Toledo Area Human Resource Association

Avoiding Pregnancy Discrimination Claims: The EEOC Weighs In

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Employers know that pregnant employees are afforded special legal protections, but for years employers have struggled with the breadth and scope of those protections. For example, are well meaning employers permitted to implement special workplace precautions to protect the employee and her child from on-the-job dangers? Are employers required to accommodate workplace restrictions related to pregnancy? Is "pregnancy" a disability? Can a small employer refuse to hire a pregnant applicant or terminate a pregnant employee whose leave would exceed the maximum time off provided to other employees? Several factors, including employers' confusion over legal obligations to pregnant employees under the Americans with Disabilities Act, have resulted in a dramatic increase in pregnancy-related charges of discrimination and litigation in recent years. Recognizing this trend, on July 14, 2014, the Equal Employment Opportunity Commission issued guidance regarding the legal protections afforded to pregnant workers under the Pregnancy Discrimination Act and the ADA.

The EEOC Guidance reminds employers that the Pregnancy Discrimination Act prohibits discrimination based upon current, as well as past, pregnancy or potential or intention to become pregnant, or medical conditions related to pregnancy or childbirth. Employers should not make assumptions about pregnant employees' job capabilities (i.e. no "forced" leave) and commitment to the job during pregnancy or following childbirth. Employers may, however, enforce leave policies so long as those policies are enforced uniformly, regardless of medical condition or sex. According to the EEOC, if an employer provides "bonding" leave beyond the period that the employee is disabled from working after childbirth, the employer is required to provide the same amount of "bonding" leave to other employees, regardless of gender (i.e. paternity leave). The EEOC also addressed employers' obligations to pregnant workers under transitional or "light duty" programs. On this, the EEOC concludes that pregnant employees must receive access to light duty work in the same manner as non-pregnant employees with similar limitations. Therefore, according to the EEOC, an employer with a light duty program restricted to employees with work-related injuries would also have to provide light duty to employees with pregnancy-related restrictions. Prior to the issuance of the EEOC Guidance, the United States Supreme Court accepted *Young v. United Parcel Service* for review. In *Young,* the pregnant employee was denied light duty work and was required to take unpaid leave because the employer's light duty accommodations only applied to employees with work-related

restrictions. The Supreme Court's decision in *Young* will likely determine the future enforceability of the EEOC Guidance.

Not surprisingly in the EEOC Guidance, the EEOC highlighted its position that pregnancy-related conditions may frequently be covered under the ADA because they constitute impairments that substantially limit a major life activity under the 2008 amendments to the ADA, which significantly expanded the definition of "disability." This is the case even if the pregnancy-related impairment is temporary. Examples of pregnancy-related impairments which may be disabilities entitled to accommodation cited by the EEOC include: pregnancy-related back pain, nausea, swelling due to limited circulation, pelvic inflammation resulting in difficulty walking, and depression. Employers must pursue reasonable accommodation through the interactive process with employees for pregnancy-related disabilities in the same manner as other disabilities. The EEOC also mentions employer requirements to provide lactation breaks under the Patient Protection and Affordable Care Act.

Finally, the EEOC provides guidance for employer best practices which include: well-written policies prohibiting discrimination on the basis of pregnancy or pregnancy-related conditions, regular supervisor training regarding employers' legal obligations to pregnant employees, regular policy and practice audits, no retaliation policies and training, and employer documentation of any employment decisions related to pregnant workers. Employers who are mindful of the EEOC's Guidance will go a long way to minimizing legal risks associated with pregnant employees.

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