CHAPTER 13

THE PREGNANCY DISCRIMINATION ACT

by Kenneth E. Milam & W. Thomas McCraney, III

[13.1] Introduction

Title VII of the Civil Rights Act of 1964, as amended, prohibits, among other things, discrimination in employment "because of sex" or "on the basis of sex."[1] In 1978, Congress enacted the Pregnancy Discrimination Act (PDA) to clarify the scope of prohibited sex discrimination. The PDA amended Title VII by adding § 701(k), which provides:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, child birth or related medical conditions; and women affected by pregnancy, child birth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected, but similar in their ability or inability to work....

As a result of this amendment, Title VII prohibits discrimination in employment against women affected by pregnancy or related conditions.[2]

[13.2] Relationship of PDA to Other Laws

The PDA is an amendment to Title VII, and as such, a violation of the PDA is a violation of Title VII. After exhausting administrative remedies through the EEOC, a plaintiff may pursue a claim of pregnancy discrimination in federal court under the disparate treatment or disparate impact models proof. If the plaintiff successfully proves a violation of the PDA, she may be entitled to

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[1] 42 U.S.C. § 2000(e), *et. seq.* (1994).

[2] After the PDA was passed, the Equal Employment Opportunity Commission ("EEOC") issued extensive guidance for employers in the form of questions and answers. These questions and answers are found at 29 C.F.R. Pt. 1604, App.

recover compensatory and punitive damages, as well as equitable relief, which is generally available to successful litigants under Title VII.[3]

Employment decisions affecting pregnant workers may implicate not only the prohibitions of Title VII, but also other laws such as the Family and Medical Leave Act of 1993 ("FMLA").[4] The FMLA mandates that employers are to provide up to 12 weeks of unpaid leave to an "eligible" employee in the following circumstances: (1) for the birth of a son or daughter and to care for the newborn child; (2) for placement with the employee of a son or daughter for adoption or foster care; (3) to care for the employee's spouse, son or daughter or parent with a serious health condition; or (4) for a serious health condition which makes the employee unable to perform the functions of the employee's job.[5] However, in order to become "eligible" for FMLA leave, the employee must be one who has been employed for at least 12 months by that employer, who has been employed for at least 1,250 hours of service during the 12 month period immediately proceeding the commencement of the leave, and is employed at a worksite where fifty (50) or more employees are employed by the employer within seventy-five miles of that worksite. The PDA does not place such eligibility requirements on employees, and thus, a pregnant worker who does not meet the eligibility requirements of the FMLA may still be entitled to protection under the PDA.[6] On the other hand, employers should note that a pregnant worker who is covered by the PDA and who also meets the eligibility requirements of the FMLA may have other or additional rights under that Act as well.[7]

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[3] Title VII is discussed in more detail in Chapter 10.

[4] 29 U.S.C. §§ 2601, *et. seq.* (1994).

[5] 29 U.S.C. § 2612 (a) (1994); 29 C.F.R. § 825.112.

[6] As in the case of Title VII generally, the only threshold eligibility requirement for the PDA is that the employer employ fifteen (15) or more workers.

[7] The FMLA is discussed in detail in Chapter 18.

[13.3] Selected PDA Issues

There are several recurring employment issues involving the PDA amendment to Title VII which can be problematic for employers and which can result in costly litigation if not handled in an appropriate manner.

[13.4] Adverse Employment Actions

Title VII, as amended by the PDA, makes it an unlawful employment practice for an employer to discriminate with respect to hiring, firing, or other terms and conditions of employment simply because a female employee is, or may become pregnant.[8] Any written or unwritten employment policy or practice that discriminates against employment applicants or employees because of pregnancy, childbirth or related medical conditions is a violation of Title VII, unless the employer can show that freedom from pregnancy is a "bona fide occupational qualification."[9] That is, an employer may not refuse to hire female applicants simply because they are or may become pregnant, unless the condition of pregnancy actually disqualifies the employee from being able to perform the essential functions of the particular job in question. This is a difficult burden for the employer to prove since there are few, if any, positions which a pregnant worker simply cannot perform either with or without reasonable accommodation.

[13.5] Ability to Work

An employer cannot refuse to hire a female because of her pregnancy-related condition so long as she is able to perform the essential functions of her job. Likewise, an employer may not deny a woman the right to work during or after pregnancy or child birth if she is physically able to perform the necessary functions of the job. The mere fact of pregnancy cannot automatically establish a

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[8] 42 U.S.C. § 2000e (1994).

[9] *See*, 29 U.S.C. § 1604.10(a) (1994).

disqualifying disability. Therefore, an employer is prohibited from using pregnancy as a reason for treating female workers less favorably with regard to employment decisions.

[13.6] Reasonable Accommodation

If a female employee is unable to perform some of the functions of her job, for example heavy lifting, because of pregnancy or related condition, the employer may not deny her the opportunity to perform modified tasks or alternative assignments or to transfer the employee to another available position if the employer provides such opportunities to employees who are temporarily disabled for other reasons. The PDA requires that the employer treat an employee temporarily disabled by pregnancy-related conditions the same way it treats employees who are temporarily disabled by other medical conditions.[10]

[13.7] Preferences

In general, an employer may not refuse to hire or discharge a female worker because of its preferences against pregnant workers or the preferences of co-workers, clients, or customers.[11] For example, an employer may not dismiss a pregnant employee or require her to take a leave of absence because the employer believes that it does not "look good" to have pregnant women in certain job categories.[12]

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[10] 29 C.F.R. Pt. 1604, App. (Q.& A. 5).

[11] 29 C.F.R. Pt. 1604, App. (Q.& A. 12).

[12] *See* EEOC v. Red Barron Steak Houses, 47 FEP 49 (N.D. Cal. 1988) (employer terminated waitress because "it did not look right" for a pregnant woman to be waiting on tables).

[13.8] Marital Status

The EEOC guidelines provide that an employer may not limit disability benefits for pregnant-related conditions to married employees.[13] This prohibition has been broadly interpreted to mean that an employer may not take adverse action against a pregnant employee because she is not married. With regard to this particular issue, employers have attempted to avoid liability by asserting their motivation for refusing to hire or for firing a pregnant, single woman was not the pregnancy per se, but rather the immoral behavior for which the pregnancy is simply a marker. Several courts have rejected this argument and found pregnancy discrimination in this situation, pointing out the impossibility of applying such a rule to unwed fathers.[14]

[13.9] Exposure to Hazardous Substances

Excluding pregnant women, or those who may become pregnant, from consideration for jobs involving exposure to substances considered hazardous (either to women's reproductive systems or to fetuses), may constitute unlawful sex discrimination. Concern for the safety of the fetus is not a legitimate reason for an employer to discriminate against a pregnant employee. This issue was put to rest with the Supreme Court's decision in UAW v. Johnson Controls,[15] which held unequivocally that it is up to the employee herself to decide whether to assume any particular known risks of the work place.

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[13] 29 C.F.R. Pt. 1604, (Q.& A. 13).

[14] *See* Viggors v. Valley Christian Ctr., 805 F. Supp. 802 (N.D. Cal. 1992); Doe v. Osteopathic Hospital, 333 F. Supp. 1357 (D. Kan. 1971) (discharge of unwed pregnant employee violated Title VII since the pregnancy, as such, did not affect job performance, was not within the bona fide occupational qualification exception, and would necessarily be applied only to women).

[15] 499 U.S. 187 (1991).

[13.10] Disability and Health Benefits

The PDA requires employers to treat disabilities caused or contributed to by pregnancy, childbirth or related medical conditions the same as disabilities caused or contributed to by other medical conditions under any health or disability insurance or sick leave plan available in connection with employment.[16]

[13.11] Disability Benefits[17]

The PDA does not require employers who do not have disability benefit programs to establish such programs. However, employers who do have such programs, or who implement such programs, must treat employees who are unable to work because of pregnancy-related conditions the same way that they treat employees who are disabled by other conditions. Employers may not treat pregnancy-related disabilities different from other disabilities by excluding them from or treating them less favorably under disability benefit program coverage. For example, when an employer provides disability benefits according to a fixed formula, i.e., a percentage of the employee's wages, then employees with pregnancy-related disabilities are entitled to benefits at the same, not a lower rate, as employees with other disabilities. Further, when an employer's disability program provides benefits for a fixed period of time, for example, up to 26 weeks, for other disabilities, the employer may not provide a shorter maximum period of time for receipt of pregnancy-related disability benefits.[18] If an employer provides extended benefits, or long-term benefit coverage for employees who are permanently disabled, the employer cannot exclude from such coverage employees who are

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[16] 29 C.F.R. § 1604.10(b).

[17] The term "disability benefits" generally refers to a means of providing income maintenance to an employee for a period of time during which he/she is unable to work as a result of a physical condition.

[18] 29 C.F.R. Pt. 1604 (Q.& A. 15).

permanently disabled by pregnancy, child birth or related medical conditions.[19] In determining whether an employee meets eligibility requirements under a disability benefit plan, an employer must follow the same procedures for employees affected by pregnancy as employees affected by other conditions. An employer may not follow different procedures or impose additional requirements in making such determinations with regard to whether pregnancy, childbirth or related condition renders an employee disabled within the terms of the disability plan.

[13.12] Health Benefits[20]

The principles discussed above with regard to disability benefits apply equally to medical or health insurance benefits. Employers who do not have medical or health insurance benefit plans for their employees are not required under the PDA to establish such plans. However, when such plans already exist, or are implemented, benefit coverage cannot exclude costs arising from pregnancy, child birth or related medical conditions. Moreover, in determining the extent of such coverage, the same terms and conditions must apply to costs incurred for pregnancy-related conditions as to costs incurred for medical conditions unrelated to pregnancy.[21]

A recurring issue in the area of health benefits is whether an employer must provide health insurance coverage for the medical expenses of pregnancy-related conditions to the spouses and dependents of its male employees. The general rule is that where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally

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[19] 29 C.F.R. Pt. 1604, App. (Q&A 16).

[20] The term "health benefits" generally refers to insurance coverage to pay the costs of medical and hospital services.

[21] *See,* 29 C.F.R. § 1604.10(b).

cover the medical expenses of spouses of male employees, including those arising from pregnancy related conditions.[22]

An employer may not exclude coverage for the pregnancy-related medical expenses of the spouses of its male employees. However, an employer may lawfully exclude coverage for the pregnancy-related medical expenses of an employee's non-spouse dependents, e.g., daughters, even if such coverage is provided for the spouses of male employees. Such an exclusion is permissible as long as it applies to the non-spouse dependents of both male and female employees. Since male and female employees have an equal chance of having a pregnant, dependent daughter (as opposed to wives), such an exclusion would affect male and female employees equally.[23]

Although an employer may not lawfully exclude coverage for the pregnancy-related medical expenses of the spouses of its male employees, it is not required to provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees under its health insurance programs. According to the EEOC guidelines, where the employer provides coverage for the medical conditions of the spouses of its employees, then the level of coverage for the pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of the female employees. For example, if the employer covers employees for 100% of the reasonable and customary expenses sustained for a medical condition, but only covers dependent spouses of employees for 50% of reasonable customary expenses for their medical conditions, the pregnancy related expenses of the male employee's spouse must be covered at the 50% level.[24]

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[22] Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669 (1983); 29 C.F.R. Pt. 1604, App., (Q&A No. 21).

[23] *See*, Q&A No. 21.

[24] 29 C.F.R. Pt. 1604, App. (Q&A No. 22)

[13.13] Parental Leave Rights

[13.14] Mandatory Leave

In general, an employer may not require a pregnant worker to take a predetermined period of leave from her employment.[25] An employer must permit an employee to work at all times during her pregnancy when she is able to perform the essential functions of her job.[26]

[13.15] Requests for Leave

The PDA requires that employers treat pregnancy-related conditions the same as any other disabling condition. If an employer has an established sick leave plan or policy, it must treat requests for pregnancy-related leave the same as any other request for medical or sick leave. That is, when an employer allows leave for temporary disabilities not related to pregnancy, it may not deny leave for pregnancy-related disabilities or apply different or additional terms or conditions to such leave.[27] For example, an employer may not require only employees disabled by pregnancy or related conditions to first exhaust their vacation leave before taking disability leave.

In the absence of an established sick leave plan, the question which typically arises is whether the PDA requires the employer to allow a pregnant worker to take a period of requested leave. Refusal to grant a pregnant worker's request for leave under certain circumstances may constitute sex discrimination.[28] The general rule however is that an employee is entitled to take a period of

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[25] 29 C.F.R. Pt. 1604, App., (Q.& A. No. 7); *see,* Maddox v. Grand View Care Center, 780 F.2d 987 (11th Cir. 1986) (Title VII is violated when an employer requires a fixed time period of maternity leave that places no such length of mandatory leave on other disability leaves).

[26] 29 C.F.R. Pt. 1604, App., (Q.& A. No. 8).

[27] *See,* Conners v. Univ. of Tennessee Press, 558 F. Supp. 38 (D. Tenn. 1982)(denial of leave of absence because of temporary pregnancy complications violates the PDA when leaves are generally granted for non-pregnancy related disabilities).

[28] *See,* 29 C.F.R. § 1604.10(c).

maternity leave only when such leave is medically necessary. An employer may not terminate a female employee who is compelled to cease work because of pregnancy without offering her, alternatively, a leave of absence.[29]

The EEOC guidelines provide some guidance to employers for use in determining whether to place on leave a pregnant employee who claims she is unable to work. Although an employer may not single out pregnancy-related conditions for special procedures for determining an employee's ability to work, an employer may use any procedure used to determine the ability of all employees to work. For example, if an employer requires its employees to submit a doctor's statement concerning their inability to work before granting requested leave, the employer may require employees affected by pregnancy-related conditions to submit such statements.[30]

[13.16] Reinstatement, Seniority and Benefits

In the case of an employee who is absent on leave because she is temporarily disabled by pregnancy-related conditions, the employer is required to hold her job open on the same basis as jobs are held open for employees on sick or medical leave for other reasons. However, if the pregnant employee has unequivocally informed the employer that she does not intend to return to work following the birth of her child, the employer need not hold her job open for any period of time.[31]

During periods of pregnancy-related leave, an employer's policy concerning the accrual and crediting of seniority must be the same for employees absent for pregnancy-related reasons as for those absent for other medical reasons.[32] The same is true for purposes of calculating such matters

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[29] *See infra* Section 13.17 concerning Childcare Leave and the Family Medical Leave Act of 1993.

[30] 29 C.F.R. Pt. 1604, App., (Q.& A. No. 6).

[31] 29 C.F.R. Pt. 1604, App., (Q.& A. No. 9).

[32] *Id.* at Q.& A. 10.

as vacation and pay increases. An employer cannot treat employees on leave or pregnancy-related reasons less favorably than employees on leave for other reasons. For example, if employees on leave for other medical reasons are credited with the time spent on leave when computing entitlement to vacation or pay raises, an employee on leave for pregnancy-related disability is entitled to the same kind of time credit.[33] If an employer provides benefits to employees on medical or sick leave, such as entitlement purchased disability insurance, payment of premiums for health, life or other insurance, continued payments into pension, saving of profit sharing plans, an employer must provide the same benefits for those on leave for pregnancy-related conditions.[34]

[13.17] Childcare Leave and the Family and Medical Leave Act of 1993

Following the birth of a child, employees are increasingly requesting time off for the purpose of caring for their new infant's needs. A frequently misunderstood aspect of the PDA is that it does not require employers to grant a period of maternity leave to an employee to care for her child.[35] The PDA only requires that pregnancy-related leave be granted under the same circumstances that leave is granted for other temporary disabilities and that leave be granted if medically necessary. The EEOC's position on child care related leave which is not medically necessary is as follows:

> While leave for child care purposes is not covered by the Pregnancy Discrimination Act, ordinary Title VII principles would require that leave for child care purposes be granted on the same basis as leave which is granted for employees for other non-medical reasons. For example, if an employer allows its employees to take leave without pay or accrued annual leave for travel or education which is not job-related,

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[33] *Id.* at Q.& A. 11.

[34] Id. at Q.& A. 17.

[35] *See,* Troupe v. May DePt. Store Co., 20 F.3d 734, 738 (7th Cir. 1994) (stating PDA does not require an employer to give maternity leave); Cooper v. Drexel Chemical Co., 949 F. Supp. 1275, 1280 (N.D. Miss. 1996) (stating PDA does not require an employer to give maternity leave).

> the same type of leave must be granted to those who wish to remain on leave for infant care, even though they are medically able to return to work.[36]

According to the EEOC, if an employer permits its employees to take a certain amount of time off for other non-medical reasons, it cannot lawfully refuse the request of a male or female parent for leave to care for a new child.

Although the PDA does not require that an employer grant an employee's request for child care leave, the Family and Medical Leave Act ("FMLA") of 1993, 29 U.S.C. §§ 2601 *et seq.* gives eligible employees the right to take child care leave, and the employer is required, under that Act, to grant such leave to either the father or the mother making such a request. Specifically, the FMLA mandates that employers are to provide up to 12 weeks of unpaid leave to eligible employees "because of the birth of the son or daughter and in order to care for such son or daughter."[37] If an eligible employee takes FMLA leave to care for his or her new child, then the employer must maintain that employee's benefits during his or her absence and restore that employee to his or her position (or an equivalent position) upon his or her return to work following leave.[38]

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[36] 29 C.F.R. Pt. 1604, App. (Q.& A. 18(A)).

[37] 29 U.S.C. § 2612(a)(1)(A). As noted previously, the FMLA also requires that leave be granted to employees so that they may care for their spouse (or other immediate family member) who is suffering from a serious health condition. 29 U.S.C. § 2612(a) (1994). Therefore, notwithstanding any protection provided to male employees by the PDA, a male employee who is otherwise eligible for FMLA leave may be entitled to a period of unpaid leave to care for his pregnant spouse who is incapacitated due to a serious pregnancy-related medical condition.

[38] *See,* 29 C.F.R. §§ 825.209, 825.214.

[13.18] Abortion[39]

The PDA amendment to Title VII contains the following provision on abortion, representing a compromise on this controversial issue:

> [42 U.S.C. §2000(e)(k)] shall not require an employer to pay for health insurance benefits for abortion, except when the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from abortion: *provided* that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.[40]

An employer may not take adverse action against an employee because that employee had or is contemplating having an abortion.[41] In addition, all fringe benefits, other than health insurance, such as sick leave, which are provided for other medical conditions, must be provided for abortions.[42] Health insurance, however, need be provided for abortions only where the life of the woman would be endangered if the fetus were carried to term or medical complications arise from an abortion. For example, if a female employee experienced complications such as excessive hemorrhaging during the course of an abortion, the employer's health insurance plan is required to pay for any additional costs attributable to the complications of the abortion. However, the employer is not required to pay for the abortion itself, except when the life of the mother would be endangered if the fetus were carried to term. While not requiring coverage for abortions, the PDA specifically

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[39] Abortion is considered a condition "related to" pregnancy. However, infertility which is not uniquely feminine is not covered by the PDA and thus an employer need not provide benefits to employees seeking fertility treatments. Krauel v. Iowa Methodist Medical Center, 915 F. Supp. 102 (S.D. Iowa 1995). On a different note, at least one court has held that, although uniquely feminine, menstrual cramps are not a medical condition relating to pregnancy or child birth. Jirak v. Federal Exp. Corp., 805 F. Supp. 193 (S.D.N.Y. 1992).

[40] 42 U.S.C. § 2000(e) (1994).

[41] *See,* Turic v. Holland Hospitality, Inc., 85 F.3d 1211 (6th Cir. 1996)(employer violated PDA for terminating employee because she was considering having an abortion). 29 C.F.R. Pt. 1604, App., Q&A 34.

[42] *Id.* at Q&A 35.

pay for any additional costs attributable to the complications of the abortion. However, the employer is not required to pay for the abortion itself, except when the life of the mother would be endangered if the fetus were carried to term. While not requiring coverage for abortions, the PDA specifically provides that an employer is not precluded from providing benefits for abortions. If an employer decides to cover the cost of an abortion, the employer must do so in the same manner and to the same degree as it covers other medical conditions.

[13.19] Conclusion

The basic principle of the PDA is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work. A woman is therefore protected against such practices as being fired, or refused a job or promotion, merely because she is pregnant or has had an abortion. She usually cannot be forced to go on leave as long as she can still work. If other employees who take disability leave are entitled to get their jobs back when they are able to work again, so are women who have been unable to work because of pregnancy. In the area of fringe benefits, such as disability benefits, sick leave and health insurance, the same principle applies. A woman unable to work for pregnancy related reasons is entitled to disability benefits or sick leave on the same basis as employees unable to work for other medical reasons. Also, any health insurance provided must cover expenses for pregnancy-related conditions on the same basis as expenses for other medical conditions. However, health insurance for expenses arising from abortion is not required except when the life of the mother would be endangered if the fetus were carried to term, or where medical complications have arisen from an abortion.