

EEOC Issues New Enforcement Guidance on Pregnancy Discrimination

The U.S. Equal Employment Opportunity Commission (EEOC) issued new Enforcement Guidance this month regarding pregnancy discrimination. This is the first comprehensive update to the EEOC's Pregnancy Discrimination Guidance since 1983. The Guidance discusses employer practices that the EEOC considers permissible and impermissible based on its interpretation of the Pregnancy Discrimination Act of 1978 (PDA), Title VII of the Civil Rights Act of 1964 (Title VII), and Title I of the Americans with Disabilities Act (ADA). It reiterates well-established law on pregnancy discrimination, but also arguably expands the reach of the current law by requiring accommodation of pregnancy under the PDA and ADA (as amended by the ADA Amendments Act of 2008 (ADAAA)), and by stating that employers should treat pregnant employees in the same manner as similarly situated employees injured on the job.

Background

The PDA prohibits discrimination based on pregnancy, childbirth, or related medical conditions. The ADA prohibits employment discrimination on the basis of disability and requires that an employer provide reasonable accommodation for an employee or applicant with a disability. Pregnancy itself is not a disability under the ADA, but pregnant employees and applicants are not excluded from its protections. The EEOC's Guidance explains that changes to the definition of "disability" in the ADAAA made it easier for workers with pregnancy-related impairments to demonstrate the need for reasonable accommodation under the ADA. Prior to the ADAAA, courts typically held that medical conditions related to pregnancy were not impairments within the meaning of the ADA. But a broader range of temporary impairments associated with pregnancy may qualify as disabilities under the ADAAA – at least where employees can show that pregnancy-related conditions substantially limit their ability to perform one or more major life activities.

The EEOC explains that reasonable accommodation of pregnancy-related disabilities "might include allowing a pregnant worker to take more frequent breaks, to keep a water bottle at a work station, or to use a stool, altering how job functions are performed; or providing a temporary assignment to a light duty position."

The Guidance also discusses pregnancy issues that implicate Title VII. Along with barring discrimination against pregnant employees, the EEOC interprets Title VII as prohibiting discrimination on the basis of an employee's past pregnancy, stated intent to become pregnant, infertility treatment, or use of contraception. The EEOC adds that pregnant women must be treated in the same manner as those who are not pregnant and given the same access to benefits (*e.g.*, light duty or leave).

The EEOC's Recommendations on Best Practices

The EEOC suggests that employers develop, disseminate, and enforce strong policies addressing the types of conduct that would constitute unlawful discrimination based on pregnancy, childbirth, and related medical conditions, and to ensure that those policies provide multiple avenues for raising concerns. It also encourages employers to develop specific, job-related qualification standards for each position that reflect the position's duties and minimize the potential for gender stereotyping and discrimination on the basis of pregnancy, childbirth, or related medical conditions. As always, employers should also make sure employment decisions are well-documented.

Regarding leave and fringe benefits, the EEOC's Guidance suggests that employers evaluate restrictive leave policies (*e.g.*, a probationary period during which leave cannot be taken) to determine whether they disproportionately impact pregnant workers and, if so, whether they are necessary for business operations. The Guidance suggests that employers ensure that any such policies note that employees may qualify for leave as a reasonable accommodation.

It also explains that leave related to pregnancy, childbirth, or related medical conditions can be limited to women affected by those conditions, but parental leave must be provided to similarly situated men and women on the same terms.

The EEOC further encourages employers to review workplace policies that limit employee flexibility, such as fixed hours of work and mandatory overtime, to ensure that they are necessary for business operations. If feasible, the Guidance suggests that employers should temporarily reassign job duties that employees are unable to perform because of pregnancy or related medical conditions.

The EEOC encourages employers to have a process in place for considering reasonable accommodation requests and to "state explicitly" in any written accommodation policy that reasonable accommodations may be available to individuals with temporary impairments, including those related to pregnancy. Further, employers should train managers to recognize requests for reasonable accommodation and make sure that anyone designated to handle such requests understands that the definition of the term "disability" is broad.

The Guidance also details employer obligations regarding employees who are breastfeeding. It states that lactation is a pregnancy-related medical condition under the PDA, and a breastfeeding employee "must have the same freedom to address such lactation-related needs that she and her co-workers would have to address other similarly limiting medical conditions."

Analysis of the EEOC's Guidance

It is important to note that while the EEOC's Guidance is not binding law, it is the standard the EEOC will use when evaluating discrimination complaints. The Guidance does not have the force of law and is entitled to deference from courts only "to the extent of its persuasive power." See *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 n.6 (2001).

The view that employers must modify job requirements for pregnant and lactating workers is controversial if it is applied outside of cases in which the employee is not substantially limited in her ability to perform one or more major life activities. Two of the five EEOC commissioners issued public statements opposing the Guidance and the EEOC's decision not to make a draft available for public review and comment before it was issued.

The timing of the Guidance is significant because the Supreme Court recently granted certiorari to review *Young v. United Parcel Service, Inc.*, 707 F.3d 437 (4th Cir. 2013), *cert. granted*, 81 U.S.L.W. 3602 (U.S. July 1, 2014) (No. 12-1226). In that case, the Court of Appeals for the Fourth Circuit held that the PDA does not mandate the kind of accommodations that the Guidance states are required. The plaintiff in *Young* was unable to lift heavy packages due to her pregnancy and argued that UPS, her employer, was required to accommodate her by putting her on the light duty work that it offered to disabled workers and those injured on the job. The Fourth Circuit found that Young was treated the same as the general category of employees who were unable to lift as a result of an off-the-job injury or illness but who were not disabled within the meaning of the ADA. As a result, it held that Young was not entitled to protection under the ADA solely by virtue of her pregnancy.

The EEOC's Guidance is contrary to the holding in *Young*. Because the Supreme Court has agreed to hear the appeal of this case in the next term, the EEOC's view will likely be put to the test soon.

Local Requirements

New York City Law. New York City has already enacted a pregnancy accommodation law that parallels the EEOC's Guidance. The law, an amendment to the New York City Human Rights Law, applies to all businesses with four or more employees or independent contractors. It requires employers to provide reasonable accommodations to pregnant women and those with medical conditions related to pregnancy and childbirth. According to the legislative findings that accompanied the law, reasonable accommodations may include "bathroom breaks, leave for a period of disability arising from childbirth, breaks to facilitate increased water intake, period rest for those who stand for long periods of time, and assistance with manual labor, among other things." Essentially, pregnant women must

be treated in the same manner as those with a disability under the City law.

New York City employers are also required to give employees written information about their rights under the City law at the start of employment. The law allows an employee who believes she has been discriminated against to file a civil lawsuit to seek damages or policy changes, or to make a complaint to the New York City Human Rights Commission. Employers who do not comply could be fined up to \$250,000, face imprisonment, or be required to change practices, provide compensation, or re-hire employees who were discriminated against.

New York State Law. The Women's Equality Act, a law that included similar protections for pregnant workers across New York State, stalled in the state legislature last year.

Other States. Alaska, California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, and Texas have enacted comparable pregnancy accommodation provisions. Several states have recently introduced comparable legislation, including New Jersey and Pennsylvania.

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