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HR CONNECTION

New EEOC pregnancy discrimination guidelines

On July 14, the EEOC issued a 60-page "enforcement guidance" on pregnancy discrimination and related issues in the workplace, giving employers insight on how the EEOC will handle pregnancy-related complaints going forward. The guidance, issued after a 3 to 2 vote along commission partisan line, is intended to clarify a number of federal laws that employers and courts have interpreted in various ways, including the Pregnancy Discrimination Act and the Americans with Disabilities Act, both of which apply to employers with 15 or more employees.

By JENNIFER A. SHOEMAKER
Daily Record Columnist

This is the first time in more than 30 years that the EEOC has updated its pregnancy discrimination guidelines, and is doing so because of the significant increase in pregnancy-related complaints over the last decade. The timing is interesting, as the guidance was issued just weeks after the U.S. Supreme Court agreed to hear *Young vs. United Parcel Service, Inc.*, a case brought by a pregnant UPS worker that is expected to face some of these issues head on. In fact, the dissenting EEOC commissioners issued public statements questioning the majorities' decision to issue the guidance without first making it available for public comment and questioned the timing given the pending court case.

The EEOC's guidance reinforces the PDA mandates that discrimination based on pregnancy, childbirth or related medical conditions is a prohibited form of sex discrimination. In addition, the PDA requires that women affected by pregnancy, childbirth or related medical conditions be treated the same as other persons not so affected but similar in their ability to do work.

The guidance takes the position that even though pregnancy itself is not a disability under the ADA, all pregnant workers are entitled to a reasonable accommodation under the ADA. Specifically, "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."

Other accommodations employers may be required to offer pregnant employees include modified work schedules (i.e., more frequent breaks or later arrival times due to pregnancy-related fatigue or morning sickness), purchasing or modifying equipment or devices (i.e., providing a pregnant employee a stool so she can sit when working in a position that ordinarily would require her to stand), or altering how a job function is performed (i.e., allowing a pregnant woman suffering from pregnancy-related carpel tunnel syndrome to dictate notes and have assistants input the data rather than requiring the pregnant employee to use a keyboard).

The EEOC's guidance also addresses how employers need to apply light duty policies under the PDA. An employer violates the PDA if it denies pregnant women light duty while providing light duty to other employees who are similarly unable to perform their jobs. As such, if an employer has a light duty policy that covers employees injured on the job, then it must also cover pregnant employees similarly unable to perform their work. This is the exact issue before the Supreme Court in *Young*, where the Fourth Circuit Court of Appeals held that the PDA does not require exactly the type of accommodations contained in the new EEOC guidance.

The guidance spells out that the fact that the EEOC will broadly interpret how and when the ADA applies to pregnant workers, and what reasonable accommodations in the workplace will be required. The guidance provides "best practices" for employers to avoid unlawful discrimination against pregnant workers.

Included are prohibitions on discrimination based on a woman's intentions to become pregnant or seeking fertility treatments, on past pregnancy and potential pregnancy (i.e., fertility issues or reproductive risk). In addition, lactation, a much dis-

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puted matter in the courts, is now considered a medical condition.

Citing the Affordable Care Act and the PDA, the EEOC guidance also calls for employers to provide prescription contraceptives to employees on the same basis as prescriptions drugs, devices and services that are used to prevent the occurrence of medical conditions other than pregnancy.

The EEOC did, however, acknowledge in an official Q&A for employers the recent *Hobby Lobby* Supreme Court decision, which granted an exception to employers on religious grounds: "EEOC's enforcement guidelines explains Title VII's prohibition of pregnancy discrimination; it does not address whether certain employers might be exempt from Title VII's requirements under the [Religious Freedom Restoration Act] or under the Constitution's First Amendment."

It is important to note, under the guidance, a pregnant worker is not protected if the woman's condition was neither revealed nor obvious, but an employer is liable for decisions motivated on a past pregnancy or on stereotypes or assumptions about a pregnant woman's ability to work.

While the EEOC guidance is not law, employers can be sure that the EEOC will apply the principals as it conducts investigations. As such, employers should review and, if appropriate, revise policies concerning discrimination, light duty, leave and benefits. Employers should continue to make employment decisions based on qualifications and not on any pregnancy or pregnancy-related conditions.

Indeed, before taking any adverse action against a pregnant employee, employers should make sure they have good documentation of non-discriminatory reasons for the decision. It remains to be seen what the *Young* decision's affect, if any, will have on the EEOC's guidance, and employers should pay careful attention to the outcome of the pending case.

Jennifer A. Shoemaker is an associate in Underberg & Kessler LLP's Litigation and Labor & Employment practice groups. She concentrates her practice in the areas of employment and family law. This article is brought to you by the Rochester affiliate of the National HR Association, a local professional HR organization focused on advancing the career development, planning and leadership of HR professionals.