

## EEOC Enforcement Guidance Expands Protections against Pregnancy Discrimination

On July 14, the Equal Employment Opportunity Commission published the first comprehensive update of enforcement guidance under the Pregnancy Discrimination Act since 1983. Issued without public comment and over the objection of two EEOC commissioners, the guidance also addresses protections for pregnant workers under the Americans with Disabilities Act. Consistent with the EEOC's identification of pregnancy discrimination as a strategic enforcement priority, the new guidance broadly interprets both statutes to expand protections for past, current, and intended pregnancies and pregnancy-related conditions. The Supreme Court is poised to weigh in on whether, and to what extent, employers may be required to accommodate pregnant workers. It remains to be seen whether the Court will give any deference to this guidance when it does.

### Background

Title VII of the Civil Rights Act of 1964 bans employment discrimination on the basis of race, color, religion, sex, or national origin. The Pregnancy Discrimination Act (PDA), in turn, amended Title VII to prohibit employment discrimination based on pregnancy, childbirth, or related medical conditions.

The Americans with Disabilities Act (ADA) also provides protections against employment discrimination for qualified individuals with pregnancy-related disabilities, and requires employers to reasonably accommodate the needs of both job applicants and employees. Under the ADA, an individual is considered to have a disability if he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment.



**Comment.** A growing number of states and two major cities — Philadelphia and, most recently, New York — already have laws in place requiring employers to provide reasonable accommodations to employees who are pregnant or have pregnancy-related conditions that go beyond the ADA's requirements. For example, New York's law does not require the employee to show that her condition is substantially limiting in order to trigger the reasonable accommodation requirement. (See our [May 29, 2014 For Your Information](#).)

## Enforcement Guidance

On July 14, the Equal Employment Opportunity Commission (EEOC) issued — without public comment and over the objection of two of the five EEOC commissioners — the first comprehensive update of [enforcement guidance](#) on pregnancy discrimination in more than 30 years. The EEOC also issued a related set of [questions and answers](#) (FAQs). The new guidance addresses protections under both the PDA and the ADA for employees affected by pregnancy.

### Expanded Protections and Reasonable Accommodation

The new guidance takes the position that the PDA prohibits discrimination on the basis of current, past, potential, or intended pregnancy, as well as medical conditions related to pregnancy or childbirth. Effectively reversing its prior position that pregnancy is not a disability, the EEOC now says that the PDA gives the same reasonable accommodation rights to pregnant employees who have any kind of work restrictions as the ADA gives to individuals with disabilities.

**Comment.** Legislation ([S.942](#) and [H.R.1975](#)) currently pending in Congress would, if enacted, expand the PDA to make it unlawful for an employer to deny reasonable accommodations for pregnancy-related limitations or to require a pregnant employee to take leave against her wishes. The fate of these bills is uncertain.

According to the guidance, pregnancy-related conditions (such as anemia, sciatica, carpal tunnel syndrome, diabetes, nausea, painful swelling, and depression) may be considered disabilities under the ADA — even if they are only temporary — and trigger a reasonable accommodation obligation on the employer's part. Thus, employers would have to provide accommodations to an employee who is experiencing a normal pregnancy as well as to one who is temporarily unable to fully perform her job due to pregnancy, childbirth, or related medical conditions. In such circumstances, the EEOC would require an employer to grant the same accommodations given to non-pregnant employees with similar inabilities to perform their jobs, such as modified job duties or work schedules, light-duty assignments, or leave.

**Comment.** The US Supreme Court has agreed to review in its next term a federal court of appeals decision that an employer's policy limiting eligibility for light duty to disabled employees and to those with on-the-job injuries did not violate the PDA. It is unclear whether the Court will give any deference to the EEOC's contrary guidance that "an employer may not deny light duty to a pregnant employee based on a policy that limits light duty to employees with on-the-job injuries."

The EEOC also takes the position that lactation is a pregnancy-related medical condition under the PDA — even though it is not incapacitating — and, thus, prohibits employment discrimination on that basis. Further, employers must accommodate lactating employees to the same extent they accommodate other employees with non-incapacitating medical conditions.

**Comment.** The Affordable Care Act (ACA) provides additional protections for nursing mothers, requiring employers to provide reasonable breaks and a private place to express breast milk. (See our [April 21, 2010 For Your Information.](#))

### Medical and Parental Leave

The guidance confirms that pregnant employees must be granted medical leave on the same basis as employees affected by other medical conditions, and accrue seniority and other benefits on the same basis as other medical leaves.

**Comment.** Other laws that affect employers' obligations relating to employee pregnancies and pregnancy-related conditions include the Family and Medical Leave Act, Executive Order 13152 (prohibiting discrimination in federal employment on the basis of parental status), and various state and local employment laws.

Except in very rare and specialized circumstances (where the employer can show that not being pregnant is a *bona fide* occupational qualification), an employer cannot require a pregnant employee to take leave. At the same time, the EEOC takes aim at restrictive leave policies, suggesting that limits on sick leave or service-related requirements for leave may have a disparate impact on pregnant employees.

Although leave related to pregnancy, childbirth, or related medical conditions may be limited under the PDA to women affected by those conditions, employers are required to treat similarly-situated employees equally for purposes of bonding with or providing care for a child (parental leave). Thus, as the guidance makes clear, fathers of newborns would be entitled to parental leave on the same terms that the employer applies to new mothers after recuperating from childbirth.

### Coverage Under Employee Benefit Plans

The guidance confirms that employer-sponsored group health plans must cover pregnancy, childbirth, and related medical conditions, and must do so on the same basis applicable to other conditions. Under the PDA, employers may refuse to provide coverage for abortion unless a full-term pregnancy would endanger the life of the mother. However, the group health plan must cover the cost of treating any medical complications that arise from an abortion.

The guidance also takes the position that the PDA requires employers that provide comprehensive health insurance to provide prescription contraception coverage, and confirms that group health plans must cover prescription contraceptives coextensively with prescription drugs, devices, and preventive services for medical conditions other than pregnancy. Although the ACA's preventive-care mandate generally requires non-grandfathered group health plans to cover contraceptive services, the EEOC does not address application of its guidance to grandfathered plans that are currently exempt from existing contraception requirements. While the FAQs acknowledge that exceptions may exist for certain employers with religious objections to contraceptives, the guidance does not expressly provide for exceptions available under the PDA. (See our [June 30, 2014 For Your Information](#).)

### In Closing

The EEOC enforcement guidance broadly interprets the law to expand protections against discrimination for past, current, and intended pregnancies and pregnancy-related conditions, and to impose new workplace accommodation requirements on employers. With a growing number of jurisdictions adopting workplace accommodation requirements for employees who are affected by pregnancy, regardless of whether they are disabled, employers should ensure that their accommodation policies satisfy federal, state, and local requirements, and that their managers are trained to deal with pregnancy-related accommodation, harassment, and antidiscrimination issues wherever they arise.

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