

Publications

Labor and Employment Alert: EEOC Issues New Controversial Enforcement Guidance on Pregnancy Discrimination

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The Equal Employment Opportunity Commission (EEOC) recently issued its first enforcement guidance on pregnancy discrimination since 1983. The new guidance was approved by a 3-to-2 vote of commissioners. The dissenting commissioners issued public statements questioning the majority's decision to issue the guidance without first making it available for public comment, criticizing the majority's interpretation of the law, and questioning the timing of the enforcement guidance given that the United States Supreme Court is scheduled to address issues covered in the guidance next term in *Young v. United Parcel Service, Inc.*

Though the EEOC guidance addresses a number of Pregnancy Discrimination Act (PDA) related topics, two of the more controversial positions taken by the EEOC within the guidance are: 1) that all pregnant employees are entitled to reasonable accommodations under the Americans with Disabilities Act (ADA), regardless of whether the pregnancy-related impairment at issue is a "disability" under the law; and 2) employers must provide light duty to pregnant workers if light duty is provided to non-pregnant workers "similar in their ability or inability to work."

The PDA and ADA

The guidance provides a general overview of the fundamental Pregnancy Discrimination Act of 1978 requirements that: (1) an employer may not discriminate against an employee on the basis of pregnancy, childbirth, or related medical conditions; and (2) women affected by pregnancy, childbirth, or related medical conditions be treated the same as other persons not so affected but similar in their ability to do work.

In its guidance, the EEOC takes the position that while pregnancy itself is not a disability under the ADA, the requirements of the PDA include that all pregnant workers are entitled to a "reasonable accommodation" as defined by the ADA. The guidance specifically states, "[A]n employer is obligated to treat a pregnant employee

temporarily unable to perform the functions of her job the same as it treats other employees similarly unable to perform their jobs, whether by providing modified tasks, alternative assignments, leave, or fringe benefits." Under this interpretation, all women affected by pregnancy, childbirth, or related medical conditions must be provided equal access to the same leave and fringe benefits as other employees who are similar in their ability or inability to work. As such, employers could be expected to provide reasonable accommodations to impairments related to pregnancy regardless of whether such impairments meet the definition of "disability" under the ADA and its 2008 amendments.

Light Duty Requirements

The EEOC's guidance also impacts how employers apply light duty policies under the PDA. According to the guidance, an employer violates the PDA if it denies a pregnant employee light duty while providing light duty to employees who are similarly unable to perform their jobs. For example, if an employer has a light duty policy that covers employees injured on the job, the policy must also cover pregnant employees similarly unable to perform their work. The EEOC's position directly contradicts current federal law and is an entirely new interpretation of the PDA. Notably, these issues are exactly those that will be before the Supreme Court next term.

Implications for Employers

It is important to point out that though the EEOC guidance does not have the force and effect of law, the EEOC will apply the positions outlined in the guidance to conduct its investigations until these issues are determined otherwise. Employers should pay attention to the Supreme Court's upcoming decision in *Young v. United Parcel Service, Inc.* (Vorys will issue a Client Alert) and should review their policies related to pregnancy, leaves of absence and accommodations to ensure compliance with the PDA and ADA.

In the event you have any questions regarding the entirety of the EEOC's guidance, or your policies and procedures, make sure to contact your Vorys attorney.