PREGNANCY DISCRIMINATION

Title VII of the Civil Rights Act of 1964 made it a prohibited activity for an employer to discriminate on the basis of a person's race, religion, national origin or sex. In 1978 the Act was amended to include the Pregnancy Discrimination Act. The Pregnancy Discrimination Act was signed into law by President Jimmy Carter on October 31, 1978. It was enacted by Congress in response to the U.S. Supreme Court's decision in Geduling v. Aiello, 417 U.S. 484 (1973) which held that discrimination on the basis of pregnancy is not sex discrimination

The Pregnancy Discrimination Act, Sec. 701 (k) of Title VII Act states:

> 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, childbirth, or related medical conditions, and women affected by pregnancy, childbirth, 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 to so affected but similar in their inability to work and nothing in section 703 (h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or where medical complications arise from an abortion. Provided, that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

The basic principal of the Pregnancy Discrimination Act 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 discharge from or refusal of employment, denial of opportunities or benefits because of her pregnancy, because she had an abortion or is contemplating having one. The Pregnancy Discrimination Act is enforced by the Equal Employment Opportunity Commission (EEOC). Title VII however, covers only employers with fifteen or more employees.

Along with the Pregnancy Discrimination Act, an employee may also be protected under the State of Colorado's Anti-Discrimination Act C.R.S. 24-34-401. Unlike Title VII, the State's Anti-discrimination law does not require a minimum number of employees. In many instances pregnant workers may also be covered under the Family and Medical Leave Act (FMLA), which is enforced by the U.S. Dept. of Labor. Employers who have contracts with the federal government in excess of $10,000 a year are covered by Executive Order 11246. Enforcement is through the Office of Federal Contract Compliance (OFCCP).

The general applicable theory is that an employer must treat pregnancy the same as any other temporary disability. Therefore, the application of policies and practices will vary from employer to employer and industry to industry. The employer is not required to implement separate rules for pregnancy but must only assure that the existing rules are applied equally to women who are or may become pregnant. This includes decisions regarding hiring, discharge, terms and conditions, fringe benefits, etc.

Maternity Leave

Pregnant employees must be permitted to work as long as they are able to perform their jobs. It is the decision of the employee and her physician as to the last date of employment. If an employee has been absent from work as a result of a pregnancy-related condition and recovers, her employer cannot require that she remain on leave until after the time of delivery. The employee must be permitted to work at all times during the pregnancy when she is able to perform her job. Also, an employer may not have a rule that prohibits an employee from returning to work for a pre-determined length of time after childbirth.

The length of time for maternity leave must be applied in the same manner as temporary disability leave. During the period of the leave the employer must hold the job open for a pregnancy-related absence the same length of time that jobs are held open for employees on sick or temporary disability leave.

Family Medical Leave Act

The Family Medical Leave Act (FMLA) became effective August 5, 1993. It covers private employers with fifty or more employees. State and local government employers are covered by the FMLA regardless of the number of employees. To be eligible an employee must have been employed with the employer for at least twelve months prior to the date of the leave and on the date that the leave is to commence, has been employed for at least 1,250 hours of service with the same employer during the previous 12-month period.

Under the Family Medical Leave Act (FMLA) an eligible employee may take up to 12 workweeks of leave during any 12-month period for reasons including:

- The birth of a child, and to care for the newborn child.

- The placement of a child with the employee through adoption or foster care and to care for the child.

During FMLA leave, an employer must maintain the employee's existing level of coverage under a group health plan. At the end of FMLA leave the employer must take the employee back into the same or an equivalent job.

Non –Pregnancy

Under the Pregnancy Discrimination Act women *affected by* pregnancy or *related conditions* must be treated in the same manner as other applicants or employees with similar abilities or limitations. To be covered an employee or applicant need not necessarily be pregnant. Employment decisions that are made on the basis of the employer's belief that the employee is trying to or simply has the potential to become pregnant are illegal.

Even if the employee has a medical condition that prevents her from becoming pregnant naturally she is covered under both the Pregnancy Discrimination Act and the State Act.

Health Insurance and Benefits

➢Health Insurance:

If an employer provides any benefits to workers on leave the employer must provide the same benefits for those on leave for pregnancy-related conditions. Pregnancy-related expenses should be reimbursed exactly as those incurred for other medical conditions, whether payment is on a fixed basis or a percentage of reasonable and customary charge basis. The amounts payable by the insurance provider can be limited only to the same extent as amounts payable for other conditions. No additional, increased, or larger deduction can be imposed. Additionally the employer must provide the same level of health benefits for spouses of male employees as they do for spouses of female employees. Pregnancy-related benefits cannot be limited to married employees. In an all female workforce or job classification, benefits must be provided for pregnancy-related conditions if benefits are provided for other medical conditions.

➢Contraceptives:

Since contraception is a means to prevent and to control the timing of the medical condition of pregnancy it must be covered in an equal manner as other prescription drugs and devices or other types of services that are used to prevent the occurrence of other medical conditions.

The Equal Employment Opportunity Commission addresses the issue of contraceptives in its policy paper of December 2003. It noted:

> "Contraception is a means by which a woman controls her ability to become pregnant. The Pregnancy Discrimination Acts prohibits discrimination against women based on their ability to become pregnant this necessarily includes a prohibition on discrimination related to a woman's use of contraceptives. An employer cannot discharge an employee from her job because she uses contraceptives, so too an employer may not discriminate in its health insurance plan by denying benefits for prescription contraceptives when it provides benefits for comparable drugs and devices.

> This conclusion is supported by additional language in the Pregnancy Discrimination Act that specifically exempts employers from an obligation to offer health benefits for abortion in most circumstances. Congress understood that absent an explicit exemption, the Pregnancy Discrimination Act would require coverage of medical expenses resulting from a woman's decision to terminate a pregnancy."

- Seniority:

Employees with pregnancy-related disabilities must be treated the same as other temporarily disabled employees for accrual and crediting of seniority vacation calculation, pay increases, and temporary disability benefits.

Bona Fide Occupational Qualification (BFOQ)

Section 703(e) of Title VII provides:

> "It shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify or refer for employment any individual for a labor organization to classify its membership or to classify or refer to employment any individual, or for an employer, labor organization, or joint labor management committee controlling apprenticeship or other training programs to admit or employ any individual in any such program, on the basis of religion, sex, national origin in those certain instances where religion, sex or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

The Bona Fide Occupational Qualification (BFOQ) is a defense that acknowledges that pregnancy was a determining factor in the adverse employment decision. In most BFOQ defenses the employer asserts that the restriction is necessary for the safety of the general public. See for example, Lenin v. Delta Air Lines, Inc., 730 F.2d 994 (5th Cir. 1984). Delta had a policy of grounding female flight attendants as soon as they became pregnant. It argued that it could not reasonably predict which pregnant women would suffer side effects that would adversely affect their ability to perform the job safely. Delta's defense was upheld by the court which ruled that the policy was justified by business necessity because it was neither unrelated to the company's safety concerns nor an unreasonable approach to addressing issues of safety.

In pregnancy-related cases the BFOQ defense is often cited by the employer arguing that it is necessary for the health and safety of the pregnant employee. For example in International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) the employer initiated a policy of excluding pregnant women or women capable of bearing children from

positions that would expose them to lead asserting that the workplace created a fetal hazard. The court held that the employer failed to establish that sex was a bona fide occupational qualification. In its ruling the Court noted that the employer's fetal protection policy could be justified only if being able to bear children was a bona fide occupational qualification (BFOQ) for the job. The fact that the job posed risk to fertile women did not justify barring all fertile women from the position.

It is not an uncommon practice for employers in the food service industry, for example, to terminate the employment of pregnant employees or require a leave of absence due to the employer's fear or paternalistic notion that the employee would be subjected to unreasonable risk in the normal performance of the job duties. As was noted before, it is the determination of the employee and her physician when she should leave the employment. The Equal Employment Opportunity Commission guidelines have held that the BFOQ exception is to be narrowly construed.

A further BFOQ defense is regarding customer preference. The Courts have consistently narrowly construed customer preference BFOQ defenses.

Reasonable Accommodation

If a pregnant employee is unable to perform the functions of her job the employer is required only to treat that employee in the same manner as it treats other temporarily disabled employees, whether by providing modified tasks, alternative assignments, disability leaves, etc. The employer is not required to specially accommodate pregnant women or to treat them more favorably than non-pregnant employees.

It is a common misconception that pregnancy is covered under the Americans with Disabilities Act (ADA) or that analogous to the ADA the employer is required to provide a reasonable accommodation. Under the ADA the failure to make reasonable accommodations for an employee who is disabled can constitute discrimination. Both the Colorado Civil Rights Commission's Rules Prohibiting Discrimination on Account of Mental and Physical Disability, rule 60.2 (C), and the Americans with Disabilities Act state that "reasonable accommodation" may include job restructuring, part-time or modified work schedules.

Under the Pregnancy Discrimination Act and the Commission's Rules and Regulations the employer is not required to provide a reasonable accommodation *unless* it creates an accommodation for other employees who may have been temporarily disabled. Thus, if the employer created light duty work, job modifications, schedule changes, etc. for others then it is required to for pregnant workers also. Absent precedent the employer is not required to provide a reasonable accommodation. However, where opportunity for accommodation is available then it is encouraged that the employer initiate steps to accommodate pregnant employees.

Medical Documentation

An employer may not single out pregnancy-related conditions for special procedures to determine an employee's ability to work. However, an employer may use any procedure used to screen other employee's ability to work. For example, if an employer requires its employees to submit a doctor's statement concerning their inability to work before granting leave or paying sick benefits, the employer may require employees affected by pregnancy-related conditions to submit such statements.

The Health Insurance Portability and Accountability Act (HIPPA), which is enforced by the Dept. of Health and Human Services (HHS), restricts the information that can be divulged by health care providers and employers. For further information access HHS's website at www.hhs.gov/ocr/hipaa/.

Abortion

Health Insurance coverage for an abortion is not covered except where the life of the female would be endangered if the fetus were carried to term or where medical complications arise from an abortion. The employer's health insurance plan must cover complications arising from abortion, e.g. excessive hemorrhaging, but is not required to pay for the abortion itself.