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HRW Alert: News for Employers About the Pregnancy Discrimination Act

Is it unlawful for an employer to offer light duty to persons who are injured on the job, but not to pregnant workers? In a March, 2015 decision interpreting the Pregnancy Discrimination Act, the U.S. Supreme Court has answered this question "maybe."

The case, *Young v. United Parcel Service, Inc.*, involved a driver for United Parcel Service (UPS) whose job required her to lift packages weighing up to 70 pounds. When the driver became pregnant after several miscarriages, her doctor restricted her from lifting more than 20 pounds during the first 20 weeks of her pregnancy and 10 pounds during the remaining weeks. In requesting an accommodation, the driver told UPS that coworkers were willing to help her lift heavy packages. UPS informed her that the lifting restrictions would prevent her from doing her job and that she did not qualify for a temporary alternative job. The driver then took a leave without pay for most of her pregnancy and later lost her employee health coverage. She returned to work about two months after giving birth.

The driver brought a suit under the Pregnancy Discrimination Act. She claimed that UPS intentionally discriminated against her because it had policies granting light-duty work to employees who (1) were injured on the job, (2) had disabilities as defined under the Americans with Disabilities Act (ADA), or (3) had lost their Department of Transportation (DOT) certifications. The employee argued that the Pregnancy Discrimination Act requires employers that provide accommodations to employees with workplace disabilities to give the same accommodations to pregnant employees who are similarly limited in their ability to work because of pregnancy.

The Pregnancy Discrimination Act, a 1978 federal law, has two parts. The first part added discrimination based on pregnancy, childbirth, or related medical conditions to the definition of sex discrimination under Title VII of the Civil Rights Act of 1964. The second part requires employers to treat women "affected by pregnancy, childbirth, or related medical conditions" the same as others "similar in their ability or inability to work."

Interpreting this language, the Supreme Court found that an employer is not required to give pregnant employees "most-favored-nation status," meaning that employers do not have to treat pregnant employees the same as "any" other employees. For example, employers could lawfully grant accommodations to workers because they work in highly hazardous jobs, or based on seniority, or because they are needed for specific reasons at the workplace, without having to grant the same accommodations to women who have a pregnancy-related disability.

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At the same time, the Supreme Court found that the Pregnancy Discrimination Act did not merely add pregnancy discrimination as a form of sex discrimination. The Supreme Court made clear that the Pregnancy Discrimination Act additionally gave employees the grounds to bring a claim of pregnancy discrimination if an employer treated *disabilities* arising from pregnancy differently from medical conditions that caused a similar inability to work. Thus, for example, it would be unlawful for an employer to provide short-term disability benefits to employees who were out of work due to cancer or other disabilities, but to fail to provide such benefits for disabilities arising out of pregnancy.

The Court then described what an employee must prove to prevail on a claim of pregnancy discrimination based on a requested accommodation. First, an employee must show that she asked for an accommodation based on pregnancy. The employee must also show that the employer refused her request but accommodated other employees similar in their inability to work.

Second, if an employer then presents a legitimate, nondiscriminatory reason for not accommodating the pregnant employee, the employee must then demonstrate that the employer's policies put a "significant burden on pregnant workers" compared to other workers. For example, as the Court explained, a pregnant employee could present evidence that the employer provides light duty to "a large percentage of nonpregnant workers while failing to similarly accommodate a large percentage of pregnant workers." A pregnant employee could also present evidence that an employer has several policies granting accommodations to certain groups of employees but not pregnant employees, the Court further explained. The Court emphasized that showing how an employer's policies operate *in practice* could also be proof that the policy amounts to a form of intentional discrimination.

In light of this decision, employers should be wary of making accommodations such as light duty available to some classes of employees, like those injured on the job, but not to pregnant workers. Some Massachusetts courts have similarly suggested that if an employer offers light duty to persons injured on the job, but not to persons disabled for other reasons, such practice could constitute disability discrimination. The most risk-averse approach, then, is to treat any employee who is unable to work full duty in a similar fashion – by engaging in the legally-required interactive dialogue, and providing a reasonable accommodation that enables the employee to do the job. If the requested light duty or modified duty would not actually enable the person to do his or her job, but instead would involve relieving the employee of truly essential job functions, the employer may not be required to provide such an accommodation. There may be business reasons for the employer to do so anyway, not the least of which is to be supportive to its workers, but the employer may wish to place some limits on how long the modified duty can remain in place. Employers should consult with counsel about the advantages, disadvantages, and risks of granting or denying an employee's request for modified duty, depending on the unique facts.