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Avoiding Pregnancy Discrimination Claims

The EEOC has had pregnancy discrimination on its radar screen for a while. A Supreme Court case, *Young v. UPS*, will likely bring more attention to the issue.

Many laws and regulations affect pregnancy and discrimination, disability, leave and accommodations. With women now comprising 47 percent of the U.S. labor force, at some point your HR department will likely have to determine how they apply to one of your employees.

The Pregnancy Discrimination Act (PDA) of 1978 extended protections under Title VII of the Civil Rights Act of 1964 to women who are pregnant or have related medical conditions. This makes employment discrimination based on pregnancy, childbirth or related medical conditions a prohibited form of sex discrimination. The PDA applies to all areas of employment: from hiring, determining promotions, qualifying for benefits and allowing accommodations for pregnancy-related disability.

What Employers Need to Know

You probably already know that you cannot take “adverse employment actions” against an employee due to her pregnan-



This Just In

The Supreme Court has agreed to hear a pregnancy discrimination case, *Young v. UPS*. Their ruling will determine whether employers must provide accommodations to pregnant workers if they provide them to workers injured on the job.

Peggy Sue Young, a UPS driver, requested light-duty work after becoming pregnant. Her doctor said she should not lift more than 20 pounds for the first 20 weeks of her pregnancy and not more than ten pounds thereafter. The collective bargaining agreement for UPS drivers provides temporary light-duty work only for those with on-the-job injuries, those accommodated under the Americans with Disabilities Act and those who had

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cy or possibility of becoming pregnant. That includes firing or failing to promote, and failure to hire someone on the basis of pregnancy (or the possibility of becoming pregnant). But you might not know some of the other actions that the EEOC considers discriminatory. Here's a partial list from a recently issued EEOC guidance:

Light-Duty Work:

- ✱ An employer has to provide light duty, alternative assignments, disability leave, or unpaid leave to pregnant workers if it does so for other employees who are similar in their ability or inability to work.
- ✱ An employer may not limit a pregnant worker's access to light duty based on the source of her impairment (e.g., it may not deny light duty to a pregnant worker based on a policy that limits light duty to employees with on-the-job injuries).
- ✱ However, if an employer's light duty policy restricts the number of light duty positions or the duration of light duty assignments, the employer may lawfully apply those restrictions to pregnant workers, if it applies the same restrictions to other workers similar in their ability or inability to work.

Job Restrictions: An employer cannot restrict a pregnant woman from certain job duties, such as working with hazardous chemicals, unless it also restricts non-pregnant employees. This applies even if the employer is trying to avoid fetal injury and has the employee's best interests at heart.

Leave:

- ✱ Employers cannot compel an employee to take leave because she is pregnant, as long as she is able to perform her job. However, they must allow women with physical limitations resulting from pregnancy to take leave on the same terms and conditions as other similarly situated individuals.
- ✱ Employers cannot require employees disabled by pregnancy or related medical conditions to exhaust their sick leave before using other types of accrued leave, unless they impose the same requirements on employees seeking leave for other medical conditions.
- ✱ Employers cannot impose shorter maximum leave periods for pregnancy-related leave than for other types of medical or short-term disability leave.
- ✱ Title VII does not require or allow an employer to provide more favorable leave terms to pregnant employees than it does for other employees. For example, an employer cannot provide six months' paid parental time for mothers to bond with their new babies if it does not also provide similar benefits for fathers.

Disability/ADA Accommodations: Pregnancy on its own **never** creates a disability that triggers an employer's responsibilities under the Americans with Disabilities Act (ADA). If an employee develops a pregnancy-related disability, you must treat her the same as you would any other disabled worker. That means providing "reasonable accom-

This Just In

lost Department of Transportation certification to drive. Young's restriction did not fall into any of these categories. UPS denied Young's request, so she took unpaid Family and Medical Leave Act leave. She eventually filed a charge with the EEOC, claiming both disability discrimination and pregnancy discrimination.

Lower courts ruled in favor of UPS. Young dropped the disability discrimination claim and appealed the pregnancy discrimination claim. The Supreme Court's ruling in *Young* might clarify do's and don'ts for employers dealing with pregnant workers who want accommodations. Meanwhile, please see the article on this page for more information.

modations" that allow her to continue to work. It also means allowing—but not requiring—pregnant employees to use leave available under the Family and Medical Leave Act (FMLA) and other leave laws.

In 2011, the U.S. Equal Employment Opportunity Commission (EEOC) received 5,797 complaints of pregnancy discrimination. Claimants received \$17.2 million in benefits that year. This does NOT include money they received from litigation, which could total many millions more.

It therefore pays to know the employment laws that apply to any given situation. If you don't, please consult an employment practices attorney.

Understanding Your Property Policy

Understanding the who, what, when, where and how of your coverage can ensure you have the coverage you need, when you need it.

Who

Business property policies cover real estate and personal property owned by the “named insured.” The policy lists this person or entity on the declarations page, located near the front of your policy packet. Be sure to review your policy to ensure your organization’s name and address are listed correctly.

Tip: When a business is involved in an acquisition, merger or sale, the other entity’s coverage does not automatically apply. Many business insurance policies have non-assignment clauses. These prevent a policy owner from transferring coverage to another person or entity without the insurer’s written consent. Any sale, acquisition or merger creates new risk exposures, so please contact us for a policy review.

Tip: Your property policy also provides some coverage for the personal property of others on your premises. This could include property of others in your care, for storage or repairs. It can also include leased personal property, such as equipment, that you have a contractual responsibility to insure. It also includes the “personal effects and personal property of employees” in or within 1,000 feet from your “described premises.” Coverage for employees’ personal property applies only after the employee’s coverage has paid for any loss or damage claims.

Older property policies usually provide only actual cash value coverage on the personal property of others. Actual cash value equals the current value of an item, or its value minus depreciation. Replacement cost coverage will pay the cost of replacing lost or damaged property with something of a comparable kind and quality, with no deprecia-

Do You Have the Right Kind of Insurance?

Because employment law is always changing, it also pays to protect your organization with employment practices liability insurance, or EPLI. Your commercial general liability or business owner’s policy excludes coverage for employment-related actions. EPLI coverage fills this important gap. It covers your legal defense costs if an individual brings a discrimination or other employment practices claim against the firm, plus any resulting legal settlements.

Buying EPLI coverage also gives you access to expertise that smaller firms usually lack. When you file a claim, your insurer will assign an attorney who has expertise in that type of claim to your case. This will help bring your case to resolution sooner, so you can get back to business.

For more information on EPLI, please contact us. ■

tion. Replacement cost coverage costs more, but your claims settlement will be higher.

What

The standard commercial property policy covers both real property (buildings and structures) and personal property. It limits coverage on structures to the building on “described premises” and any structures within 1,000 feet of the “described premises.” This can include additions; permanently installed fixtures, machinery and equipment; and equipment and other personal property used to maintain or service the premises.



Tip: Standard policies exclude coverage for structures such as paved surfaces, retaining walls, foundations; underground pipes, flues or drains; fences and antennas. It also excludes certain types of personal property, including “valuable papers” (bills, currency and securities), electronic data; trees, shrubs and plants; fragile articles; and valuables such as jewelry, watches, furs and precious metals. You can buy separate coverage for some of these items; please contact us for information.

When

Your policy will cover any scheduled (listed) real and personal property from damage that occurs during the policy period.

Tip: Your policy will cover newly acquired or constructed property for a maximum of 180 days after acquisition or construction. To ensure coverage after that, you must notify your insurer to add (schedule) coverage. The 180-day coverage limit also applies to your personal property at newly acquired or constructed buildings.

Where

Your policy protects your covered personal property, no matter where it is located. It even covers personal property at “other locations.” The standard policy defines this as more than 1,000 feet from the “described premises.”

Tip: Your property policy will also cover personal property in transit. This coverage applies if your property is in vehicles owned, leased or operated by you, or in the custody

of a common carrier, contract carrier or registered mail carrier. It does not apply if you are transporting cargo for a fee.

How (Much)

The most your policy will pay for loss or damage is the “limit of insurance” noted in the policy declarations. The limit applies “per occurrence,” or covered incident.

After a covered claim occurs, you’ll pay the deductible amount out of pocket, then your insurer will pay the remainder of the claim amount, up to the policy’s limit.

Tip: If you insure your property on a replacement cost basis, the insurer will penalize you if you underinsure it. Standard policies require insureds to insure their property to at least 80 percent of value. If a loss occurs and your coverage doesn’t meet that insurance-to-value ratio, the policy will pay your loss on an actual cash value basis instead.

For example, if you have a building and contents worth \$1 million, you should have at least \$800,000 in coverage. Although you meant to update your policy limits, you never did... and your policy has limits of only \$600,000. A fire destroys everything. The insurer will penalize you by paying only the actual cash value of your lost building and personal property, up to the \$600,000 limit. That oversight could cost you hundreds of thousands of dollars.

We can help you review your property coverage to ensure you have the coverage you need, when you need it. For more information, please contact us. ■

Why Corporations of All Sizes Need D&O Insurance

D&O insurance helps companies of all sizes attract and retain top executive talent.

Directors and officers liability insurance (D&O) covers corporate directors and officers from liability for negligent acts, omissions and misleading statements that harm employees or shareholders.

Directors have serious responsibilities. When acting in their official capacity, they owe the corporation:

- 1** A duty of care. They must make informed decisions, perform in good faith, and act in the best interest of the company.
- 2** A duty of loyalty. They must not act to further personal interests and refrain from personal action damaging to the corporation.
- 3** A duty of obedience. They must perform their duties within the corporate charter/bylaws and act in accordance with all laws, statutes and regulations pertaining to their industry.

Breaching any of these obligations can lead to personal liability for the individual

director or officer involved, as well as an allocation of blame to the other directors and officers on the board.

Why Buy D&O Coverage

- ✦ To avoid paying for claims against directors and officers. Most corporate bylaws require the organization to “indemnify” its directors if they are named in a lawsuit or claims as a result from acting in their official capacity. This means the corporation must pay for the director’s legal representation, plus any settlements or judgments.

Judgments and settlements in D&O claims can cost millions.

- ✦ To recruit the best directors and officers. Even if your bylaws require indemnification of directors and officers, these individuals want to know the funds will actually be available when needed. D&O insurance guarantees they will.
- ✦ To protect the organization from certain employment practices lawsuits. Employment practices claims (claims by employees and job applicants) topped the causes of D&O claims for private and nonprofit

corporations in a 2012 survey by Towers Watson. For public companies, derivative and direct shareholder suits led the causes of claims.

- ✦ To protect investors. They want to know that they have adequate financial backing in case gross mismanagement makes their investment in a company go sour.

How Much Does It Cost?

No standard D&O policies exist. Underwriters will tailor coverage to your company’s needs and determine your rates based on the exposure your company presents. A company with unsound management practices creates higher risk exposures for the insurer; likewise companies in unstable industries. The more information you can provide to demonstrate your company’s good management practices, the better coverage terms you will be able to secure.

To apply for D&O coverage, you will likely have to present information on any past shareholder or employment practices claims, copies of corporate bylaws and minutes of board meetings, copies of employee handbooks, biographical information on your board members and more.

For assistance in preparing an application for D&O insurance, please contact us. ■



Funds to Recover from a Physical Disaster

Forty percent of all businesses affected by a natural disaster never re-open, according the Small Business Administration. We recently discussed SBA disaster loans with Rick Jenkins, supervisory public information officer with the SBA.

After a disaster, businesses of all sizes and private, non-profit organizations may apply for an SBA physical disaster loan of up to \$2 million. Borrowers can use these funds to repair or replace damaged real estate, equipment, inventory and fixtures. They may also request as much as 20 percent of the loan amount in additional funds to use for mitigation. Owners can use these funds to protect the property against future disasters of the same type.

Jenkins recommends that business owners know their geography and its associated hazards. In the West, dry summers and drought conditions can lead to wildfires. Businesses located in coastal areas, particularly near the Gulf Coast, are vulnerable to hurricane. And businesses in low-lying areas

anywhere are subject to flood.

Jenkins suggests taking appropriate mitigation measures. For example, in windstorm areas, reinforcing structures and installing hurricane shutters and tie-downs can reduce the risk of damage. Business owners on the West Coast will want to pay attention to trees and brush located on their premises. To prevent the spread of wildfire, business owners will want to keep landscaping trimmed and well-watered and remove dry brush.

Although SBA disaster loans will cover uninsured or under-insured losses, business owners should not rely on loans to recuperate from a disaster. To recuperate as quickly as possible from a disaster, Jenkins recommends that business owners buy as much insurance as they can on real estate and contents. "Insure, insure, insure," he says. "Only borrow what your insurance won't cover."

For more information on what your insurance does cover, and how to add additional coverage, please contact us. ■

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