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Alert

EEOC Issues New Guidance on Pregnancy Discrimination, Adding to New York City's Protections

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The U.S. Equal Employment Opportunity Commission (EEOC) recently issued new comprehensive guidance on pregnancy discrimination. The EEOC takes a number of comprehensive positions with respect to the Pregnancy Discrimination Act (PDA) and the Americans with Disabilities Act (ADA). This *Alert* summarizes the highlights of the EEOC's new 60-page guidance and also reminds employers in New York City to consider New York City's recently enacted pregnancy protections.

EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues

The EEOC issued Enforcement Guidance (the "Guidance") on July 14, 2014,[1] updating its previous guidance regarding pregnancy discrimination and related issues for the first time since 1983. The Guidance's overarching theme is that the PDA and the ADA are to be construed broadly to afford maximum protection to employees affected by pregnancy. Employers should be aware of their obligations under the PDA and the ADA, as well as the EEOC's newly articulated positions.

The Guidance takes the following positions on the PDA:

- The PDA prohibits discrimination on the basis of current, past, potential or intended pregnancy, as well as on the basis of medical conditions related to pregnancy or childbirth.
- An employer must accommodate an employee affected by pregnancy, childbirth or related medical conditions who is temporarily unable to fully perform her job in the same manner as other employees similarly unable to fully perform their jobs, whether through modified tasks or work schedules, temporary light-duty assignment, leave or other accommodations. This part of the Guidance may soon be outdated depending on the Supreme Court's decision in *Young v. United Parcel Service*.[2] In this case, the Court will determine whether the PDA requires an employer to provide certain accommodations to pregnant employees if those same accommodations are provided to non-pregnant employees with similar inabilities to work.
- Lactation is a pregnancy-related medical condition for the purposes of the PDA, even if it is non-incapacitating. This means that an employee cannot be discriminated against on the basis of lactation. It also means that if an employer generally accommodates employees with non-incapacitating medical conditions, then employees who are lactating must be similarly accommodated.

[1] Accessible at www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

[2] 707 F.3d 437 (4th Cir. 2013), *cert. granted*, 81 U.S.L.W. 3602 (U.S. July 1, 2014) (No. 12-1226).

- An employer cannot force a pregnant employee to take leave unless it can be shown that non-pregnancy is a *bona fide* occupational qualification — a rare circumstance.
- Insurance offered by an employer must cover contraception on the same basis as any other prescription. This seems to challenge the Supreme Court's recent decision in *Burwell v. Hobby Lobby Stores*.[3] The EEOC takes the position that the Court's decision in that case was decided on First Amendment grounds and insists that providing contraception is still very much required under the PDA, notwithstanding any argument of religious freedom that an employer might make.
- Parental leave must be provided on the same terms to similarly situated men and women, barring medical circumstances that may be specific to women and would therefore warrant additional leave time.

The Guidance takes the following positions on the ADA:

- Pregnancy-related conditions may be considered disabilities under the ADA if they are substantially limiting, even if the condition is only temporary. Some of the possibilities listed in the Guidance include anemia, sciatica, carpal tunnel syndrome, diabetes, nausea, painful swelling and depression.
- For a pregnancy-related condition that rises to the level of a disability, the affected employee is entitled to reasonable accommodations, whether through a modified schedule, light duties, leave or otherwise.

New York City Pregnancy Accommodation

As we advised in a previous *Alert*, New York City adopted new pregnancy protections by requiring employers with four or more employees to provide reasonable accommodations for pregnancy, childbirth and related medical conditions, unless the employer can prove that providing the accommodation would cause undue hardship. The law gives examples of what types of accommodations an employer might need to provide, including restroom breaks, breaks to facilitate increased water intake, periodic rest if the employee stands for extended periods of time, and assistance with manual labor. As we noted in another previous *Alert*, employers are required to provide employees with written notice of their rights under the law. In addition to applying to employers smaller than those covered under the ADA (which only applies to employers with 15 or more employees), New York City's new law does not require that the affected employee show that her condition is substantially limiting, whereas this is required under the ADA.

Best Practices for Employers

The Guidance sets forth an extensive list of best practices for employers, including the following points which are taken verbatim from the Guidance:

- Train managers and employees regularly about their rights and responsibilities related to pregnancy, childbirth, and related medical conditions.
- Conduct employee surveys and review employment policies and practices to identify and correct any policies or practices that may disadvantage women affected by pregnancy,

[3] 134 S. Ct. 2751 (June 30, 2014).

childbirth, or related medical conditions or that may perpetuate the effects of historical discrimination in the organization.

- Focus on the applicant's or employee's qualifications for the job in question. Do not ask questions about the applicant's or employee's pregnancy status, children, plans to start a family, or other related issues during interviews or performance reviews.
- Develop specific, job related qualification standards for each position that reflect the duties, functions, and competencies of the position and minimize the potential for gender stereotyping and for discrimination on the basis of pregnancy, childbirth, or related medical conditions. Make sure these standards are consistently applied when choosing among candidates.
- When reviewing and comparing applicants' or employees' work histories for hiring or promotional purposes, focus on work experience and accomplishments and give the same weight to cumulative relevant experience that would be given to workers with uninterrupted service.
- Disclose information about fetal hazards to applicants and employees and accommodate resulting requests for reassignment if feasible.
- If there is a restrictive leave policy (such as restricted leave during a probationary period), evaluate whether it disproportionately impacts pregnant workers and, if so, whether it is necessary for business operations. Ensure that the policy notes that an employee may qualify for leave as a reasonable accommodation.
- Monitor compensation practices and performance appraisal systems for patterns of potential discrimination based on pregnancy, childbirth, or related medical conditions. Ensure that compensation practices and performance appraisals are based on employees' actual job performance and not on stereotypes about these conditions.

Employers considering their responsibilities with respect to pregnant employees need to carefully consider their obligations under the PDA, the ADA and other applicable federal, state and city laws. For example, the requirements of the Family and Medical Leave Act that are applicable to medical impairments and child birth will apply to employers with 50 or more employees. Employers also need to consider other laws addressing state disability and nursing mother accommodation, which we addressed in an earlier *Alert*. Employers need to tread carefully when navigating the thicket of laws applicable to pregnancy, gender discrimination and harassment, and disability.

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SRZ summer associate Joseph Brown (not admitted) assisted in the preparation of this *Alert*.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

