



## **EEOC ISSUES UPDATED ENFORCEMENT GUIDELINE REGARDING PREGNANCY DISCRIMINATION**

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On July 14, 2014, the EEOC issued an updated Enforcement Guideline (“Guideline”) on Pregnancy Discrimination. This is the first significant update since 1983.

The Guideline emphasizes the overlaps of law that protect pregnant and recently pregnant women. Specifically, the Guideline discusses the protections afforded pregnant employees by Title VII of the Civil Rights Act of 1963 (“Title II”), the Pregnancy Discrimination Act (“PDA”), the American With Disabilities Act, as amended (“ADA”) and Family Medical Leave Act (“FMLA”). The Guideline explains the fundamental requirement that “an employer may not discriminate against an employee on the basis of pregnancy, childbirth or related medication conditions; and that women affected by pregnancy, childbirth or related medical conditions must be treated the same as other persons similar in their ability or inability to work.”

The EEOC emphasizes that the employer must be aware of the multiple laws that provide protection to pregnant and recently pregnant women.

### **TITLE VII/PDA VIOLATION**

Employers must make employment-related decisions regarding pregnant employees based solely on how other similar employees are treated.

For example, an employer must not take any action regarding a pregnant employee *because* she is pregnant. Even if the employer is taking an action it believes is favorable for a pregnant employee, such action, if based solely on the pregnancy, will be discriminatory. Thus, an employer cannot change the duties of a pregnant employee simply because the employer fears for the

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health of the fetus or the pregnant employee, if the pregnant employee has not requested such changes in duties.

A pregnant employee must be treated similarly to other employees as it relates to the ability to work or inability to work. The EEOC explains, “an employer cannot fire a pregnant employee for being absent if her absence f[a]lls within the provisions of the employer’s sick leave policy.” It follows that if the employer allows non-pregnant employees to take sick leave if they have the time available, the pregnant employee must also be allowed to take such leave if she has accrued sick leave time.

### **PDA/ADA VIOLATION**

Similarly, if an employer treats a pregnant woman differently from other disabled employees, the employer will violate the ADA. For example, if the pregnant woman develops high blood pressure, severe headaches and nausea and is diagnosed with preeclampsia, she is entitled to be treated similarly to all other disabled employees. Thus, absent an undue burden, the employer must provide an accommodation for the pregnant employee until the preeclampsia subsides.

### **PDA/FMLA VIOLATION**

An employer is also prohibited from forcing an employee to take leave while she is pregnant, as long as she is able to perform her job. Thus, an employer who imposes leave on a pregnant employee is violating her rights.

Further, if an employee takes leave while pregnant for a pregnancy-related ADA protected condition, the employer cannot discount the time from the employee’s FMLA leave after the child is born. The ADA leave should not be counted against the FMLA leave despite the fact that both types of leave arise out of her pregnancy unless the employer has a specific written policy requiring that both types of leave run concurrently.

### **RECENT ENFORCEMENT**

The updated Guideline was issued to address the rise in claims of pregnancy discrimination and the prevalence with which employers have continued to discriminate against pregnant women. “Pregnancy is not justification for excluding women from jobs that they are qualified to perform, and it cannot be a basis for denying employment or treating women less favorably than co-workers similar in their ability or inability to work. Despite much progress, we still continue to see a significant number of charges alleging discrimination,” said EEOC Chair Berrien.

Earlier this month, the EEOC issued a press release regarding a settlement it reach with Kevin & J Company, Inc. (“Kevin & J”) because of a pregnancy discrimination case. The Atlanta-based retail company was forced to pay Fifteen Thousand Dollars (\$15,000.00) to an employee who worked as a customer associate for only two days. Jenny Thosychangh’s employment was terminated on her third day of work, immediately after she advised the store manager of her pregnancy. Not only was Kevin & J required to pay a monetary relief, but it is enjoined from discriminating against employees on the basis of sex or pregnancy, and must maintain an anti-discrimination policy and train employees on their rights pursuant to Title VII. Further, Kevin & J will be required to report to the EEOC on its anti-discrimination actions for the next few years.

### **EMPLOYER TAKE AWAY**

Along with the Guideline, the EEOC issued Best Practices for employers.

These include the following:

- creating, implementing and maintaining an anti-discrimination policy that includes pregnancy discrimination
- providing anti-discrimination training to managers and staff
- focusing on the applicant’s or employee’s qualifications and ability to perform the job
- respond to pregnancy discrimination complaints efficiently and effectively

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Employers are encouraged to contact our law firm with regards to creating, implementing and maintaining an anti-discrimination policy or to defend them against a complaint of pregnancy discrimination.

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