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Management Alert

EEOC Says Reasonable Accommodation Required for All Pregnant Workers

By Paul Kehoe and Tracy M. Billows

On July 14, 2014, without the fanfare of a public meeting, the Equal Employment Opportunity Commission published Guidance on its website addressing the treatment of pregnancy under Title VII. Most significantly, the Guidance adopted a novel position that under the language of the Pregnancy Discrimination Act of 1978 ("PDA"), all pregnant workers are, as a practical matter, entitled to a "reasonable accommodation" as the term is understood under the Americans with Disabilities Act ("ADA"), as amended. The EEOC's position has never been adopted by any Circuit Court of Appeals. Indeed, the few courts that have reviewed the issue have rejected it.

The Guidance essentially sets forth two interrelated concepts, that (1) an individual with a covered ADA disability is an appropriate comparator for PDA purposes to a woman who has a pregnancy-related restriction, and (2) an employer cannot restrict light duty positions based on the source of the individual's restriction, for example, on-the-job injuries or covered disabilities under the ADA. These are precisely the issues that the Supreme Court will resolve next term in *Young v. UPS*. In addition, the standards adopted in the Guidance are currently proposed in the Pregnant Worker's Fairness Act, S. 942 and H.R. 1975.

Given the broad expansion of covered disabilities under the ADAAA, many more pregnancy-related impairments rise to the level of an ADA-covered disability (e.g., anemia, pregnancy-related sciatica, preeclampsia, gestational diabetes). In these instances, a pregnant employee would be afforded the same right to reasonable accommodation under the ADA as any other individual with a disability, regardless of whether the impairment was related to pregnancy. In addition, twelve jurisdictions have adopted pregnancy accommodation statutes or ordinances. However, the Guidance says that "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 assignments, leave or fringe benefits." This results in a reasonable accommodation requirement applying, even for those pregnant employees whose impairments do not rise to the level of a disability under the ADA (e.g., those with a "normal" pregnancy) notwithstanding that under the ADA, pregnancy is not an impairment.

As a practical matter, employers will feel the greatest impact of the Guidance in the area of light duty and leave as applicable to female workers with "normal" pregnancies. Currently, under federal law, where an employer's policy provides leave or light duty for employees injured or otherwise medically limited in their ability to work for any reason, a pregnant employee is entitled to such leave—the fact that her limitation arises from a normal pregnancy, rather than an injury or medical condition—is irrelevant. Conversely, as was permissible in *Young*, where an employer's light duty or leave policy limits eligibility to those with a disability or those with on the job injuries, an employee with a normal pregnancy would not be eligible for light duty. Under the Guidance, employers would be required to provide light duty and/or leave for all pregnant employees, regardless of whether they were "disabled" under the ADA.

While the EEOC Guidance does not have the force of law, and the ultimate propriety of its position will be determined by the Supreme Court and Congress, any guidance document is a directive to EEOC investigators and attorneys, this is the standard under which the EEOC will conduct its investigations.

Above all, it is important that employers stay abreast of federal, state and local laws concerning pregnancy discrimination and accommodations. It is also crucial that employers review key policies to ensure that they are current, including equal employment opportunity, nondiscrimination, reasonable accommodation, FMLA and similar leave policies. These policies should clearly inform employees that they have a right to raise accommodation requests, to whom such requests should be made, and that the employer will engage in the interactive process. It is also important that managers be trained to recognize when requests are being made, triggering the interactive process.

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