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ARE EMPLOYERS OBLIGATED TO PROVIDE LIGHT DUTY TO PREGNANT EMPLOYEES? RECENT EEOC SETTLEMENTS SERVE AS A REMINDER TO HEALTH CARE EMPLOYERS

More and more, we receive questions from clients about their obligations to accommodate pregnant employees in the workplace. Regardless of whether or not the pregnant employee is disabled as defined by the Americans with Disabilities Act ("ADA"), employers must consider whether pregnancy discrimination laws require an accommodation, including whether pregnant employees are entitled to a light duty work assignment.

THE EEOC PURSUES HEALTH CARE LIGHT DUTY PROGRAMS

The U.S. Equal Employment Opportunity Commission ("EEOC") recently made its position on this issue clear. On December 20, 2017, a North Dakota health system ("Health System") agreed to pay $95,000 to settle a pregnancy and disability discrimination lawsuit brought by the EEOC.

The EEOC alleged in its complaint, filed September 25, 2017 in the U.S. District Court for the District of North Dakota, that the Health System failed to accommodate an employed nurse's pregnancy-related medical restrictions, which resulted in her termination, in violation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act ("PDA"), as well as the ADA. The nurse, who was pregnant and had a 25-pound lifting restriction, sought an accommodation from the Health System, but her request was denied. The EEOC alleged that the Health System accommodated other nurses who were not pregnant but had restrictions due to work-related injuries, including by providing them with light or modified work assignments. However, as alleged by the EEOC, the Health System did not provide the pregnant nurse with the same accommodations.

In a press release issued by the EEOC, it stated that:

> "Employers must understand that the law obliges them to accommodate restrictions of pregnant employees -- just as they would accommodate other employees who are similar in their ability or inability to work," said Julianne Bowman, the EEOC's district director in Chicago, who managed the federal agency's pre-suit administrative investigation. "It is especially important that they understand that if they are accommodating persons with restrictions arising from a work-related injury, they may have to provide the same accommodations to employees with restrictions arising out of pregnancy."

More recently, on January 29, 2018, the EEOC settled a second pregnancy discrimination lawsuit it had filed against a network of memory care, at-home care and hospice centers ("Network"). The EEOC alleged in its press release that the Network terminated an employed caregiver rather than accommodate her pregnancy-related medical restrictions, "which it could have done by putting her on light duty." As part of the Consent Decree between the EEOC and the Network, the Network agreed to treat pregnant employees seeking job modifications similar to the way it treats non-pregnant employees such as disabled employees or employees on workers' compensation who are similar in their ability or inability to work.

These two recent cases are an important reminder to employers about their obligations with regard to accommodating pregnant employees, under both the PDA and ADA. If an employer provides light duty assignments for any other employees, then there could be risk in failing to provide such an accommodation to pregnant employees who are similar in their ability or inability to work.

REMEMBERING *YOUNG V. UPS*

These cases are a reminder, too, that the U.S. Supreme Court ruled on this issue in March 2015 in *Peggy Young v. United Parcel Service, Inc.* Similar to the recent EEOC settlements, the issue in *Young* was whether an employer must reasonably accommodate a pregnant worker as it does other workers who are not pregnant, and it centered around UPS denying participation to a pregnant driver with lifting restrictions in its light duty program. You may recall that UPS's light duty program was only available to three categories of workers: 1) drivers who had become disabled on the job; 2) employees who had lost their Department of Transportation certification; and 3) employees who suffered from a disability under the ADA. The Supreme Court ultimately held that a plaintiff could rebut an employer's proffered "legitimate, non-discriminatory reasons" in defending its practices by:

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> providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.

In our blog post on the *Young* case, we noted that this decision makes it easier for a pregnant employee to successfully establish a claim for disparate treatment. Following the Supreme Court's decision in *Young*, the EEOC revised its "Enforcement Guidance on Pregnancy Discrimination and Related Issues" to adopt the standard established by the Supreme Court in *Young*.

In addition, with regard to the ADA, the EEOC's Enforcement Guidance states that:

> Although pregnancy itself is not an impairment within the meaning of the ADA . . some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA, as amended . . . Moreover, under the amended ADA, it is likely that a number of pregnancy-related impairments that impose work-related restrictions will be substantially limiting, even though they are only temporary.

WHAT IS AN EMPLOYER TO DO?

It seems more pregnant workers who are in more physically demanding roles, such as bedside care positions, are having work restrictions issued by their treating physicians. The time is now for health care entities to be reviewing their light duty practices and policies and considering the following:

- Determine if there is a formal light duty program, or even an informal practice, that excludes pregnant employees with work restrictions from participating. If so, what are the employer's reasons for prohibiting pregnant employees from participating?
- Understand that the burden on an employer to defend such practices is significant, making it more difficult to successfully prevail.
- Strongly consider revising the eligibility requirements of any light duty practices or policies to allow pregnant employees who have similar work restrictions as others offered light duty assignments to participate.
- Educate managers/supervisors on any changes to your light duty practices and policies.
- Use this as an opportunity to also remind managers/supervisors about an employer's obligation under the ADA and how to recognize requests for reasonable accommodations.
- Apart from requirements to accommodate under federal law, remember certain states have adopted pregnancy discrimination and accommodation statutes. Be sure to familiarize yourself with any applicable state laws.

Managing light duty practices and policies can be challenging, and in light of these recent lawsuits and settlements, the EEOC has made its position clear as it relates to pregnant workers' rights who have work restrictions. If you have questions about this topic, please contact Kevin Stella at kstella@hallrender.com or Mary Kate Liffrig at mliffrig@hallrender.com or your regular Hall Render attorney.

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