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Technical Update

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Parental, Pregnancy, and Nursing Rights of Employees

State and federal laws protecting workers from sex and gender discrimination also extend to prevent differential treatment of pregnant workers. Treating a worker differently on account of pregnancy may be a violation of Title VII of the Equal Rights Act. This is different from U.S. Supreme Court decisions under the ADA, in which an employer has been given the right to withhold employment on account of permanent disabilities which might pose a substantial safety or health risk to coworkers or the disabled individual. Pregnancy is not usually a disability, as it is a temporary condition. However, discrimination against a pregnant worker because she is "perceived" to be disabled (or discrimination against the caretaker for a disabled child, spouse, parent; or the associate of a disabled person) might be an ADA violation. Thompson ADA Compliance Guide, January 2008, pp. 2-3. Reproductive ability has been found to be a major life activity by the Supreme Court under certain circumstances; a disability must be permanent and not temporary, however. Bragdon v. Abbott, 524 U.S. 624 (1998).

If a pregnant woman does want to take the advice of her physician to refrain from job assignments that may endanger her pregnancy, she can ask for and receive up to 12 weeks of federal Family Medical Leave under the same terms and conditions as men.

Female Albuquerque police officers sued for discrimination in violation of the Pregnancy Discrimination Act of Title VII. Albuquerque required pregnant employees to take sick leave first, instead of allowing personal or vacation leave first as they did with others taking FMLA, which adversely affected paid benefits and their right to work overtime after they returned. Defendants responded that they were merely applying a "uniform policy applicable to all employees". The Tenth Circuit found the evidence sufficient that a reasonable jury could find the defendants' explanation pretextual and that a trial court or jury could infer an intent to discriminate on the basis of pregnancy. Accordingly, they sent the case back to the district court level for trial on the discrimination issue. Orr v. City of Albuquerque, No. 07-2105 (10th Cir. 7/8/2008).

Colo. Rev. Stat. § 25-6-301 and § 25-6-302 (2004) recognizes the benefits of breast-feeding and encourages mothers to breast-feed. The law also allows a mother to breast-feed "in any place she has a right to be." Colorado law requires employers to provide nursing mothers with reasonable unpaid break time or permit them to use paid break time to express (pump) breast milk for up to two years after a child's birth. The employer must make reasonable accommodation to provide a private location for nursing moms that is not a bathroom stall and is near the work area, 2008 Colo., Sess. Laws, Chap. 106. The employer shall make reasonable efforts to provide a place, other than a toilet stall, for the employee to express breast milk in privacy.

What This Means For Counties

Remember that all policies, leaves, and pay issues must be equitable based on the way they get applied to pregnant and nursing moms (as well as fathers who want time for caretaking responsibilities). Don't forget that men have an equal right to take time off for various family needs under the FMLA, and don't allow discrimination or harassment of either men or women based on these rights. Remember to address nursing needs in your break policies. Review all terms and conditions of employment to allow for equitable practices for workers with maternity and paternity status.

For more information, contact CTSI at 303-861-0507.