

Week of July 26, 2006

MRA - News to Know

Taken from MRA's Inside HR newsletter

Tips on Pregnancy Issues

Citing a 14-year trend of increasing numbers of pregnancy discrimination charges filed with the Equal Employment Opportunity Commission, an EEOC regional attorney and a pair of employment attorneys shared insights for handling workplace leave, insurance, post-pregnancy concerns, and other issues during a July 12, 2006, audioconference sponsored by the Practising Law Institute.

The number of pregnancy-bias charges filed with EEOC is up 33 percent since 1992, according to Elizabeth Grossman, acting regional attorney of the commission's New York City office. And more than 50 percent of annual pregnancy charges now are based on discharge and come from the retail and services industries, she said. Grossman said she believes the number of pregnancy charges has risen so much because of an increase in employees' awareness of their rights, and willingness to assert them, rather than an increase in bias. Economic issues also might be a factor, she added. But Grossman also added that the charges filed likely represent "only the tip of the iceberg." Many women do not report pregnancy discrimination because they are concerned about the impact of doing so on their jobs and careers, she said.

However, Grossman said that many women also do not fully understand their civil rights when it comes to pregnancy and working. For instance, there is no legal requirement that an employer provide pregnancy leave unless it has a policy allowing leave for other reasons. But when the employer has such a policy - almost all do - it must be applied uniformly, regardless of the reason underlying the leave request, she said. Employers also cannot force an employee to take pregnancy leave, or return from such leave sooner than she wants to return, Grossman said. Moreover, employers cannot make an employee on pregnancy leave stay out a certain amount of time, and must provide a returning employee with the same opportunities, benefits, and other terms of employment, as those provided to employees on any other short-term disability leave, she said.

Grossman, along with fellow panelists Pearl Zuchlewski of Kraus & Zuchlewski in New York and Alan M. Koral of Vedder, Price, Kaufman & Kammholz in New York, said the right to be free from workplace pregnancy discrimination often intersects with rights provided under other federal and state laws. Chief among these, they said, are the Family and Medical Leave Act and the Americans with Disabilities Act.

Grossman said employers should offer a pregnant worker a transfer when her job duties require her to work with or around hazardous materials. But the offer needs to be made in a way that is not "stereotypical" or "paternal," she warned. "And the woman gets to make the decision," Grossman said. The employer "can't act on its own." Koral said he has seen clients give hazardous materials advisories to pregnant workers, and sometimes seek a release of liability based on the disclosed dangers. "But a woman can't waive the rights of a fetus," he said, so such waivers are of limited value.

As for employer-provided health insurance, Grossman said pregnancy and related conditions must be covered on an equal basis with other medical conditions. But an employer is "not required to cover abortion unless the women would be in danger," she said.

The EEOC has taken the position that the Pregnancy Discrimination Act does not allow employers to exclude coverage for women's contraceptives if it provides coverage for other types of drugs, services, or devices used to prevent other medical conditions, Grossman said. "There has been some litigation on this issue, and there are a number of cases pending," she said. However, claims seeking or based on the denial of insurance coverage for infertility treatment "have been largely unsuccessful," Grossman

said. Employees would be more likely to have success in such a scenario by suing under the ADA, she suggested.

Regarding post-pregnancy issues, according to Koral, "the courts have wrestled in various ways" with whether workplace issues arising after childbirth fall under the protections of the PDA. Early on, courts realized that the intention of Congress in this area was "very expansive," he said. And last year, the U.S. Court of Appeals for the Sixth Circuit found that a woman does not have to have been pregnant at the time of alleged discrimination to state a viable PDA claim, he said.

Zuchlewski agreed that there is a trend in case law recognizing that "you don't necessarily have to be pregnant to be covered by the PDA." Some courts, she added, are beginning to recognize "maternal wall" discrimination claims brought by women who allege that they face obstacles to advancement because they are mothers. Such claims are similar to traditional "sex-plus" claims, she explained, which are based on proof that an employer does not discriminate against all women, just women who share some other trait. Grossman said EEOC currently is not pursuing any such cases. "But I think it's something we'll all be working on in the future," she said.

Severe Staff Shortages in India and China

According to a recent *Financial Times* article, shortages of skilled labor are sweeping across both India and China.

One software developer in New Delhi claimed that more than half of the candidates do not show up for scheduled interviews and that on average only one out of 20 of those interviewed was qualified.

In some areas of China the shortage is so severe that even local companies are forced to look offshore for suitable staff.

There are significant implications for global business. The idea that both countries have unlimited good-value talent is colliding with a very different reality. Companies that have offshored production there in anticipation of savings are feeling the pinch of labor markets that have tightened much more rapidly than expected. Recruitment and training of skilled workers are becoming harder and more expensive than ever.

The article published in the *Financial Times* discusses the situation in-depth and offers some underlying causes for the problem. If you would like a copy of the full article from *Financial Times* and a related article PacificBridge.com, please contact peggys@mranet.org.

IRS Clarifies Rules for Debit Cards

The Internal Revenue Service is giving employers more ways to substantiate claimed medical expenses when workers use debit or credit cards in medical reimbursement plans and dependent care assistance programs. IRS Notice 2006-69, issued July 11, 2006, clarifies the methods and requirements of substantiating medical expenses charged to cards under health flexible spending arrangements and health reimbursement arrangements that were first outlined in Revenue Ruling 2003-43.

NEWS FROM THE STATES

Wisconsin

In June Wisconsin's Minimum Wage was increased to \$6.50 and members were alerted to put up the new poster (Note, the poster is optional.). While updating this poster, DWD also updated numerous other required posters, which are listed below. Changes might be the addition of a street address or an offer to provide the information in an alternate format or translate it to another language. When contacted, a representative of DWD said that while it was a good practice to have the most current poster up, it was not required for employers to replace their previous edition with the 6/2006 models. These posters can easily be printed from the website at: <http://www.dwd.state.wi.us/dwd/posters.htm>.

Wisconsin Fair Employment Law
Hours and Time of Day Minors May Work in Wisconsin
Wisconsin Family and Medical Leave Act
Employee Rights Under Wisconsin's Business Closing/Mass Layoff Law
Employee Protections against Use of Honesty Testing Devices
Retaliation Protection for Health Care Workers in Wisconsin

If you have questions about which of these you must post, contact Infonow@mranet.org or call the Information & Research Line at 866-ASK-MRA1 or 262-696-3660.

Indiana

Effective July 1, 2006, state health plans, a Health Maintenance Organization or a group health insurer must offer coverage for non-experimental, surgical treatment if the morbid obesity has persisted for at least 5 years and non-surgical treatment supervised by a physician for at least 18 months has been unsuccessful.

Morbid obesity is defined as (1) a weight of at least two times the ideal weight for frame, age, height, and gender, as specified in the 1983 Metropolitan Life Insurance tables; (2) a body mass index of at least thirty-five (35) kilograms per meter squared, with comorbidity or coexisting medical conditions such as hypertension, cardiopulmonary conditions, sleep apnea, or diabetes; or (3) a body mass index of at least forty (40) kilograms per meter squared without comorbidity. Body mass index is equal to weight in kilograms divided by height in meters squared.

Information contained in Inside HR should not be regarded as a substitute for legal counsel in specific areas. Members may contact the Information and Research Line at 866.ASK.MRA1 or 262.696.3660 or Infonow@mranet.org for additional information.
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