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*Legal Update*

*July 2014*

# EEOC ISSUES NEW ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION

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Pregnancy discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) are on the rise, from 3,977 charges in 1997 to 5,342 charges in 2013. One study indicates that they are rising at a faster rate than women are joining the workforce. This month, the EEOC released a new Enforcement Guidance on Pregnancy Discrimination and Related Issues (the "Guidance"), along with Questions & Answers and a Fact Sheet for Small Businesses, which discuss employers' obligations to pregnant employees under the Pregnancy Discrimination Act (PDA) and the Americans with Disabilities Act (ADA). This is the EEOC's first comprehensive update of its guidance on pregnancy discrimination since 1983, and it incorporates significant developments in this area of law during the past three decades.

While controversial and criticized by many (including two of the five female EEOC Commissioners who voted to disapprove the Guidance), the new Guidance seeks to address questions that are currently pending before the Supreme Court in the case, *Young v. United Parcel Services*. In *Young*, both the trial and appellate courts held that the PDA does not require an employer who provides accommodations to non-pregnant employees with work limitations to provide accommodations to pregnant employees who are "similar in their ability or inability to work." By contrast, the EEOC advances in its new Guidance that these kinds of accommodations are in fact required and that a pregnant employee "may still establish a violation of the PDA by showing that she was denied light duty or other accommodations that were granted to other employees who are similar in their ability or inability to work."

## An Overview of the PDA

Congress passed the PDA in 1978. It declared that discrimination based on pregnancy, childbirth, or related medical conditions is a type of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964. Prior to the PDA's enactment, pregnancy discrimination was not considered a type of sex discrimination, and employers could discriminate against pregnant employees. Under the PDA, an employer must treat women affected by pregnancy, childbirth, or related medical conditions the same as other persons who are not so affected if they are "similar in their ability or inability to work." The PDA applies to all aspects of pregnancy and employment, such as hiring, discharge, promotion, benefits, and treatment in comparison with non-pregnant employees similar in ability or inability to work.

## Highlights of the New Guidance

The EEOC has adopted a broad view of pregnancy discrimination in interpreting the PDA and the ADA. Among other updates to EEOC policy, the EEOC concludes in its Guidance that:

- The PDA does not limit discrimination claims to those based on a current pregnancy. In other words, not only is it unlawful for an employer to discriminate against an employee who is currently pregnant, but it is also unlawful to discriminate on the basis of an employee's past pregnancy or her potential or intention to become pregnant in the future.
- An employer may not make employment decisions based on stereotypes or assumptions about a pregnant employee's or candidate's job capabilities and commitment to the job. For example, an employer may not ask a visibly pregnant woman about her work availability, then disregard her statement that she intends to work right up to the delivery date, and refuse to hire her, believing that she may decide to stop working earlier.
- An employer must provide the same benefits for pregnancy-related medical conditions as it provides for other medical conditions. For example, employer-provided health insurance benefits must cover pregnancy, childbirth, and related medical conditions.
- Lactation is a pregnancy-related medical condition, and an employer may not discriminate on the basis of lactation. An employer must provide a lactating employee "the same freedom to address such lactation-related needs that she and her co-workers would have to address other similarly limiting medical conditions."
- An employer may not require a pregnant employee to take leave as long as she is able to perform her job, even if the employer believes it is acting in the employee's best interest.
- An employer must offer light duty to a pregnant employee if it provides light duty positions to non-pregnant workers "similar in their ability or inability to work." For example, if an employer has a policy of providing light duty to an employee who cannot perform his job duties for up to 90 days due to a disability covered by the ADA, the employer must provide similar accommodations to pregnant employees with similar limitations, even if the pregnancy itself does not constitute a disability.

## Suggested Best Practices for Employers

The Guidance also offers some suggested best practices that employers may adopt to reduce the chance of pregnancy discrimination claims. For example, employers should:

- Develop, disseminate, and enforce a policy based on the PDA's and ADA's requirements
- Provide training to managers and employees regarding pregnancy discrimination
- Investigate complaints promptly and thoroughly
- Make hiring, promotion, and other employment decisions without regard to stereotypes or assumptions about women affected by pregnancy, childbirth, or related medical conditions
- Make sure all employment decisions are well documented
- Avoid restrictive leave policies that disproportionately impact pregnant employees
- Monitor compensation practices for patterns of potential pregnancy-based discrimination
- Develop a procedure and a written policy for reasonable accommodation requests

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## Illinois Law

Even if the Supreme Court's decision in *Young*, expected later this year, were to overrule the Guidance or parts of it with respect to federal law, employers will nonetheless be subject to applicable State law. Illinois recently passed a law that expands its protection of pregnant employees. Similar to the PDA, an amendment to the Illinois Human Rights Act (the "Act") prohibits employers from discriminating against employees "on the basis of pregnancy, childbirth, or related medical conditions." The current Act generally applies only to employers with 15 or more employees.

Beginning January 1, 2015, the amended Act's pregnancy provisions will apply to employers with one or more employees. Along with other protections, the Act will require an employer to make a reasonable accommodation for an employee's medical condition related to pregnancy or childbirth unless the employer can demonstrate that the accommodation would create an undue hardship.

## Conclusion

Employers should consult with counsel and revisit their leave, disability, benefits, and anti-discrimination policies to ensure compliance with the EEOC Guidance as well as the amended Illinois Human Rights Act. They should also keep an eye out for further developments, including the *Young* decision.

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