

July 16, 2014

EEOC Enforcement Guidance on Pregnancy Discrimination Adds ADA Duties of Reasonable Accommodation

By Margaret Hart Edwards and Danielle A. Fuschetti

On July 14, 2014, the EEOC issued its long-anticipated Enforcement Guidance on Pregnancy Discrimination and Related Issues (the Guidance), which, according to Commissioner Lipnic, “adopts new and dramatic substantive changes to the law” regarding workplace treatment of pregnancy. Employers must become aware of the Guidance, as it not only explains the EEOC’s understanding of the law and how it will seek to enforce it, but also attempts to expand the law to provide greatly enhanced protections to pregnant employees.

The Guidance

The Guidance covers the vast expanse of federal workplace laws touching on pregnancy and related conditions, including the Pregnancy Discrimination Act (PDA), the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), the Affordable Care Act (ACA), the Family and Medical Leave Act (FMLA), and Executive Order 13152, which prohibits discrimination in federal employment based on parental status. The Guidance is intended to provide a definitive document on the EEOC’s position on pregnancy. Its refrain: pregnant employees are entitled to accommodation under *both* the PDA *and* the ADA.

The Guidance is composed of four sections addressing the PDA, ADA, other laws, and best practices, respectively. The sections covering the PDA and ADA describe the basic precepts of the laws and their application to pregnancy and related conditions, illustrated through examples. The third section briefly summarizes the other laws in the field, and the final section provides a bullet point list of the steps the EEOC recommends that employers take to comply with the EEOC’s construction of the law.

The PDA and ADA sections advance several contentious positions regarding the accommodations required for pregnant individuals and the legal source of these accommodations. Drawing on the PDA’s requirement that pregnant individuals be treated the same as others similar in their abilities or inabilities to work, and the EEOC’s regulations implementing the ADA, which state that impairments arising from pregnancy may be eligible for accommodation, the Guidance concludes:

- The PDA requires accommodations for pregnant women, regardless of the severity of their pregnancy-related work limitations, if the types of accommodations are provided to other employees with similar abilities or inabilities to work. The Guidance incorporates

the concepts of “reasonable accommodation” and “undue hardship” into the analysis of an accommodation request. It also provides several examples of what the EEOC considers reasonable accommodations for restrictions arising out of pregnancy.

- The ADA requires accommodation of pregnancy-related disabilities, regardless of their relationship to a healthy and routine pregnancy. The assertion that “an impairment’s cause is not relevant in determining whether the impairment is a disability” could nullify the provision of the ADA regulations stating that pregnancy is not an impairment. Thus, following this approach, conditions present to some degree in most pregnancies, such as balance issues, morning sickness, and changes in body size, could qualify for accommodations under the ADA.
- The PDA requires accommodations for pregnant women where non-pregnant similarly abled or disabled individuals have received accommodations, regardless of whether the accommodations result from laws like the ADA, a policy that prioritizes workplace injuries over other physical limitations, or an employer’s choice free from any legal obligations on the matter. The EEOC declares that an employer may not confine light duty to those suffering from workplace injuries, but must provide light duty to pregnant employees who need it as well. In doing so, the EEOC explicitly rejects contrary cases from at least four federal circuit courts of appeals. The Guidance concludes that employers should now abandon policies requiring different treatment for employees injured on the job and employees with similar disabilities due to pregnancy.
- Common employer policies, such as a policy that restricts sick leave to only 10 days, may disparately impact pregnant women. It is likely that a number of pregnancy-related impairments that impose work restrictions will be substantially limiting for ADA purposes, even if temporary, and provides multiple examples.

The Guidance takes the position that employers that provide health insurance must provide prescription contraceptives in health plans, states when coverage must be provided for fertility treatments unique to women, contends that GINA could be violated by an adverse employment action taken to avoid insurance costs arising from the genetic impairments of the employee’s child, explains that lactation must be accommodated by employers, and clarifies what forms of parental leave policy are permissible.

Implications for Employers

The immediate impact of the Guidance will be more aggressive enforcement of the PDA and more ADA/PDA cross-over cases. The courts are likely to give judicial deference to the Guidance, so it will affect the direction of future case law. Several of the Guidance’s assertions will substantially change employers’ obligations if accepted by courts.

Earlier cases accepted the argument that employees receiving their accommodations under laws other than the PDA are not appropriate comparators for plaintiffs suing under the PDA. The EEOC’s Guidance does not agree. Thus, accommodation may be under the PDA so long as accommodation is required for a comparator under the ADA, possibly even where the ADA comparator is merely hypothetical. The Guidance also disagrees with the permissibility of workplace policies that provide special treatment to injuries sustained in the workplace but deny those accommodations to pregnant women. A case that will be decided by the U.S. Supreme Court, *Young v. United Parcel Services, Inc.*, will likely shed further light on these arguments.

While most of the Guidance focuses on expanding the rights of pregnant employees, it also provides employers with a few footholds for proving their compliance. Some of the examples of compliant behavior in the PDA and ADA sections may provide employers with arguments that their decisions are permissible, or at the least should not be the subject of EEOC actions against them. Either way, the Guidance does not carry the formal authority of regulations, so courts are free to reject portions of the Guidance.

Practical Steps to Respond

The EEOC provides a long list of Best Practices for compliance, and employers concerned about compliance should consider following at least some of these. The most important steps are:

- Review anti-discrimination, benefits, leave of absence, light duty, and accommodation policies to make necessary changes to ensure they are compliant with the law.

- Train managers and human resources professionals on rights and responsibilities under the PDA, the ADA, and other statutes that bear on pregnancy, and specifically on the duty to accommodate restrictions related to pregnancy, childbirth, or lactation.
- Focus on qualifications in employment decisions rather than planned pregnancy, pregnancy, recent pregnancy, or caregiver status.
- Take pregnancy discrimination complaints very seriously and protect employees who complain from retaliation.
- Make sure the business reasons for employment actions are well documented.
- Disclose information about fetal hazards to applicants and employees and accommodate any requests for reassignments to the extent feasible.

[Margaret Hart Edwards](#) is a Shareholder, and [Danielle Fuschetti](#) is an Associate, in Littler's San Francisco Office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Ms. Edwards at mhedwards@littler.com or Ms. Fuschetti at dfuschetti@littler.com. The Guidance can be accessed [here](#). Those interested in reading more about the Guidance are encouraged to visit Littler's Workplace Policy Institute [article](#) on the subject.