GONZALEZ SAGGIO HARLAN

THE GSH 60 SECOND MEMO®

SPONSORED BY THE GSH EMPLOYMENT GROUP

July 30, 2014

Jerilyn Jacobs, Esq.

Questions on this topic? **CLICK HERE**

# For First Time in Decades, EEOC Issues New Guidelines on Treatment of Pregnant Employees

**By Jerilyn Jacobs**

Earlier this month, and for the first time in 30 years, a divided U.S. Equal Employment Opportunity Commission issued comprehensive updates to its enforcement guidelines on pregnancy discrimination and related issues. The guidelines concern the Pregnancy Discrimination Act of 1978 (the "PDA"), which amended Title VII, and they mark a significant change in, and expansion of, the EEOC's views on employer obligations under the PDA.

Perhaps the most notable development in the new guidelines is the EEOC's application of the Americans with Disabilities Act ("ADA") to pregnant employees. Although the EEOC acknowledges that pregnancy itself does not meet the broadened definition of "disability" brought about by the ADA Amendments Act of 2008, it takes the position that pregnancy-related conditions can fall under that broadened definition. Thus, ADA protections are, in the EEOC's view, extended to certain pregnant employees. Indeed, the guidelines state that employees with pregnancy-related impairments are entitled to reasonable accommodation as that term is applied to disabled employees under the ADA. As noted by EEOC Commissioner Victoria Lipnic in her dissent to the issuance of the new guidelines, this is a position that has been rejected by every federal court of appeals to consider the issue.

The guidelines also indicate a significant change in how the EEOC believes employers should respond to requests for light-duty assignments. The guidelines assert that pregnant employees who seek, but are denied, available light-duty assignments need not point to another non-pregnant employee who was treated more favorably than the pregnant employee in order to show discrimination. For example, an employer who has a policy providing light-duty work only to workers whose restrictions stem from a job injury or a disability under the ADA cannot deny a light-duty request solely on the grounds that the requesting employee's restriction stems from a pregnancy. Nevertheless, employers must provide only *equal* access to light-duty assignment and need not treat pregnant employees more favorably than non-pregnant employees in terms of who is awarded light-duty positions. As the guidelines note, if an employer's light-duty policy places certain restrictions on the availability of light-duty positions, such as limits on the number of light-duty positions or the duration of light duty assignments, those restrictions can be lawfully applied to pregnant workers as well.

Similarly, the guidelines state that, in the EEOC's view, employers must provide leave for pregnancy-related conditions to at least the same degree it provides them to non-pregnant employees with comparable medical conditions. For example, under the guidelines an employer may not require employees with pregnancy-related conditions to first exhaust their sick leave before using other types of available, accrued leave if the employer does not impose the same requirement on non-pregnant employees seeking leave due to a medical condition.

The guidelines also state that parental leave policies should be provided on equal terms to women and men. For example, if an employer's short-term disability insurance policy provides pregnant employees up to 10 weeks of paid pregnancy-related medical leave for pregnancy and child birth, and the employer also provides, as an additional benefit, six weeks of parental leave for bonding and general care for the child, then this additional six weeks of leave should be afforded to both women and men. Because of this distinction, employers with more generous paid parental leave policies may want to consider designating the amount of leave it will provide for pregnancy-related medical leave and childbirth as opposed to bonding and general care time.

The guidelines also specifically mention protections for lactation and breastfeeding. Calling lactation a "pregnancy-related medical condition," the guidelines state that an adverse employment action taken against an employee due to the employee's breastfeeding schedule is unlawful. As we have noted in prior 60 Second Memos, employers with employees who are breastfeeding should be mindful of providing an adequate, appropriate space for expression of milk

and for a reasonable amount of breaks.

The guidelines also touch on the subjects of abortion and contraception to note that Title VII protects women from being fired for use of contraception, for having or contemplating an abortion, or, conversely, for refusing to have an abortion. The guidelines also note that employers may violate Title VII by providing health insurance that excludes coverage of prescription contraceptives if the health insurance plan covers other preventive care, such as vaccinations, physical examinations, and prescription drugs to prevent high blood pressure or to lower cholesterol levels. However, employers are not required to offer health insurance that covers abortion, except in cases where the life of the mother would be endangered. As noted by Commissioner Lipnic in her published disapproval to the guidelines, however, this aspect of the guidelines has already been overtaken by recent events - namely the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc., et al.* - and thus employers must now await further clarification on the issue from either the EEOC or federal courts.

In light of these guidelines, employers may want to re-evaluate their reasonable accommodation and leave policies to ensure they apply equally to pregnant and non-pregnant employees. Employers may also want to consider focused training of managers and supervisors, as they are typically the people to whom employees report pregnancies and pregnancy-related medical conditions. Proper training of how to respond to and handle situations where employees notify their supervisors or managers of a possible pregnancy, a pregnancy, or a pregnancy-related medical condition, may serve as that proverbial ounce of prevention.

But as we have previously noted, the EEOC's guidance is just that - guidance. The guidelines do not act as a statement of the law, and while courts will look to them, they are not binding on them. Nevertheless, the guidelines identify the types of conduct and situations that the EEOC believes to be discriminatory, and they serve as a valuable indicator of where the EEOC may dedicate its future investigation and litigation resources.



 Forward this issue



Arizona | California | Florida | Georgia | Illinois | Indiana | Iowa | Massachusetts
New Jersey | New York | Ohio | Tennessee | Washington, D.C. | Wisconsin

**www.gshllp.com**