ROBERT B. SEYBERT
(402) 475-1075 (OFFICE)
(402) 475-9515 (FACSIMILE)
RSEYBERT@BAYLOREVNEN.COM
WWW.BAYLOREVNEN.COM

BAYLOR, EVNEN, CURTISS, GRIMIT & WITT, LLP
WELLS FARGO CENTER
1248 O STREET, SUITE 600
LINCOLN, NEBRASKA 68508
PHONE- 402.475.1075
BAYLOREVNEN.COM

What Employers Need to Know about the EEOC's New Pregnancy Discrimination Enforcement Guidelines

The Equal Employment Opportunity Commission ("EEOC") recently issued new enforcement guidelines on the treatment of pregnant employees under the federal Pregnancy Discrimination Act ("PDA"), a 1978 amendment to Title VII of the Civil Rights Act, and most of the federal workplace laws touching on pregnancy. It has been more than 30 years, with the 1983 release of pregnancy-related materials, since the EEOC has released guidelines on this important topic. As expected, the EEOC took an expansive view of the protections for pregnant employees. As most attorneys and HR professionals are aware, the EEOC's enforcement guidelines aren't law, nor do they create law, but they have considerable implications as it is the agency that upholds the nation's federal anti-discrimination laws. However, it is important to note that these new guidelines are a blue print for what the EEOC and affiliated state agencies will be looking for with investigations of pregnancy charges filed under federal law.

With respect to the Americans with Disabilities Act ("ADA") and pregnancy as a "disability," the new guidelines state that, "[a]lthough pregnancy itself is not an impairment within the meaning of the ADA, and thus is never on its own a disability, some pregnant workers may have impairments related to their pregnancies that qualify as disabilities . . . even though they are only temporary." Thus, routine pregnancy-related conditions that did not previously rise to the level of disability, such as back pain, lifting restrictions, increased water intake, or other conditions, can now be considered disabilities covered by the ADA, which entitles workers to accommodations at work.

The EEOC's guidance is effective immediately and clarifies the EEOC's position on a number of topics involving pregnant employees. For example:

- Absent proof of a bona fide occupational qualification, employees cannot be compelled to take leave just because they are pregnant.
- The PDA prohibits discrimination based not only on current pregnancies, but also on past pregnancies, an employee's potential, or intention, to become pregnant in the future, infertility treatments, the use of contraception, abortion, and lactation.
- Leave related to pregnancy, childbirth, or related medical conditions can be limited to women affected by those conditions, but parental leave must be provided on an equal basis to men and women. At present, both mothers and fathers qualify for unpaid leave under the Family and Medical Leave Act if they have worked full time for at least one year for a larger company, but fathers tend to have little, if any, paid parental leave compared to mothers, which the EEOC now says is discriminatory.
- Reasonable accommodations for pregnancy-related impairments may include redistributing marginal job functions, altering how an essential or marginal job function is performed, modifying work schedules, modifying policies, and providing modified or light duty work.

A significant portion of the EEOC's guidance focuses on light duty work for pregnant employees. The EEOC's position is that employers must treat a pregnant employee who is temporarily unable to perform her job in the same manner as it treats other non-pregnant employees with similar limitations in their ability to work. The EEOC also says that if an employer provides light duty assignments to any of its employees who temporarily are unable to perform their full duties, then similar accommodations should be made for pregnant employees who cannot perform their full duties. According to the EEOC's guidance, an employer can limit the number of light duty positions that it has available to its workforce, but it cannot prohibit pregnant employees from obtaining those positions based on the source of their limitations (i.e. workers' compensation claims). The EEOC's guidance also suggests that an unpaid leave of absence is not a reasonable accommodation for a pregnant employee who can perform many of her essential job functions, or where other light duty work is available.

The impact for employers at this point is unknown because the United States Supreme Court has agreed to hear a case on this very issue. The case, *Peggy Young v. United Parcel Service*, was brought by a pregnant UPS worker who was denied light duty work and terminated when her doctor gave her lifting restrictions based on her pregnancy. The Court labeled UPS's policy "pregnancy-blind" and concluded that forcing UPS to accommodate Young would grant her preferential treatment over non-pregnant workers who were denied an accommodation under the policy because their injury-induced restrictions did not rise to the level of an ADA disability. The court rejected Young's invitation to "transform an antidiscrimination statute into a requirement to provide accommodation to pregnant employees, perhaps even at the expense of other, nonpregnant employees." The Supreme Court will hear the case in the 2014–2015 term, and its decision could make the EEOC's guidelines moot. In the meantime, employers can expect the EEOC to attempt to enforce the PDA against those who do not reasonably accommodate the restrictions of pregnant workers.

It is important for employers to tread carefully and seek legal assistance when difficult situations arise with pregnant workers. Employers should consider revising and updating their pregnancy accommodation policies and procedures to comply with the new EEOC guidelines. These guidelines highlight the EEOC's willingness to litigate pregnancy-related discrimination complaints, so employers should be aware of potential pregnancy discrimination claims.

For more information regarding the EEOC or company pregnancy policies, please contact Robert Seybert at rseybert@baylorevnen.com or call 402-475-1075 to ask for any of the firm's employment lawyers.