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New pregnancy bias guidance not without controversy

By David C. Henderson

On July 14, the Equal Employment Opportunity Commission released its first comprehensive update on pregnancy discrimination enforcement guidance since 1983.

The new publication, "Enforcement Guidance: Pregnancy Discrimination and Related Issues," and the accompanying Q&A document and fact sheet address the Pregnancy Discrimination Act's amendment of Title VII of the Civil Rights Act of 1964 and the applicability of the 2008 amendment of the Americans with Disabilities Act as it relates to pregnancy-related impairments.

The new materials are not without controversy, and whether they represent a federal agency's overly aggressive leap forward in terms of employee rights or merely a summary of developing case law will depend largely on one's interpretation of the law as it has developed to date.

This explains, at least in part, why only three of the EEOC's five commissioners voted in favor of issuing the guidance, and two of the commissioners went so far as to issue dissenting public statements on the same day that the update was published.

Employers nevertheless would do well to heed the viewpoints expressed. Key points emphasized in the new guidance include the following:

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1) Discrimination based on pregnancy, childbirth or related medical conditions is a form of unlawful sex discrimination within the meaning of Title VII.

Employers are required under Title VII to treat pregnant women the same as non-pregnant applicants or employees who are similar in their ability or inability to work.

As a result, an employer cannot fire, refuse to hire, demote or take any other adverse action against a woman if pregnancy, childbirth or a related medical condition is a motivating factor.

Moreover, the Title VII legal protections apply to all aspects of employment. That includes pay, job assignments, promotions, layoffs, training and fringe benefits (such as leave and health insurance). Such protections also extend to women not currently pregnant but who have the ability or intention to become pregnant.

2) Although pregnancy itself is not a disability within the meaning of the ADA, pregnancy-related impairments can rise to the level of disabilities, and when they do, they trigger the ADA's prohibition against disability discrimination and its requirement of reasonable accommodation.

From the standpoint of the ADA, a pregnancy-related impairment, like any other impairment, constitutes a disability whenever it substantially limits one or more major life activities, substantially limited a major life activity in the past, or is regarded by the employer as a disability.

Pregnancy-related disabilities thus trigger the same reasonable accommodation obligations and the same protections against discrimination as other disabilities.

A reasonable accommodation is a change in the workplace or in the way things customarily are done that enables an individual with a disability to apply for a job, perform a job's essential functions, or enjoy equal benefits and privileges of employment.

An employer may deny a reasonable accommodation to a qualified individual with a disability only if it would result in undue hardship.

Reasonable accommodations that may be necessary for a pregnancy-related disability can include the following:

- Redistributing non-essential functions that a pregnant worker cannot perform, or altering how an essential or marginal function is performed;
- Modifying workplace policies by allowing a pregnant worker more frequent breaks or allowing her to keep a water bottle at a workstation even though the employer generally prohibits employees from keeping drinks at their workstations;
- Modifying a work schedule so that someone who experiences severe morning sickness can arrive later than her usual start time and leave later to make up the time;
- Allowing a pregnant worker placed on bed rest to telework if feasible;
- Granting leave in addition to what an employer would normally provide under a sick leave policy;
- Purchasing or modifying equipment, such as a stool for a pregnant employee who needs to sit while performing job tasks typically performed while standing; and
- Temporarily reassigning an employee to a light-duty position.

3) Because the ADA prohibits "associational discrimination," its protections against disability discrimination extend to the parents of a newborn with a disability.

The ADA prohibits discrimination against applicants and employees based on their "association" with an individual with a disability.

As a result, an employer would violate the ADA if it refused to hire the mother or father of a newborn with a disability because of concern that the mother or father would take too much time off to care for the child or that the child's medical condition would impose high health care costs.

4) Employers generally should avoid asking questions about an applicant's or employee's pregnancy.

Title VII does not prohibit employers from asking applicants or employees about gender-related characteristics such as pregnancy. But employers generally should refrain from asking those questions nevertheless. Such questions could suggest unlawful animus.

Further, the EEOC will consider the fact that an employer has asked such a question when evaluating a charge alleging pregnancy discrimination.

5) The prohibition against pregnancy discrimination includes a prohibition against discrimination because of medical conditions relating to pregnancy.

The Pregnancy Discrimination Act does not allow discrimination because of medical conditions related to pregnancy. Conditions may include symptoms such as back pain; disorders such as preeclampsia (pregnancy-induced high blood pressure) and gestational diabetes; complications requiring bed rest; and the after-effects of a delivery.

Lactation is a pregnancy-related medical condition as well. A lactating employee must be able to address lactation-related needs to the same extent that she and her co-workers are able to address other similarly limiting medical conditions. This may involve a changed schedule or the use of sick leave, depending on circumstances.

The EEOC also points out that breastfeeding mothers who are hourly employees also have rights under other laws, including a provision of the Patient Protection and Affordable Care Act that amended the Fair Labor Standards Act to require employers to provide reasonable break time and a private place for breastfeeding employees to express milk.

6) Adverse employment actions based on assumptions or stereotypes about pregnant workers are unlawful.

An employer necessarily may require that a pregnant worker be able to perform the duties of her job. But adverse employment actions based on mere assumptions or stereotypes about pregnant workers are prohibited, even when the employer believes it is acting in an employee's best interest.

As a result, sex-specific job restrictions based on concerns about fertility, childbearing capacity, or health of the mother or fetus are justified only when the employer can show that lack of childbearing capacity, non-pregnancy or non-fertility is a bona fide occupational qualification, or BFOQ.

7) Harassment based on pregnancy, childbirth or related medical conditions is as unlawful as any other form of sexual harassment.

Unwelcome and offensive jokes or name-calling, physical assaults or threats, intimidation, ridicule, insults, offensive objects or pictures, and interference with work performance motivated by pregnancy, childbirth or related medical conditions can be unlawful harassment.

Harassment is illegal when it is so frequent or severe that it creates a hostile or offensive environment, or when it results in an adverse employment decision.

And as with other forms of sexual harassment, employer liability can result from the conduct of supervisors, co-workers or non-employees over whom the employer has some control.

8) The PDA does not require employers to give preferential treatment to pregnant workers.

The Pregnancy Discrimination Act requires only that an employer treat pregnant workers the same as it treats workers who are not pregnant but who are similar in their ability or inability to work.

As a result, an employer must treat an employee temporarily unable to perform the functions of her job because of her pregnancy or a related medical condition in the same manner as the employer treats other employees similar in their ability or inability to work, whether by providing modified tasks, alternative assignments, or benefits such as disability leave and health insurance.

Thus, an employer can offer light duty to pregnant employees on the same terms that it offers light duty to other workers similar in their ability or inability to work. But if an employer does not provide light duty to employees who are not pregnant, it does not have to do so for pregnant workers.

Similarly, employers with health insurance benefit plans must apply the same terms and conditions for pregnancy-related costs as for medical costs unrelated to pregnancy.

If the plan covers pre-existing conditions, then it must cover the costs of an insured employee's pre-existing pregnancy. If the plan covers a particular percentage of the medical costs incurred for non-pregnancy-related conditions, it must cover the same percentage of recoverable costs for pregnancy-related expenses.

9) The employer must administer leave in an equal manner.

An employer may not force an employee to take leave because she is or has been pregnant, as long as she is able to perform her job.

Conversely, an employer must allow women with physical limitations resulting from pregnancy to take leave on the same terms and conditions as other employees similar in their ability or inability to work.

Also, an employer must hold open a job for a pregnancy-related absence for the same length of time that jobs are held open for employees on sick or temporary disability leave.

And finally, under the Pregnancy Discrimination Act, leave related to pregnancy, childbirth or related medical conditions may be limited to women affected by those conditions.

But parental leave is different; it must be provided to similarly situated men and women on the same terms. In other words, if an employer extends leave to new mothers beyond the period of recuperation from childbirth, it cannot lawfully refuse to provide an equivalent amount of leave to new fathers for the same purpose. MLW

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