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New EEOC Developments Expand Employers' Pregnancy Accommodation Obligations

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For the first time in more than 30 years, on July 14, 2014, the Equal Employment Opportunity Commission ("EEOC") overhauled its guidance on pregnancy discrimination issues—broadening anti-discrimination coverage and cautioning employers on their obligation to provide reasonable accommodations to employees with pregnancy-related conditions. The EEOC's Guidance takes the position that, under multiple federal statutes, employers have broad accommodation and non-discrimination obligations with respect to pregnant employees, recently pregnant employees, and lactating employees. The EEOC Guidance signals an aggressive enforcement stance by the EEOC, and it conflicts with some federal court cases, although other federal courts have ruled consistently with the EEOC's position. Just two weeks prior to the issuance of the EEOC Guidance, the U.S. Supreme Court granted a petition for certiorari in Young v. United Parcel Service, Inc., *to address whether, and in what circumstances, the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) ("PDA"), which was an amendment to Title VII of the Civil Rights Act of 1964, requires an employer that provides work accommodations to non-pregnant employees with work limitations to provide work accommodations to pregnant employees who are "similar in their ability or inability to work." Until the Supreme Court provides a definitive ruling on pregnancy non-discrimination and accommodation obligations, employers would be prudent to act in conformance with the EEOC Guidance.*

The EEOC's *Enforcement Guidance on Pregnancy Discrimination and Related Issues*[1] explains the EEOC's position on employers' obligations in relation to pregnancy under the PDA, the Americans with Disabilities Act, as amended ("ADA"),[2] the Family and Medical Leave Act ("FMLA"), and various other laws. According to the Guidance, pregnancy-related obligations apply to employees who currently are pregnant, who have been pregnant in the past, who intend to become pregnant, or who merely potentially may become pregnant.

In defining pregnancy-related discrimination, the Guidance is clear: employers are prohibited from considering an employee's present, past or future pregnancy with respect to employment decisions and should avoid pregnancy-related stereotypes and assumptions about an employee's capabilities or job ambitions. Even well-intentioned employer decisions aimed at protecting an employee's pregnancy, fertility, or fetus will "rarely, if ever, justify sex-specific job restrictions" as a "bona fide occupational job qualification," in the absence of evidence that the specific employee has limitations on performing the functions of the job.

The Guidance emphasizes that numerous pregnancy-related impairments may be considered a "disability" under the ADA and trigger employers' reasonable accommodation duties. Notably, the EEOC now adopts the position that, even under the PDA, employers must offer accommodations, such as light duty assignments, to pregnant employees if the employer provides the same accommodation to non-pregnant employees with similar work restrictions. Other accommodations employers may be required to offer pregnant employees include modified work schedules (*e.g.,* more frequent breaks, or later arrival times due to pregnancy-related fatigue or morning sickness), purchasing or modifying equipment or devices (*e.g.,* providing a pregnant employee with a stool so she can be seated when working in a position that would ordinarily require her to stand), or altering how a job function is performed (*e.g.,* allowing a pregnant employee with pregnancy-related carpal tunnel syndrome to dictate notes and have assistants input the data, rather than requiring the pregnant employee to use a keyboard).

New Changes to EEOC's Guidance

The new Guidance is divided into four sections addressing the PDA, the ADA, related laws such as the FMLA, and best practices for employers. As established under the PDA, employers are prohibited from discriminating against an employee on the basis of pregnancy, childbirth, or related medical conditions, and they must treat pregnant employees the same as other employees who are similar in their abilities or inabilities to work.

Now, the EEOC construes the PDA to be more closely intertwined with other federal laws—thus expanding and complicating the scope of employers' duties to employees with pregnancy-related conditions. Below are highlights of the EEOC's new Guidance:

- **Employees who are temporarily unable to perform the functions of their job due to pregnancy-related conditions must be treated the same as other, non-pregnant employees with similar abilities or inabilities to work, including providing them accommodations.** If, for example, an employer provides light duty assignments to non-pregnant employees injured on the job, comparable light duty assignments must also be offered to pregnant employees with similar limitations on their ability to perform work.

[1] *See* http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

[2] Both the PDA and ADA apply to private employers, as well as to state and local government employers, with 15 or more employees.

- **Pregnancy or childbirth-related conditions may qualify for accommodations under the ADA, so long as such accommodations are reasonable and do not impose undue hardship on the employer.** Such conditions include morning sickness, lactation, and gestational diabetes. While pregnancy itself is not a disability under the ADA, pregnancy-related impairments that substantially limit a major life activity—even if they are only temporary and a normal condition of pregnancy—may qualify as a disability under the ADA. Employers must also accommodate impairments of the reproductive system that lead to physical restrictions to enable a full-term pregnancy, such as conditions that require bed rest during pregnancy.

- **Pregnant employees and new parents are protected from a range of potentially-discriminatory actions taken against them by their employers.** For example, the Guidance states that employers that provide health care insurance may not exclude prescription contraceptives in employee health plans regardless of whether the contraceptives are provided for birth control or medical purposes, and coverage must be provided under certain circumstances for fertility treatments for women. In addition, any parental leave provided by employers (as distinguished from medical leave associated with childbirth) must be provided on the same terms to similarly situated men and women.

Pregnancy Discrimination Law Landscape in 2014

With its new Guidance, the EEOC hopes to successfully combat "the persistence of overt pregnancy discrimination, as well as the emergence of more subtle discriminatory practices."[3] However, the timing of the Guidance, which was approved by a 3-2 vote along partisan lines, has fueled concerns that the EEOC's credibility may soon be undermined by the U.S. Supreme Court's anticipated ruling on pregnancy discrimination issues in *Young v. United Parcel Service, Inc.*

The plaintiff in *Young* was denied light duty work as an accommodation for her pregnancy and was subsequently laid off by UPS. Even after the U.S. solicitor general submitted a May 2014 brief advising the Supreme Court that the EEOC was expected to clarify the pregnancy discrimination issues in dispute, the Court nevertheless accepted the case for its 2014-2015 term. Depending on the decision in *Young* on the extent of required pregnancy-related workplace accommodations, the EEOC may gain support for its Guidance or need to revise it.

Also, the EEOC's position that employers can violate Title VII by excluding coverage of prescription contraceptives from their health insurance plans may put the EEOC at odds with *Burwell v. Hobby Lobby Stores, Inc.* In the much-publicized decision, the Supreme Court recently ruled that, because the 1993 Religious Freedom Restoration Act ("RFRA") prohibits the government from passing laws that "burden" the free exercise of religion, closely held for-profit employers cannot be required under the Affordable Care Act to provide contraceptive options that conflict with the employers' sincerely held religious beliefs. In a Q&A about the Guidance, the EEOC takes note of the *Hobby Lobby* decision, but declines to endorse a religious belief exemption. Instead, the EEOC comments that its Guidance "explains Title VII's prohibition of pregnancy discrimination; it does not address whether certain employers might be exempt from Title VII's requirements under the RFRA or under the Constitution's First Amendment."[4]

Even before the EEOC released its new Guidance, pregnancy discrimination issues had already been the subject of increasing attention from state legislatures and courts. In 2014 alone, numerous state and local governments enacted laws requiring employers to provide reasonable accommodations on the basis of

[3] *See* http://www.eeoc.gov/eeoc/newsroom/release/7-14-14.cfm

[4] *See* http://www.eeoc.gov/laws/guidance/pregnancy_qa.cfm

pregnancy or childbirth. Such laws became effective this year in Minnesota, New Jersey, and West Virginia, as well as in New York City, Philadelphia, and Central Falls (Rhode Island). Most recently, the Illinois legislature passed a similar law that is expected to take effect on January 1, 2015.

While the Guidance provides pregnant employees with greater protections than afforded under most states' laws, the Guidance mirrors, in many respects, the strong pregnancy discrimination laws already in effect in California.[5] Employers in California are required to provide reasonable accommodations for pregnant employees that may include modifying work duties, practices or policies, and providing furniture and breaks as needed.

The EEOC's updated Guidance also arrives on the heels of emerging case law extending anti-discrimination protections to recently-pregnant employees. In *Albin v. LVMH Moet Louis Vuitton, Inc.,* the Southern District of New York denied a motion to dismiss a failure-to-promote claim on the basis of a recent pregnancy. In its July 8, 2014 opinion, the court explained that, in the Second Circuit, women who are four months or less removed from giving birth are generally protected by Title VII's anti-discrimination provisions. The length of time that a new mother is protected under the law is unclear and must be decided on a case-by-case basis by first identifying when the adverse employment action occurred. This opinion is consistent with the EEOC's new Guidance declaring that a "lengthy time difference between a claimant's pregnancy and the challenged action will not necessarily foreclose a finding of pregnancy discrimination."

In addition, courts have held that employer actions to avoid providing accommodations to pregnant employees are unlawful. On July 15, 2014, the Northern District of Illinois ruled in *Cadenas v. Butterfield Health Care II, Inc.* that an employee's pregnancy-related "anticipatory discharge" claim could proceed. Here, the employer had an unwritten policy of offering light duty work only to employees with work-related injuries. After receiving notes from the plaintiff's doctor detailing the plaintiff's activity restrictions while pregnant, the employer fired the plaintiff in her 15th week of pregnancy, before her medical restrictions were to take effect around the 20th week of her pregnancy. To avoid liability for pregnancy discrimination, according to the *Cadenas* court, the employer must show that the medical restrictions would have significantly disrupted the company's business. In its new Guidance, the EEOC expressly prohibits such adverse employment actions based on pregnancy or childbirth.

Best Practices for Employers under EEOC's New Guidance

Key takeaways from the EEOC's detailed list of "Best Practices" for employers to ensure compliance with the new Guidance include:

- Review and, where appropriate, revise policies concerning light duty, leave, benefits, accommodation, and anti-discrimination.
- Focus on employees' qualifications when making employment decisions, rather than any intended, current, or past pregnancy.
- Treat a pregnant employee temporarily unable to perform the functions of her job the same way as other employees similarly unable to perform their jobs are treated, whether by providing light duty assignments, leave, or fringe benefits.

[5] *See generally* Cal. Gov't Code §§ 12926, 12940, 12945; 2 CCR § 11029 *et seq.*

- Do not assume that implementing certain changes to the employer's normal practices or policies would be too burdensome and therefore not required, even though there is an "undue hardship" exception to reasonable accommodation obligations.

- Avoid openly questioning a pregnant individual's ability to perform her job. Although pregnant or fertile women might be excluded from certain jobs if there is a bona fide occupational qualification, this defense cannot be based on fears of danger to the employee or her fetus, fears of potential liability, or assumptions and stereotypes about pregnant women.

- Train managers and human resource staff on the protections afforded to employees under the PDA, ADA, and other federal statutes relating to pregnancy rights.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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