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KD Alert: The EEOC Issues Far-Reaching Pregnancy-Related Guidance

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Revising its more than thirty-year old guidance, the United States Equal Employment Opportunity Commission (EEOC) this week issued updated and far-reaching "Enforcement Guidance on Pregnancy Discrimination and Related Issues." The new Guidance incorporates pregnancy-related conditions into the definition of disability under the Americans with Disabilities Act, as amended, and discusses when and how an employer must provide reasonable accommodations for these conditions. The Guidance also expresses the EEOC's view that the Pregnancy Discrimination Act (PDA) covers not only discrimination related to pregnant employees but also discrimination based on past pregnancy or a woman's potential to become pregnant.

The Guidance is not without controversy as it greatly expands the scope of protections afforded to employees relating to pregnancy. Indeed, the EEOC narrowly approved the Guidance on a 3-2 vote with one Commissioner noting the Guidance may become moot when the United States Supreme Court decides Young v. UPS, a case that touches on many of the same issues the Guidance addresses.

The Guidance Expands the Class of Protected Employees to Include Those who Have Been, are, or Potentially may be, Pregnant

Specifically, the EEOC takes the position that an employer is prohibited from discriminating against an employee who intends to become pregnant, is pregnant, or has been pregnant. For example, the EEOC finds it unlawful for an employer to make adverse employment decisions relating to hiring, assignments, or promotion that are based on assumptions and stereotypes about pregnant workers' attendance, schedules, ability to work, and commitment to their job. The EEOC also finds it unlawful to terminate an employee shortly after she returns from medically-related pregnancy leave if the pregnancy is the reason for termination and will find close proximity between the employee's return and termination coupled with a non-credible explanation for the termination as evidence of discrimination.

Employers can also run afoul of the PDA by taking an adverse action against a pregnant or fertile employee based on concern for her safety, such as involuntarily moving a pregnant employee to a less stressful but lower compensated position or banning fertile women from jobs with exposure to harmful chemicals.

Although under federal law employers are not prohibited from inquiring about whether an employee or applicant intends to become, or is pregnant, the EEOC will take these inquiries into account when evaluating a charge of alleged pregnancy discrimination. Therefore, best practices dictate not making pregnancy-related inquiries to employees or applicants (and under some state laws, these inquiries are already unlawful).

The Guidance also provides protection to new fathers. If an employer provides leave to mothers for bonding or caring for a newborn beyond the time necessary for the mother to recuperate from the delivery, the employer must also provide the equivalent amount of leave to new fathers for the same purpose.

The Guidance Requires New Accommodations for Pregnancy-Related Conditions

The Guidance also makes clear that the EEOC expects employers to accommodate medical conditions related to pregnancy, childbirth, and pregnancy-related impairments and to not treat employees suffering from these conditions differently than other employees. The

Guidance notes these conditions can include back pain, preeclampsia (pregnancy-induced high blood pressure), gestational diabetes, complications requiring bed rest, the after-effects of delivery, and any related disability that substantially limits one or more major life activity, which the EEOC states should be construed broadly. An employer may only deny a reasonable accommodation if it would result in an undue hardship for the employer and the employer must allow pregnant employees light duty assignments if it provides these types of accommodations to any other employee.

Significantly, the EEOC finds lactation as a pregnancy-related medical condition. Under the Guidance, an employer must accommodate lactation-related needs to the same extent it does for other non-incapacitating medical conditions. Examples include allowing lactating employees to change their schedules or use sick leave for lactation-related needs. The Guidance also specifies that employers must provide reasonable break time and a private place for lactating employees to express milk.

The Guidance suggests the following as reasonable accommodations for pregnant employees:

- *Redistributing marginal or nonessential functions (for example, occasional lifting) that a pregnant woman cannot perform;*
- *Modifying workplace policies such as allowing pregnant women more frequent breaks or allowing her to keep liquids at her workstation when that would otherwise be prohibited;*
- *Modifying work schedules to allow an employee who experiences morning sickness to come in later;*
- *Allowing a bed-rested pregnant woman to work from home where feasible;*
- *Giving leave beyond what is provided for in the sick leave policy;*
- *Purchasing equipment such as a stool to allow a pregnant employee to sit when performing tasks that otherwise would require standing; and*
- *Temporarily reassigning an employee to a light duty position.*

The Supreme Court Will Have the Final Say

The far-reaching implications of the Guidance may soon become moot after the Supreme Court hears and decides *Young v. UPS, which addresses whether, and in what circumstances, an employer that provides work accommodations to non-pregnant employees with work limitations must also provide work accommodations to pregnant women who are similar in their ability or inability to work.*

By issuing the Guidance, the EEOC appears to be attempting to resolve this issue before the Supreme Court hears the case in the fall. However, the Supreme Court may very well agree with UPS and the lower federal courts that decided this case and invalidate portions of the Guidance.

What Should Employers Do in the Interim?

Employers should not wait until the Supreme Court renders its decision in the *Young v. UPS case. The EEOC Guidance is effective now and employers can expect the EEOC to process and investigate charges based upon these changes. Employers must act now to ensure their policies and practices are in compliance. Training for managers and supervisors is critical and time sensitive.*

Not surprisingly, the Guidance is lengthy and complex. Feel free to direct any questions to the attorneys in the Employment Law Group of Kaufman Dolowich & Voluck (KD) about the Guidance or the Group's training programs. KD will continue to closely monitor the Supreme Court's decision and provide further analysis regarding employers' treatment of their pregnant workers.

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