



WHAT HR PROFESSIONALS NEED TO KNOW ABOUT THE EEOC'S NEW PREGNANCY DISCRIMINATION GUIDANCE

By Leslie E. Silverman

On July 14, 2014, the U.S. Equal Employment Opportunity Commission issued its much-anticipated Enforcement Guidance on Pregnancy Discrimination and Related Issues¹ (Pregnancy Guidance), along with a Q&A document² and a Fact Sheet for Small Businesses.³ The Commission released the new Pregnancy Guidance to replace its 32-year-old Compliance Manual section on pregnancy discrimination⁴ and to provide employees and employers with a better understanding of their rights and obligations under the Pregnancy Discrimination Act (PDA) and the Americans with Disabilities Act (ADA), as amended.

While portions of the new Pregnancy Guidance are devoted to restating and updating prior Commission guidance, the EEOC is now reinterpreting federal anti-discrimination laws in ways that provide pregnant employees with greater protections than advanced previously. In particular, the Pregnancy Guidance's more expansive interpretation of the PDA represents a significant departure from prior Commission guidance on the subject matter. In addition to exploring pregnancy discrimination issues under the PDA, the new guidance explains how the ADA Amendments Act (ADAAA) applies to pregnancy-related disabilities, discusses other federal laws affecting pregnant workers and includes a best-practices section.

With the issuance of this Pregnancy Guidance, the Commission is forewarning employers that they should be providing pregnant employees with the same access to, and same types of, accommodations provided to other employees. Whether that will mean business as usual or will necessitate widespread change, the Commission's Pregnancy Guidance offers HR professionals new insight into how the EEOC will enforce pregnancy-related anti-discrimination laws in the years to come.

¹ See *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues*, EEOC Notice No. 915.003 (July 14, 2014) ("Pregnancy Guidance"), available at: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last visited July 31, 2014).

² See *Questions and Answers about the EEOC's Enforcement Guidance on Pregnancy Discrimination and Related Issues*, available at: http://www.eeoc.gov/laws/guidance/pregnancy_qa.cfm (last visited July 31, 2014).

³ See *Fact Sheet for Small Businesses: Pregnancy Discrimination*, available at: http://www.eeoc.gov/eeoc/publications/pregnancy_factsheet.cfm (last visited July 31, 2014).

⁴ Section 626: Pregnancy, EEOC Compliance Manual Volume II; Policy Guidance in the Supreme Court Decision in *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.* (1991).

What Is New or Noteworthy in the Pregnancy Guidance?

The Pregnancy Discrimination Act

The PDA was enacted in 1978 to clarify that discrimination based on “pregnancy, childbirth, or related medical conditions” was a form of sex discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII).⁵ Under the plain language of the PDA, pregnant employees are to be treated the same as non-pregnant co-workers who are “similar in their ability or inability to work.”⁶ In other words, if a pregnant employee is able to work, she must be permitted to do so under the same terms and conditions as other employees. And if the pregnant employee is unable to work, she must be accorded the same rights, leave, privileges and benefits as similarly situated employees.

- **Expanded Definition of Pregnancy Coverage:** The Pregnancy Guidance redefines pregnancy and pregnancy-related conditions to provide a broader definition. In the new Pregnancy Guidance, the EEOC essentially takes the position that the PDA protects pregnancy along with every facet of the reproductive process—from the decision whether or not to conceive (or use birth control)⁷, to termination of pregnancy, to childbirth, to post-childbirth conditions (including lactation).⁸ In addition, in the new Pregnancy Guidance, the EEOC takes the position that the PDA “does not restrict claims to those based on current pregnancy,” which allows female employees and applicants to bring claims that they have been subjected to discrimination based on past or future pregnancies.⁹
- **New Light-Duty & Accommodation Requirements:** The Pregnancy Guidance also significantly expands employers’ obligation to provide light-duty or alternative assignments and other accommodations to pregnant employees. The EEOC takes the novel position that workers who are placed in light-duty positions because they were either injured on the job or because they have an ADA-qualifying disability would be

⁵ *Pregnancy Guidance* (citing *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 288 (1987) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 – 30 (1971))).

⁶ *Pregnancy Guidance* (citing *California Fed. Sav. & Loan Ass’n*, 479 U.S. at 290).

⁷ The EEOC has adhered to its prior position that “employers can violate Title VII by providing health insurance coverage that excludes coverage of prescription contraceptives, whether the contraceptives are prescribed for birth control or for medical purposes.” *Pregnancy Guidance*, Section I(A)(3)(d) citing Commission Decision on Coverage of Contraception (Dec 14, 2000). However, the Pregnancy Guidance acknowledges that it does not address whether, in light of the Supreme Court’s June 20, 2014, decision in *Burwell v. Hobby Lobby Stores, et. al.*, 134 S.Ct. 2751 2014 WL 2921709 (June 30, 2014), closely held for-profit corporations whose owners have religious objections might be exempt from Title VII requirements under the Religious Freedom Restoration Act (RFRA) or the Constitution’s First Amendment. See Q & A #16, *Questions and Answers about the EEOC’s Enforcement Guidance on Pregnancy Discrimination and Related Issues*.

⁸ *Pregnancy Guidance*, Section I(A) – (B).

⁹ *Pregnancy Guidance*, Section I(A)(2) and I(A)(3).

proper comparators to pregnant employees.¹⁰ This means that pregnant employees, including those with normal healthy pregnancies, may be entitled to light duty, reassignment or any other workplace accommodation if the employer makes those same accommodations available to co-workers. The Pregnancy Guidance further provides that policies that limit light duty to employees injured on the job may be found to be impermissible on the grounds that they distinguish between pregnant and non-pregnant workers based on the cause of their limitations.¹¹

- **Medical Leaves:** The new Pregnancy Guidance strongly suggests that the EEOC may challenge the validity of sick leave policies that limit the number of days of sick leave that can be taken or that restrict employees from taking leave during an initial period of employment.¹² The Guidance indicates that policies that restrict sick leave could have a disproportional impact against pregnant women. Accordingly, if a claimant establishes that a leave policy has disparate impact, the employer must prove that its policy is job-related and consistent with business necessity.¹³ Notably, the Pregnancy Guidance also provides that an employer’s “mere articulation of reasons” would be insufficient and that supporting evidence justifying its policy would be required.¹⁴
- **Parental Leave:** The Pregnancy Guidance distinguishes “parental leave” from pregnancy-related medical leave, which is limited to mothers affected by pregnancy complications, childbirth or related conditions under the PDA. The EEOC reiterates its view that while only the mother can receive pregnancy-related medical leave for the period of incapacitation, both parents would be entitled under Title VII to receive equal parental leave for the purpose of bonding with or caring for a child.¹⁵
- **Health Insurance Obligations:** The Pregnancy Guidance reaffirms the EEOC’s long-standing position that employer-provided health insurance must include coverage of pregnancy, childbirth and related medical conditions.¹⁶ Further, the terms and conditions of coverage—such as percentage of medical costs covered, amount of deductible and coverage of pre-existing conditions—must be the same as those for medical costs unrelated to pregnancy.¹⁷ The Pregnancy Guidance also reiterates that this would not

¹⁰ *Pregnancy Guidance*, Section I(C)(1)(c).

¹¹ *Pregnancy Guidance*, Section I(C)(1)(d).

¹² *Pregnancy Guidance*, Section I(C)(2)(b).

¹³ *Pregnancy Guidance*, Section I(C)(2)(b).

¹⁴ *Pregnancy Guidance*, Section I(C)(2)(b).

¹⁵ *Pregnancy Guidance*, Section I(C)(3).

¹⁶ *Pregnancy Guidance*, Section I(C)(4)(a).

¹⁷ *Pregnancy Guidance*, Section I(C)(4)(a); *see also* footnote 7, or a discussion of contraceptive coverage.

preclude health insurance exclusions for infertility coverage, provided that such exclusions are gender neutral.¹⁸

- **Pregnancy-Related Inquiries:** While Title VII does not expressly prohibit employers from asking employees or applicants whether they are or intend to become pregnant, the Pregnancy Guidance makes clear that if an employer subsequently makes an unfavorable job decision, the EEOC will consider any such pregnancy-related inquiry as indicative of discrimination.

The Americans with Disabilities Amendments Act

- **Application of the ADAAA to Pregnancy-Related Impairments:** The Pregnancy Guidance reiterates that while pregnancy, in and of itself, is not an impairment that qualifies as a “disability” within the ADA, many impairments resulting from pregnancy and childbirth will in fact qualify as disabilities.¹⁹ The guidance explains that as a result of the ADAAA, “it is likely that a number of pregnancy-related impairments that impose work-related restrictions will be substantially limiting, even though they are only temporary.”²⁰ In addition, the Pregnancy Guidance lists pregnancy-induced sciatica, gestational diabetes and preeclampsia as examples of pregnancy-related medical conditions that would qualify as a disability and give rise to the ADA’s reasonable accommodation requirement.
- **Reasonable Accommodation:** The Pregnancy Guidance also describes a number of commonplace reasonable accommodations that employers can make for pregnant employees. Such reasonable accommodations could include redistributing marginal or non-essential job functions among other employees, providing more-frequent breaks, changing work schedules to accommodate morning sickness or to allow an employee to make up time, granting leave, or allowing an employee placed on bed rest to work from home when feasible.²¹

Criticisms Surrounding the Pregnancy Guidance

While certainly well-intended, the EEOC’s newest guidance is perceived by some as an unauthorized expansion of the protections afforded to pregnant employees under the PDA and the ADAAA. Critics believe that the Commission is providing enhanced protections and

¹⁸ *Pregnancy Guidance*, Section I(A)(3)(c).

¹⁹ *Pregnancy Guidance*, Section II(A).

²⁰ *Pregnancy Guidance*, Section II(A).

²¹ *Pregnancy Guidance*, Section II(A).

additional rights that go far beyond the statutory language or legislative intent of these federal anti-discrimination laws.

Notably, the EEOC issued the new Pregnancy Guidance immediately on the heels of the Supreme Court granting certiorari on July 1, 2014, in the appeal of *Young v. United Parcel Service*,²² a case involving an employee who was denied light duty and terminated despite a pregnancy-related lifting restriction. The Supreme Court is now poised to decide whether and under what circumstances an employer that provides accommodations such as light duty to non-pregnant employees with work limitations must also provide those accommodations to pregnant workers who are similar in their ability or inability to work.²³ EEOC Enforcement Guidance is not binding on the Supreme Court, as the judicial branch has the sole authority to interpret laws. This means that should the Court interpret the provisions of the PDA in a manner that conflicts with the new Pregnancy Guidance, portions of the guidance will become moot.

Critics have also raised questions about the process by which the Pregnancy Guidance was issued. While the EEOC did hold a Commission Meeting on Unlawful Discrimination Based on Pregnancy and Caregiving Responsibilities in February 2012, and held the record open for public comment following the meeting, the EEOC did not make the final draft of the proposed guidance available for public comment and review despite the urgings of several members of the Commission, the business community and others.

Given these concerns, it is not surprising that the Pregnancy Guidance narrowly passed the Commission by a vote of 3-2, with Republican Commissioners Constance Barker and Victoria Lipnic casting votes against the new Pregnancy Guidance.²⁴ Commissioner Lipnic, who is known for successfully collaborating with colleagues on both sides of the aisle, expressed her disappointment in the process stating that “public input on the Pregnancy Guidance would have been invaluable, particularly in light of the fact that the Pregnancy Guidance adopts new and dramatic substantive changes to the law.”²⁵ She further opined that “[a]llowing for public review would have, in my view, potentially strengthened any final document, but perhaps more important, provided for the increased transparency and credibility of the Commission.”²⁶

State & Local Legislation

The Commission is not alone in its effort to bolster legal protections for pregnant workers. In the last few years, a growing number of states and local municipalities—including Maryland, New

²² *Young v. UPS*, 707 F.3d 437 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 2898 (2014).

²³ *Id.*

²⁴ Commissioners Barker and Lipnic each took the unusual step of issuing public statements.

²⁵ Statement of the Honorable Victoria A. Lipnic, Commissioner, U.S. Equal Employment Opportunity Commission, “Enforcement Guidance on Pregnancy Discrimination and Related Issues,” July 14, 2014.

²⁶ *Id.*

Jersey, Illinois, West Virginia, New York City and Philadelphia— have enacted legislation in this area.

What HR Professionals Should Do Now

Although the Supreme Court may ultimately invalidate portions of the new Pregnancy Guidance, the guidance became immediately effective upon its release. To be sure, the EEOC is now investigating pregnancy discrimination charges and selecting and pursuing cases in accordance with its newest guidance. HR professionals should take this time to carefully review the Pregnancy Guidance and related materials to determine whether their company's current policies and practices are in compliance. Specifically, HR professionals should:

- Review accommodation, leave and other employment policies in light of the new Pregnancy Guidance.
- Determine whether their company provides light-duty assignments or other accommodations and the circumstances under which they are provided. If these assignments are limited to workers who are injured on the job or to individuals with ADA-qualifying disabilities, strongly consider modifying the policy to make light duty available to pregnant workers.
- Train managers and supervisors about their rights and responsibilities under the PDA and the ADA.
- Remind managers and anyone involved in the recruitment process to refrain from making *any* pregnancy-related inquiries. It is never appropriate to ask an employee or applicant whether they are or intend to become pregnant, and the new guidance makes clear that the EEOC will consider any such inquiry as evidence of pregnancy discrimination.
- Proceed with utmost caution when dealing with an employee who has recently returned from pregnancy leave or has made it known that she is trying to become pregnant. Make sure that there is objective evidence supporting hiring and/or termination decisions or other adverse employment actions, including evidence that the same action was taken when similar issues arose with other employees.

Leslie E. Silverman is a shareholder in the law firm of Fortney & Scott, located in Washington, D.C., and a member of SHRM's Special Expertise Panel on Labor Relations. From 2002-2008, she served as a Commissioner and Vice Chair of the U.S. Equal Employment Opportunity Commission.