
# Employer Guidance: Pregnancy and the Americans with Disabilities Act

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## Employer Guidance: Pregnancy and the Americans with Disabilities Act

In today's legal landscape, it is essential that employers recognize the interplay of protections or benefits offered to pregnant workers by statutes such as the Pregnancy Discrimination Act ("PDA"), the Family Medical Leave Act ("FMLA") and the Americans with Disabilities Act, as amended ("ADAAA"). One concept which is frequently overlooked is the significance of the ADAAA's potential application to pregnant workers, which may trigger employee rights and employer responsibilities. Specifically, it is essential to understand the effect of the 2008 amendments to the ADA, which broaden the scope of a disability to allow for inclusion of more temporary impairments such as pregnancy-related conditions.

### The Americans with Disabilities Act, As Amended

Title I of the ADAAA prohibits employment discrimination against a qualified individual based on the individual's disability. Specifically, all covered employers are prohibited from discriminating "against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." Prior to 2008, several courts held that medical conditions related to pregnancy do not ordinarily constitute a "disability" under the Act. However, in 2008, Congress amended the ADA to broaden the definition of a disability to include more temporary or less severe impairments. Specifically, under the ADAAA, a disability is (a) a physical or mental impairment that substantially limits one or more major life activities of an individual; (b) a record of such impairment; or (c) being regarded as having such an impairment.

Although pregnancy is not independently considered a disability under the ADAAA definition, some pregnancy-related impairments qualify as disabilities under the Act. As such, employers are prohibited from discriminating on the basis of such impairments and must provide reasonable accommodations to disabled employees or applicants unless such accommodation would cause undue hardship to the employer in the form of significant difficulty or expense. Because the ADAAA's application to pregnancy-related impairments is a relatively recent development, many employers are unaware of their obligations under the Act. In fact, in its Strategic Enforcement Plan for 2013-2016, the U.S. Equal Employment Opportunity Commission ("EEOC") recognized "accommodating pregnancy-related limitations under the [ADAAA] and the [PDA]" as an emerging or developing issue which it seeks to address as a national priority.

The EEOC's Enforcement Guidance on Pregnancy Discrimination provides several examples of pregnancy-related impairments, including pregnancy-related anemia, pregnancy-related sciatica, pregnancy-related carpal tunnel syndrome, gestational diabetes, nausea causing severe dehydration, abnormal heart rhythms that may require treatment, swelling due to limited circulation and depression.

**Reasonable Accommodations Under the ADAAA**

Accordingly, requests for accommodation from pregnant workers should be treated similarly to requests from other employees with disabilities by conducting an analysis under the ADAAA framework. Once a worker requests an accommodation for a pregnancy-related impairment that substantially limits a major life activity, an employer has an obligation to engage in the interactive process and to provide a reasonable accommodation, absent undue hardship. In the pregnancy condition context, a reasonable accommodation may include measures such as job restructuring or redistribution of non-essential functions, a part-time or modified work schedule, allowance of more frequent breaks, telecommuting, leave of absence, and reassignment to a vacant position or light duty, although this is not an exhaustive list. An employee is not required to use "magic words" to request an accommodation, and an employer may request reasonable documentation to establish that a worker has a disability under the ADAAA which necessitates accommodation, such as a note from a treating physician.

One area of common confusion for employers arises when individuals request accommodations following pregnancy-related leaves of absence. Under the Family Medical Leave Act ("FMLA"), employers with 50 or more employees must provide eligible employees with up to 12 weeks of leave (in a 12-month period) for the birth or care of a new child, for the employee's own serious health condition, or for the employee's care of a spouse or child with a serious health condition. State law may also provide additional or concurrent leave benefits. When an employee's FMLA leave expires, an employer must be cautious in requiring the employee to return to work if the employee claims to suffer from a pregnancy-related condition, which could qualify as a disability under the ADAAA. In this situation, an ADAAA analysis and engagement in the interactive process is necessary, as a temporary leave of absence beyond any accrued sick or vacation time may be considered a reasonable accommodation, absent undue hardship to the employer.

**Additional Employee Protections: The Pregnancy Discrimination Act and State Laws**

Even if a worker's pregnancy-related condition does not qualify as a disability under the broad scope of the ADAAA, an employer may be required to accommodate the limitation under the Pregnancy Discrimination Act ("PDA"). Title VII, as amended by the PDA in 1978, prohibits discrimination based on current pregnancy, past pregnancy, potential or intended pregnancy or medical conditions related to pregnancy or childbirth. Under the PDA, an employee who is temporarily unable to perform the functions of her job due to her pregnancy or pregnancy-related condition must be treated in the same manner as other employees with similar limitations. Thus, if an employer provides an accommodation such as light duty to employees who are not pregnant but are similar in their ability or inability to work, the employer must provide the same accommodation to the pregnant employee. The United States Supreme Court recently analyzed this issue in *Young v. UPS*.

Furthermore, employers may be subject to state laws in addition to the ADAAA and the PDA, or in the alternative. For example, in 2014, the New Jersey Law Against Discrimination was amended to include pregnancy as a protected class, thereby requiring covered employers to provide reasonable accommodations for pregnant employees even if the employees' pregnancy-related conditions do not qualify as a disability under the ADAAA or state law. In Pennsylvania, the Pennsylvania Human Relations Act prohibits discrimination on the basis of pregnancy, although it does not currently provide for accommodation of pregnancy or related medical conditions. Employers may also be subject to local laws such as the Philadelphia Fair Practices

Ordinance, which requires employers in the city of Philadelphia to provide reasonable accommodations to pregnant employees.

**Recommended Best Practices**

In line with guidance offered by the EEOC, the following best practices serve to assist employers in non-discrimination and accommodation of pregnant employees in line with the ADAAA (and PDA):

- Develop and enforce a strong non-discrimination company policy in accordance with ADAAA and PDA requirements, which addresses conduct that could be considered discrimination;
- Develop and maintain a system for employee complaints which allows employees to report violations or concerns through multiple individuals or avenues;
- Promptly and thoroughly investigate employee complaints regarding discrimination and respond efficiently, including implementing corrective or preventative measures as necessary;
- Maintain and enforce a company anti-retaliation policy which protects employees who submit discrimination complaints from being fired, demoted, harassed or otherwise retaliated against for opposing discrimination;
- Provide ongoing training to management and employees regarding their rights and responsibilities under the law;
- Continuously review company policies and practices as well as emerging law to identify and correct any policies which disadvantage women affected by pregnancy, childbirth or related medical conditions;
- Implement a policy and process in which employees suffering from pregnancy-related medical conditions can request a reasonable accommodation, and requests are expeditiously reviewed and granted by management as appropriate under the law;
- Train all managers to recognize requests for reasonable accommodation (no "magic words" are necessary) and to promptly respond to or pass along the request to the appropriate company decision-maker;
- Train those responsible for handling accommodation requests to ensure that they recognize that pregnancy-related impairments may qualify as disabilities and understand the process for determining an appropriate accommodation and limitations as to requiring employees to submit medical documentation beyond reasonable documentation establishing an ADAAA disability.

This list is not inclusive, and employers should consult an employment attorney to effectively recognize and manage responsibilities under the ADAAA and related law.

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Sara E. Hoffman is an associate in the Employment and Labor Law group. Her practice focuses on representation of employers in a variety of litigation matters including sexual harassment, race, national origin, religion, disability and age discrimination cases as well as other state law and constitutional claims. She also counsels employers on matters such as employment policies and handbooks, employment contracts, workplace discrimination and other employment issues