The Equal Employment Opportunity Commission's new Enforcement Guidance on Pregnancy Discrimination and Related Issues describes the agency's view of prohibitions on discrimination against pregnant workers and how the EEOC sees employment laws enacted in the past 30 years, such as the 1990 Americans with Disabilities Act (ADA), the 1993 Family and Medical Leave Act (FMLA), and the 2008 ADA Amendments Act (ADAAA), apply to these workers.


The controversial Guidance garnered the votes of only three of the Commission's five members. In separate statements, Commissioners Constance S. Barker and Victoria A. Lipnic dissented from the agency's adoption of the Guidance. Both noted the substance of the Guidance overstepped legal precedents and was a dramatic departure from existing law and the agency's previous guidance. They criticized the agency for not making the Guidance available for public review and comment before the Commissioners had to vote, noting the move signaled a lack of transparency.

Four Parts
Part One of the Guidance's four parts discusses the prohibitions under Title VII of the Civil Rights Act, as clarified by the Pregnancy Discrimination Act of 1978 (PDA). Part Two discusses the application of the ADAAA's accommodation and non-discrimination requirements and the definition of disability to pregnancy-related impairments. Part Three discusses other legal requirements affecting pregnant workers, including the FMLA. Part Four describes "Best Practices" for employers.

The Guidance's more controversial requirements include the following:

1. an employer policy of providing light duty only to employees with on-the-job injuries violates the PDA (Commissioner Lipnic noted that this position has not been adopted by any federal circuit court);

2. an employer must provide accommodations to an employee with a normal and otherwise healthy pregnancy;

3. certain employer inquiries, comments or discussions regarding an employee's pregnancy or potential pregnancy are indicative of discrimination; and

4. an employer health insurance plan must cover prescription contraceptives on the same basis as prescription medications that prevent medical conditions other than pregnancy.

Light Duty, Accommodations, Inquiries
The Guidance addresses circumstances under which employers may have to provide light duty to pregnant workers. The EEOC contends an employer may not refuse a pregnant worker's request for light duty based 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 or to workers with an ADA-covered disability). The Guidance states that workers needing light duty due to on-the-job injuries or
ADA-covered disabilities are appropriate similarly situated comparators to a pregnant worker needing light duty because they are similar to the pregnant worker in the ability or inability to work. This view conflicts with the decisions of several federal courts of appeals, including the Fourth, Eleventh and Sixth Circuits, as the EEOC recognizes in its notes.

Until now, the PDA has been interpreted to mean pregnancy is not a disability under the ADA. However, again departing from existing law, the Guidance states that to the extent a worker’s normal, healthy pregnancy limits her ability to perform certain job duties, and to the extent an employer would accommodate an employee with similar limitations, the employer also must accommodate the pregnant worker or risk discriminating against the woman on the basis of her pregnancy.

The EEOC also declares that certain employer inquiries related to pregnancy or potential pregnancy are indicative of discrimination. In the Q&A document, EEOC states, “Although Title VII does not prohibit employers from asking applicants or employees about gender-related characteristics such as pregnancy, such questions are generally discouraged. The EEOC will consider the fact that an employer has asked such a question when evaluating a charge alleging pregnancy discrimination.”

Prescription Contraceptives
The Guidance provides that employers violate Title VII by providing health insurance that excludes coverage for prescription contraceptives, regardless of whether the contraceptives are provided for birth control or medical purposes. It further explains that, to comply with Title VII, employer-provided health plans must cover prescription contraceptives on the same basis as other prescription drugs, devices, and services used to prevent the occurrence of medical conditions other than pregnancy. If an employer-provided health plan covers preventive care for vaccinations, physical examinations and prescription drugs to prevent high blood pressure or to lower cholesterol levels, then prescription contraceptives also must be covered.

The Guidance notes that Title VII does not require that employer-provided health plans provide coverage for abortions, except where the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from an abortion.

The EEOC included a caveat in its Q&A document that the Guidance does not address whether certain employers might be exempt from Title VII’s requirements under the Religious Freedom Restoration Act or First Amendment of the Constitution. The U.S. Supreme Court ruled in Burwell v. Hobby Lobby Stores, Inc., that the Patient Protection and Affordable Care Act’s contraceptive mandate violated the RFRA as applied to closely held family for-profit corporations whose owners had religious objections to providing certain types of contraceptives. It is unclear how a court could distinguish Hobby Lobby in a challenge to the Guidance’s rules around contraception, especially contraceptive methods that an employer equates to abortion, bearing in mind Title VII’s existing exception for abortion coverage. (For details of Hobby Lobby, see our article, Supreme Court Rules Closely Held Companies Not Subject to Contraceptive Coverage Mandate of Health Care Reform Law.)

In addition, the Guidance does not address its impact on other employers who are currently exempt from existing contraception requirements, such as those who maintain plans that are grandfathered under the Affordable Care Act.

Far-Reaching Best Practices
The EEOC stated that the Guidance’s “Best Practices” suggestions, which the agency concedes “go beyond federal non-discrimination requirements,” are suggestions that may “decrease complaints of unlawful discrimination and enhance employee productivity.”

These recommendations include implementing a strong policy against pregnancy discrimination, training managers, responding to complaints promptly and effectively, evaluating restrictive leave policies for any disproportionate impact on pregnant workers, consulting with pregnant workers to develop a plan for covering job duties during anticipated absences, and stating explicitly that reasonable accommodation procedures are available to employees with pregnancy-related impairments. As the dissenters noted, much of the Guidance seems to impose requirements on employers that are not supported by the language of the PDA or the ADAAA; indeed, they may even contradict some court decisions.

State and Local Laws
The Guidance points out that employers must comply with state or local provisions regarding pregnant workers unless those provisions require or permit discrimination based on pregnancy, childbirth, or related medical conditions.

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This is a brief summary of the Guidance. Employers should review their pregnancy, discrimination, leave and disability accommodation-related policies and practices in light of the Guidance and the
Q&A document. They should consult with employment counsel to determine whether they may be affected by the Guidance, and if so, how.

Jackson Lewis attorneys are available to answer inquiries regarding this and other workplace developments. Please contact the Jackson Lewis attorney with whom you regularly work.

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June 21, 2019  
**Colorado Enacts ‘Ban the Box’ Legislation to Take Effect in September 2019**

In an effort to prevent persons with criminal records from being automatically ruled out for job vacancies, Colorado Governor Jared Polis has signed “ban the box” legislation. The new law will go into effect in September 2019 for employers with at least 11 employees, and employers with fewer than 11 employees have until September 2021 to...

June 21, 2019  
**New York Expands Harassment Laws**

Major changes to New York’s harassment laws were among the flurry of bills advanced and passed by the New York State Legislature in the final hours of its 2019 Legislative Session. Employers will face greater potential liability under bills passed on June 19 and 20 to lower the standard of review for sexual harassment cases (S.6577 [...

June 20, 2019  
**Connecticut Expands Harassment Training and Posting Obligations for Employers**

Nearly all employers in Connecticut will now have to provide sexual harassment training to employees under Connecticut Public Act No. 19-16, also referred to as the “Time’s Up Act," an amendment to existing state law that Connecticut Governor Ned Lamont signed into law on June 18, 2019. The law requires employers of all sizes to...

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Related Practices

- Disability, Leave and Health Management
- Workplace Training