A Timely Analysis of Legal Developments

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Maryland Employers Soon Must Provide "Light Duty" to Pregnant Disabled Women and Update Employment Handbooks

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Effective October 1, 2013, Maryland employers with 15 or more employees must provide their pregnant employees with certain reasonable accommodations beyond the requirements of the federal Americans with Disabilities Act (ADA) and Pregnancy Discrimination Act (PDA). The Reasonable Accommodations for Disabilities Due to Pregnancy Act (SB 784/HB 804) mandates that employers provide pregnant employees who are temporarily disabled with light duty assignments or transfers to less strenuous jobs, among other potential accommodations. Typically, these accommodations remove essential functions from a job, in contrast to traditional ADA accommodations which remove impediments or otherwise assist employees in performing the essential functions of their jobs.

Significantly, the amendment to Maryland's Fair Employment Practices Act (FEPA)[1] states also that an employer must post in a conspicuous location—and include in any employee handbook—information concerning an employee's rights to a reasonable accommodation under the new law. In this regard, on September 12, 2013, the Maryland Commission on Civil Rights informed the public that, although the law does not direct the Commission to create a poster, the Commission will create a poster in the near future. For now, the Commission suggests:

> In the interim employers should consult legal counsel for the specific language to post and provide in employee handbooks consistent with [the new law].

The Reasonable Accommodations for Disabilities Due to Pregnancy Act

The impetus to amend the Maryland FEPA to include additional accommodations for pregnant employees was a decision issued by the U.S. Court of Appeals for the Fourth Circuit. In *Young v. UPS*,[2] the Fourth Circuit held that employers are not required under the ADA or PDA to provide pregnant employees with light duty assignments so long as the employer treats pregnant employees the same as non-pregnant employees with respect to offering accommodations.

1 Md. Code Ann., Art. 20 *et seq.*

2 707 F.3d 437 (4th Cir. 2013).

In *Young*, the plaintiff worked for UPS as a part-time driver. Although all drivers were required to be able to lift items weighing up to 70 pounds, the plaintiff's duties generally included carrying lighter letters and packages. After the plaintiff became pregnant, she asked for a brief leave of absence. Shortly thereafter, the plaintiff submitted a doctor's note with a recommendation that she not lift more than 20 pounds, and asked for an accommodation to work light duty. UPS refused these requests and did not allow her to return to work because lifting more than 20 pounds was an essential function of her job.

Notably, UPS, as do many employers, accommodated on-the-job injuries with light duty assignments. However, UPS did not offer light duty assignments to any employee, male or female, who had a medical condition unrelated to a work injury. The plaintiff argued that the PDA requires employers to provide pregnant employees light duty work if it provides similar work to other employees in other circumstances. Both the U.S. District Court for the District of Maryland and the Fourth Circuit held that UPS's policy was lawful under the ADA and PDA because it was (1) "gender-neutral" and (2) employers are not required to provide light duty assignments to disabled employees under the ADA.

As a result of *Young v. UPS*, Maryland's General Assembly amended Maryland's FEPA to require employers to provide certain reasonable accommodations to pregnant employees who provide notice to their employers of a temporary disability, even if the accommodation removes essential functions of the position. The statute offers no definition for when a pregnant employee would be deemed "temporarily disabled" under the law, although this determination presumably depends on medical documentation.

In particular, the law requires an employer to consider the following accommodations for a pregnant employee:

- Changing the employee's job duties;
- Changing the employee's work hours;
- Relocating the employee's work area;
- Providing mechanical or electrical aids;
- Transferring the employee to a less strenuous or less hazardous position; or
- Providing leave.

If a pregnant employee requests a transfer to a less strenuous or less hazardous position as a reasonable accommodation (light duty), the employer must honor the request *if* the employer has a policy, practice, or a collective bargaining agreement requiring or authorizing the transfer of other temporarily disabled employees. In other words, if an employer has a policy authorizing special accommodations for employees who suffer on-the-job injuries, it must offer the same accommodation to pregnant employees who are temporarily disabled. In sum, with respect to pregnancy, the legislation will not permit an employer to distinguish between employees that require light duty due to a work-related illness or injury and pregnant employees who also properly request a temporary light duty assignment.

Also, even if the employer does not have a policy or practice of providing light duty work for any injured or temporarily disabled employees, it must still provide a light duty assignment to a pregnant employee *if* the employee's health care provider "advises the transfer." In this situation, however, there are defenses available that are not available to employers that already provide light duty under some circumstances. Most notably, an employer is not required to: (a) create a new position it would not otherwise have created; (b) discharge another employee; (c) transfer any employee with more seniority than the employee requesting the accommodation; or (d) promote any employee who is not qualified to perform the job.

The law does not change an employer's obligation to engage in the interactive process whether the light duty accommodation is offered or not. Moreover, the law states that the employee must provide an employer with a health care provider's certification that includes the date the reasonable accommodation became medically advisable, the probable duration of the accommodation, and an explanatory statement as to the medical advisability of the accommodation as a prerequisite to a light duty accommodation.

What this Means for Maryland Employers

Employers in Maryland should educate themselves and speak with their employment counsel regarding the FEPA requirement to provide "light duty" assignments, among other new potential accommodations, to pregnant employees who are temporarily disabled. Moreover, employers

should consult with their employment counsel concerning the new posting and handbook requirements by which employees are to be informed of these new requirements. If an employer does not have an employee handbook, it still must either edit or revise an existing policy, or create a new one to ensure compliance with this law. This new amendment presents employers with a good opportunity to update their handbooks to include other recent developments in labor and employment law.

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