PREGNANCY RIGHTS IN THE WORKPLACE: NEW CONSIDERATIONS DURING THE COVID-19 PANDEMIC

The COVID-19 pandemic has had a devastating effect on the American workplace, dramatically impacting both employers and employees' livelihoods while also raising a host of new legal issues for the Courts to confront in the years to come. With unemployment rates reaching levels not seen since the Great Depression, and increasing numbers of bankruptcy filings and "for sale" signs, both employers and employees will likely be looking to the Courts for relief. Notably, we expect that certain protected groups will assert legal claims of unlawful discrimination, retaliation or termination because of the influence of the COVID-19 pandemic on employers' employment decisions since March 2020 of this year.

Pregnant women are part of such a group. Pregnant women are at greater risk than the general public to develop severe complications from COVID-19. In a 27 November 2020 report, the Centers for Disease Control and Prevention (CDC) wrote that pregnant women are at an "increased risk for severe illness from COVID-19", "more likely to be admitted to the Intensive Care Unit (ICU), receive invasive ventilation and extracorporeal membrane oxygenation, and are at an increased risk of death compared to nonpregnant women[1]."

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Unfortunately, pregnant women are also extremely vulnerable to pregnancy discrimination in the workplace. In fact, pregnant women have become a target of employer "cost-cutting" measures during the pandemic. Facing months of mandatory shutdowns of in-person operations of "non-essential" businesses, employers have been struggling to "keep the lights on" by cutting salaries, staff, and benefits, while many shut down their businesses entirely. Pregnant women are often first on the chopping block due to several reasons, including (1) stereotypes and/or antiquated notions about telework or other remote work accommodations; (2) actual and/or perceived medical issues; (3) employers' refusal to consider reasonable accommodations; (4) misunderstanding or ignorance of COVID-19 risks; or (5) outright harassment. Many pregnant employees who were deemed "nonessential" were fired or had their positions eliminated entirely, while male and/or non-pregnant employees remained employed. Fearing irreversible or unpredictable effects of a COVID-19 diagnosis and hospitalisation during pregnancy, a good deal of these employees were forced to accept their employers' unlawful decisions and simply apply for unemployment benefits.

Pregnant employees who kept their jobs because they are deemed "essential workers" face a different challenge: choosing between the health of their unborn child and their livelihood. Even though we are continuing to learn about the short-term effects of the COVID-19 virus, for those pregnant women who worked in hospitals actively admitting COVID-19 patients, the health risks are abundantly clear.

In the United States, pregnant employees are protected by Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act (PDA), as long as their job employs 15 or more employees. Specifically, Title VII's protections against discrimination on the basis of sex also include discrimination on the basis of "pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). Under Title VII, a pregnant employee may have a claim of sex discrimination if she is treated less favourably than a similarly situated, non-pregnant employee. For example, even in the COVID-19 era, an employer cannot fire a pregnant employee simply because she is pregnant. Additionally, an employer cannot stereotype against a female employee by perceiving her as "less reliable", "less productive" or

deem her "more of a risk" than a male employee simply because she may become pregnant in the future.

Pregnant employees are also protected by the Americans with Disabilities Act (ADA) if they have a pregnancy-related medical condition or they are temporarily disabled, i.e. unable to perform the functions of their job due to childbirth or a pregnancy-related medical condition. In Young v. United Parcel Service, Inc., 575 U.S. 206 (2015), the Supreme Court held that an employer's facially neutral accommodation policy may constitute pregnancy discrimination if it places a "significant burden" on pregnant employees, and the employer's "legitimate, non-discriminatory reasons" for the policy are not "sufficiently strong". Specifically, employers may not place such a burden on pregnant employees due to financial reasons or inconvenience. This ruling was instructive in a subsequent pregnancy discrimination case regarding an employer's denial of light duty accommodations to pregnant employees. In Legg v Ulster County, 820 F3d 67 (2d Cir. 2016), the Second Circuit ruled that an employer's broad denial of light duty accommodations to pregnant women could place a significant burden on pregnant employees.

Although both Young and Legg were decided years before the COVID-19 pandemic, they both constitute precedent and a strong reminder to employers that even the application of a neutral employment policy can constitute pregnancy discrimination if it places a burden on pregnant employees. For example, employers cannot adopt a broad policy prohibiting telework during the COVID-19 pandemic if they previously permitted other disabled employees to engage in telework in the past. Instead, employers must apply company policies equally to male and female employees, and cannot withhold a bonus or raise from a pregnant employee solely because she needed, and took, maternity leave in a given year. However, employers are permitted to delay bonuses or raises due to financial difficulties caused by the COVID-19 pandemic, as long as they do so regardless of gender or pregnancy status.

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Finally, pregnant women are also protected by the Family Medical Leave Act (FMLA), as enforced by the U.S. Department of Labor (DOL), as long as they are "eligible" under the law's strict requirements. For FMLA eligibility (regardless of pregnancy status) an employee must (1) work for a "covered" employer, i.e. that has 50 or more employees for 20 or more consecutive workweeks; (2) work 1,250 hours during the 12 months prior to the start of the leave; (3) work at a location with 50 or more employees within a 75 mile radius; and (4) work for the covered employer for at least 12 months.

Prior to COVID-19, qualified pregnant employees could take up to 12 weeks of protected leave in connection with their pregnancy or after the birth of their child. Crucially, those employees are also entitled to job protection and the continuation of any benefits. However, under the FMLA, qualified employers are not required to compensate their pregnant employees during their protected (maternity) leave,

and most women have the option of applying for short-term disability benefits. In order to state a cause of action for FMLA discrimination, pregnant employees must either show that (1) the employer interfered with, or wrongfully denied leave; (2) takes adverse action against the employee for making a complaint of FMLA interference; or (3) takes adverse action against the employee because she exercised her FMLA rights. Post-COVID-19, qualified pregnant women continue to have the same protections under the FMLA, and may also have a claim for FMLA interference or retaliation if their employers fail to return them to the same or substantially similar position that they held prior to taking maternity leave. However, due to the COVID-19 pandemic, we anticipate that more employers will argue that they are no longer financially stable enough to reinstate their pregnant employees.

In response to the COVID-19 pandemic, the DOL also enacted the Families First Coronavirus Response Act (FFCRA), which provides additional paid sick leave or expanded family medical leave to employees who are either (1) quarantined or experiencing COVID-19 symptoms but may not yet be diagnosed; or (2) unable to work because they are caring for an individual who is quarantined, or for a child whose school or childcare provider is closed or unavailable due to COVID-19. The latter may be extended for up to an additional ten (10) weeks, and will apply through 31 December 2020. For example, a new mother may be eligible for extended leave under FFCRA if her baby's daycare is closed because of the COVID-19 pandemic, and she is the primary caregiver. However, private employers with fewer than 50 employees may not be required to provide paid leave due to school closings or childcare unavailability under FFCRA if they can demonstrate that it would "jeopardize the viability of the business[2]."

The effect of the COVID-19 pandemic remains uncharted territory, and litigants will face a greater "burden-shifting" challenge than ever before in order to specifically demonstrate that they have been wrongfully terminated on the basis of pregnancy, childbirth, or pregnancy-related condition. While there are significant federal, state and even city laws that protect pregnant women in the workplace, the viability of those claims, and the reasonableness of the employers' "non-discriminatory reasons" for alleged pregnancy discrimination during the COVID-19 pandemic remain at the Courts' discretion, and will be less reliant on "case law" than ever. Nevertheless, we anticipate that issues surrounding employers' failure to engage in the interactive process or provide reasonable accommodation to pregnant employees will be at the forefront during these unprecedented times.

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[1]*"Data on COVID-19 during Pregnancy: Severity of Maternal Illness." https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/special-populations/pregnancy-data-on-covid-19.html. Last visited on December 2, 2020.*

[2]*Families First Coronavirus Response Act: Employee Paid Leave Rights. https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave#_ftnref1.*