Thompson's
ADA Compliance Guide

Human Resources Series | THOMPSON | August 2014 | Vol. 25, No. 8

EEOC: All Pregnant Workers Entitled to Accommodations

Supreme Court will weigh in during next term

Pregnant employees are entitled to workplace accommodations, according to new guidance issued July 14 by the U.S. Equal Employment Opportunity Commission.

Because the Pregnancy Discrimination Act requires that employers treat pregnant employees the same as other workers "not so affected but similar in their ability or inability to work" — and because the Americans with Disabilities Act requires employers to accommodate workers with temporary disabilities — employers must accommodate pregnant employees. This may include providing modified tasks, alternative assignments, leave or fringe benefits, the guidance states.

The guidance also took aim at a case pending before the U.S. Supreme Court. The Court has agreed to hear *Young v. UPS*, a case from last year in which the 4th

See *Pregnant Employees*, p. 4

Guest Columnist

In Light of New Guidance, Review all Pregnancy Accommodation Requests

By Michael Arnold, Esq.

Updated enforcement guidance on pregnancy discrimination was released July 14 by the U.S. Equal Employment Opportunity Commission — the first time the EEOC has done so in more than 30 years. The new guidance has significant implications for how employers should accommodate pregnant employees and structure their parental leave policies, and it also tees up a potential issue regarding employer coverage of contraceptives in their health insurance plans.

Quick Primer on the Relevant Statutory Law

The Pregnancy Discrimination Act of 1978, one of the laws the EEOC enforces, expanded the scope of the definition of "sex" discrimination under Title VII of the Civil Rights Act of 1964 to include a prohibition against discrimination because of pregnancy, childbirth or related medical conditions. The PDA does not include a specific requirement that employers accommodate

See *Guidance*, p. 7

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Alcoholic Truck Driver Unqualified Under ADA

A truck driver with alcoholism was not qualified for his job under the Americans with Disabilities Act, the 11th U.S. Circuit Court of Appeals has ruled. It was up to the employer to interpret the U.S. Department of Transportation's ban on "current" alcoholics, the court said. Despite having completed a treatment program, the employer was entitled to decide that his diagnosis — made one month prior — was too recent to allow him to return to work.

Facts of the Case

Sakari Jarvela worked as a commercial truck driver for Crete Carrier Corp. When he was diagnosed with alcoholism, he took Family and Medical Leave Act leave for treatment but when he completed the program a month later, Crete fired him, citing DOT regulations that prohibit individuals with a "current clinical diagnosis of alcoholism" from driving commercial trucks. Jarvela sued, alleging that the company discriminated against him based on his disability. It also interfered with his FMLA right to reinstatement and retaliated against him for taking leave, he alleged.

The U.S. District Court for the Northern District of Georgia granted summary judgment for the employer, finding that Jarvela was not a "qualified individual" under the ADA. It also said his FMLA interference claim had no merit because there was unrebutted evidence that Crete would have fired him because of his alcohol dependence regardless of his FMLA leave. In addition, Jarvela's retaliation claim failed because he failed to show a causal connection between his leave and his termination, the court said.

Thompson's
ADA Compliance Guide

DIRECTOR OF PUBLISHING: **TRAVIS HICKS**
ASSOCIATE PUBLISHER: **GWEN COFIELD**
EDITOR: **KATHRYN MCGOVERN**
SENIOR PRODUCTION MANAGER: **LISA LANG**

Thompson's ADA Compliance Guide (USPS 006-258) is published monthly by Thompson Information Services, 4340 East-West Highway, Suite 300, Bethesda, MD 20814. Periodicals Postage Paid at Bethesda, MD and at additional mailing offices. (ISSN 1054-5948 print) (ISSN 2372-4420 online)

POSTMASTER: Send address changes to: *Thompson's ADA Compliance Guide*, Thompson Information Services, P.O. Box 41868, Austin, Texas 78704.

This newsletter for *Thompson's ADA Compliance Guide* includes looseleaf supplements to the *Guide* in March, June, September and December. For subscription service, call 800-677-3789. For editorial information, call 202-872-4000. Please allow four to six weeks for all address changes.

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ADA Claims

Jarvela appealed, arguing that the lower court erred in finding that he is not a qualified individual. A qualified individual under the ADA is one who "satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and with, or without reasonable accommodation, can perform the essential functions of such position," the court explained. Jarvela's job description states that an essential function of his position is the ability to qualify as a commercial truck driver as defined by DOT regulations.

Under DOT regulations, a person is not qualified to drive a commercial motor vehicle if he has a "current clinical diagnosis of alcoholism." The regulations fail, however, to say who decides whether a diagnosis is "current." Jarvela argued that it should be a DOT medical examiner; Crete argued that it should be the employer. "Crete has the better argument," the court said. "DOT regulations unambiguously place the burden on an employer to ensure that an employee meets all qualification standards. [Therefore], the employer must determine whether someone suffers from a current clinical diagnosis of alcoholism." Crete decided that Jarvela was not qualified under DOT regulations to drive a commercial truck, the court said. "The district court found no fault with Crete's determination. And we find no fault with the district court's determination upholding Crete's."

FMLA Claims

Jarvela also alleged that the lower court erred in dismissing his FMLA claims. Crete, however, said that it did not interfere with his rights because it would have fired him regardless of whether he took leave. Because Jarvela could not present evidence to the contrary, his interference claim fails, the court said. Jarvela also failed to show that Crete retaliated against him for taking leave, the 11th Circuit said, agreeing with the lower court that Jarvela could not show that the decision to fire him was related to his FMLA leave. Temporal proximity alone is insufficient, the court concluded (*Sakari Jarvela v. Crete Carrier Corp.*, No. 13-11601 (11th Cir. June 18, 2014)).

Employer Takeaways

Despite the favorable ruling for Crete, employers should remember that an employee with a disability is considered qualified for his job if he can perform the essential functions of his job with or without an accommodation. Employees may be entitled to accommodations such as reassignment or leave beyond that provided by the FMLA. The 11th Circuit did not consider Crete's duty to accommodate Jarvela because of a technicality: he failed to properly allege a failure to accommodate at the district court level. ❖

Supreme Court Will Review EEOC's Enforcement Tactics

At the request of both parties, the U.S. Supreme Court has agreed to review an appeals court opinion holding that courts cannot challenge the pre-litigation tactics of the U.S. Equal Employment Opportunity Commission.

The dispute stems from language in Title VII of the Civil Rights Act, which prohibits discrimination based on race, color, religion, sex and national origin.

EEOC enforces that law and, if its finds reasonable cause to believe a charge of discrimination, it must "endeavor to eliminate any ... alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." EEOC can sue only after it "has been unable to secure from the respondent a conciliation agreement acceptable to the Commission." Because the law only states that the efforts must be acceptable to the commission, there is disagreement as to whether anyone can challenge those efforts.

The commission sued employer Mach Mining in September 2011, alleging that the company violated Title VII by failing to hire any female miners since beginning operations in 2006, despite having received applications from many highly qualified women.

Mach Mining chose to defend against the allegations in part by criticizing EEOC for failing to properly conciliate before filing its complaint in court. The case eventually made its way to the 7th Circuit, which disagreed with the employer, holding the law makes clear that conciliation is an informal process entrusted solely to EEOC's judgment. It states that EEOC may sue if it "has been unable to secure from the respondent a conciliation agreement *acceptable to the Commission*" (emphasis added).

"Congress's failure to provide even the outlines of such a standard tends to show that it did not intend for judicial review of conciliation through an implied affirmative defense," the 7th Circuit concluded.

Because EEOC's conciliation efforts are not judicially reviewable, there is no affirmative defense by which employer can allege inadequate efforts, the court said. (See *In 'Landmark' Ruling, 7th Cir. Holds Employers Cannot Question EEOC's Pre-litigation Efforts*, February newsletter.)

The employer asked the Supreme Court to hear the case, and EEOC backed its bid for certification, saying that that lower courts need to be instructed that they cannot review the commission's process.

By reviewing *Mach Mining*, the Court will resolve a split among the federal courts of appeal. The 2nd, 4th, 5th, 6th, 8th, 10th and 11th Circuits all disagree with the 7th, EEOC said (*EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178 (4th Cir. 1979); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104 (5th Cir. 1981); *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097 (6th Cir. 1984); *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012); *EEOC v. Zia Co.*, 582 F.2d 527 (10th Cir. 1978) and *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256 (11th Cir. 2003).

The 7th Circuit acknowledged the split it created with its sister circuits but said "we are not persuaded to join them." ❖

‘Inflexible’ Leave Policy Did Not Discriminate Against Disabled Employee, 10th Circuit Affirms

Kansas State University’s leave policy — which grants all employees a full six months of sick leave — more than sufficiently complies with the Rehabilitation Act, an appellate court has ruled. The decision dismissed the claims of a professor who lost her job after failing to return to work after more than six months — and then complained that the university’s “inflexible” leave policy discriminated against workers with disabilities because it did not provide additional leave as a reasonable accommodation. The case is *Hwang v. Kansas State University*, No. 13-3070 (10th Cir., May 29, 2014).

Section 504 of the Rehabilitation Act prohibits recipients of federal funding from discriminating based on disability. It holds employers to the same standards as Title I of the Americans with Disabilities Act.

Facts of the Case

Grace Hwang was an assistant professor at KSU and taught for 16 years on a year-to-year contract. In her last year of employment, Hwang, as a term employee, had no contractual rights beyond June 12, 2010.

In the summer of 2009 Hwang was diagnosed with leukemia and underwent a bone marrow transplant and a series of chemotherapy treatments that incapacitated her for more than six months.

At the time she sought treatment, Hwang had accumulated approximately two months of leave and intended to apply that time to her treatment-induced absence. Additionally, Hwang applied for, and received, six months of paid leave through KSU’s shared leave program, which is the maximum amount of shared leave that an employee may use.

In December 2009, KSU’s human resources department contacted Hwang and advised her to apply for long-term disability benefits through the Kansas Public Employees Retirement System. Hwang said she believed that HR was telling her to apply for LTD to ensure that she would continue to receive benefits in case she was unable to return to work by the summer of 2010.

In February 2010, Hwang was approved for LTD, which included 60 percent of her salary. By accepting the LTD option over a continued leave of absence without pay, Hwang would be responsible for paying her own health insurance premium of $1,340 per month. Moreover, she would be forced to resign from her position at KSU, effective Feb. 21. Hwang, a single mother of two, accepted LTD but also expressed a desire to return to work as she unsuccessfully applied for two other positions at KSU — special assistant to the president for community relations and interim associate provost for international programs.

On March 1, 2010, Hwang attempted to receive scheduled chemotherapy, but was informed that KSU had

See *Leave Policy*, p. 5

Pregnant Employees (continued from p. 1)

U.S. Circuit Court of Appeals ruled that a corporate policy that does not include pregnancy among the conditions making an employee eligible for light duty is a “neutral and legitimate business practice.”

In *Enforcement Guidance: Pregnancy Discrimination and Related Issues*, EEOC made clear that “an employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee’s limitations (e.g., a policy of providing light duty only to workers injured on the job).” In other words, if an employer provides light duty for any workers, it also must do so for pregnant employees.

EEOC has effectively imported the ADA into the PDA using a disparate treatment analysis, said David K. Fram, director of ADA and EEO services for the National Employment Law Institute. Now, women affected by pregnancy, childbirth or related medical conditions are entitled to accommodations regardless of whether they have a disability, he said.

Therefore, requested accommodation for pregnancy will be subject to the ADA’s undue hardship analysis, the commission said. In addition, an employee trying to prove that her employer failed to accommodate her pregnancy can do so by showing that reasonable accommodations are provided under the ADA to individuals with disabilities who are similar in their ability or inability to work.

Supreme Court

The Supreme Court also will take a stance on whether the PDA requires employers to accommodate pregnant employees, it announced July 1.

The court agreed to review *Young v. United Parcel Service, Inc.*, in which the 4th Circuit held that UPS did not violate PDA by limiting light-duty accommodations to employees: (1) injured on the job; (2) disabled as defined by the Americans with Disabilities Act; or (3) legally

See *Pregnant Employees*, p. 6

cancelled her health insurance. Hwang contends that she was never told that her insurance would be cancelled, nor was she made aware of her COBRA rights.

One week later, Hwang filed an internal disability discrimination complaint against KSU and initiated the grievance process. After a formal hearing, KSU informed Hwang on May 18, 2010, that the university had considered her complaint, but concluded that no discrimination occurred and it would take no further action. Hwang subsequently filed a federal lawsuit asserting four causes of action against KSU: (1) discrimination; (2) failure to accommodate; (3) retaliation; and (4) disparate treatment. The U.S. District Court for the District of Kansas dismissed all four claims and Hwang appealed.

Appeals Court Weighs in

The 10th U.S. Circuit Court of Appeals found nothing "inherently discriminatory" in KSU's "inflexible" six-month leave policy. On the contrary, the court said, "in at least one way an inflexible leave policy can serve to protect rather than threaten the rights of the disabled — by ensuring disabled employees' leave requests aren't secretly singled out for discriminatory treatment, as can happen in a leave system with fewer rules, more discretion, and less transparency."

The Supreme Court's rejection of the notion that inflexible seniority policies necessarily discriminate against individuals with disabilities could just as easily apply to inflexible leave policies, the circuit court said, citing *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

The High Court noted that such inflexible policies can: (1) provide important employee benefits by creating and fulfilling employee expectations of fair, uniform treatment; (2) introduce an element of due process; and (3) limit potential "unfairness in personnel decisions."

Hwang, in support of her appeal, directed the 10th Circuit to the following sentence from the U.S. Equal Employment Opportunity Commission's *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*:

> If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its "no-fault" leave policy to provide the employee with the additional leave, unless it can show that: (1) there is another effective accommodation that would enable the person to perform the essential functions of his/her position; or (2) granting additional leave would cause an undue hardship.

However, the court found that the agency also expressly states that "an employer does not have to retain an employee unable to perform her essential job functions for six months just because another job she can perform will open up then." An employer doesn't have to do so much, the EEOC says, "because six months is beyond a reasonable amount of time."

"[T]he EEOC seems to agree with our conclusion that holding onto a non-performing employee for six months just isn't something the Rehabilitation Act ordinarily compels," the 10th Circuit concluded.

Employer Takeaways

When is a modification to an inflexible leave policy legally necessary to provide a reasonable accommodation? What distinguishes an absence that enables an employee to discharge the essential duties of her job — and may even amount to a legally compelled reasonable accommodation?

These are the questions that the *Hwang* court asked. The answers, it determined, usually depend on factors like:

- duties essential to the job in question;
- the nature and length of the leave sought; and
- the impact on fellow employees.

"The idea of accommodation is to enable an employee to perform the essential functions of his job," the *Hwang* court opined. "An employer is not required to accommodate a disabled worker by … eliminating an essential function of the job."

Franczek Radelet attorney Jeff Nowak cautioned employers from overly celebrating a circuit decision that covers jurisdictions in Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming.

"On one hand, [the *Hwang* court's] reasoning is of tremendous value to employers, who collectively have been yearning for guidance on how much leave they have to provide their employees before termination becomes an option," says Nowak. "On the other hand, this is the opinion of one appellate court. If you placed this issue in front of a handful of other appellate courts, an employer could end up with a far different result — or one that was not nearly as precise as this court's guidance."

Nowak echoed the *Hwang* court's comments that reasonable accommodations are all about "enabling employees to work, not to not work." However, Nowak advised employers to remember one important principle: "individually assess the situation of every employee so as to help return them to work." ❖

Princeton HealthCare to Pay $1.35 Million To Settle EEOC Suit on Disability Discrimination

Blanket leave policy too rigid to properly engage in ADA's interactive process

Princeton HealthCare System will pay $1.35 million and will undertake significant remedial measures to settle a disability discrimination lawsuit brought by the U.S. Equal Employment Opportunity Commission. EEOC's suit alleged that PHCS' "fixed leave policy" failed to consider leave as a reasonable accommodation, in violation of the Americans with Disabilities Act.

Since PHCS' leave policy merely tracked the requirements of the federal Family Medical Leave Act, employee leaves were limited to a maximum of 12 weeks. This meant that employees who were not eligible for FMLA leave were fired after being absent for a short time, and many more were fired once they were out more than 12 weeks.

"This case should send a clear message that a leave of absence is a reasonable accommodation under the law," said Robert D. Rose, regional attorney of EEOC's New York District Office. "Policies that limit the amount of leave, even if they comply with other laws, violate the ADA when they call for the automatic firing of employees with a disability after they reach a rigid, inflexible leave limit."

Under the consent decree settling the suit, PHCS is prohibited from having a blanket policy that limits the amount of leave time an employee covered by the ADA may take. PHCS must instead engage in an interactive process with covered employees, including employees with a disability related to pregnancy, when deciding how much leave is needed.

"Employers must understand that fixed leave policies, by definition, limit the opportunity for the employee and employer to engage in the interactive process and determine whether leave may be a reasonable accommodation under the federal law," said EEOC senior trial attorney Rosemary DiSavino.

In addition, PHCS can no longer require employees returning from disability leave to present a fitness-for-duty certification stating that they are able to return to work without any restrictions. PHCS also agreed that it will not subject employees to progressive discipline for ADA-related absences, and will provide training on the ADA to its workforce.

EEOC will monitor PHCS's compliance with the decree over the next four years and will distribute the $1.35 million to employees who were unlawfully terminated under PHCS's former policy.

The case is *EEOC v. Princeton HealthCare System*, No. 3:10-cv-04126 (D.N.J. June 26, 2014).

This is the latest in a series of cases challenging unlawful leave policies, and the relief obtained furthers EEOC efforts to address emerging and developing issues under ADA, which is one of six national priorities identified by EEOC's Strategic Enforcement Plan.

Other significant resolutions of EEOC cases involving leave and attendance policies include Interstate Distributor ($4.85 million nationwide resolution challenging maximum 12-week leave policy), Supervalu ($3.2 million resolution challenging termination of approximately 1,000 employees at the end of medical leave), Sears ($6.2 million resolution challenging automatic termination policy and failure to accommodate employees injured at work) and Verizon ($20 million nationwide resolution challenging "no fault" attendance policy). ❖

Pregnant Employees (continued from p. 4)

unable to work as truck drivers due to a loss of their U.S. Department of Transportation certification.

In appealing to the Supreme Court, Peggy Young alleged that the 4th Circuit disregarded PDA's text, which states that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."

Both UPS and EEOC recommended that the Court decline to hear the case, arguing that review of the case is unnecessary, largely because of the commission's then-upcoming guidance.

Lawmakers

Congress also is considering the Pregnant Workers Fairness Act (S. 942), which would require accommodations for pregnancy, childbirth or related medical conditions, unless it would impose an undue hardship on the business. The law also would make it illegal to deny opportunities to an applicant or employee because of potential needed accommodations and to force a pregnant employee or applicant to accept leave or any other accommodation.

The bill was introduced May 2013 and referred to the Senate's Committee on Health, Education, Labor and Pensions. ❖

Guidance (continued from p. 1)

pregnant workers. But it does require employers to treat pregnant workers at least as well as non-pregnant workers who are similar in their inability to work.

The Americans with Disabilities Act prohibits discrimination against disabled employees and requires employers to accommodate them. A "disabled" employee, generally, is someone with a physical or mental impairment that substantially limits one or more major life activities, or someone who has a record of or who is regarded as having a disability. In 2008 Congress passed the ADA Amendments Act, which expanded ADA's definition of "disability" to cover, among other things, temporary and less severe impairments and to clarify that major life activities include activities like lifting, walking, standing or bending.

It is widely known that pregnancy itself does not qualify as a disability under the ADA. However, this does not necessarily mean that an employer is relieved from reasonably accommodating a pregnant worker under the ADA or the PDA. Here's why: "Impairments" related to pregnancy (like hypertension or gestational diabetes) that "substantially limit a major life activity" (like lifting) likely now qualify as disabilities under the ADA requiring reasonable accommodation. Moreover, as we will soon discuss, EEOC has taken the position in its new guidance that the PDA requires accommodation for all pregnancies.

EEOC's New Guidance

Specifically, the EEOC's new guidance addresses: the fact that the PDA covers not only current pregnancy, but discrimination based on past pregnancy and potential to become pregnant; lactation as a covered condition; when employers may have to provide light duty for pregnant workers; leave for pregnancy and for related conditions; a prohibition against requiring pregnant workers to take leave; the requirement to provide parental leave (which is distinct from leave associated with childbearing or recovery) to similarly situated men and women on the same terms; accommodations for workers with pregnancy-related impairments under the ADA; and best practices for employers to avoid unlawful discrimination against pregnant workers. Here are some quick takeaways from the guidance:

Employers Should Accommodate Pregnant Workers (at Least For the Moment)

While the PDA does not include an explicit requirement that employers accommodate pregnant workers, EEOC updated its guidance to effectively read one into the statute. Here is the relevant language from the EEOC's guidance:

> The ADAAA expanded the definition of disability to include employees with conditions requiring work-related restrictions similar to those needed by pregnant women. For example, someone who, because of a back impairment, has a 20-pound lifting restriction that lasts for several months would be an individual with a disability under the ADA entitled to reasonable accommodation, absent undue hardship. The same individual would be an appropriate comparator for PDA purposes to a woman who has a similar restriction due to pregnancy.

In other words, you will now have to accommodate the pregnant worker because she will be the same or similar to the temporarily disabled worker in her ability or inability to work.

Pregnant Workers More Likely to Seek ADA Protection

The updated guidance also confirms that the recent amendments to the ADA now make it much easier for pregnant workers to demonstrate that their pregnancy-related impairments qualify as disabilities under the ADA and are subject to reasonable accommodation. The guidance identifies various pregnancy-related impairments that could qualify as disabilities under the ADA.

Potential Accommodations for Pregnant Workers

The EEOC guidance includes specific examples of reasonable accommodations that might be required for pregnant employees. These include:

- Redistributing marginal functions (¶214-1) that the employee is unable to perform due to the disability.
- Altering how a job function is performed, such as modifying standing or lifting requirements.
- Modifying policies by, for example, allowing a worker to have water near her desk despite a policy prohibiting it.
- Purchasing or modifying equipment — for example, so an employee working at a counter can sit on a stool.
- Modifying work schedules, such as allowing a worker to see a doctor during the day make up the missed time.
- Granting leave (which may be unpaid leave) in addition to what an employer would normally provide.
- Temporary assignment to a light-duty position.

The standard rules apply to the accommodation — it must, of course, be reasonable, and the employer can select the one that it prefers. It also can refuse to provide the accommodation if it would pose an undue hardship.

Treat Men Equally When it Comes to Parental Leave

It's certainly acceptable to provide women with separate paid or unpaid leave to recuperate from childbirth or childbirth-related conditions. But you cannot provide additional paid or unpaid parental leave to bond and/or care for the

See *Guidance*, p. 8

Guidance (continued from p. 7)

child to women and not equally to men. Such a policy will violate the law, according to the EEOC. Therefore, confirm that your parental leave-related policy makes this distinction.

Hobby Lobby Fight Likely to Enter Civil Rights Space

The EEOC guidance sidestepped any substantive comment on the recent *Hobby Lobby* decision's application to Title VII or other laws. In that case, the Supreme Court held that the Affordable Care Act's contraceptive mandate violated the federal Religious Freedom Restoration Act as applied to closely held family for-profit corporations whose owners have religious objections to providing certain types of contraceptives. The guidance does note that an employer may violate the PDA by excluding prescription contraceptives from a health insurance plan that otherwise offers comprehensive coverage to its employees, but the EEOC took no position whether certain employers, like those discussed in Hobby Lobby, might be exempt from the PDA's requirements under the First Amendment or RFRA.

The *Young v. UPS* Case

It will be interesting to see how, if at all, the U.S. Supreme Court addresses part of the guidance when it hears the *Young v. UPS* appeal in its next term. In that case, a UPS part-time driver asked her employer to accommodate a lifting restriction. UPS rejected her request, stating that it only accommodated employees: (1) injured on the job; (2) "disabled" under the ADA; and (3) who lost their U.S. Department of Transportation certification because of a failed medical exam, lost license or involvement in an accident.

Young sued in 2007 (before the passage of the ADA amendments) for, among other reasons, pregnancy discrimination. UPS won on summary judgment at the trial court level and the 4th U.S. Circuit Court of Appeals affirmed, concluding that UPS' accommodation policy applied to pregnant and non-pregnant workers equally and that UPS was not required to add pregnancy as a fourth category. Young asked the U.S. Supreme Court to review the decision, which in turn asked the U.S. Solicitor General to weigh in. In an amicus curiae or "friend of the court" brief, the Solicitor General asked the Court to decline to review because the enforcement guidance, which would soon be on its way, would take the position that employers must accommodate pregnant workers. In other words, it saw no need for the Supreme Court to fix a problem the lower courts could resolve themselves. Of course, this didn't help Young, who sued before the passage of the amendments. The Supreme Court promptly ignored the Solicitor General's request granting review of the appeal, which it will hear in its next term. The Supreme Court has refused to endorse the EEOC's guidance before (more recently in the Vance case when it rejected the EEOC's definition of supervisor), and employers await word whether it will do so again, or at least clarity from the court on what obligations they do have to accommodate pregnant workers.

Recommendations

In light of the guidance and while we wait to hear from the Supreme Court, we recommend these best practices:

Consider accommodating your pregnant workers. The guidance confirmed what we expected: that employers may no longer routinely dismiss reasonable accommodation requests related to pregnancy. You should carefully review these requests to avoid potential liability.

Try to be practical; see the bigger picture. If accommodating pregnancy requests will prove inexpensive, consider allowing them even if you believe not doing so is lawful. And even if the accommodation request may be expensive, measure it against the other potential benefits such as a corresponding increase in employee morale, your ability to retain valuable employees and your reputation in the market — benefits that may ultimately outweigh the cost of the accommodation and enhance your bottom line.

Comply with all laws. You may already be subject to a state and/or local statute (such as in Maryland and New York City) that explicitly obligates you to accommodate pregnant workers. If you are and you aren't accommodating your pregnant workers, it's time to change course.

Enforce policies consistently. Real problems arise for employers that reject outright requests by pregnant employees that they would grant for other workers. This may seem obvious, but is lost on many employers who treat pregnancy-related requests uniquely. For example, all other things being equal, if you would advance a non-pregnant worker vacation days because she wanted to join her friends on a bachelorette party, then you should think twice before denying a vacation advance request by a pregnant worker who wants to rest at home in the last week of her term.

Don't make decisions on behalf of pregnant workers. Employers often get into trouble when they try to modify a pregnant employee's work situation (for example, "I am not going to let you lift anything heavy while you are pregnant"). You can't do that except in very limited circumstances — if she is willing and able to perform the job, you usually must and should let her work. ❖

Michael Arnold is a partner in Mintz Levin's Employment, Labor and Benefits practice. He represents clients in connection with a variety of complex employment litigation matters and regularly advises clients regarding HR life cycle and employment law compliance issues. He also drafts and negotiates employment-related agreements and HR policies and procedures. Michael serves as an editor for and is a regular contributor to the Mintz Levin blog http://www.employmentmattersblog.com/.