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EEOC Issues Pregnancy Discrimination Enforcement Guidance

Article By:

Michelle Seldin Silverman

The guidance was issued over steep objection from two commission members and raises questions about its statutory authority and timing.

The **Equal Employment Opportunity Commission** (EEOC) issued new **enforcement guidance** (the Guidance) on July 14 relating to pregnancy in the workplace.[1] Like all EEOC guidelines, the new Guidance does not have the force of law and is entitled to deference from courts only "to the extent of its persuasive power."[2] In this case, the Guidance is controversial, particularly for its view that employers must modify job requirements for pregnant and lactating workers, even if the pregnancy is normal and the employee is healthy and not disabled under the meaning of either the Americans with Disabilities Act (ADA) or state law. Many critics believe that the Guidance is not grounded in statutory authority, including two of the five EEOC commissioners who dissented. Moreover, the Guidance's timing raises questions, with the U.S. Supreme Court set to review Young v. United Parcel Service, Inc., in which the U.S. Court of Appeals for the Fourth Circuit held that the Pregnancy Discrimination Act (PDA) does not mandate the kind of accommodations that the EEOC now claims are required.[3] Given the Supreme Court's decision to hear the Young matter, many believe the EEOC's Guidance is premature and could, in essence, be overruled by the high court.

Background

The Young case involves the claims of a female United Parcel Service (UPS) driver, Peggy Young, who requested light duty after becoming pregnant. UPS drivers must be able to lift up to 70 pounds, but, as soon as she became pregnant, Young brought a note from her doctor, stating that she would not be able to lift more than 20 pounds for the first half of her pregnancy and no more than 10 pounds for the second half. UPS had a policy of limiting light duty to three categories of employees: (1) those who had been injured on the job, as required by the applicable collective bargaining agreement (CBA), (2) those who had lost their U.S. Department of Transportation (DOT) certification—also required by the applicable CBA, and (3) those who were disabled under the ADA. Young did not fit into any of these categories. As such, she was denied light duty and was instead accommodated with an extended leave of absence. Young returned to work after giving birth.

Notwithstanding UPS's decision to grant Young extra leave (far in excess of her entitlement under the Family and Medical Leave Act), she sued UPS, alleging discrimination on the basis of her race,

gender discrimination in violation of Title VII, discrimination on the basis of pregnancy in violation of the PDA, and discrimination on the basis of a perceived disability in violation of the ADA. The U.S. District Court for the District of Maryland awarded summary judgment to UPS. Young appealed only her ADA and PDA claims.

In a unanimous decision, the Fourth Circuit affirmed the award of summary judgment to UPS, concluding that the record contained no evidence to suggest that UPS perceived Young to be disabled (only that she could not lift more than 20 pounds) and finding that UPS did not discriminate against Young on the basis of her pregnancy. UPS's light duty policy was pregnancy-neutral, the Fourth Circuit explained, which is all that the PDA requires.

In reaching this conclusion, the Fourth Circuit rejected Young's contention that the PDA mandates more than pregnancy-neutral policies and actually requires employers to provide pregnant women with every privilege and accommodation given to nonpregnant workers. Young grounded her argument in a provision of the PDA that states that pregnant women must be treated the same as those who are "similar in their ability or inability to work." In Young's opinion, this provision means that pregnant women must be given all benefits given to nonpregnant co-workers, even when there are legitimate, nonpregnancy-related reasons for different treatment.

After the Fourth Circuit upheld the dismissal of her claims, Young petitioned the Supreme Court for certiorari and, on July 1, certiorari was granted.

Overview of the EEOC's Guidance

Notwithstanding the Supreme Court's pending review of these issues, the EEOC Guidance advances a number of controversial positions. For example, the Guidance states the following:

- Employers must treat pregnant women the "same as others who are similar in their ability or inability to work but are not affected by pregnancy, childbirth, or related medical conditions."

- "[A]n 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."

- Employers must permit a lactating employee the "same freedom to address . . . lactation-related needs that she and her co-workers would have to address other similarly limiting medical conditions. For example, if an employer allows employees to change their schedules or use sick leave for routine doctor appointments and to address non-incapacitating medical conditions, then it must allow female employees to change their schedules or use sick leave for lactation-related needs under similar circumstances."

- Employers must provide light duty to pregnant workers if light duty is provided to nonpregnant workers "similar in their ability or inability to work."

- "Leave related to pregnancy, childbirth, or related medical conditions can be limited to women affected by those conditions. However, parental leave must be provided to similarly situated men and women on the same terms. If, for example, an employer extends leave to new mothers beyond the period of recuperation from childbirth (e.g. to provide the mothers time to bond with and/or care for the baby), it cannot lawfully fail to provide an equivalent amount of leave to new fathers for the same purpose."

- Based on on the ADA Amendments Act of 2008's changes to the definition of "disability," in some circumstances, employees with temporary pregnancy-related impairments may now be covered by the ADA.

- The PDA requires workplace adjustments for pregnant employees if the adjustments would be required for an employee with an ADA-covered disability.

- Employers may not discriminate against a female employee based upon her decision to use contraceptives. "To comply with Title VII, an employer's health insurance plan must cover prescription contraceptives on the same basis as prescription drugs, devices, and services that are used to prevent the occurrence of medical conditions other than pregnancy."[4]

The Guidance also includes a list of purported best practices for employers, including the following:

- "If there is a restrictive leave policy (such as restricted leave during a probationary period), evaluate whether it disproportionately impacts pregnant workers and, if so, whether it is necessary for business operations. Ensure that the policy notes that an employee may qualify for leave as a reasonable accommodation."

- "Review workplace policies that limit employee flexibility, such as fixed hours of work and mandatory overtime, to ensure that they are necessary for business operations."

- "Ensure that employees who are on leaves of absence due to pregnancy, childbirth, or related medical conditions have access to training, if desired, while out of the workplace."

- "Temporarily reassign job duties that employees are unable to perform because of pregnancy or related medical conditions if feasible."

Dissent from EEOC Commissioners

Commissioners Constance Barker and Victoria Lipnic issued public statements opposing the Guidance.[5] Both commissioners questioned the EEOC's decision not to make the draft guidance available for public review and comment before it was issued. In addition, they questioned the Guidance's timing, given the Supreme Court's decision to hear Young in its next term.

Commissioner Barker's opposition was particularly critical. She attached a May 23, 2014 internal commission memorandum to her public statement, in which she argued that the majority's interpretation of the PDA is without legal basis. Commissioner Lipnic also criticized the Guidance for "read[ing] out of the law the requirement that pregnant workers be treated the same, not better than, other workers for all employment purposes." Commissioner Lipnic noted that the Guidance regarding contraception requires review in light of the Supreme Court's decision in Hobby Lobby Stores, which held that certain employers may not lawfully be compelled to provide all forms of contraception.

Implications for Employers

Some jurisdictions—such as California[6]; Central Falls, Rhode Island[7]; Maryland[8]; Minnesota[9]; New York City[10]; New Jersey[11]; Philadelphia[12]; and West Virginia[13]—have already enacted pregnancy accommodation laws that, in many respects, parallel the EEOC's Guidance. Recently,

Illinois passed a pregnancy accommodation law that will become effective January 1, 2015, and a number of other states and local municipalities have pending pregnancy discrimination laws in their respective legislatures. Employers located in these jurisdictions should carefully review their reasonable accommodation and leave policies to ensure that they are appropriately accommodating pregnant employees and should train managers and human resources professionals regarding the obligation to accommodate pregnancy-related impairments. Employers throughout the United States should pay close attention to the Supreme Court's upcoming decision in Young and consult with counsel to review their existing accommodation and leave policies.

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[1]. *See* EEOC, Enforcement Guidance: Pregnancy Discrimination and Related Issues (July 14, 2014), *available* here.

[2]. EEOC v. SunDance Rehab. Corp., 466 F.3d 490, 500 (6th Cir. 2006). EEOC enforcement guidelines do not receive deference pursuant to*Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984). *See Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 110 n.6 ("[W]e have held that the EEOC's interpretive guidelines do not receive*Chevron* deference.")

[3] . *Young v. United Parcel Service, Inc.*, 707 F.3d 437 (4th Cir. 2013),*cert. granted*, 81 U.S.L.W. 3602 (U.S. July 1, 2014) (No. 12-1226).

[4]. The Guidance on an employer's legal obligation under Title VII with respect to contraception raises serious questions in light of the Supreme Court's recent decision in *Burwell v. Hobby Lobby Stores, Inc.*, Nos. 13-354, 13-356, 2014 WL 2921709 (U.S. June 30, 2014). In *Hobby Lobby*, the Supreme Court held that, under the Religious Freedom Restoration Act, and irrespective of other federal mandates, certain employers may*not* lawfully be compelled to provide insurance covering all forms of contraception.

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

[6]. *See* Cal. Gov't Code § 12945 (effective Jan. 1, 2012).

[7]. *See* Gender Equity in the Workplace Ordinance, *available* here(effective Apr. 14, 2014).

[8]. *See* Md. Code Ann., State Gov't § 20-609 (effective Oct. 1, 2013).

[9]. *See* Minn. Stat. Ann. §§ 181.941 (effective July 1, 2014); 181.9414 (effective May 12, 2014).

[10]. *See* New York City Comm'n on Human Rights, *available* here(effective Jan. 30, 2014).

[11]. *See* N.J. Stat. Ann. § 10:5-3.1 (effective Jan. 17, 2014).

[12]. *See* Philadelphia Fair Practices Ordinance, Pregnancy Discrimination Amendment, *available* here (effective Jan. 20, 2014).

[13]. *See* W.Va. Code § 5-11B (effective June 4, 2014).

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