
PREGNANCY DISCRIMINATION IN OREGON WORKPLACES: FREQUENTLY ASKED QUESTIONS

Talia Y. Guerriero, Attorney at Law
specializing in employment law with a focus
on retaliation, discrimination, and family leave
talia@oregonworkplacelaw.com

Note that there are many facts unique to your case that might change any one of these answers, including the number of employees your employer has, the type of industry, whether there is a union, and whether it is a public employer. This information is not intended to be relied upon as legal advice but to give you some basic information about the framework of the law. Also, this information is current as of May 2019 but the area of law is constantly changing so be sure to check for applicable updates.¹

1. Am I protected from discrimination in employment in Oregon based on my pregnancy status?

Yes. An employer cannot treat you differently in any aspect of hiring or firing or your “terms and conditions” of employment, such as altering your schedule, giving you bad performance reviews, demoting you, paying you less money, refusing to promote you, giving you undesirable job duties, transferring you to undesirable job locations, or subjecting you to increased scrutiny or surveillance, because of your pregnancy or childbirth or related medical condition. It is also discrimination for an employer to lay you off specifically because of your pregnancy or childbirth or related medical condition. “In judging the physical ability of an individual to work, pregnant women must be treated the same as males, non-pregnant females and other employees with off-the-job illnesses or injuries.” OAR 839-005-0026.

In determining whether an employer is discriminating against you, you can look to (1) direct statements made about your pregnancy, or (2) indirect ways that the employer treats you differently than other employees in a similar position as you.

Oregon Revised Statute (“ORS”) 659A.030(1)(b) prohibits differential treatment of employees on the basis of gender, which includes pregnancy and childbirth under ORS 659A.029. This law applies to employers with **1 or more employees**.

¹ The Oregon state legislature has the most comprehensive information regarding the current state of the law (https://www.oregonlegislature.gov/bills_laws/pages/ors.aspx), but you can also check the Bureau of Labor and Industries (BOLI) website for news, updates, and technical assistance (www.oregon.gov/BOLI).

Additionally, the federal Pregnancy Discrimination Act (“PDA”) is an amendment to Title VII of the Civil Rights Act of 1964 and protects employees against discrimination under 42 USC §2000e(k). This law applies to employers with **15 or more employees**.

2. *I have another diagnosis related to my pregnancy, such as gestational diabetes. I am scared to tell my boss about it, but it is impacting me severely. Am I protected from discrimination in employment as a result of that condition?*

Yes. First, ORS 659A.029 is clear that the protection includes “related medical conditions or occurrences.”

Second, you might also be covered by the Oregon disability statutes or the Americans with Disabilities Act (“ADA”) if the employer has **more than six employees**. You will want to examine how the condition “substantially limits one or more major life activity,” such as bending, lifting, walking, or eating, as described in ORS 659A.104 and 42 USC § 12102. If it qualifies as a “disability” - or even if your employer just perceives you as having a “disability” - ORS 659A.112 will also protect you from discrimination. If the employer has **more than fifteen employees**, the ADA, 42 U.S. Code § 12112, will also provide protection.

3. *I am concerned about my ability to work all the way up until the birth or to work full-time. Does my employer have to do anything to help me modify my work responsibilities or do I just have to go on leave?*

On May 22, 2019, the Governor signed a bill (HB 2341) that will become law on January 1, 2020 that clarifies an Oregon employer’s affirmative obligation to provide reasonable accommodations for pregnancy and related conditions, including breastfeeding and lactation, regardless of whether there is any disability. The law explicitly states that an employer must consider whether the pregnant employee needs, and the employer can provide, a reasonable accommodation such as:

- (1) Acquisition or modification of equipment or devices;
- (2) More frequent or longer break periods or periodic rest;
- (3) Assistance with manual labor; or
- (4) Modification of work schedules or job assignments.

You can also consider whether you need additional leave from work as an accommodation. Furthermore, the law makes it clear that they cannot treat you

poorly or fire you because you asked for a reasonable accommodation or because they think you might need an accommodation.

This particular law only applies to employers with *six or more employees*; however, there are some protections under Oregon discrimination law for employers with fewer than six employees. It can be a little more complicated, but questions you might ask include whether the employer makes those kinds of accommodations for other employees with injuries or disabilities and whether the employer is evidencing any discriminatory intent as described above in Question 1. For example, does the employer provide light duty to people who were injured on the job?

Regardless, it shouldn't hurt to ask for options for modifying your job to stay within your restrictions. Note that it is helpful to work with a doctor to be able to provide medical verification or documentation of your restrictions. When you ask for options, try to use the word "accommodation" because it has very specific legal connotations. And if you have any questions, consult an attorney on this tricky area of the law!

Note that under any of these laws, an employer may be able to argue that the accommodation would cause an "undue hardship." If that's the case, you should discuss the situation with an attorney to help you assess the strength or weakness of the argument.

- 4. *After finding out I'm pregnant, my boss treats me like I'm fragile. He just seems very concerned for my well-being but now he has taken away certain job duties without me asking him to. I don't think that he's doing it to be mean, but I think it's premature and over protective. Is that discrimination?***

Very likely. Your boss's actions do not have to come with bad intentions. If the actions are taken because of your pregnancy, childbirth, or related medical conditions and are not based upon your actual restrictions or inability to perform the job duties, then you are being treated differently because of your pregnancy and that is discrimination.

Additionally, HB 2341 will also add language to clarify that an employer may not "require an applicant or an employee to accept a reasonable accommodation that is unnecessary for the applicant or the employee to perform the essential duties

of the job or to accept a reasonable accommodation if the applicant or employee does not have a known limitation.”

5. *My employer’s disability plan specifically excludes conditions related to abortion or miscarriage. Is that legal?*

No. Employers are obligated to provide coverage to “disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment.” See, 29 CFR § 1604.10; ORS 659A.029.

6. *I complained to Human Resources that I thought my boss was treating me differently because of my pregnancy. They told me that what the boss did was justified. But after I complained, my boss’s attitude has become very hostile, and I think she’s out to get rid of me or lay me off. Is this retaliation?*

Very likely. If you complain about behavior that you have a good faith belief is illegal pregnancy discrimination, you are protected from retaliation under both federal and state laws. These complaints are called “protected activity” and you do not have to be correct about the law or be able to cite a particular law in order to be protected.

If you can show that your boss was aware of your complaint and then markedly changed her behavior towards you as a result of it, particularly if the behavior affects things like your performance or pay or continuation of employment, you may have a case of retaliation and should refer to Questions 8 and 9 below.

7. *Does my employer have to fire me in order for me to have a legal claim for retaliation or discrimination?*

No. You do not have to be terminated first in order to have an actionable case of discrimination or retaliation. As described in Question 1, discrimination can occur in the “terms and conditions” of employment.

For retaliation claims, the bar is even lower. Retaliation can be any “adverse action” that might “deter a reasonable person from engaging in protected activity.” In other words, anything that would make an employee less likely to complain again in the future. For more information, the EEOC has issued detailed

guidance with hypotheticals explaining “adverse actions” dated August 25, 2016 and available at <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm>.

8. *Okay, I’m pretty sure I’ve suffered discrimination or retaliation. What do I do now?*

If you think you’ve been subjected to discrimination or retaliation, speak to a lawyer as soon as possible. You could have legal claims that would entitle you to back pay, money to compensate you for the emotional hardship you’ve suffered, or other penalties. You have time-sensitive deadlines on the various claims and they are even shorter if you work for a public employer due to a 180-day “Tort Claims Notice” requirement under ORS 30.275. If you are unable to find a lawyer, you can also file your claim with the Bureau of Labor and Industries (“BOLI”)² or the Equal Employment Opportunity Commission (“EEOC”)³ but it’s always best if you can speak to a lawyer first.

- You can also ***check your employer’s policies*** on reporting the discrimination to a supervisor or human resources. If you don’t give your employer a chance to fix it, a court may say you can’t bring a claim in some circumstances.
- You can also take very ***good notes*** with dates and witness names to assist you with your case. Just a note to also be careful who you speak to about the circumstances (including e-mails and texts) and what you post on Facebook because you may have to share **all** of that information with the employer once you file a lawsuit.

Note that many lawyers will take these cases on a “contingency” basis so that you do not have to pay their fees from your own pocket and they only get paid only if you win or get a settlement (although you may be responsible for some of the “costs” of the lawsuit).

9. *Am I entitled to leave for the pregnancy and am I guaranteed a job when I return?*

This answer is very dependent on the employer’s number of employees, your hours of work, the employer’s policies, and how your pregnancy has impacted your health so you should get advice specific to your situation. However, you may

² https://www.oregon.gov/boli/CRD/Pages/C_Crcompl.aspx.

³ <https://www.eeoc.gov/employees/charge.cfm>

be entitled to somewhere between 12 and 36 weeks of “protected leave” related to your health and to the birth of your child as described below. In addition, you may be entitled to leave as a reasonable accommodation under disability laws or under HB 2341 even if you don’t have a disability.

Federal leave law is covered by the Family Medical Leave Act (FMLA) and Oregon leave law is covered by the Oregon Family Leave Act (OFLA). You may be qualified under one, both, or neither. However, remember that even if your employer is not covered by FMLA or OFLA, they cannot treat you differently than other employees who need leave for medical conditions so always ask about their policies more generally. Being on “protected leave” means that your employer must either reinstate you to your former position even if they filled your position in the meantime or, if the position no longer exists, reinstate you to any available equivalent position. ORS 659A.171(1).

To be qualified under FMLA:

- (1) you must have worked 1,250 hours during 12 months prior to the leave; and
- (2) the employer must employ 50 or more employees within a 75-mile radius.

To be qualified under OFLA:

- (1) you must have worked 25 hours/week for 180 days prior to the leave; and
- (2) the employer must employ 25 or more employees within a 75-mile radius.

If you are qualified and you develop a “serious medical condition” related to pregnancy or childbirth, you could be entitled to a total of **12 weeks of unpaid leave** under FMLA and OFLA.

Note that although the leave laws only require “unpaid leave,” you may be able to use your paid time off during your leave; however, using paid leave does not extend your entitlement to the 12 weeks. In fact, your employer might even require you to use your accrued paid time for the leave. Furthermore, all employers with 10 or more employees in Oregon (at least 6 for employers located in Portland) must provide up to **40 hours of paid sick leave per year**.

If you are qualified under OFLA and you take the 12 weeks of leave for an illness, injury or condition related to pregnancy or childbirth that disables you from performing any available job duties offered by the covered employer, you could be entitled to an **additional 12 weeks** of unpaid leave within a one-year period for any other qualifying purpose, including:

- (1) To care for an infant or newly adopted child under 18 years of age, or for a newly placed foster child under 18 years of age, or for an adopted or foster child older than 18 years of age if the child is incapable of self-care because of a mental or physical disability.
- (2) To care for a family member with a serious health condition.
- (3) To recover from or seek treatment for a serious health condition of the employee that renders the employee unable to perform at least one of the essential functions of the employee's regular position.
- (4) To care for your child who is suffering from an illness, injury or condition that is not a serious health condition but that requires home care.
- (5) To deal with the death of a family member.

ORS 659A.159; ORS 659A.162(3)(a).

Furthermore, if you take the leave to care for an infant or newly adopted child or foster child, you could be entitled to **another 12 weeks of unpaid time** within that one-year period in order to care for a child who later suffers from an illness, injury, or condition that requires home care. ORS 659A.162(3)(b).

If you are still unable to return to work after you run out of the FMLA/OFLA and sick leave, you should consider whether you have a qualifying "disability" that might entitle you to an accommodation of additional unpaid leave until you are able to return to work. However, it is important to discuss with your doctor potential return-to-work dates as an employer generally does not have to accommodate requests for leave of an unlimited duration.

Note: You should also check your particular health and disability plans for possible qualification for additional benefits that are not addressed here. If you are in the Harrison Electrical Workers Trust (under which you were then able to select between the Harrison Trust Plan, Providence, and Kaiser), and go out on FMLA, the Harrison Trust will pay up to 3 months of health and welfare coverage for you, if you meet certain criteria. The criteria includes that you must be actively employed by a Contributing Employer at the time you take FMLA, you must have worked for 1 or more Contributing Employers for at least 12 months (not consecutive) before the FMLA, and you must have worked at least 1,250 hours during the 12 months before the FMLA. In the case of disability, you might also be eligible for an additional 3 months of disability waivers. Please call the

Trust office at (503) 224-0048 (x1679) for details and refer to the Summary Plan Description.