THE RISE IN PREGNANCY-RELATED EMPLOYMENT DISCRIMINATION CLAIMS

By Maria C. Walsh

Laws protecting female workers from discrimination have succeeded, more women are entering and remaining in the workforce in more diverse occupations than ever before. With expanded participation has come the need to adapt the workplace to pregnant and breast-feeding workers. It is estimated that 75 percent of women entering the workforce will be pregnant during their employment, and 75 percent of new mothers choose to breastfeed. Discrimination claims result when pregnancy-related needs conflict with working conditions and benefits.

Enacted in 1978, the Pregnancy Discrimination Act banned employment discrimination on the basis of pregnancy, childbirth or related medical conditions. More than 35 years and several laws later, we're still grappling with how to apply that edict to the realities of today's workplace. As more women juggle pregnancy and childbirth-related issues with the demands of their work, employers must navigate some highly personal personnel issues.

Most employers are aware that the Equal Employment Opportunity Commission (EEOC) defines "pregnancy discrimination" as "treating a woman unfavorably because of pregnancy, childbirth or a medical condition related to pregnancy or childbirth." Employers can't discriminate on the basis of pregnancy by refusing to hire, train, promote or provide equal pay, insurance or other benefits because of an employee's pregnancy. Nor can an employer discriminate against a pregnant worker or applicant because of customer, co-worker or client prejudice.

In 2008, Congress amended the Americans with Disabilities Act (ADA) by extending legal protection to *temporary* impairments of "major life activities" in the ADA Amendments Act. Although pregnancy is not a "disability," temporary medical complications resulting from pregnancy, such as severe nausea, gestational diabetes, sciatica, post-partum depression, etc., may constitute "disabilities" within the meaning of the ADA. If a woman is temporarily unable to perform her job due to a medical condition related to pregnancy or childbirth, the EEOC expects the employer to treat her in the same way as other temporarily disabled employees. If an employer provides light duty, alternative assignments, disability or other leave to temporarily disabled employees, the same benefits must be afforded workers temporarily disabled by pregnancy.

Charges of discrimination result when seemingly neutral policies adversely impact a pregnant worker. An employee who loses sales commissions because her accounts were reassigned temporarily during her pregnancy leave may allege discrimination. A worker disciplined for tardiness due to pregnancy-related nausea also may claim discrimination. If the employer has no effective process for addressing employee concerns before they become administrative charges, the continued employment relationship may be threatened.

After pregnancy-related discrimination charges increased nearly 50 percent between 1997 and 2011, the EEOC urged employers to do more to accommodate pregnancy-related limitations. The EEOC increased attention on whether employers were engaged in an "interactive process" to explore reasonable accommodations for employees temporarily disabled by pregnancy-related medical complications. Temporary reasonable accommodations might include rescheduling early-morning meetings, reassigning shifts, substituting videoconferencing for long-distance travel or making other work adjustments that enable the employee to perform her job while pregnant. Employers need not adopt a requested accommodation that poses "undue hardship" to the employer.

Supervisors trained to conduct effective interactive discussions and to identify appropriate accommodations can reduce employee frustration and pregnancy-related charges.

Human resource professionals or mediators can help managers and employees explore reasonable accommodations through interactive discussions before claims are filed.

Even healthy employees who are not "temporarily disabled" may have pregnancy-related conditions that challenge their ability to work. A glance at any online forum for pregnant employees demonstrates that healthy, pregnant employees juggle work needs (i.e., weight-lifting assignments, time on their feet, exposure to noxious fumes, travel demands, etc.) with concerns for the health of their child and themselves. Employees who do not qualify for legally mandated accommodation may request leave to avoid work environments they fear pose potential hazards to their pregnancy.

Pregnant employees who qualify for leave under the Family Medical Leave Act (FMLA) are entitled to 12 weeks unpaid leave because pregnancy is a "serious health condition." New mothers usually want to reserve some of their 12-week FMLA leave to care for their newborn. Advocates for further accommodation in the workplace argue that the option of taking leave is neither as productive for the employer nor as useful to the employee as reasonable workplace accommodation to the needs of healthy, pregnant workers. If an employer can accommodate weight-lifting restrictions temporarily to permit a pregnant employee to work longer during her pregnancy, both the employer and employee benefit. Some employers worry that their accommodation of healthy, pregnant employees will invite charges of gender discrimination from non-disabled male employees. To date, litigation on this front is sparse, and several states (including Alaska, California, Connecticut, Hawaii, Illinois, Maryland, New Jersey and Texas) and local jurisdictions (including Philadelphia and New York City) have legislated requirements that employers accommodate non-disabled pregnant female employees.

The 2010 Patient Protection and Affordable Care Act also promotes accommodation by requiring employers to provide both private space (other than a bathroom) and unpaid break time for one year after birth for expressing breast milk. Employers of fewer than 50 employees may gain exemption by proving compliance would impose an "undue hardship." The Act does not pre-empt state laws that mandate greater accommodation (such as paid break time or coverage in excess of one year).

Disputes about whether otherwise neutral employment policies discriminate against pregnant workers or whether a particular accommodation is required continue to spawn litigation across the country. Early intervention and resolution can improve productivity and job satisfaction while avoiding costly claims of discrimination and retaliation. ■

Maria C. Walsh *is a full-time mediator and arbitrator with JAMS and has vast experience resolving employment discrimination claims. She can be reached atmwalsh@jamsadr.com.*