

## PREGNANCY DISCRIMINATION CLAIMS ON THE RISE

Employee claims of pregnancy discrimination have risen sharply in recent years. In 2000, 4,160 such claims were filed with the Equal Employment Opportunity Commission (EEOC). That number jumped to 4,730 in 2005 and reached 6,119 in 2010, marking growth of nearly 50 percent in the past decade and making pregnancy discrimination one of the fastest-growing discrimination charges handled by the EEOC.

Most employers understand the importance of safeguarding against workplace discrimination on the basis of an employee's sex. However, the growing trend of pregnancy discrimination claims means that employers should also be aware of the Pregnancy Discrimination Act of 1978 (PDA), an amendment to Title VII of the Civil Rights Act of 1964 that provides protection to women based specifically on their pregnancy status.

The PDA mirrors Title VII's other non-discrimination provisions and prohibits all forms of workplace discrimination, including harassment, refusing to hire or taking some adverse employment action against an employee because of her pregnancy. The law also prohibits a broader range of discriminatory workplace conduct than other Title VII provisions, including unequal treatment because of a pregnancy-related condition or because of the prejudices of other employees, clients or customers.

A case filed this year in a Maryland federal district court illustrates how claims of pregnancy discrimination can arise in unexpected circumstances.

The plaintiff, Na'imah Ferdinand-Davenport, a licensed social worker, claimed that her former employer denied her fair access to job openings because of her pregnancy [*Ferdinand-Davenport v. The Children's Guild*, 110 FEP Cases 1658 (D. Md. 2010)]. The employer eliminated Ms. Ferdinand-Davenport's position in a downsizing, three months after she announced her pregnancy. After informing Ms. Ferdinand-Davenport of two remaining open positions in other offices, the employer allegedly did not return her phone calls when she requested more information about the positions. Both jobs were filled before Ms. Ferdinand-Davenport was given the opportunity to interview. She sued the company in January, alleging that her employer deliberately excluded her from the promotion process because of her pregnancy.

The employer filed a motion to dismiss Ms. Ferdinand-Davenport's lawsuit, arguing that she never actually attempted to apply for the open positions and that the three-month time gap between her pregnancy and her termination – as well as her positive performance reviews following the pregnancy announcement – negated any inference of pregnancy discrimination. However, in October 2010, the federal district court denied the employer's motion to dismiss the pregnancy discrimination claim under the PDA, finding that the facts alleged by Ms. Ferdinand-Davenport were sufficient to raise an inference of discriminatory failure to hire her because of her pregnancy.

### Employers' Best Practices To Avoid Pregnancy Discrimination

Because many employment practices are implicated by the pregnancy of an employee or prospective employee, employers should consider the following measures in developing pregnancy and anti-discrimination policies:

- Review current policies on pay, promotion standards, leave and other employment terms to ensure that they do not include qualifications that may unfairly discriminate against pregnant employees.
- Develop specific, job-related qualification standards and focus only on these standards at the time of hiring or recruitment. If pregnancy conflicts with any standard, retain the qualification only if it is reasonably necessary to the normal operation of the position or the business.
- Communicate with employees to discuss any possible limitations or accommodations needed as a result of pregnancy and avoiding assumptions based on pregnancy status.

## Conclusion

While many employers often consider pregnancy-related issues in the context of the Family and Medical Leave Act, employers must also consider that the PDA imposes anti-discrimination obligations on employers similar to those for race, sex, religion and other protected class statuses under Title VII. Formulating policies and practices will help employers guard against the tangible and intangible costs associated with pregnancy discrimination in the workplace. Employers who have questions about dealing with specific pregnancy discrimination or Title VII compliance issues should contact their labor and employment attorney.

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## NLRB PROPOSES MANDATORY, PRO-UNION POSTER FOR ALL EMPLOYERS

On December 21, 2010, the National Labor Relations Board (NLRB) announced its proposed plan to require virtually all employers to post a large notice to employees informing them of rights under the National Labor Relations Act (NLRA), particularly their right to unionize. The poster is controversial and will not be mandatory until after a 60-day comment period, which expires on February 22, 2011.

### Pro-Union Motivation

The poster's apparent motivation is to foster unionization. The NLRB is concerned that 92 percent of private sector employees, government data shows, are not unionized. According to the NLRB's justification for a poster, "The overwhelming majority of private sector employees are not represented by unions, and thus lack an important source of information about NLRA rights." Who should tell this overwhelming majority about their rights? The government or unions, according to the NLRB. The NLRB proposal ignores the fact that 92 percent of the private sector employees may be intentionally non-union for one of many valid reasons or that their employers are a ready source of information of this issue.

## Content of the Poster

The proposed text of the poster is basically the same as one recently imposed upon federal contractors through Executive Order 13496. The text does not expressly quote employees' four statutory rights under NLRA Section 7. Rather, the poster paraphrases and amplifies all but one of those rights. Most of the poster emphasizes unionization rights. Only one line, though, is given to an employee's right to "refrain" from – to say no or not participate in – the other three Section 7 rights. Nor does the proposed poster inform employees about other important union-related rights, such as an employee's Beck rights (an employee covered by a union security clause may refuse to pay union dues and fees for anything other than collective bargaining) or an employee's right not to pay union dues at all in right-to-work states like North or South Carolina. The complete poster can be found at: [http://www.nlrb.gov/About\\_Us/news\\_room/Notice\\_for\\_Rule\\_making/2010-ew019\\_PI.pdf](http://www.nlrb.gov/About_Us/news_room/Notice_for_Rule_making/2010-ew019_PI.pdf).

## Posting

Under the proposal, all NLRA-covered employers must conspicuously display the 11-inch by 17-inch poster in the workplace "where notices are customarily posted." An employer must also electronically distribute the poster, such as by e-mail or intranet, "if the employer customarily communicates with its employees by such means." If a workforce is comprised of significant numbers of employees who are not proficient in English, then the employer must display a poster or posters using their applicable languages.

## Penalties

Once the NLRB's proposal becomes final, failure to display the poster in the workplace could trigger significant legal problems for the employer. These include:

- An unfair labor practice charge;
- Evidence of an employer's "unlawful motive," an important factor in establishing other unfair labor practice charges; and
- Extra time (beyond the normal six-month period) to file other unfair labor practice charges against the employer

## Employer Options

Before the regulation takes effect, employers – either individually or through a group – may submit their comments or concerns to the NLRB at before February 22, 2011. Afterward, assuming that the poster and related requirements remain essentially as proposed, an employer must display the requisite poster.

At the same time, a union-free employer could consider posting its own explanation about its policies and the employees' related rights and opportunities. An employer might also post other relevant government posters nearby, such as (if applicable) the state's Right to Work poster. An employer might also use the opportunity to meet with its employees and discuss the NLRB's poster, the advantages of remaining union-free and the employees' right to say "no" to unions or unionization.

The proposed poster raises important labor relations concerns and opportunities. Employers should consult with labor counsel regarding their related options and responsibilities.

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