

## EEOC Issues Updated Enforcement Guidance On Pregnancy Discrimination

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The U.S. Equal Employment Opportunity Commission (EEOC) recently issued Enforcement Guidance on Pregnancy Discrimination and Related Issues, its first comprehensive update on the subject of discrimination against pregnant workers since 1983. While the Enforcement Guidance is not binding in court, it can be persuasive authority in litigation and the EEOC will rely upon it when making determinations related to discrimination charges.

The guidance reinforces the fundamental Pregnancy Discrimination Act (PDA) requirements that an employer may not discriminate against an employee on the basis of pregnancy, childbirth, or related medical 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. It also explains how the definition of "disability" within the Americans with Disabilities Act as amended by the ADA Amendments Act of 2008 (collectively referred to as the "ADA") might apply to workers with impairments related to pregnancy. Although pregnancy itself is not impairment within the meaning of the ADA, some pregnant workers may have impairments related to their pregnancies that qualify as "disabilities" under the ADA. A number of pregnancy-related impairments may be considered disabilities, even though they are temporary, such as pregnancy-related gestational diabetes, sciatica, and preeclampsia.

If a pregnancy-related impairment rises to the level of a disability under the ADA, then an employer may need to evaluate potential accommodations to determine whether such an accommodation is reasonable, does not cause undue hardship, and would allow the employee to perform the essential functions of her job. The EEOC's Guidance provides the following examples of accommodations that may be deemed reasonable and necessary for a pregnancy-related disability:

- Redistributing marginal or nonessential functions (for example, occasional lifting) 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 work remotely where feasible;
- Granting leave in addition to what an employer would normally provide under a sick leave policy; and
- Temporarily reassigning an employee to a light duty position.

Finally, the guidance sets forth best practices for employers to consider adopting in the workplace, including the following:

- Do not ask questions about the applicant's or employee's pregnancy status, children, plans to start a family, or other related issues during interviews or performance reviews.

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- Make hiring, promotion, and other employment decisions without regard to stereotypes or assumptions about women regarding pregnancy, childbirth, or related medical conditions.
- When reviewing and comparing the work histories of applicants or employees who have taken pregnancy-related leave for hiring or promotional purposes, focus on the work experience and accomplishments of the employee/applicant with interrupted service and give the same weight to cumulative relevant experience that would be given to workers with uninterrupted service.
- If there is a restrictive leave policy (such as restricted leave during a probationary period), evaluate whether it disproportionately impacts pregnant workers and, if so, whether such a policy is necessary for business operations. Ensure that the policy notes that an employee may qualify for leave as a reasonable accommodation.
- Monitor compensation practices and performance appraisal systems for patterns of potential discrimination based on pregnancy, childbirth, or related medical conditions.
- Review any light duty policies to ensure that such policies are structured to provide pregnant employees access to light duty equal to any light duty provided to non-pregnant with similar limitations on their ability to work.
- If a particular accommodation requested by an employee cannot be provided, explain why, engage in the interactive process and explore the possibility of providing an alternative accommodation.

The EEOC's Enforcement Guidance, along with a Questions and Answer document and Fact Sheet for small businesses, are available on the EEOC's website:

- The Enforcement Guidance
- Q&A document
- Fact Sheet

Miller Canfield's Employment and Labor Group is available to assist employers in auditing current policies to ensure compliance with the updated guidance.

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