PRESENTATION

Baby Bump Blunders! Avoiding Pregnancy Discrimination in the Workplace

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BAKER DONELSON

EXPAND YOUR EXPECTATIONS™

THE BIRTH PLAN
WHAT TO EXPECT WHEN YOUR EMPLOYEE IS EXPECTING

- What the pregnancy discrimination law does and does not require from employers;
- What employers should do while Congress and the Supremes are working out the law;
- How to use a checklist for analyzing granting light duty to or making other adjustments for pregnant employees.

THE DELIVERY . . .

- In 1964, Congress passed Title VII of the 1964 Civil Rights Act which prohibits sex discrimination.

- In 1974, the Supreme Court upheld, against an equal protection constitutional challenge, California's disability program which specifically excluded disability coverage for normal pregnancies in the case of *Geduldig v. Aiello*.

- Two years later, in 1976, the Supreme Court ruled in *General Electric Company v. Gilbert* that discrimination on the basis of pregnancy was not sex discrimination, but rather discrimination between pregnant and non-pregnant persons which was not covered by Title VII.

CONGRESS WAS *NOT HAPPY* WITH THE SUPREMES

THEY WANT PDA!

In direct response to the ruling in *Gilbert*, Congress amended Title VII to include protection for pregnant women through the enactment of the

Pregnancy Discrimination Act of 1978 (PDA).

CONGRESS WAS *NOT HAPPY* WITH THE SUPREMES

THEY WANT PDA!

"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."

AFTERMATH OF THE PDA

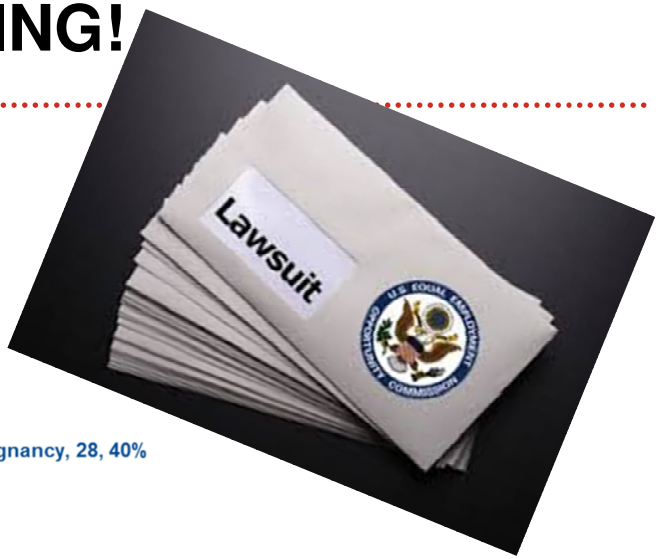
- From 1997 through 2011, there was a steady and consistent increase in the number of pregnancy discrimination charges filed with the EEOC and state/local Fair Employment Practices Agencies.

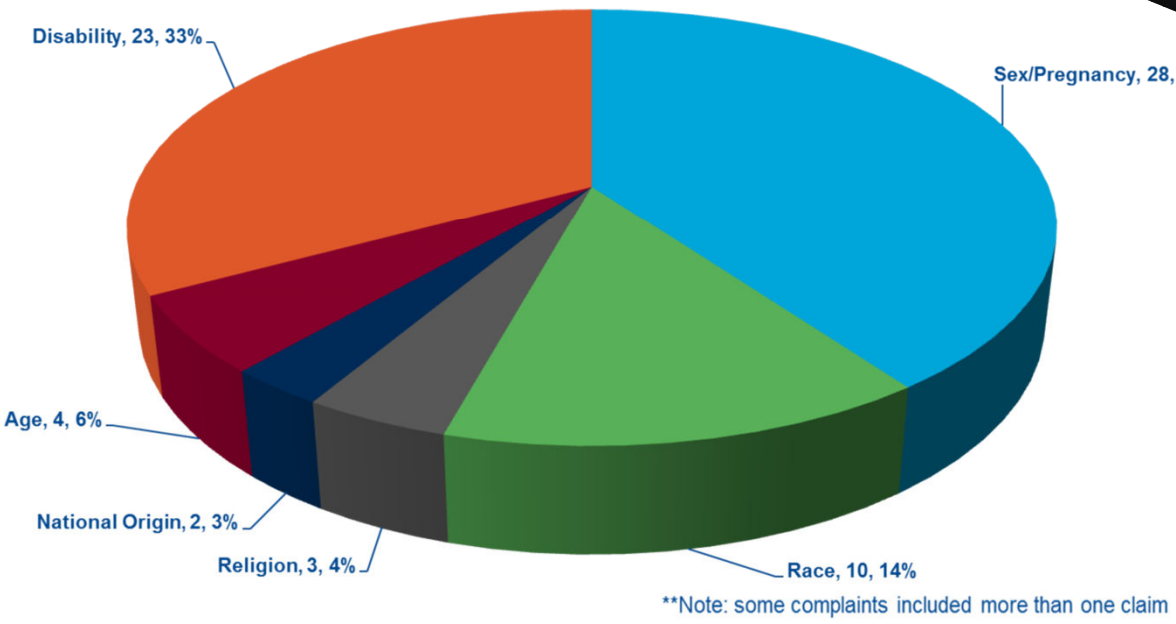
- Between 2000 and 2011 the number of charges alleging pregnancy discrimination increased by **41 percent**.

AND THEN THE EEOC STEPPED IN . . .

In 2012, the EEOC announced that part of its strategic enforcement plan would be a renewed focus on pregnancy discrimination and accommodations for pregnant workers.

THEY WERE NOT JOKING!





2014 CALL TO ACTION

EEOC Chairwoman Jacqueline A. Berrien argued the update was needed and timely. “Despite much progress, we continue to see a significant number of charges alleging pregnancy discrimination, and our investigations have revealed the persistence of overt pregnancy discrimination, as well as the emergence of more subtle discriminatory practices.”

EEOC GUIDANCE JULY 14, 2014

http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

A FIGHT A FIGHT!

- 3 to 2 Split of the Commission
- Commissioner Constance Barker, “a novel interpretation of the PDA for which there is no legal basis.”
- Commissioner Victoria Lipnic
  - no public review
  - questioned timing
  - novel position unsupported by the law

WHAT DID THE EEOC HAVE TO SAY?

- Part One of the Guidance's four parts discusses the prohibitions under Title VII of the Civil Rights Act, as clarified by the Pregnancy Discrimination Act of 1978 (PDA).

- Part Two discusses the application of the ADAAA's accommodation and non-discrimination requirements and the definition of disability to pregnancy-related impairments.

- Part Three discusses other legal requirements affecting pregnant workers, including the FMLA.

- Part Four describes "Best Practices" for employers.

REMEMBER . . . the PDA SAYS

"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."

GUIDANCE: What is included in the protections for *"pregnancy, childbirth or related medical conditions"?*

The PDA prohibits discrimination based on the following:

1. Current Pregnancy
2. Past Pregnancy
3. Potential or Intended Pregnancy
4. Medical Conditions Related to Pregnancy or Childbirth

GUIDANCE: CURRENT PREGNANCY

- Discrimination occurs when an employer refuses to hire, fires, or takes any other adverse action against a woman because she is pregnant, without regard to her ability to perform the duties of the job.
- Critical Inquiry – Employer's Knowledge of Pregnancy
- No Liability When No Knowledge of Pregnancy . . . don't ask!
  - *(especially if the employee just looks like she is gaining weight!!)*

GUIDANCE: PAST PREGNANCY – "THE FOURTH TRIMESTER"

- PDA does NOT restrict claims to those based on current pregnancy.

- A causal connection between a claimant's past pregnancy and the challenged action more likely will be found if there is close timing between the two.
  - Lack of proximity not necessarily a homerun for employers

GUIDANCE: POTENTIAL OR INTENDED PREGNANCY

1. Discrimination Based on Reproductive Risk

2. Discrimination Based on Intention to Become Pregnant – Interview Woes – No Family Questions!

3. Discrimination Based on Infertility Treatment – No penalty for time off for infertility treatments.

4. Discrimination Based on Use of Contraception

GUIDANCE: MEDICAL CONDITION RELATED TO PREGNANCY & CHILDBIRTH

- An Employer may not discriminate against a woman with a medical condition relating to pregnancy or childbirth and must treat her the same as others who are **similar in their ability or inability to work** but are not affected by pregnancy, childbirth, or related medical condition.

BREASTFEEDING

- Employee must have the same freedom to address lactation-related needs that she and her co-workers would have to address other similarly limiting medical conditions.
  - Ex. Rearrangement of breaks

- Patient Protection and Affordable Care Act – Requires employers to provide reasonable break time and a private place for hourly employees who are breastfeeding to express milk.

DID THEY GO TOO FAR???

The Guidance's more controversial requirements include the following:

- an employer policy of providing light duty only to employees with on-the-job injuries violates the PDA
- an employer must provide accommodations to an employee with a normal and otherwise healthy pregnancy;
- certain employer inquiries, comments or discussions regarding an employee's pregnancy or potential pregnancy are indicative of discrimination

DID THEY GO TOO FAR??

"shall be treated the same for all employment-related purposes . . . as other persons not so affected"

"The Pregnancy Guidance states that non-pregnant workers receiving such reasonable accommodations are the appropriate comparators for purposes of PDA compliance. This, too, is a position rejected by the majority of courts which have considered it. These positions represent a dramatic departure from the Commission's prior position, and perhaps more important, contravene the statutory language of the PDA." - *Commissioner Lipinic*

DID THEY GO TOO FAR??

- Commission rejects the position that the PDA does not require an employer to provide light duty for a pregnant worker if the employer has a policy or practice limiting light duty to workers injured on the job and/or to employees with disabilities under the ADA.

WAS THE GUIDANCE PREMATURE?

Young v. UPS, Inc.

UPS has a policy of giving light-duty assignments to various categories of employees who are physically unable to do their usual jobs.

Young v. UPS, Inc. *(continued)*

Under the policy, these categories of employees are entitled to light-duty assignments:

- ✓ employees who have been injured on the job;
- ✓ employees who have a qualifying disability under the ADA; and
- ✓ employees who have temporarily lost their DOT certifications.

The Facts . . .

- Ms. Young gives her supervisor a doctor's note stating she should not lift more than 20 pounds for the first 20 weeks of her pregnancy and not more than ten pounds thereafter.
- HR informs Ms. Young that she is not among the categories of employees that are entitled to light duty.
- Ms. Young takes unpaid leave for the duration of her pregnancy, losing income as well as her medical coverage months before the birth of her child.
- Ms. Young sues UPS for pregnancy discrimination under Title VII of the 1964 Civil Rights Act.

Ms. Young argued

- When employers give a benefit to some employees who are similar to a pregnant employee in their limitations on working (*"other persons not so affected"*), employers must give that same benefit to the pregnant employee.

- So if UPS gives light-duty assignments to an employee injured on the job who has temporary lifting restrictions, they should also give light-duty assignments to pregnant employees who have temporary lifting restrictions.

UPS Argued

- The policy is a pregnancy-blind policy and that to win her case Young needed to prove she was denied the accommodation because of bias against her as a pregnant woman.

- Many non-pregnant employees were also denied light duty.

Both the U.S. District Court for the District of Maryland and the Fourth Circuit Court of Appeals held that the company's policy was lawful under the PDA because "where a policy treats pregnant workers and non-pregnant workers alike, the employer has complied with the PDA."

NOT EVERYONE AGREES . . .

- Three other appellate courts have also upheld light-duty policies that accommodate some categories of temporarily disabled employees, but not pregnant employees. (5th, 7th, **11th**)

- The 6th and 10th Circuits recognize a pregnant female makes out at least a *prima facie* case of discrimination where she can show some employees are accommodated and pregnant women are not.

THE "SUPREMES" TAKE THE STAGE

- April 2013 – Ms. Young asked the Supreme Court to hear the case.
- May 2013 – Amicus (Friend of the Court) briefs filed by law professors and women's rights organizations
- October 2013 – The Supreme Court asked the Solicitor General to weigh in on whether to take the case.

THE "SUPREMES" TAKE THE STAGE

- May 19, 2014 – Solicitor General filed brief as requested.
- June 2, 2014 – Ms. Young filed a supplemental brief.
- June 3, 2014 – Matter in conference with the Justices.
- June 4, 2014 – UPS filed a supplemental brief.
- July 1, 2014 – Petition granted; currently being briefed.
- December 3, 2014 – Set for Oral Argument.

WHAT DID THE SOLICITOR GENERAL TELL THE SUPREMES?

- First, the Fourth Circuit Court of Appeals who heard Ms. Young's case and all the other Circuits who side with the Fourth Circuit are WRONG.
- The ***source*** of the employee's temporary lifting restrictions (on or off the job) is not relevant at the *prima facie* case stage of litigation.
- Pregnant employees and employees injured on the job who have lifting restrictions are similar in their ability to work and are proper comparators.
- But, the Fourth Circuit may have been right that an ADA disabled employee is not a proper comparator.

WHAT DID THE SOLICITOR GENERAL TELL THE SUPREMES?

- Second, the "question presented does not warrant review at this time."
  - ***Why?***
  - Because the ADA amendments expanded the definition of disability to include temporary conditions and made it clear an individual's ability to lift, stand or bend are major life activities under the law.
- An employer must now look at each pregnant employee's medical condition and limitations to determine if the employee qualifies as a person with a disability entitled to a reasonable accommodation absent undue hardship.

WHAT DID THE SOLICITOR GENERAL TELL THE SUPREMES?

- Plus, the EEOC was then considering the adoption of new enforcement guidance on pregnancy discrimination that would address a range of issues related to pregnancy under the PDA and the ADA.

- According to the SG, this guidance would clarify the issues raised by facts like those in the *Young* case "diminishing the need for this Court's review of the question presented at this time."

Legislative Action

Pregnant Workers Fairness Act – H.R. 5647

(Died in Committee)

Pregnant Workers Fairness Act – S. 942

(Referred to Committee on Health, Education, Labor and Pensions on 5/4/2013)

The bill requires employers to make the same sorts of accommodations for pregnancy, childbirth, and related medical conditions that they do for disabilities.

NOW WHAT ARE WE SUPPOSED TO DO??

WE GOT YOU COVERED – GO-TO CHECKLIST

- Policies matter!
  - Audit your existing policies and practices in light of the Guidance's interpretation of the PDA and ADA.
  - The Guidance clearly demonstrates that employer policies that are consistently applied will be a solid defense against claims of discrimination.
- Before taking any adverse action against a pregnant employee, make sure your organization has solid documentation of non-discriminatory reasons for the decision.
- Do not make assumptions about pregnant or female employees or give a pregnant employee your opinion about what is good for her.

WE GOT YOU COVERED – GO-TO CHECKLIST!

- If the employee has a healthy pregnancy and is just placed on restrictions for the health of the fetus, assess the following:
  - Where is the employee located and what state/local laws may apply? Do you have a duty to reasonably accommodate just "pregnancy" under a state or local law?
  - Ten states and two cities have passed laws requiring some employers to provide reasonable accommodations to pregnant workers: Alaska, California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, New Jersey, Texas, West Virginia, New York City, and Philadelphia. . . . NOT GEORGIA!!

WE GOT YOU COVERED – GO-TO CHECKLIST!

- Do you have a light-duty/accommodation policy that applies to temporary conditions that are not disabling?
- Who is covered by the policy?
- The policy must be “pregnancy blind” and consistently applied.
- To be lawful, there can be no evidence of pregnancy bias.

WE GOT YOU COVERED – GO-TO CHECKLIST!

- If you do not have a light-duty policy, do you have a past practice of granting light duty to employees who have temporary restrictions that limit their ability to perform certain job duties?

- In the absence of a lawful light-duty policy, you must treat the pregnant employee the same as you treat other employees who have temporary restrictions. What is your customary practice? Follow it with regard to a pregnant employee.

WE GOT YOU COVERED – GO-TO CHECKLIST!

- Make sure you comply with all applicable federal and state leave laws related to pregnancy-related leaves.
- Remember, you cannot force a pregnant employee to take a leave of absence simply because you are concerned about her health or the health of the unborn fetus.
- If the pregnant employee develops a medical condition during or after pregnancy that is covered the ADAAA, you must go through reasonable accommodation process.

Potential Legal Claims Based on Family Responsibilities

- FMLA implications
- EEOC Guidelines on caregiver discrimination.
- Nursing mothers have rights to express milk in the workplace under the FLSA, ACA, and many state laws.
- But the law still does not require preferential or favored treatment of those who choose to have children. *EEOC v. Bloomberg*

Keep in mind you can always be more generous than just meeting minimum legal requirements.

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