

## XPO Pregnancy Outcry Seen As 'Wake-Up Call' For Employers

By **Braden Campbell**

*Law360 (December 6, 2018, 8:18 PM EST)* -- Shipping giant XPO Logistics is facing vocal criticism over allegations that it mistreated pregnant workers, underscoring the need for companies to do right by employees who are expecting, experts say.

Nearly 100 members of the U.S. House of Representatives sent a letter to the leaders of the House Committee on Education and the Workforce on Tuesday calling for a congressional investigation following media reports “exposing the alleged disturbing treatment of employees” by XPO, including that it worked pregnant women to the point of miscarriage. If employers aren’t already taking this issue seriously, they need to, experts say.

“The fact that so many congresspeople want to home in on this particular company and its practices is a wake-up call for employers,” said attorney Jeff Nowak, a leave and disability expert at Franczek Radelet PC.

### **Avoid Knee-Jerk Reactions**

Although pregnancy can affect an employee’s ability to do her work, employers put themselves at risk when they assume that pregnant workers can’t get the job done.

Nowak, who blogs about leave-related issues for his firm, recently wrote a post about an ex-Jersey Mike’s sub shop worker whose Facebook post claiming she was fired because of her pregnancy went viral. The worker said she interviewed for and accepted a job without telling her new boss she was four months pregnant. She informed her boss of her pregnancy a few days after she started and was swiftly let go, with the supervisor saying the business couldn’t accommodate a future maternity leave and chastising her for not mentioning the pregnancy during the interview.

This is a perfect example of what not to do, Nowak said, noting that workers are not obligated to disclose pregnancy in interviews.

“Employers have to avoid that knee-jerk reaction that the candidate misrepresented pregnancy, and also, separately, the notion that a pregnant employee can’t or shouldn’t get the job because they’re pregnant,” Nowak said.

McCarter & English LLP attorney Hugh Murray said there is a “long history of paternalistic” employers

assuming pregnant women can't do certain work that businesses would be ill-advised to repeat. He cited the U.S. Supreme Court's 1991 ruling in *United Automobile Workers v. Johnson Controls Inc.*, which involved a policy barring women of childbearing age from taking jobs that exposed them to lead because it could harm fetuses.

"The Supreme Court said you can't do that, and so there's this balance between respecting autonomy ... and being productive and trying to run the business well," Murray said.

### **Follow the Process**

Pregnancy is not a disability under the Americans with Disabilities Act, but under relatively new Supreme Court precedent, employers should generally treat its complications as such.

In 2015 in *Young v. UPS*, the U.S. Supreme Court said that workers denied help in dealing with pregnancy-related ailments have a case under the ADA if their employers help nonpregnant workers with similar limitations. This means employers should make an effort to accommodate workers' pregnancy-related complications.

"The idea is that if a woman has a restriction ... the employer has an obligation to engage in an interactive process to figure out, 'What can we do to allow the job to get done,'" Murray said. As an example, an employee whose pregnancy makes it difficult for her to do her job can ask to be transferred to a position she could perform, he said.

But this obligation is not unlimited. The ADA requires businesses to provide workers "reasonable accommodations," like a lighter workload or different hours, that help them perform the "essential functions" of their jobs as long as the accommodations don't impose an "undue hardship" on the company.

"There's no bright line" between reasonable and undue, however, so employers should carefully analyze the impact an accommodation would have before granting it or denying it, Nowak said.

"Generally speaking, we need to be acutely aware of how that accommodation would impact the workplace, impact operations," Nowak said.

### **Have a Pregnancy Policy**

The same day the congressional representatives sent their letter, XPO announced that it had adopted a new pregnancy policy providing "the kind of support pregnant women need, without penalizing them in any way for any temporary change in the nature of their work."

Such a step is a smart one for an employer that wants to keep peace with pregnant workers, Nowak said.

"I'm certainly drafting pregnancy accommodation policies ... more than ever before," he said. "In light of the growing number of ... state pregnancy accommodation laws, it's important for employers to have some kind of pregnancy accommodation policy."

Nowak recommends employers create policies that treat pregnancy the same way they treat disabilities. That is, employers should "welcome employees who are pregnant to come forward and identify any

assistance they might need in the workplace.” They should also specify that requests will be “considered on an individual basis and in communication with the employee,” and that they will be handled promptly.

Murray echoed Nowak, saying employers should have a policy to ensure supervisors know how to handle requests and that workers know to make them.

“It can be very simple,” he said. “It can say, ‘If an employee gets pregnant, we don’t think there’s any particular reason that people aren’t able to keep doing their job, but if for some reason there’s some restriction that gets put in place, let us know.’”

XPO said Tuesday it has launched an internal investigation in the wake of media reports about its alleged mistreatment of pregnant women. It will implement "any recommended improvements" at the investigation's end, the company said.

--Editing by Jill Coffey and Kelly Duncan.

*Update: This story has been updated with comment from XPO.*