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Managing Pregnant Employees: EEOC Offers New Guidance on the Treatment of Pregnant Workers

By Jessica Summers

Regardless of industry, size, or geography most employers will, at some point, be faced with the issue of how to handle a pregnant employee. On July 14, 2014, the EEOC issued new enforcement guidance on pregnancy discrimination. This is the first new guidance that the EEOC has published on this issue in over 30 years and has important implications for employers and employees alike.

The guidance, entitled "Enforcement Guidance on Pregnancy Discrimination and Related Issue," focuses on the protections and rights provided to pregnant employees under the Pregnancy Discrimination Act (PDA) and the Americans with Disabilities Act (ADA), as amended. The guidance updates and replaces the EEOC's 1983 guidance on the issue and provides a number of useful and illustrative examples of discrimination and appropriate ways to manage pregnant employees. While much of the content may seem common sense to employers long familiar with navigating discrimination laws, the guidance, among other things, delves into the amendments that were made to the ADA since the 1983 guidance and how these amendments apply in cases of pregnancy.

Of import, as noted further below, the guidance specifically instructs that employers who provide accommodations to non-pregnant employees must also accommodate pregnant employees who are similarly unable to work. However, as we previously reported, on July 1, 2014, the Supreme Court granted certiorari in the case of *Young v. United Parcel Service* on the precise question of whether the PDA requires such equivalent accommodation for non-pregnant and pregnant employees. This case will be heard by the Supreme Court at some point during its next term which begins on October 6, 2014. Thus, while employers should be mindful of the EEOC's current guidance, they should also be aware that, depending on the Supreme Court's decision, a significant portion of that guidance could be superseded within the next year.

For employers, some of the most significant reminders and takeaways from the new guidance are:

– A pregnant employee must be treated the same as a non-pregnant employee with the same inability to work or restrictions on work. As reflected in the many examples provided in the guidance, this rule extends to all aspects of employment including modifications to job duties, reassignment, leave and other benefits. The bottom line is that an employer must treat an employee who has work limitations because of a pregnancy the same as the employer would treat an employee who has similar work restrictions that are not the result of pregnancy. Thus, for example, if an employer allows an employee with an injury that prevents him or her from lifting to move to a light duty job, the employer must provide an employee whose pregnancy prevents her from lifting the same opportunity to move to a light duty job.

– Employers should not make unrequested changes to a pregnant employee's duties or status. While employers may be concerned about the health and safety of a pregnant employees and their babies, the guidance makes clear that an employer's well-meaning decision to change a pregnant employee's job duties or to place her on leave because of her pregnancy when such a change or leave has not been requested could violate the PDA. Just as employers must treat pregnant and non-pregnant employees with work restrictions alike, employers must treat pregnant employees who have not indicated that they have any restrictions the same as any other employee.

– Bonding leave and accommodations for caregivers must be equally available to employees of both genders. Although not covered under the Pregnancy Discrimination Act, the new guidance highlights the fact that, under Title VII, employers who provide bonding leave to new parents or special accommodations for caregivers must do so on a gender-neutral basis. The guidance distinguishes between leave provided to a female employee related to physical limitations caused by, or recovery from,

pregnancy or child birth and leave provided to bond with, or care for, a child. While an employer may provide female employees with leave to recover from pregnancy or childbirth, such as under a short-term disability policy, any additional leave not directly related to that recovery must be made equally available to male employees. While the guidance does not specifically identify what the EEOC believes is a reasonable period of leave to recover from childbirth, the guidance does provide an example which states that an employer would not violate Title VII by providing female employees with 10 weeks of short term disability to recover from childbirth and both female and male employees with 6 additional weeks of bonding leave.

– Employees suffering from pregnancy-related impairments may be covered by the ADA and entitled to reasonable accommodations. The guidance makes it clear that, while pregnancy itself is not an ADA covered disability, temporary impairments related to pregnancy may qualify as disabilities under the amended ADA. As such, employers should be mindful that they may have an obligation to provide reasonable accommodations for employees suffering from pregnancy related impairments. The guidance provides a number of examples of the types of pregnancy related disabilities that would constitute an ADA covered disability and what reasonable accommodations might be offered to address such a disability.

In light of the new guidance, and the numerous examples provided therein, employers would be well advised to consider their own policies and practices and to work with managers to ensure that pregnant employees are treated and managed in accordance with the law. Employers should also be sure to consider the laws of their own state as many states, including Maryland, have their own laws governing the employment and management of pregnant employees.

