

The Employment Law Counselor hosted by Jeff Stewart Episode 3

PLUS Staff: [00:00:00] Welcome to this PLUS Podcast, the Employment Law Counselor hosted by Jeff Stewart. Before we get started, we'd like to remind everyone that the information and opinions expressed by our speakers today are their own, and do not necessarily represent the views of their employers, or of PLUS. The contents of these materials may not be relied upon as legal advice.

Jeff Stewart: Hello everyone and welcome to the Employment Law Counselor Podcast. I'm your host, Jeff Stewart, and today we'll be covering pregnancy discrimination and some new laws in 2023 that put additional responsibilities on employers dealing with pregnant employees. This podcast is a collaboration between White and Williams LLP and the Professional Liability Underwriting Society, commonly referred to as PLUS.

While our podcast is not legal advice, it is a practical discussion between two attorneys that deal with the maze and minefield of labor and employment law on a daily basis. If you like what you hear, please give us a five-star review and subscribe, so you never miss an episode. [00:01:00] Today, I'm joined by one of my colleagues here at White and Williams, Tanya Salgado, who practices out of our firm's Philadelphia office.

How are you doing today, Tanya?

Tanya Salgado: Great. How are you doing, Jeff?

Jeff Stewart: I am wonderful. I'm excited for this discussion on pregnancy discrimination. How about you?

Tanya Salgado: I am as well. Thanks for having me.

Jeff Stewart: Absolutely. So why don't we just dive right in? You know, when people have asked me about pregnancy discrimination, I always tell them that there's really a patchwork of laws that have kind of dealt with this over the years, but there's no, while we have a pregnancy discrimination act, that is not a end all and be all.

Would you agree?

Tanya Salgado: Yes, for sure. And I would agree that this is definitely a patchwork. Under the current state of the law, you have a variety of federal laws as well as a variety of, uh, laws passed under state and local jurisdictions, and there's certainly some significant gaps under the current pregnancy [00:02:00] discrimination law.

It was an amendment to Title VII, and it provides for protection from discrimination, but it doesn't explicitly provide for accommodations such as maternity leave and until the Supreme Court's decision in *Young v. UPS* back in 2015, it was very unclear to what extent pregnant employees were entitled to accommodations.

And, and quite honestly, even after that decision, the law was less than clear as to an employer's obligation to provide accommodations.

Jeff Stewart: And that's why we have some of these new laws that have been passed here in 2023. Now, I also, I find it interesting that a lot of people don't know that the EEOC actually puts out, you know, their kind of enforcement priorities.

Kind of a list of things that they're going to be on the lookout for on a regular basis. And currently pregnancy discrimination is one of those [00:03:00] priorities.

Tanya Salgado: Yes, and certainly employers do not want to be on the EEOC'S hot list. When the EEOC files an action on behalf of an employee, they typically will issue a press release, and you really don't want to be that the test case for the EEOC on their new enforcement priority.

Jeff Stewart: Absolutely not. So, let's talk a little bit, you know, I mentioned in our, in our opening that there's really a patchwork of laws that deal with pregnancy discrimination. Tanya, you mentioned the Pregnancy Discrimination Act as one of the patchwork of laws, one of the others, is the Family and Medical Leave Act, commonly known as the FMLA.

And what that does is provide up to twelve weeks of leave for eligible employees. The problem is that there are many employees who are not eligible under the FMLA either because their company is not [00:04:00] large enough and therefore the law doesn't apply to them. Or if they are too new, you know, the FMLA requires that you be with your employer for at least a year before you're eligible for any leave.

Tanya Salgado: That's right. And you have to have worked 1,250 hours in the previous twelve months as well. So that might also eliminate coverage for some part-timers.

Jeff Stewart: Absolutely. So, there's the Pregnancy Discrimination Act, there's the Family and Medical Leave Act, and as you mentioned, there's questions as to whether or not accommodations would fall under the ADA, the Americans with Disabilities Act, or not.

So that's part of the patchwork. Now we also have the Affordable Care Act. Do you want to talk about some of the provisions in the Affordable Care Act when it comes to pregnancy and postpartum?

Tanya Salgado: [00:05:00] So, the Affordable Care Act amended the Fair Labor Standards Act, and this goes back to March of 2010. And under this amendment, employers are required to provide nursing mothers with reasonable break time to express breast milk.

However, this law has some important limitations. It only applies to non-exempt employees under the FLSA, and it only applies for up to one year after the child's birth. The amendment does require employers to provide an appropriate private space for these pumping breaks other than a bathroom. But again, I think the biggest limitation on the laws that currently stands is the fact that it only applies to non-exempt employees, thus leaving, you know, an entire portion of the workforce without protection under the federal law.

Now that said, there are some state laws that have already provided [00:06:00] protection for nursing mothers as well as providing for pregnancy accommodations, but this really varies by jurisdiction. I practice in Pennsylvania as well as New Jersey. The city of Philadelphia has had an ordinance on the books ever since 2014 that already provides for pump breaks, and it also provides for pregnancy accommodations.

Similarly, the New Jersey law also provides for pumping breaks as well as reasonable accommodations from others.

Jeff Stewart: And I think it's one of the reasons that we have local and state laws in effect, is because there have been these gaps. There have been these, frankly, pregnant employees who are left behind and not receiving protections under, for example, the FMLA or under the Affordable Care Act.

And recently, Congress has [00:07:00] enacted a pair of laws to try to fill in these gaps. The first one, which became law earlier this year, is the Providing Urgent Maternal Protections for Nursing Mothers Act, also known as the PUMP Act. And what that does is tries to expand that protection for pumping breaks from, as you said, just non-exempt employees under the Affordable Care Act, and expands it to all employees.

Tanya Salgado: That's right. And it still includes that one year limitation on the time, but it's an important expansion, and one thing I think it's important to note is that, if you're an employer and you're in a jurisdiction that already has a law on the books concerning pump breaks, make sure that you take a look at that law and compare it to the PUMP Act.

The [00:08:00] state and local jurisdictions often provide more protections than are required under the federal law. For example, some jurisdictions provide for a much longer period of time. I think I heard that California has a period of time for several years after the, the birth of the child, so that the PUMP Act provides a floor, not a ceiling.

So those employers that are in those jurisdictions that already have a law, you need to make sure that you comply with both sets of laws to the fullest extent.

Jeff Stewart: Absolutely. Absolutely. And the other part of this PUMP Act that they have attempted to clarify is that employees need to be provided a clean, sanitary location for pump breaks that is not a bathroom and that is private.

Now, obviously not a bathroom, that's pretty [00:09:00] straightforward. But, saying, "hey, it needs to be private and sanitary" means, you know, you don't put people in a janitor's closet. And that privacy piece is something that you may have to think about. For example, if you have offices that all have windows, you may need to provide curtains or some way of making an office completely private.

Tanya Salgado: That's right. And you know, another piece of this consideration for privacy is the fact that a lot of employers have cameras set up throughout the workplace. So, you need to give some thought if you're setting up a sort of an ad hoc place for your employee to, to pump, make sure that the cameras are not intruding.

You could find yourself in the crosshairs of all kinds of lawsuits, not just a lawsuit under, under the PUMP Act. Similarly, if you've got employees who are working remotely, the PUMP Act does apply to teleworking employees. Um,

obviously they need to be given privacy. If [00:10:00] you're an employer that monitors your employees while they're at home working, you need to provide options for privacy during the pump breaks.

Jeff Stewart: Absolutely. So, let's shift gears to the other law that is going into effect, actually goes into effect on June 27th, 2023, and that's the Pregnant Worker Fairness Act, which primarily requires accommodations for pregnant workers, and there's no longer any need to show a disability. We're not claiming it's a disability.

We're just saying, "you know what? Pregnant workers deserve accommodation during pregnancy, the same as a disabled employee would due to their disability. But we're not calling pregnancy a disability."

Tanya Salgado: I think that's a really good point. Under the current law, as you point out, pregnancy is not in and of itself a disability.

Under the Americans with [00:11:00] Disabilities Act, individuals are entitled to accommodations, reasonable accommodations, to the extent that they are a qualified individual with a disability. So, for example, certain pregnancy related conditions such as gestational diabetes or perhaps pre-eclampsia, these types of conditions would rise to the level of being a disability, which would entitle the employee to a reasonable accommodation under the ADA.

But as you point out, most normal pregnancies do not rise to that level, and yet at the same time, pregnant employees may very well be in need of practical accommodations that will enable them to do the job on the same basis as any other employee. And so, this law, the PWFA is meant to fill in the gaps and provide for accommodations even in the absence of an ADA qualifying disability.

Jeff Stewart: And that accommodation process is similar to the [00:12:00] ADA in that there needs to be an interactive process with the employee. What is it you need? Let's talk about what the issues are, et cetera. And it doesn't have to be the exact accommodation that someone is looking for, but we need to have that back and forth with the employee.

And also, there is an exception if there is an undue hardship to the employer. Now, I always tell employers, don't rely on undue hardship. Let's work with the employees and let's see what accommodations we can come up with to address their issues.

Tanya Salgado: Sure. You know, the interactive process is an important component of the Americans with Disabilities Act, and what's interesting about the PWFA is that that's actually sort of baked into the, the, the language of the statute.

The law definitely anticipates that there's going to be an interactive process [00:13:00] and it provides that it's a violation of the law if an employer forces an employee to accept as a reasonable accommodation, an accommodation that was not arrived at through that interactive process.

So, from my perspective, I think that really highlights the importance of the interactive process when we're talking about pregnancy accommodations. It's always important, but just be aware that it's received particular attention in this particular statutory scheme.

Jeff Stewart: Absolutely. And accommodations can take any one of a number of different forms.

You know, you may think, oh, somebody needs an accommodation of a more ergonomic chair or something like that. But it could be something like, you know what? Closer parking. Depending on, you know, the size of the parking lot you've got, it could be something as unusual as appropriate sized uniforms. If you're an employer that [00:14:00] requires your employees to wear uniforms, either having pregnancy sized uniforms or an exemption from the uniform requirement during pregnancy, that can be a reasonable accommodation.

Tanya Salgado: Yeah, it's interesting. The EEOC has been directed to issue regulations to specifically address reasonable accommodations under the new statute. But in the meantime, to provide guidance, the EEOC has on its website an FAQ and it does provide a listing of suggested accommodations. So, you know, filling in that gap until we get the regulations from the EEOC employers would be certainly advised to take a look at that FAQ and take that into account as you are addressing requests for reasonable accommodation.

Jeff Stewart: Absolutely Tanya.

One of the big changes here, or one of the gaps that's filled under the PWFA is [00:15:00] requiring employers to provide leave, reasonable leave, for time off for delivery, not the twelve weeks of the FMLA, but some form of reasonable leave.

Tanya Salgado: Yes. Yes, that's important. Again, as we were talking about, the Family Medical Leave Act only applies to certain covered employers, and it only applies to certain eligible employees.

The PWFA applies to employers who have 15 or more employees, so that really fills in the gap and provides a flexible, uh, accommodation process for employers and employees who would not otherwise be covered for time off for pregnancy. And, you know, at this point we don't have the EEOCs regulations.

Presumably, they will cover that. In the meantime, I think it's a good idea to take a look at what types of leave an employer provides for other employees who are similarly situated who need time [00:16:00] off perhaps due to a medical condition, a temporary disability, or a similar type of situation. Six weeks is typically the rule of thumb is as the minimum amount of time off covered for short-term disability policies.

And then of course, you've got the twelve-week standard provided by the FMLA. So, I think that as a practical matter, employers are going to want to take a look at what is reasonable and makes sense for their workplace, keeping in mind the parameters that are suggested by these other laws.

Jeff Stewart: And this is another example of a time where you really want to be proactive and let's establish a standard and then utilize that.

Not, "well we'll kind of figure it out once someone comes to us." Let's take a look. What are we going to, are we going to provide twelve weeks like the FMLA? Are we going to say, you know what, eight weeks is what makes sense? Absent [00:17:00] some form of medical complications where then you would be dealing with the ADA, but that's really for an employer to look at until we get that EEOC guidance.

Would you agree?

Tanya Salgado: Yes. I think that makes sense. And again, that interactive process is going to be important here.

Jeff Stewart: Absolutely. Now the, the PWFA also has a non-discrimination provision, and one of the examples of that prohibited discrimination is removing someone from their position based upon the belief that their pregnancy impedes their ability.

Tanya Salgado: Yeah. Yeah. That's, that's an important component of this. And you know, to some extent that was provided for under the older statute, the PDA. There's sort of this idea that some employers may have and, and perhaps it comes from, you know, a good place you want to protect an employee from [00:18:00] perceived dangers in the work place and so you put someone on leave, you know, be very much aware that that is not an acceptable employment practice under the current law and certainly not under the PWFA.

Jeff Stewart: And Tanya, in my experience, a lot of times employers who do this, they remove someone from a position, really and truly believe that they are doing the right thing and acting on the employee's behalf and yet that's where they can get in trouble.

Tanya Salgado: Yes, that's right. That's right. Again, the interactive process is really key here because it may very well be that the employee is perfectly capable of continuing to work and so to remove them based on an assumption or belief is, is specifically addressed in the statute.

Jeff Stewart: Absolutely. And the same with requiring the employee to take leave. This isn't just removing somebody from a position and moving them to a different one, but if saying, oh, you [00:19:00] know what? You're getting close to your due date. I think you need to be off. That is an example of prohibited discrimination under the law.

Tanya Salgado: That's right. That's right. The law provides that if you remove someone, or force them to put on a leave of absence when another reasonable accommodation can be provided, that in and of itself, is an example of prohibited discrimination.

Jeff Stewart: Absolutely. So, you know, we've talked about these two new laws here, both the PUMP Act and the PWFA.

How are you advising your clients to mitigate their risk?

Tanya Salgado: Well, I think a, a really good first step, it would be to take a look at your policies and procedures and your employee handbooks and make sure that your handbooks are updated. It's really a key to include a provision for reasonable accommodations for pregnancy in the handbook.

Good idea to [00:20:00] provide examples. Similar to the examples that are provided in the EEOCs FAQ. Make sure that your managers and supervisors are up to date. You know, provide some training for them on these new provisions.

And again, a key component of all this is to make sure they also understand the anti-retaliation provisions.

Making a request for a reasonable accommodation is protected activity, and an employee must not be disciplined or otherwise retaliated against for making these requests. So, that's a really important first step. Also be aware of the local laws. Again, make sure that your handbook complies not just with the federal law, but if your local law provides a higher standard, make sure that your handbook complies fully with the local laws as well as the federal law.

Jeff Stewart: And I agree with every one of those points, and what I would add is have a plan before someone comes to [00:21:00] you. You know, for example, with regard to the PUMP Act. Have an area that you're going to designate.

This is going to be the pumping room, or this is how we're going to make someone's office meet that definition. But have a plan prior to, I always, I'm always a fan of being proactive, not reactive, and this is one where you absolutely can be.

Tanya Salgado: Yep, yep. Absolutely.

Jeff Stewart: All right, so I always like to give our listeners some key takeaways from our discussion here today.

So, do you have a key takeaway for our listeners, Tanya?

Tanya Salgado: So, I would say do not forget the interactive process across the, the spectrum of employment laws, whether we're talking about the ADA, whether we're talking about religious discrimination, but particularly in the context of pregnancy accommodations.

[00:22:00] Make sure you have that good faith dialogue with your employees about what accommodations are needed.

Jeff Stewart: That's a good one, and I think I would actually springboard on what you were saying a minute ago, which is it is time to update your employee handbook. I mean, here's just two examples of new laws in 2023.

There were several new laws that took effect last year, and if your handbook hasn't been updated in two years, you are definitely behind and now is as good a

time as any to make sure these are taken care of because employees, while you think, may think, ah, they never read the employee handbook.

In reality they do, especially when an issue arises. And I guarantee you if you have an employee that becomes pregnant, they're going to look at what are your policies with regard to leave, with regard to working while pregnant, and [00:23:00] accommodations, et cetera, and you want them to have the answers at their fingertips.

So, I would say update your handbook because this is a time when it is specifically looked at.

Tanya Salgado: Absolutely.

Okay. Well, I want to thank you, Tanya, for joining me, and I want to thank all of our listeners for joining us here on the Employment Law Counselor Podcast, where we try to make sense of the world of labor and employment law.

On behalf of myself and Tanya Salgado, we thank you for listening. If you enjoyed this episode, please leave us a five-star review, tell your friends and subscribe to the podcast. For more information on this and many other topics, please visit the White and Williams website at www.whiteandwilliams.com, where you can visit our blog and learn more about the firm.

Until next time, stay safe and stay compliant.

PLUS Staff: Thank you for listening to this episode of the Employment Law Counselor. If you haven't checked out the previous episodes, make sure to give those a listen [00:24:00] and check back in the next few weeks for the newest episode. If you have an idea for a future PLUS Podcast, you can visit the PLUS website and complete the content idea form.