



Labor & Employment ADVISORY ■

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EEOC Issues New Enforcement Guidance on Pregnancy Discrimination

On July 14, 2014, the Equal Employment Opportunity Commission (EEOC) issued new Enforcement Guidance (the "Guidance") on pregnancy discrimination and related issues. This is the first update to the EEOC's pregnancy-related Enforcement Guidance in 30 years and, consistent with the EEOC's identification of pregnancy discrimination as a strategic enforcement priority, the Guidance expands protections for pregnancy and pregnancy-related conditions through broad interpretation of the Pregnancy Discrimination Act (PDA) and Americans with Disabilities Act (ADA).

The Guidance is divided into four parts. Part I emphasizes the PDA's prohibition on pregnancy discrimination, which, according to the EEOC, includes discrimination on the basis of current pregnancy, past pregnancy, potential or intended pregnancy, and medical conditions related to pregnancy or childbirth. The Guidance includes examples of pregnancy discrimination that may arise in various scenarios, including in less-obvious contexts such as breastfeeding, abortion, fertility and paternal leave. Notably, the EEOC clarified that it now construes the PDA to require employers to offer temporary light duty assignments to pregnant employees on the same terms as such assignments are provided to non-pregnant employees who are similarly restricted in their ability to work. This change in the EEOC's interpretation will have a significant impact on employers who limit temporary light duty assignments to employees who are injured on the job. Additionally, the EEOC emphasized that parental leave must be provided to similarly situated men and women on the same terms.

Part II of the Guidance discusses pregnancy-related impairments under the ADA, including when pregnant employees may be entitled to reasonable accommodation and what those accommodations should look like. While pregnancy is not a disability, many common pregnancy-related impairments such as cervical insufficiency, preeclampsia, conditions requiring cesarean section, pregnancy-related anemia, sciatica and carpal tunnel syndrome, gestational diabetes, nausea that can cause severe dehydration, abnormal heart rhythms, swelling and depression may constitute disabilities that require reasonable accommodation. The Guidance lists several examples of reasonable accommodations that may be necessary for a pregnancy-related disability, including modified work schedules, granting leave and temporary assignment to a light duty position.

Part III briefly describes legal requirements outside of the ADA and PDA that affect pregnant employees. In addition to the Family Medical Leave Act (FMLA), the Guidance highlights the provision of the Patient Protection and Affordable Care Act, which requires employers to provide reasonable break time and a private non-bathroom place for employees who are nursing. The EEOC emphasizes that the PDA and ADA do not preempt state laws that provide additional protections for pregnant employees. Rather, federal law is a floor beneath which pregnancy disability

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protections may not drop. This point is significant because several states have recently considered legislation that would require employers to provide paid family leave and/or provide accommodations for pregnant employees. Lastly, Part IV of the Guidance outlines best practices that employers may adopt to reduce the chance of pregnancy-related PDA and ADA violations.

Although the Guidance should not come as a surprise to employers familiar with the EEOC's recent agenda, the timing of the Guidance and the fact that it was issued without public comment over the dissent of two of the five EEOC commissioners has stirred some controversy. In early July, just two weeks before the Guidance was published, the U.S. Supreme Court agreed to hear a case involving a PDA claim and the issue of whether and in what circumstances the PDA requires an employer to provide work accommodations to pregnant employees with limitations. The case *Young v. UPS* will be decided next term. The Supreme Court's decision in *Young* may contradict the Guidance, hindering the credibility of the Commission and leaving employers confused about their obligations.

In light of the EEOC's enforcement priorities, the current Guidance, and the trend toward increased state law protections for pregnancy issues in the workplace, Alston & Bird recommends employers should do the following:

- Review the EEOC's [Enforcement Guidance](#), published [questions and answers](#), and employer [fact sheet](#).
- Review and stay current with state and local pregnancy discrimination laws in your jurisdictions.
- Review and revise parental leave policies.
- Review and revise policies and processes related to leave, employee flexibility (i.e., fixed hours and mandatory overtime), reasonable accommodations (including light duty, temporary reassignment, and modified work schedules) and any pregnancy-specific policies.
- State explicitly in any written reasonable accommodation policy that reasonable accommodations may be available to individuals with temporary impairments, including impairments related to pregnancy.
- Train managers to recognize requests for reasonable accommodations, particularly requests from pregnant employees who may not articulate their limitations as related to an impairment or disability.
- While waiting for the Supreme Court's decision in *Young*, treat pregnant employees the same as non-pregnant employees who are similar in their ability or inability to work.
- Consult counsel when uncertain about your obligations or best practices.

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