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CLIENT ALERT: EEOC Issues Enforcement Guidance on Pregnancy Discrimination

On July 14, 2014, the U.S. Equal Employment Opportunity Commission ("EEOC"), in a 3-2 vote, issued an enforcement guidance for the Pregnancy Discrimination Act ("PDA"), a 1978 amendment to Title VII of the Civil Rights Act of 1964 ("Title VII"). Since it has been thirty years since the EEOC last issued any guidance on the PDA, the new enforcement guidance covers a wide array of legal developments related to pregnancy discrimination.

The theme of the guidance is that employers must treat pregnant women affected by pregnancy or related medical conditions the same way that they treat non-pregnant applicants or employees who are similar in their ability or inability to work. The guidance is broken into four parts. The guidance explains (1) requirements under the PDA; (2) ADA & Pregnancy related impairments; (3) FMLA and other requirements affecting pregnant workers; and (4) best practices for employers. In addition to the guidance, the EEOC issued Questions and Answers and a Fact Sheet for Small Businesses to educate employers of their obligations under the federal anti-discrimination laws.

The PDA prohibits employers with at least 15 employees from discriminating on the basis of pregnancy, childbirth, or related medical conditions. Note that some states provide broader anti-pregnancy discrimination protections. Part I of the enforcement guidance deals with the application of the PDA, including hypotheticals, including the following:

- Employers must avoid stereotypes and assumptions concerning the job capabilities and commitment to the job of pregnant women.
- It is unlawful to discriminate based on reproductive risk, infertility treatment, or use of contraceptives.
- Employers must provide parity for fringe benefits such as health insurance and apply the same terms and conditions for pregnancy-related costs as for medical costs unrelated to pregnancy. Note however, the U.S. Supreme Court's recent ruling in *Burwell v. Hobby Lobby Stores, Inc.*, that the Patient Protection and Affordable Care Act's contraceptive mandate violated the Religious Freedom Restoration Act ("RFRA") for owners of closely held for-profit corporations who have religious objections to providing certain types of contraceptives. The guidance "does not address whether certain employers might be exempt from Title VII's requirements under the RFRA or under the Constitution's First Amendment." The guidance affirms Title VII's general prohibition against pregnancy discrimination, which includes contraceptives.
- Medical conditions related to pregnancy and childbirth include breastfeeding and abortion.
- Employers are to provide pregnant workers equal access to benefits such as leave, light duty, and health benefits. Note that currently before the U.S. Supreme Court is a case, *Young v. United Parcel Serv., Inc.,* which will resolve to what extent an employer must accommodate a pregnant nondisabled employee by providing light duty. However in the enforcement guidance the EEOC has declared its position: "the PDA requires 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."

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- Although leave related to pregnancy, childbirth, or related medical conditions can be limited to women affected by those conditions, nonmedical-related parental leave must be provided to similarly situated men and women on the same terms.
- Policies or practices that have a disparate impact on pregnant employees may be discriminatory if an employer cannot show that the policies or practices are job related and consistent with business necessity.
- Employers must allow women who are on pregnancy-related medical leave to accrue seniority and retirement benefits in the same way as those who are on leave for reasons unrelated to pregnancy.

The EEOC's new enforcement guidance also explains how the broader ADA Amendments Act of 2008 (ADAAA) permits pregnancy to qualify as a disability in some circumstances. Although a pregnancy on its own is not a disability, some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADAAA. The enforcement guidance describes some of the possible substantial limitations to one or more major life activities. Employers must also provide a reasonable accommodation for pregnancy-related impairments unless the accommodation would result in an undue hardship.

While Title VII requires parity in pregnancy-related or child care leave if leave is provided for other temporary illnesses or family obligations, the FMLA requires broader protections for pregnant workers and parents. Under the FMLA, covered employers must provide 12 weeks of job-protected leave for covered employees to care for and bond with a newborn baby or a recently adopted child or care for self, spouse, child, or parent because of a serious health condition.

The guidance also highlights section 4207 of the Patient Protection and Affordable Care Act, which requires employers to provide reasonable break times for nursing mothers until the child's first birthday. Employers must make available a private place, other than a bathroom, for such breaks. Under the Fair Labor Standards Act, hourly employees, who are not exempt from the overtime pay requirements, are entitled to breaks to pump breast milk.

The EEOC concludes this section with a reminder to employers that in addition to Title VII, they must also comply with "state or local provisions regarding pregnant workers unless those provisions require or permit discrimination based on pregnancy, childbirth, or related medical conditions."

The EEOC suggests best practices for employers to "reduce the chance of pregnancy-related PDA and ADA violations and to remove barriers to equal employment opportunity." Some of the proactive steps suggested include the following:

- Creating, disseminating and enforcing policies based on the requirements of the PDA and the ADA;
- Taking a critical look at "hiring, promotion, and other employment decisions without regard to stereotypes or assumptions about women affected by pregnancy, childbirth, or related medical conditions";
- Evaluating leave and fringe benefit policies for consistency with the law and protection against disparate impact against pregnant workers;

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- Ensuring that the terms and conditions of employment provide equal access to professional development and protection from unlawful harassment;
- Reviewing light duty policies "so as to provide pregnant employees access to light duty equal to that provided to people with similar limitations on their ability to work"; and
- "Having a process in place for expeditiously considering reasonable accommodation requests made by employees with pregnancy-related disabilities and for granting accommodations where appropriate."

In light of the enforcement guidance, employers should review their policies to ensure the legal requirements under the PDA are met. It is also recommended that employers review current practices that may leave them vulnerable to complaints of unlawful discrimination. Employers are strongly encouraged to contact their MBJ attorneys with questions regarding their compliance with the PDA, ADA, and other requirements affecting pregnant workers.

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