

# HR QUESTION ? of the month



## ***Can you ask for a waiver for workers' compensation claims?***

**Question:** Can the company request an employee, including a pregnant worker, to sign a waiver from liability, due to potential danger of on-the job injury sustained or harm sustained, at the hands of a mental health patient who is a resident of our facility? Would a request for waiver of liability expose the company to pregnancy discrimination, based on terms of employment, work conditions, or any other employment terms?

**Response:** We do not recommend requiring (or even requesting) that employees sign any sort of "release" or "waiver" against future workers' compensation claims. If an employee sustains an injury or illness within the course and scope of his or her employment, generally he or she would be entitled to exercise his or her rights to file a workers' compensation claim. An employee cannot be required as a condition of employment to waive this right (and even if he or she did sign such a waiver, we are not aware that it would enforceable). Certainly employees should be informed at the outset of employment or any time their position or duties changes of the nature of the job, and employers can take measures to ensure that employees are fit for the jobs for which they are hired or into which they are transferred, promoted, etc.. The employer must be careful when making inquiries about medical or health conditions, however, to avoid violating the Americans with Disabilities Act. Please see the guidance published at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> and <http://www.eeoc.gov/policy/docs/preemp.html> for information relative to when inquiries are, and are not, permitted under federal law.

The employer must of course ensure that it protects the safety and security of its employees (although admittedly some risks may not be able to be avoided, such as those that may occur at the hands of mental health patients who may exhibit unpredictable behavior, and with whom employees may work or come into contact). The employer certainly should consult with its workers' compensation and general liability carriers relative to these risks and how best to protect employees who are exposed to them.

Regardless, the employer should not single out women who are pregnant for any special treatment in the workplace. Federal and state discrimination laws prohibiting the employer from discriminating on the basis of pregnancy. In this regard, the employer cannot and should not assume that women who are pregnant are any less capable of performing their duties than any other employee who is not pregnant, nor should the employer speculate or assume that pregnant employees are at greater risk of exposure to "potential danger of on-the-job injury." Unless and until an employee indicates that she is or may be unfit for duty due to her pregnancy and/or is not able (or does not want) to continue to perform her job duties (and in either situation the employer can require that she present documentation from her physician to support her assertion), the employer should not speculate or assume that a woman who is pregnant requires any special treatment in the workplace. To do so (regardless of any benevolent intent) creates significant exposure to the employer for a pregnancy discrimination claim and thus is ill advised. The employer should further avoid speculating or assuming that an employee may become injured at work based on her pregnancy as this, too, can create exposure to the employer for discrimination and/or retaliation claims, as noted. To the extent the employer requires employees to sign documents relative to risks in the workplace (such documents should be drafted by counsel to ensure they are valid and enforceable), this should be required of all employees, not just women or those women who are pregnant.

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