



## **PREGNANCY, MATERNITY, AND PATERNITY**

*Some Sleepless Nights Can Be Avoided – Preventing Claims of Discrimination and Harassment Before They Start*

By Ellen A. Adams and Paula M. Williams

June 6, 2017

In its Strategic Enforcement Plan for 2017-2021, the EEOC continues to prioritize “accommodating pregnancy-related limitations under the Americans with Disability Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA).”. Employers must therefore be diligent to take steps to adequately educate their leaders about their legal obligations under the PDA, ADAAA, and Family Medical Leave Act (FMLA) in managing expectant and new parents to avoid claims of discrimination, harassment, and interference with FMLA rights.

### **PDA Obligations**

Though pregnancy alone is not a disability under the ADAAA, the EEOC’s Enforcement Guidance on Pregnancy Discrimination and Related Issues illustrates that a pregnant employee’s request for accommodation requires an analysis under the ADAAA *and* the PDA. Even if a pregnant employee is not “disabled” under the ADAAA, an employer may have a duty to accommodate a pregnancy-related restriction under the PDA if the employer has accommodated similar non-pregnancy-related restrictions in the past. See *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015).

In *Young*, the United States Supreme Court developed a new test for evaluating whether an employer violated the PDA by failing to accommodate a pregnant employee. Based on *Young*, a pregnant employee first must demonstrate she requested an accommodation that was not provided and that the employer accommodated other non-pregnant employees “similar in their ability or inability to work.” The employer then has the burden to prove a legitimate, non-discriminatory reason for refusing to accommodate the pregnant employee. The inquiry does not end there, however, and if the employee can show the employer’s reason imposes a significant burden on pregnant employees that is not warranted by the employer’s proffered reason, then the employee could still prove discrimination under the PDA.

### **ADAAA Obligations**

In addition to the PDA, pregnancy-related medical conditions may constitute a disability under the ADAAA, imposing further accommodation obligations on employers. Employers must engage in the “interactive accommodation process” in good faith before declining a requested accommodation as unreasonable or as imposing an undue hardship. As such, a pregnant employee’s request for accommodation should be viewed through both the lens of (a) whether the employee qualifies as “disabled” under the ADA and (b) whether the employee’s limitations are similar to the limitations of other employees whose accommodation requests have been granted.

### **FMLA Obligations**

Finally, an employer must also consider its potential obligations to a pregnant employee or to the spouse of a pregnant employee under the FMLA. The FMLA imposes an entirely different set of obligations on covered employers that must be met. Making matters more challenging, the FMLA also subjects managers and supervisors to personal liability for FMLA violations. Even if the FMLA is not implicated, an employer must determine whether leave is an appropriate accommodation based on both the ADAAA and the PDA.

## STEPS TO TAKE

- **Review and Update Your Leave, Accommodation, Discrimination and Retaliation Policies**
  - “Suitable” policies that are compliant with the latest developments under the ADAAA, PDA, and FMLA are essential, but by themselves are not likely enough to avoid liability.
  - Make sure you can prove all of your employees, including temps in certain circumstances, have received the policies.
- **Regularly Train All Your Employees Regarding Your Policies and Procedures**
  - It is essential to train managers and supervisors to be alert to potential issues under the ADAAA, PDA, and FMLA in order to effectively minimize risk of liability, particularly with respect to the FMLA since individual managers and supervisors have risk of personal liability.
  - It is also crucial to train leaders to look across and carefully evaluate multiple complex issues to determine whether requests for accommodation or FMLA leave should be granted, especially where certain requests are outsourced.
  - Employers should provide regular training for all employees, not just managers and supervisors.
  - Make plans for you and your leaders to log into GableGotwals’ free webinar on this topic on June 6, 2017 from 12:00 to 1:00 pm and document the participation as a key to your defense.
- **Engage Counsel to Audit Your Prevention Practices and Assist with Your Training**
  - Having counsel audit your policies and practices helps minimize your risk of costly employment claims.
  - GableGotwals has a team of experienced employment lawyers who are ready to assist.

*Ellen Adams’ and Paula Williams’ practice primarily consists of defending employers against claims of discrimination, harassment, retaliation, wrongful termination, and alleged wage and hour violations. In addition to their litigation practice, Ms. Adams and Ms. Williams counsel and advise clients on developing policies, procedures, and training, responding to complaints, handling investigations, and other employment matters.*



Ellen A. Adams  
Direct Line: (405) 235-5520  
eadams@gablelaw.com

One Leadership Square  
211 North Robinson, 15th  
Floor  
Oklahoma City, OK 73102  
(405) 235-5500

[www.gablelaw.com](http://www.gablelaw.com)



Paula M. Williams  
Direct Line: (405) 235-3302  
pwilliams@gablelaw.com

One Leadership Square  
211 North Robinson, 15th  
Floor  
Oklahoma City, OK 73102  
(405) 235-5500

[www.gablelaw.com](http://www.gablelaw.com)

*This article is provided for educational and informational purposes only and does not contain legal advice or create an attorney-client relationship. The information provided should not be taken as an indication of future legal results; any information provided should not be acted upon without consulting legal counsel.*