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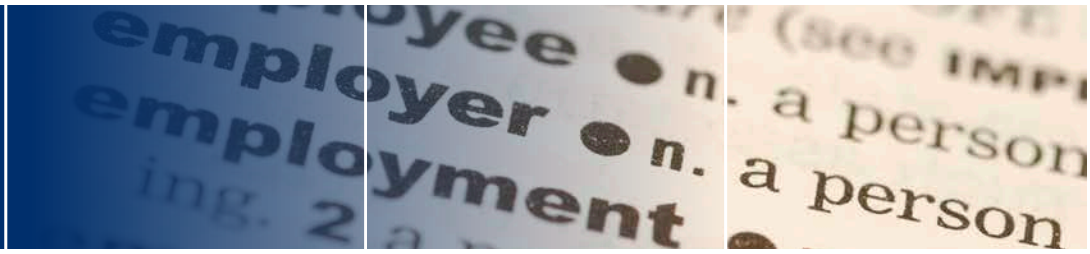

NEWSLETTER
October 2014

EEOC Issues Enforcement Guidance on Pregnancy Discrimination and Related Issues Over Commissioners' Dissent: An Overview and Best Practices for Employers in a Changing Landscape

On July 14, 2014, the EEOC issued Enforcement Guidance: Pregnancy Discrimination and Related Issues (Guidance).[1] The Guidance is the first comprehensive update on the EEOC's position on discrimination based on pregnancy in the workplace since 1983 and supersedes the earlier guidance.

The Guidance is organized into four parts: part one provides an overview of the Pregnancy Discrimination Act of 1978 (PDA); part two discusses the definition of who has a "disability" under the Americans with Disabilities Act (ADA) and the ADA Amendments Act of 2008 (ADAAA) as related to persons who have pregnancy-related impairments, and reasonable accommodations afforded to those suffering from pregnancy-related impairments that constitute a disability; part three provides an overview of other laws, including the Family and Medical Leave Act (FMLA) affecting the rights of pregnant employees in the workplace; and part four provides "best practices" for employers to follow, which the Commission recognizes in the Guidance "may go beyond federal nondiscrimination requirements."

1 EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues (July 14, 2014). A full text of the document is available at [http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm].

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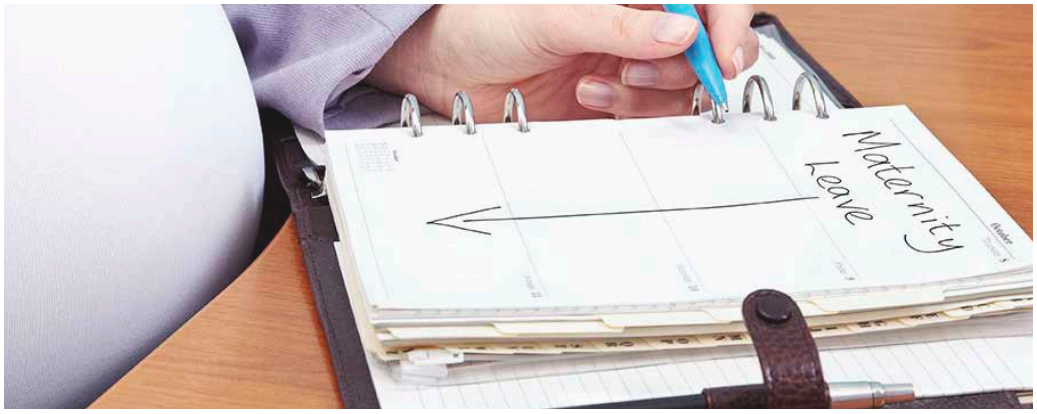

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The EEOC's implementation of the Guidance is not without controversy. Two of the five EEOC commissioners, Commissioner Constance S. Barker (appointed by President George W. Bush) and Commissioner Victoria A. Lipnic (appointed by President Barack Obama), voted against the Guidance and issued statements setting forth their objections.[2] [3] Commissioner Barker attached to her statement a May 23, 2014, Memorandum that she distributed internally to her fellow commissioners in response to an earlier draft of the Guidance. The objections of the dissenting commissioners are shared by many within the legal community.

A significant criticism of the Guidance is the EEOC's position that employers must reasonably accommodate a pregnant employee with leave or light duty even when the pregnant employee does not have a pregnancy-related medical condition that qualifies as a disability.

Specifically, the Guidance states: "Title VII required that individuals affected by pregnancy, childbirth, or related medical conditions be treated the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work. Thus, an 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 programs, leave, or fringe benefits."

The objecting commissioners point out that the EEOC's Guidance in this regard expands and distorts the scope of "comparators" for those trying to prove a claim of discrimination under the PDA.

Commissioner Barker explained in her May 23, 2014, Memorandum that, "the expansion of the concept of 'comparators' to those who merely have similar work restrictions runs counter to the underlying rationale for the use of comparators as evidence of intentional discrimination under Title VII. … Thus, under well-established law, providing favored treatment (such as reasonable accommodations) to an employee who is a qualified individual under the ADA, but not to a Pregnant Employee, fails to create any inference of discrimination. The reason for this is very simple. The employee with the disability was given the favored treatment (the accommodation) not for discriminatory reasons but because he was entitled to them as a matter of law."

Moreover, both commissioners took issue with the provision of the Guidance that states, "an employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a policy of providing light duty only to workers injured on the job)."

The result of the Guidance requires that an employer who offers light duty to employees who suffer on-the-job injuries must offer such light duty to pregnant employees or else the employer is engaging in "source discrimination" – discriminating against pregnant employees based on the "source" of the need for light duty. According to Commissioner Barker, "the fallacy in this argument is that such a policy denies light duty for every 'source' of injury except on-the-job injuries. Thus, if the source of the injury for a male employee is a broken leg from a weekend car accident, he would be denied light duty the same as the Pregnant Employee."

Aside from criticism over the Guidance expanding the scope of coverage afforded under the PDA, there is criticism over the timing of its publication. On July 1, 2014 – just two weeks prior to the date the EEOC issued its Guidance governing pregnancy discrimination – the U.S. Supreme Court granted plaintiff's petition for *certiorari* in *Young v. United Parcel Serv. Inc*. and agreed to decide the following question: "whether,

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2 Public Statement of Commissioner Constance S. Barker, "Issuance of EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues" (July 14, 2014). Commissioner Barker's Public Statement and her May 23, 2014, internal Memorandum is available at [http://op.bna.com/dlrcases.nsf/id/kmgn-9lznp5/$File/barkerdissent.pdf].

3 Statement of Commissioner Victoria A. Lipnic, "Enforcement Guidance on Pregnancy Discrimination and Related Issues," (July 14, 2014). Commissioner Lipnic's Public Statement is available at [http://op.bna.com/dlrcases.nsf/id/kmgn-9lznpp/$File/lipnic.pdf].

and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide work accommodations to pregnant employees who are 'similar in their ability or inability to work.'" [4]

The plaintiff in *Young* worked as a delivery driver for UPS, became pregnant and submitted a doctor's note requesting that UPS permit her to work light duty. UPS had a light duty policy for (1) employees injured on the job as required by the applicable collective bargaining agreement, (2) those who lost their Department of Transportation certification also as required by the applicable collective bargaining agreement, and (3) those who were disabled under the ADA. The Fourth Circuit Court of Appeals upheld the federal district court in Maryland's decision to grant summary judgment to UPS, concluding that UPS's policy of providing light duty to certain categories of workers (but not to pregnant ones) did not violate the PDA.

The Commission has been criticized for publishing its Guidance addressing the very issue the U.S. Supreme Court had already agreed to decide in *Young*. The credibility of the Commission and the effectiveness of the Guidance will be undermined in the likely event the U.S. Supreme Court's decision in *Young* runs contrary to the Guidance.

A second significant criticism of the EEOC's Guidance is the section entitled "Discrimination Based on the Use of Contraception," wherein the EEOC takes the position that "Employers can violate Title VII by providing health insurance that excludes coverage of prescription contraceptives, whether the contraceptives are prescribed for birth control or for medical purposes. Because prescription contraceptives are available only for women, a health insurance plan facially discriminates against women on the basis of gender if it excludes prescription contraception but otherwise provides comprehensive coverage."

Commissioner Barker noted in her dissenting Memorandum, "No appellate courts have held that the PDA requires employers to provide contraceptive coverage."

As related to the issue of the EEOC's timing in issuing the Guidance, on June 30, 2014 – just two weeks prior to the publication of the Guidance – the U.S. Supreme Court issued its decision in *Burwell v. Hobby Lobby Stores, Inc.*, holding that closely held, for-profit entities with religious objections to certain aspects of the birth control mandate imposed by the Patient Protection and Affordable Care Act could avoid the mandate by invoking the Religious Freedom Restoration Act.[5]

Commissioner Lipnic noted in her dissenting statement, "the Pregnancy Guidance's discussion of an employer's legal obligation under Title VII with respect to contraception has already been overtaken by events, specifically, the Court's recent decision in *Burwell v. Hobby Lobby Stores, Inc.* [citation omitted]. It is my view that the Commission's position with respect to

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4 707 F.3d 437 (4th Cir. 2013) cert. granted, 81 U.S.L.W. 3602 (U.S. July 1, 2014).

5 134 S. Ct. 2751 (2014).

contraception mandates under Title VII needs to be thoroughly reviewed in light of this case, particularly insofar as it held that under the Religious Freedom Restoration Act, and irrespective of other federal law mandates, certain employers may not lawfully be compelled to provide all forms of contraception."

A third criticism of the Guidance is that the EEOC did not make a final draft of the Guidance available for public review and comments. Indeed, Commissioner Lipnic pointed out, "I continue to believe that public input on the Pregnancy Guidance would have been invaluable, particularly in light of the fact that the Guidance adopts new and dramatic substantive changes to the law. Allowing for public review would have, in my view, potentially strengthened any final document, but perhaps more important, provided for the increased transparency and credibility of the Commission. Our failure to do so is, to me, a missed opportunity."

WHAT DOES THIS MEAN FOR EMPLOYERS?

- EEOC Enforcement Guidance does not have the force of law but may be looked to by the courts for guidance. This being the case, it is particularly important for employers to stay abreast of the law especially as courts, including the U.S. Supreme Court, may adopt holdings that are inconsistant with the Guidance. Employers should carefully deliberate any employment decision that is based on the Guidance for which no support in the law is found or where the law is not settled on a particular issue.
- State and local jurisdictions, including Alaska, California, Connecticut, Delaware, Hawaii, Louisiana, Maryland, Minnesota, New Jersey, New York City, Philadelphia, Texas, West Virginia and Central Falls, Rhode Island, have enacted their own pregnancy accommodation laws.[6] Employers in these jurisdictions should ensure that their current policies and practices are compliant with applicable state and local pregnancy accommodation laws.
  - The state of Illinois recently passed pregnancy accommodation legislation that takes effect January 1, 2015, which applies to employers with one or more employees, and which replaces and expands on the state's current pregnancy accommodation law that applies to public employers who employ pregnant peace officers or fire fighters.[7]
  - Pregnancy accommodation bills are also pending in the District of Columbia, Georgia, Missouri, New York, Pennsylvania, Rhode Island and Wisconsin.

6 ALASKA STAT. § 39.20.520 (2013); CAL. GOV'T CODE § 12945 (2012); CONN. GEN. STAT. § 46a-60(a)(7) (2011); DEL. CODE ANN. tit. 19, § 711 (2014); HAW. CODE R. § 12-46-107 (1990); LA. REV. STAT. ANN. § 23:342 (1997); MD. CODE ANN., STATE GOV.'T. § 20-609 (2013); MINN. STAT. ANN. § 181.9414 (2014); N.J. STAT. ANN. § 10:5-12(s) (2013); N.Y.C. ADMIN. CODE § 8-107(22) (2014); PHILADELPHIA, PA. CODE § 9-1100, et seq. (2014); TEX. LOC. GOV'T CODE § 180.004 (2001); W. VA. CODE § 5-11B (2014); CENTRAL FALLS, R.I., REV. ORDINANCES ch. 12, (art. I.) § 12-5 (2014).

7 775 ILL. COMP. STAT. 5/2-102(I) (effective 2015).

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- On a federal level, the Pregnant Workers Fairness Act has been introduced to Congress to provide pregnant workers with accommodations; President Obama has called on Congress to pass the bill. The changing landscape of the protection afforded to pregnant women is additional reason that employers should stay abreast of the law in this area to ensure that their policies and practices remain legally compliant.

- Employers should review their policies and practices as to granting leaves or other accommodations to workers under the ADA, the FMLA and any corresponding state laws, and ensure that these policies are applied as appropriate to pregnant workers.

- Employers should train their human resources professionals, managers and supervisors so that they do not run afoul of the company's policies or the law in addressing employment-related matters (i.e., requests for light duty, time off or other accommodations) as to pregnant employees.

Wilson Elser's national team of Employment & Labor attorneys is available to assist employers in making decisions involving developing legal issues.

Members of Wilson Elser's Employment & Labor practice, located throughout the country, provide one convenient point of contact for our clients. Please contact any of the following partners to access the experience and capabilities of this formidable team.

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