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Pay Careful Attention to Pregnancy Accommodation Requests as EEOC Plans New Enforcement Guidance

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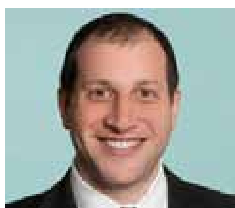

The U.S. Equal Employment Opportunity Commission — the agency responsible for enforcing most federal discrimination laws — is preparing to issue new guidance addressing an employer's obligation to reasonably accommodate pregnant workers. Will the guidance offer a new interpretation of the law or just cement what we already know?

Probably the latter.

Quick Primer on the Relevant Statutory Law

The Pregnancy Discrimination Act of 1978, one of the laws the EEOC enforces, expanded the scope of the definition of "sex" discrimination under Title VII of the Civil Rights Act of 1964 to include a prohibition against discrimination because of pregnancy, childbirth or related medical conditions. The PDA does not include a specific requirement that employers reasonably accommodate pregnant workers. But it does require employers to treat pregnant workers at least as well as non-pregnant workers who are similar in their inability to work. In other words, as the EEOC has stated, employers must treat employees who are temporarily unable to perform their job or certain functions of their job because of a condition related to their pregnancy the same way they treat any other temporarily disabled employees.

The Americans with Disabilities Act of 1990 prohibits discrimination against disabled employees, including by requiring employers to reasonably accommodate them. A "disabled" employee, generally, is someone who has a physical or mental impairment that substantially limits one or more major life activities, or someone who has a record of or who is regarded as having a disability. In 2008 Congress passed the ADA Amendments Act, which as the name suggests, amended the ADA to expand its definition of "disability" to cover a wider range of "impairments," including temporary and less severe impairments and to clarify that an impairment that substantially limits a major life activity includes among other activities, activities like lifting, walking, standing or bending.

It is widely known that pregnancy by itself does not qualify as a disability under the ADA and an employer therefore need not provide a reasonable accommodation to a woman based solely on that pregnancy. However, this does not necessarily mean that an employer is relieved from reasonably accommodating a pregnant worker under the ADA or the PDA. Here's why: "Impairments" related to pregnancy (like hypertension or gestational diabetes) that "substantially limit a major life activity" (like lifting) likely now qualify as disabilities under the ADA requiring reasonable accommodation.

Even where no pregnancy-related impairment is in play, employers still may be required to reasonably accommodate an otherwise healthy pregnancy under the PDA. If, as a result of the 2008 ADA amendments, an employer is now required to reasonably accommodate a temporarily disabled employee, it also would likely need to reasonably accommodate a pregnant worker to comply with the PDA's requirement that it treat a pregnant worker at least as well as they treat any other temporarily disabled employee. Consider, for example, an employee with a temporary back condition and a

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pregnant employee who are both limited to standing for no more than 20 minutes at a time: an employer likely would have to accommodate the former under the ADA and the latter under the PDA.

The *Young v. UPS* Case

With that as background, let's move onto the *Young v. UPS* case. In that case, a former UPS part-time driver became pregnant and asked for an accommodation that would allow her to perform her job duties without having to lift more than 20 pounds during the first half of her pregnancy and 10 pounds for the remainder of her pregnancy. UPS rejected her request, advising Young that it did accommodate otherwise healthy pregnant workers. Instead, it only accommodated those employees: (1) injured on the job; (2) "disabled" under the ADA; and (3) who lost their U.S. Department of Transportation certification because of a failed medical exam, lost driver's license or involvement in a motor vehicle accident. Young ultimately took a leave of absence without pay during her pregnancy and lost her medical coverage.

She later sued UPS in 2007 (before the passage of the ADA amendments) for, among other reasons, pregnancy discrimination under the PDA. UPS won on summary judgment at the trial court level and the 4th U.S. Circuit Court of Appeals affirmed, concluding essentially that UPS' policy accommodating those three categories of workers (injured on the job, ADA disabled and lost DOT certification) applied to pregnant and non-pregnant workers equally and that UPS was not legally required to add pregnancy as a fourth accommodation category. Young then asked the U.S. Supreme Court to review the decision. The Supreme Court in turn asked the U.S. Solicitor General to weigh in on whether it should take on the case by submitting what's called an amicus curiae or "friend of the court" brief — that is, a brief submitted by a non-party providing helpful information to the court that the parties wouldn't typically provide.

The Solicitor General Says that EEOC Enforcement Guidance Is on the Way

In that brief, the Solicitor General asked the Supreme Court to decline to review the court of appeals' decision even though, like Young, the government believes that the court of appeals got it wrong!

The first of the two reasons it provided: it expects that on a going forward basis, because of the passage of the ADA amendments, courts will now find that employers will have to accommodate pregnant workers. In other words, it sees no need for the Supreme Court to fix a problem the lower courts can resolve by themselves. Of course, this doesn't help Young, who sued before the passage of the ADA amendments.

Second, as the Solicitor General stated:

[T]the EEOC is currently considering the adoption of new enforcement guidance on pregnancy discrimination that would address a range of issues related to pregnancy under the PDA and the ADA. The publication of such guidance should clarify the Commission's interpretation of those statutes with respect to policies like the one at issue in this case, thus diminishing the need for this Court's review of the question presented.

While there is no timetable set for its release, it is widely expected that, consistent with the EEOC's Strategic Enforcement Plan, this guidance will interpret the PDA and ADA broadly as it relates to an employer's obligation to accommodate pregnant workers.

On July 1, 2014, contrary to the Solicitor General's recommendation, the Supreme Court decided to hear this case in its next term. Employers are hoping that it will result in a decision that provides much-needed clarity on this issue rather than creating any new gray areas.

Conclusion

While we await the EEOC's guidance, employers should consider the following:

1. Don't wait for the guidance. This guidance may just confirm what we sort of suspect already: that employers must no longer routinely dismiss reasonable accommodation requests related to pregnancy. You should carefully review these requests to avoid potential liability.

2. Try to be practical; see the bigger picture. If accommodating pregnancy requests will prove inexpensive, consider allowing them even if you believe not doing so

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is lawful. And even if the accommodation request may be expensive, measure it against the other potential benefits such as a corresponding increase in employee morale, your ability to retain valuable employees and your reputation in the market — benefits that may ultimately outweigh the cost of the accommodation and enhance your bottom line.

3. Comply with ALL laws. You may already be subject to a state and/or local statutes (for example, Maryland and New York City) that explicitly obligate you to reasonably accommodate pregnant workers. If you are and you aren't accommodating your pregnant workers, it's time to change course.

4. Enforce policies consistently. Real problems arise for employers that reject outright requests by pregnant employees that they would grant for non-pregnant workers. This may seem obvious, but is lost on many employers who treat pregnancy-related requests uniquely. For example, all other things being equal, if you would advance a non-pregnant worker vacation days because she wanted to join her friends on a bachelorette party, then you should think twice before denying a vacation advance request by a pregnant worker who wants to rest at home in the last week of her term.

5. Don't make decisions on behalf of pregnant workers. Employers often get into trouble when they try to modify a pregnant employee's work situation (for example, "I am not going to let you lift anything heavy while you are pregnant"). You can't do that except in very limited circumstances; if she is willing and able to perform the job, you usually must and should let her work. ❖

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