

E-ALERT | Employment

November 10, 2014

EEOC ISSUES ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION

This past summer, the Equal Employment Opportunity Commission (“EEOC”) issued its long-anticipated [Enforcement Guidance on Pregnancy Discrimination and Related Issues](#) (“Guidance”). This is the first comprehensive update of the EEOC’s guidance on pregnancy discrimination since the 1983 publication of a Compliance Manual chapter on the subject. According to one EEOC Commissioner, the Guidance “adopts new and dramatic substantive changes to the law” regarding workplace treatment of pregnancy.

While the Guidance is intended to provide a definitive document on the EEOC’s position on pregnancy, it was issued on the heels of the Supreme Court’s decision to grant certiorari in a case involving the Pregnancy Discrimination Act, [Young v. United Parcel Service, Inc.](#), 134 S.Ct. 2898 (2014). Depending on the Supreme Court’s decision in that case, which is set to be argued on December 3, 2014, employer responsibilities to pregnant employees may be more limited than the Guidance would suggest.

THE GUIDANCE

The Guidance covers many of the federal laws touching on pregnancy related discrimination, including the Pregnancy Discrimination Act (“PDA”) (a 1978 amendment to Title VII), the Americans with Disabilities Act (“ADA”), the Family and Medical Leave Act, Executive Order 13152, the Genetic Information Nondiscrimination Act, and the Affordable Care Act.

The Guidance generally seeks to expand protections for pregnant employees, rejecting “pregnancy blind” policies and earlier cases holding that employees receiving accommodation under laws other than the PDA are not appropriate comparators for plaintiffs suing under the PDA. Relying on the PDA requirement that pregnant individuals be treated the same as other persons “not affected” by pregnancy but similar in their “ability or inability to work,” as well as the EEOC’s regulations implementing the ADA, stating that impairments arising from pregnancy may be eligible for accommodation, the Guidance reaches several important conclusions:

- 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 similarly situated employees. The Guidance incorporates the concepts of “reasonable accommodation” and “undue hardship” into this analysis.
- The ADA requires accommodation of pregnancy-related disabilities, regardless of their relationship to a healthy and routine pregnancy. Accordingly, conditions present to some degree in most pregnancies (e.g., 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 situated employees have received accommodations, regardless of whether the accommodations are required by law or provided by the employer by choice.

YOUNG V. UPS

The case of *Young v. UPS* asks the Supreme Court to examine the issue of whether and when the PDA requires employers that provide work accommodations to nonpregnant employees to do the same for pregnant employees with similar ability or inability to work. UPS had a “pregnancy blind” policy under which workers could get temporary alternative or light duty assignments under certain circumstances, such as if they were hurt on the job, were disabled, or lost their Department of Transportation certification. But pregnant employees did not receive the same accommodations; when a pregnant employee requested light duty because of a lifting restriction associated with her pregnancy, she was denied the assignment because she did not have a qualifying circumstance. She was forced to stay home without pay until after her pregnancy since she could not perform an “essential function” of her job as a delivery driver. The [Fourth Circuit](#) upheld the policy, following similar rulings in the Fifth, Sixth, Seventh, and Eleventh Circuits.

POTENTIAL IMPLICATIONS FOR EMPLOYERS

While the Guidance foreshadows more aggressive enforcement of the PDA and more ADA/PDA cross-over cases, employers should pay close attention to the Supreme Court’s decision in *Young v. UPS*. If accepted by the Supreme Court and the lower courts, several of the Guidance’s assertions could substantially alter an employer’s obligations to offer a panoply of accommodations to healthy pregnant women, as well as women with pregnancy-related illnesses or complications. The Guidance recommends training managers and employees regularly about their rights and responsibilities related to pregnancy, childbirth, and related medical conditions under the ADA, PDA, and other statutes and making any written reasonable accommodation procedures an employer may have widely available to all employees, reminding employees that the employer will provide reasonable accommodations to employees with disabilities (including pregnancy) who need them, absent undue hardship.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our employment practice group:

Eric Bosset	+1.202.662.5606	ebosset@cov.com
Lindsay Burke	+1.202.662.5859	lburke@cov.com
Thomas Williamson	+1.202.662.5438	twilliamson@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

In an increasingly regulated world, Covington & Burling LLP provides corporate, litigation, and regulatory expertise to help clients navigate through their most complex business problems, deals and disputes. Founded in 1919, the firm has more than 800 lawyers in offices in Beijing, Brussels, London, New York, San Diego, San Francisco, Seoul, Shanghai, Silicon Valley, and Washington. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.

© 2014 Covington & Burling LLP, 1201 Pennsylvania Avenue, NW, Washington, DC 20004-2401. All rights reserved.