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EEOC Issues Guidance on Pregnancy Discrimination, Suggesting New Pregnancy Accommodation Requirements

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Insights for Employers

Employers everywhere should take notice. The EEOC's recently released guidance on pregnancy in the workplace will require employers to make changes to existing policies and procedures, and will inevitably have far-reaching effects for employers of all size.

On July 14, 2014, the U.S. Equal Employment Opportunity Commission (EEOC) issued new guidance on pregnancy discrimination in the workplace. *Enforcement Guidance: Pregnancy Discrimination and Related Issues* is the first official update of the EEOC's position on pregnancy in 30 years. The Guidance comprises four parts: Part I, discussing equal treatment of pregnant and non-pregnant employees under the Pregnancy Discrimination Act (PDA); Part II, addressing treatment of pregnancy and pregnancy-related conditions as disabilities under the Americans with Disabilities Amendments Act (ADAAA); Part III, reviewing other federal and state laws impacting pregnant workers; and Part IV, setting forth the EEOC's best practices for employers. While the Guidance does not officially constitute "new law," it will inevitably be relied upon by the Commission's own investigators and, most likely, by both state and federal courts. As such, there is no question that the Guidance will serve as a useful tool for employers as they seek to avoid claims of discrimination involving gender and pregnancy.

In practical terms, the most significant development for employers involves the accommodation of pregnant employees in the workplace. The Guidance provides that, to comply with the PDA's requirement that "pregnant employees be treated the same as non-pregnant employees," accommodations provided to pregnant workers must be equal to accommodations provided to disabled non-pregnant employees, *regardless of whether the pregnant workers are disabled under the ADA*. In a dissent from the Guidance, one Commission member described this as "me too" coverage — "whatever a person with a disability under the ADA is entitled to, I'm entitled to, too." In other words, under the PDA, pregnant employees who are not considered disabled under the ADA are nevertheless entitled to reasonable accommodations if they merely have job restrictions that are similar to an individual with a disability. The EEOC directly discusses this policy in the context of light duty work: if an employer offers light duty work to employees who are unable to perform their normal duties due to ADA disabilities, the employer must provide similar light duty work to a pregnant employee (for example, due to a lifting restriction or discomfort standing)

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without making any inquiries into whether the pregnant employee is disabled. This is true even if the employer's policy is narrowly drafted to provide light duty only to employees hurt on the job. According to the EEOC, if even one employee can have light duty, every pregnant employee gets it, too. This is a drastic departure from PDA law as establish by the federal courts. Accordingly, employers should be aware that this change could be short-lived. In fact, a dispute over this very issue will be heard by the U.S. Supreme Court next year in *Young v. UPS*, where the Court will be asked to decide whether disabled workers are appropriate "comparators" to pregnant workers when determining whether discrimination occurred under the PDA.

In addition to that most significant new position, the EEOC has made some other noteworthy statements in its Guidance, including that: (i) an employer may risk discrimination claims merely by discussing pregnancy plans with job applicants and employees; (ii) the anti-discrimination law covers not only active pregnancy but also discrimination based upon past pregnancy and a woman's potential to become pregnant; and (iii) under the ADAAA, most pregnancy-related impairments are disabilities regardless of how temporary they may be. Lastly, the Commission has taken the controversial position that an employer discriminates against women by excluding contraception from otherwise comprehensive health care coverage. Note that the EEOC acknowledges, however, that this position is most likely circumscribed by the Supreme Court's recent decision in *Burwell v. Hobby Lobby* that certain employers may not be lawfully compelled to provide contraception under the Affordable Care Act.

The Guidance is extensive, and addresses a number of matters and issues not discussed here. Employers are encouraged to review the Guidance or the shorter "Q&A" document issued by the EEOC, and to immediately assess all current policies and practices to ensure compliance. Hinshaw's Labor and Employment attorneys nationwide are able to help employers understand how the Guidance affects their workplace, as well as guide them through implementing necessary policies and procedures changes so as to comply with the Guidance.

Guidance: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

Q&A document: http://www.eeoc.gov/laws/guidance/pregnancy_qa.cfm

Young v. UPS on Oyez.com: http://www.oyez.org/cases/2010-2019/2014/2014_12_1226

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