor restricted her from lifting more than 20 pounds in the first 20 weeks of pregnancy and 10

pounds thereafter. UPS placed her on unpaid leave, saying that she could not work because the company required drivers in her position to be able to lift up to 70 pounds.

Since that case, savvy employers have made sure that if their policies and practices allow accommodations or light duty for certain categories of employees (such as those with on-the-job injuries), they also apply to pregnant women.

Wise employers also don't leave accommodations to first-level supervisors, who often lack formal training in the legal obligations surrounding accommodations. Instead, once a request for an accommodation is made, trained Human Resources personnel should engage in the interactive process to try to determine a reasonable accommodation.

Employers should look at their current policies and procedures to make sure they take into account accommodations on the basis of pregnancy, childbirth, or related medical conditions (including lactation), train managers in recognizing and responding to requests for accommodations, and establish procedures for determining what accommodations are appropriate.

For assistance with policies, training, procedures, or issues that arise with accommodations, contact your Akerman attorney.
