



# Pregnancy Discrimination Act

## Who, What, Why . . .

*Who does it apply to:* The law applies to all employers with 15 or more employees.

*What is the issue:* Title VII was passed in the 1960's to protect against discrimination based on race, color, religion, sex or national origin. Since that time, other laws have been passed adding protection against discrimination toward other groups. The Pregnancy Discrimination Act ("PDA") was passed in 1978 to modify Title VII to specifically protect against discrimination based on . . . you guessed it . . . pregnancy.

*What am I required to do:* Employers are required not to discriminate against employees on the basis of "pregnancy, childbirth, or related medical conditions." More specifically, employers are required not to treat an employee adversely because of these characteristics in relationship to any significant aspect of employment.

*What constitutes a violation:* There are two kinds of violations – direct mistreatment and disparate impact.

- Direct mistreatment is straightforward. If an employer affirmatively mistreats an employee because of pregnancy by failing to hire, firing, demoting, or any other type of significant slight someone might dream up, it can be actionable as pregnancy discrimination.
- Disparate impact is more subtle. If an employer creates a policy that is neutral or non-discriminatory on its face, that policy might have a consequence of negatively impacting pregnant workers more significantly than others. An employer policy that employees who like pickles and ice cream together must be fired, is not discriminatory on its face because it may affect any worker. That said, conventional wisdom suggests that pregnant women like strange food combinations during pregnancy. This facially neutral rule has a disparate (greater) impact on pregnant workers and may create a claim for discrimination against the employer as to all pregnant employees. Of course, in the real world, the policy, the violation, and the impact will likely

be much more subtle so these claims are often much more complicated to bring.

*What if my employee violates without my consent:* Choose carefully who you place in charge. Employees placed in positions of authority with the power to control the circumstances of other employees are not personally liable. Their liability is placed with the employer even if the employee acts without authority. The same is true of independent contractors (whether properly characterized or not) placed in positions of authority over employees.

*Hasn't this law been in the news lately:* Why, yes. Yes it has. The Equal Employment Opportunity Commission ("EEOC") recently issued new "guidance" for employers regarding the scope of protection for women under the PDA. Even though the PDA does not provide any of these protections in writing and pregnancy is not a "disability," the EEOC has decided it will enforce the PDA as though pregnant employees must be given the same protections a disabled person is provided under the Americans with Disabilities Act ("ADA").

Specifically, the EEOC now insists that employers "reasonably accommodate" pregnant employees. For example an employer would need to redistribute non-essential functions of the pregnant employee's job duties to others, modify a pregnant employee's work schedule to take more breaks, or modifying equipment or seating to make the workspace more comfortable for pregnant employees. Additionally, the EEOC wants employers to implement light duty policies for pregnant workers to allow for different job duties during pregnancy or an altered work schedule.

*Do I have to follow the EEOC guidance:* Yes and no. While the EEOC's guidance will probably not stand up in court as the law exists right now, it will cost a lot of money to fight it. Plus, there is a law proposed in Congress now entitled the Pregnant Worker Fairness Act which would essentially make the EEOC's guidance law. In a year or so, the legal requirements will likely

match the EEOC's guidance so it can't hurt to start abiding by the rules now.

### Common Situations:

*Maternity Leave:* Doulas United is a small, Austin based, company providing pregnancy coaching for expectant mothers. Natasha, one of the company's coaches, has, herself, become pregnant. When the time comes for Natasha to have her baby, she asks for maternity leave to care for her new child. Operating on a bit of a double standard, Doulas tells her the company just can't afford to grant her time off. If she leaves to care for her newborn, her position will be given to someone else. Natasha makes a claim under the PDA. Is she in for a payday? Nope. The PDA only prevents discrimination. Doulas does not have 50 employees so the federal Family Medical Leave Act (which grants up to 12 weeks unpaid leave) does not apply. With no maternity leave law in Texas, Doulas can let Natasha go without creating a legal issue if she fails to return immediately to work.

*Take that, EEOC:* Anger Management Trainers, Inc. ("AMT") hates government intervention and refuses to kowtow to the EEOC's new guidance. When Sue asks for a new keyboard and desk set up as a reasonable accommodation of her pregnancy-related carpal tunnel syndrome, AMT management tells her to jump in a lake. Has AMT jumped into troubled waters? Unfortunately, yes. Even though the EEOC's guidance is not law and won't likely stand up in court at this time, Sue's request is protected under the ADA. All pregnancy related illnesses are likely disabilities within the meaning of that law and reasonable accommodation must be afforded the employee.

*Octomom:* Billy operates Billy Bob's Breeding, a thoroughbred horse breeder. Lilly has been a rising star in the company, but

has become pregnant and plans to have more children. Billy, a father himself, treats Lilly perfectly during pregnancy and gives her three month's maternity leave even though his company is not required to do so. Billy even pays Lilly ½ wages during her leave. When she returns, Billy welcomes her back into the company. Months later, however, when it comes time to choose a manager for the company so Billy can take more time off, Billy selects a male employee who is barely qualified. He just doesn't feel that he can count on Lilly to handle the reigns with her new baby and plans for a bigger family. Has Billy erred? Yes. Even though he treated Lilly properly during pregnancy and immediately after, he cannot retaliate against Lilly for her pregnancy and plans for a large family.

### What should I do:

*Good:* Count up your workers every few months to know whether the law applies to you. Once you have more than 15, institute an anti-discrimination policy including pregnancy discrimination.

*Better:* In addition to developing a policy, control who is permitted to interview and make material decisions about employees to be sure they are aware of the concerns of pregnancy and other discrimination.

*Best:* In addition to the items above, create job descriptions for each position. Use the job descriptions to prepare advertisements for positions, to ask objective interview questions, and to create a uniform and objective performance review system to avoid accidentally discriminating against someone based on pregnancy.



Michael Kelsheimer focuses his practice on the employment law needs of Texas businesses and executive employees. He recognizes that the cost and expense of litigation make resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at [mkelsheimer@grayreed.com](mailto:mkelsheimer@grayreed.com) or by phone at **469.320.6063**