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Equal Employment Opportunity Commission Updates Pregnancy Discrimination Guidance

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In the wake of the U.S. **Supreme Court's** decision in **Young v. UPS**,^[1] the **EEOC** has modified those aspects of its Enforcement Guidance on Pregnancy Discrimination and Related Issues ("Guidance") that deal with disparate treatment and light duty.

Under the prior guidance, issued in 2014, the EEOC asserted that a pregnant worker could prove a violation of the **Pregnancy Discrimination Act ("PDA")** simply by showing that she was "treated differently than a non-pregnant worker similar in his/her ability or inability to work." The 2014 guidance also took the position that an employer could not refuse to offer a pregnant worker an accommodation by relying on a policy that provides light duty only to workers injured on the job. The Supreme Court, however, was highly critical of and rejected this interpretation of the PDA, finding that it would require employers who provide a single worker with an accommodation to provide similar accommodations to all pregnant workers, irrespective of other criteria.

Thus, in the Guidance the EEOC deleted that language and an entire section that discussed its interpretation of "Persons Similar in Their Ability or Inability to Work." The EEOC has updated its discussions about disparate treatment and light duty work assignments for pregnant workers by adopting the Supreme Court's holding that a plaintiff may establish a *prima facie* case of pregnancy discrimination by following the *McDonnell Douglas* burden-shifting framework (*i.e.*, by showing that she is pregnant, that she sought accommodation which was not granted, and that the employer accommodated others similar in their ability or inability to work). Further, a plaintiff may show that the legitimate, non-discriminatory reasons for the employer's actions - even if supported by a facially neutral policy - were pretextual by showing the employer's policies caused a "significant burden" on pregnant workers without reasons that were "sufficiently strong to justify the burden."

To illustrate, the Guidance states that a practice of providing light duty to a large percentage of non-pregnant employees, while failing or refusing to provide light duty to a large percentage of pregnant workers, might demonstrate that the policy significantly burdens pregnant employees. The Guidance, however, fails to specify what it considers a "large percentage," and provides no detail or examples as to what reasons might be sufficiently strong to justify such a burden.

This is the second time in two years that the EEOC has updated its enforcement guidance in this area. Last year, the EEOC revamped the Guidance to provide an overview of coverage under the PDA, to address the impact of the inclusion of pregnancy-related impairments under the Americans with Disabilities Amendments Act of 2008, and to address other benefits that must be provided to pregnant workers. These aspects of the Guidance remain unchanged.

Employers should take note of the EEOC's increased scrutiny of facially neutral policies that may impose significant burdens on pregnant workers. The EEOC's current Strategic Enforcement Plan identifies the



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accommodation of pregnancy-related limitations as an emerging issue that will be prioritized, and the updated Guidance on this subject is evidence of the agency's focus in this area.

[1] *Young v. UPS*, 135 S. Ct. 1338 (2015).

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