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# EEOC "Delivers" Guidance on Pregnancy Discrimination

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On July 14, 2014, over the vocal dissent of two commissioners, the Equal Employment Opportunity Commission ("EEOC") released its "Enforcement Guidance on Pregnancy Discrimination and Related Issues." The Guidance, which focuses on the Pregnancy Discrimination Act ("PDA") and the Americans with Disabilities Act ("ADA"), as amended in 2008, is the first time since 1983 that the EEOC has offered its official position on the obligations imposed on employers by the PDA. The Guidance includes a number of controversial positions and interpretations that have generated an avalanche of commentary and criticism, including a public statement by Commissioner Constance Barker in which she called the Guidance fatally flawed.[1] The Guidance does not have the force of law, and with the United States Supreme Court poised to rule in the *Young v. United Parcel Service* case in the next term, its impact may be short-lived. Still, employers and their counsel should understand its implications and prepare for its potential impact.

### The PDA

The PDA prohibits discrimination based on pregnancy, childbirth, or related medical conditions. This seemingly straight-forward determination has caused confusion and conflicting results among the courts on what constitutes discrimination because of "pregnancy, childbirth, and related medical conditions."[2] Consistent with the EEOC's ever-expanding views on the scope of the federal anti-discrimination laws, the Guidance favors a broad approach. For example, the Guidance clarifies that the PDA prohibits discrimination against not only pregnant women, but also against women with past pregnancies or who may or intend to become pregnant. In addition, discrimination based on stereotypes and assumptions about a pregnant woman's job capabilities and commitment is unlawful, even where the employer is acting on the belief that its actions are in the employee's or the child's best interest. By way of example, the EEOC warns against excluding a pregnant woman from handling dangerous chemicals or moving heavy equipment out of concern that those activities could harm either the woman or the child.


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Likewise, the Guidance endorses a broad interpretation of the phrase "related medical condition" and specifically identifies lactation as a pregnancy-related medical condition. Thus, the Guidance cautions that "if an employer allows employees to change their schedules or use sick leave for routine medical appointments and to address non-incapacitating medical conditions, then it must also permit female employees to change their schedules or use sick leave for lactation-related needs under similar circumstances."

The most controversial position taken by the EEOC in the Guidance starts with the proposition that women affected by pregnancy, childbirth, or related medical conditions must be treated in the same manner as other employees "who are similar in their ability or inability to work but are not affected by pregnancy, childbirth or related medical conditions." According to the EEOC, "an employer is obligated to treat a pregnant employee temporarily unable to perform the functions of her job the same as it treats other employees similarly unable to perform their jobs, whether by providing modified tasks, alternative assignments, leave or fringe benefits." These statements appear in the section of the Guidance addressing the PDA, but the content reads like a reasonable accommodation analysis under the ADA. When stripped to its most basic premise, the Guidance mandates that *under the PDA*, pregnant employees are entitled to "workplace adjustments similar to accommodations" that are provided to individuals with disabilities even if the pregnancy-related condition is not itself a disability. The source of the limitation (whether pregnancy, disability or injury) is immaterial, and the focus is on whether the employees have a similar ability or inability to work. In a May 23, 2014, memorandum to her fellow commissioners, Commissioner Barker sharply criticized this interpretation of the PDA because it "allows pregnant employees to bypass the requirements of a qualified individual with a disability under the ADA, thus elevating pregnant employees to a kind of super-status above that of individuals with disabilities."

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The EEOC's stance provides a perfect segue into another key issue covered by the Guidance that is at the center of the *Young v. UPS* case - whether an employer must provide a pregnant employee with a light-duty assignment to accommodate her pregnancy-related incapacity or limitation. The plaintiff in *Young* requested light duty to accommodate a pregnancy-related lifting restriction, but UPS's policy limited light duty to employees who (1) had been injured on the job; (2) had lost their U.S. Department of Transportation certification; or (3) were disabled under the ADA. Young did not qualify for light duty under the UPS policy and her request was denied, but she was accommodated with an extended leave of absence. The District Court for the District of Maryland granted summary judgment to UPS and the Fourth Circuit Court of Appeals affirmed, finding that UPS's light-duty policy was "pregnancy-neutral" as required by the PDA. The Supreme Court's decision is expected to address both "pregnancy-blind" employer policies and the appropriate comparators for pregnant workers for establishing a pregnancy discrimination claim under the PDA.

The Guidance takes on both issues. First, the Guidance states that an employee "may still establish a violation of the PDA by showing that she was denied light-duty or other accommodations that were granted to other employees *who are similar in their ability or inability to work*." In an example eerily similar to the UPS policy, the EEOC concluded that an employer policy that makes light-duty work available only to employees who suffer an on-the-job injury violates the PDA. The EEOC reasoned that the policy treats a pregnant employee who is similarly situated in her ability or inability to work differently simply because of the *source* of her limitation, pregnancy versus on-the-job injury. As if the example were not clear enough, the Guidance expressly "rejects the position that the PDA does not require an employer to provide light duty for a pregnant worker if the employer has a policy or practice limiting light duty to workers injured on the job and/or to employees with disabilities under the ADA." Second, the Guidance provides that in disparate treatment cases, a pregnant employee can compare herself to employees with disabilities or on-the-job injuries to establish her prima facie case of pregnancy discrimination.

### The ADA

The EEOC's analysis of the ADA in the Guidance is not nearly as surprising. While the EEOC acknowledges that pregnancy itself does not constitute an "impairment" under the ADA, it finds that a broad range of temporary impairments associated with pregnancy could qualify as disabilities. Since the 2008 amendments to the ADA greatly expanded the types of impairments that would qualify as disabilities, it comes as no great surprise that pregnancy-related impairments that impose work-related restrictions will be substantially limiting, even though temporary. The Guidance provides that "a pregnant employee may be entitled to reasonable accommodation under the ADA for limitations resulting from pregnancy-related conditions that constitute a disability or for limitations resulting from the interaction of the pregnancy with an underlying impairment." The Guidance includes a lengthy list of accommodations that may be necessary, with hypothetical scenarios. No surprises here, as the list is consistent with the position the EEOC has taken generally on accommodating employees with disabilities.

### What Now?

Lest employers are left scratching their heads in the wake of the Guidance, the EEOC comes to the rescue with its "suggestions for best practices" that could help employees avoid liability under the PDA or ADA. Chief among them is the need for employers to develop, disseminate, and enforce a strong policy that includes a process for addressing accommodation requests by pregnant employees. If employers follow the Guidance to the letter, a revamping of existing policies is undoubtedly necessary since until the Guidance, it seems fair to say that few employers understood that the PDA imposed a reasonable accommodation obligation. Leave policies should be reviewed and revised. Notably, under the Guidance, parental leave must be offered to similarly situated men and women on the same terms.

The EEOC encourages employers to develop specific, job-related qualification standards for each job position that reflect the duties of the position. By doing so, employers can minimize the potential for making hiring, promotion, and other employment decisions based on stereotypes or assumptions about women affected by pregnancy, childbirth, or related medical conditions.

### Timing Is Everything

Many have questioned the timing of the EEOC's release of the Guidance. For one thing, the Supreme Court's impending decision in *Young* could turn the Guidance on its ear. The EEOC did not put the draft guidance before the public for comment, as it has traditionally done with prior enforcement guidance on other issues. Moreover, the Guidance comes at a time when Congress is considering passage of the Pregnant Workers Fairness Act ("PWFA"), which would amend the PDA to *expressly* require employers to grant reasonable accommodations to pregnant workers.[3]

### Conclusion

Concerns and criticism aside, the Guidance attempts to address legitimate concern over pregnancy discrimination in the workplace and expands the protection of the PDA. Employers who fail to see the writing on the wall are going to invite (unwanted) attention and scrutiny from the EEOC. Indeed, failing to abide by the requirements of the PDA could give "birth" to a whole new set of problems for employers.

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1. See Public Statement of EEOC Comm'r Constance S. Barker, Issuance of EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues (July 14, 2014); Statement of EEOC Comm'r Victoria A. Lipnic, Enforcement Guidance on Pregnancy Discrimination and Related Issues (July 14, 2014).

2. Compare *Hall v. Nalco Co.,* 534 F.3d 644 (7th Cir. 2008) (finding that discrimination against a female employee because she was seeking fertility treatment is actionable) with *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425 (5th Cir. 2013) (holding that lactation discrimination is not covered because lactation is not related to pregnancy).

3. Pregnant Worker's Fairness Act, S. 942, 113th Cong. (2013); Pregnant Worker's Fairness Act, H.R. 1975, 113th Cong. (2013).