

## Employment Law

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### New Employees and the Pregnancy Discrimination Act

As employers cautiously return to the hiring market, they should make certain that they have in place hiring practices that permit maximum flexibility if new hires fail to perform as expected. One dilemma employers may confront is a new employee who accepts an offer of employment, or even begins work, but then informs the employer that he or she will need significant time off in the near future. This situation may arise, for example, when a newly hired employee is pregnant or adopts a child and desires to take a leave of weeks or months during the first three to six months or year of employment. The employer then faces the question of whether it is free to rescind a job offer or terminate employment because of this unanticipated absence.

This Alert discusses employee hiring and termination, as affected by the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (“PDA”). Because this Alert only addresses hiring practices and potential terminations during the first 12 months of employment, the provisions of the federal Family and Medical Leave Act do not apply.<sup>1</sup>

#### EMPLOYER LIABILITY FOR ANTICIPATORY ACTION

The PDA prohibits employers with 15 or more employees from firing, refusing to hire or promote, or taking other adverse action against an employee because of her pregnancy. The PDA does not require that employers give pregnant employees “special treatment.” However, employers must treat pregnant employees the same as

they would treat non-pregnant employees in comparable situations. For example, an employer may terminate a pregnant employee for excessive absenteeism, as long as the employer also fires non-pregnant employees who are excessively absent. This is true even if the pregnant employee’s absenteeism is a direct result of her pregnancy or the birth of her child.

Employers may face liability, however, when a pregnant employee is fired merely because the employer *anticipates* that the employee will be absent. Courts have held that it is a violation of the PDA to terminate or refuse to hire a pregnant individual because of an unsupported belief that, because of her pregnancy, the individual will miss work in the future. That sort of stereotypical thinking will not pass muster under the PDA.

The Fourth Circuit held that it is a violation of the PDA to refuse to hire a pregnant applicant based on the unsupported assumption that the pregnancy would cause the applicant to miss work. *Wagner v. Dillard Dep’t Stores, Inc.*, 17 Fed. Appx. 141 (4th Cir. 2001). In *Wagner*, a woman was given a verbal offer of employment, which was then withdrawn after the employer discovered she was pregnant. The employer rescinded the offer because it believed the woman would miss work due to her pregnancy. However, there was no factual basis for this assumption, because the applicant had expressed the intention to work up to the birth and to take no maternity leave. Therefore, the court held that, because the em-

<sup>1</sup> State and local laws may apply as well and should be consulted prior to pursuing a particular course of action.

ployer had no valid reason to believe the applicant could not fulfill the duties of the job, it could not refuse to hire her solely because of the pregnancy.

Similarly, the Seventh Circuit ruled that it was a potential violation of the PDA to fire an employee because the employer thought the pregnant employee would eventually miss work. *Maldonado v. U.S. Bank*, 186 F.3d 759 (7th Cir. 1999). The employee in *Maldonado* was a substitute bank teller, a job that required her to be “on call” during the summer to fill in for vacationing employees. After the employee disclosed her pregnancy, she was fired because the employer presumed she would be unavailable to fill in during the summer months, since the employee’s baby was due during that critical time. The court held that this was a potential violation of the PDA, because the employer could not fire the pregnant employee based on anticipated absences “unless it ha[d] a good faith basis, supported by sufficiently strong evidence, that the normal inconveniences of [the] employee’s pregnancy [would] require special treatment.” Essentially, an employer cannot presume that all pregnant employees will miss a large amount of work; instead, there must be a strong basis for this belief as to the particular employee.

Finally, in another Seventh Circuit case, the court held that an employer could fire a pregnant employee if the employee’s continued presence was necessary for the job and the employee expressed a clear intent to take extended leave. *Marshall v. American Hosp. Ass’n*, 157 F.3d 520 (7th Cir. 1998). In *Marshall*, the pregnant employee was hired to plan a conference. The position required a sustained presence in the office in the months prior to the event. Shortly after starting the job, the employee informed her employer that, because of her pregnancy, she intended to take an extended leave during the period immediately before the conference. Because the employee expressed this clear intent to take leave and because the job required attendance in the office during that specific time, the court held that the employer had a good faith basis to believe the employee would not fulfill the requirements of the job. As a result, the court held that it was not a violation of the PDA to fire the pregnant employee under those circumstances.

## AVOIDING PITFALLS UNDER THE PDA

Employers can minimize the risk of claims by planning carefully for the hiring process and ensuring that employee policies are clear and uniformly applied to all job applicants and new employees. For example, employers may want to adopt some of the following practices to increase their flexibility:

- **Clearly state the requirements of the position—such as that the job is full-time and that attendance is critical—in employment notices, during interviews and in job descriptions.**

To protect against a claim for discrimination or wrongful termination, a defendant often has to establish that the terminated employee could not perform a required function of the job. By clearly stating job requirements such as good attendance, the employer can demonstrate that a particular requirement has been applied uniformly to all applicants and is essential to the position. As a result, if the newly hired employee then informs the employer that he or she will be unable to fulfill this requirement because of the need to take leave in the near future, the employer will face fewer risks when terminating the employee if the absence occurs.

- **Adopt written policies that limit leave for new employees.**

An employer may wish to adopt uniform policies that define available leave during an initial period of employment, such as the first three or six months or even longer. Those policies might include:

- Vacation does not begin to accrue for the first three or six months;
- Sick leave accrues at a specified rate;
- Any short-term disability policy does not apply during the first six months of employment; and
- Unpaid leave is not available.

If an employee does not meet the attendance requirements during this period, he or she may be fired without violating discrimination laws such as the PDA.

Policies such as the foregoing have been upheld by the Fifth Circuit Court of Appeals. *Stout v. Baxter Healthcare Corp.* 282 F.3d 856 (5th Cir. 2002). In *Stout*, the employer had in place a policy stating that, during an initial 90-day probationary period, a new employee would lose his or her position if he or she was absent for more than three days. The employer further specified that vacation and medical leave did not accrue during this period. When the employee missed more than three days during this probationary period due to pregnancy-related complications, the employment was terminated. The Fifth Circuit rejected the employee's argument that the employer's policy had a disparate impact on females, stating that there was no evidence that she would have been treated differently if the absences were due to causes other than pregnancy and stating further that the PDA "does not protect a pregnant employee from being discharged for being absent from work even if her absence is due to pregnancy or to complications of pregnancy, unless the absences of nonpregnant employees are overlooked." The ruling in *Stout* and other cases makes it critical that the employer adopt and implement policies that are consistently applied to all employees. If there is evidence that the employer has failed to follow such a neutral process, the employee may be able to establish a disparate impact claim.

- **Ensure that policies are crafted without discriminatory intent, are applied uniformly, and are designed to cover all classes of employees.** Employers should be aware that facially neutral policies do not always comply with the PDA. A facially neutral policy may be considered discriminatory if evidence suggests it was adopted to target pregnant workers. *Piraino v. Int'l Orientation Res., Inc.*, 84 F.3d 270 (7th Cir. 1995). In *Piraino*, the employer hired an applicant who was pregnant. The employer did not learn of the pregnancy until after the applicant had begun work. Two months later, the employer adopted a facially neutral policy, prohibiting maternity leave

and other sorts of unpaid leave during the first year of employment. The employer defended the policy, stating that it merely put in writing a long-standing unwritten policy. The court ruled, however, that there were genuine issues of fact regarding the employer's intent in adopting the policy. To avoid such a result, it is recommended that any newly adopted policy apply only prospectively to persons who begin work after the policy goes into effect.

By implementing these practices, employers should gain increased flexibility and should lessen risks as they return to the hiring market.

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