On July 14, 2014, the Equal Employment Opportunity Commission (EEOC) issued its long-anticipated Enforcement Guidance: Pregnancy Discrimination and Related Issues (Guidance). The Guidance is controversial on several fronts. It contains substantive provisions that arguably impose requirements on employers beyond those required by the relevant federal statutes. The EEOC’s process in issuing the Guidance and the decision to issue it now also has raised opposition.

The Guidance was approved along party lines, with the two Republican Commissioners, Constance Barker and Victoria Lipnic, voting against the Guidance and the three Democratic Commissioners, Chair Jacqueline Berrien, Vice Chair Jenny Yang, and Commissioner Chai Feldblum, voting in favor. Commissioners Barker and Lipnic expressed concern that the Guidance was not made available for public comment before it was issued (Public Statement of Commissioner Constance S. Barker, dated July 14, 2014; Statement of the Honorable Victoria A. Lipnic, Commissioner, U.S. Equal Employment Opportunity Commission, dated July 14, 2014).

The EEOC justified its decision to issue the Guidance by explaining that, since the enactment of the Pregnancy Discrimination Act (PDA) in 1978, the number of charges alleging pregnancy discrimination has increased substantially. The timing of the Guidance has been criticized, however, because it was issued just two weeks after the July 1, 2014 decision by the United States Supreme Court to review the decision of the United States Court of Appeals for the Fourth Circuit in Young v. United Parcel Service, Inc. In Young, the Fourth Circuit ruled that the PDA does not require employers to offer light duty to pregnant employees who have work restrictions even if light duty is available for certain non-pregnant employees. As discussed below, the Guidance takes a contrary position on this issue, which could be obviated by a Supreme Court decision.

Commissioner Barker’s and Commissioner Lipnic’s decisions to vote against the Guidance were motivated in part by the EEOC’s decision to issue the Guidance now, rather than waiting for the Supreme Court’s decision in Young. As Commissioner Lipnic stated, “I think it is unwise of the Commission to issue guidance at this time, potentially setting forth standards and practices for employers that may well be mooted in the very near future depending on how the Court decides Young. Moreover, the credibility of the Commission is done no favor by issuing any Guidance on these points while these critical questions are pending – particularly if the Court adopts the position which directly contravenes that taken in the Guidance (which, in this instance is far from an unlikely hypothetical or rhetorical question, insofar as no Circuit Court of Appeals has adopted the Commission’s position, and indeed, most have flatly rejected it).”

In addition, pending before Congress is the Pregnant Workers’ Fairness Act, which seeks to amend the PDA to require employers to grant reasonable accommodations for pregnant workers, an obligation that the Guidance presumes already exists in the PDA. As Commissioner Barker stated after she reviewed a draft of the Guidance, “[t]he very fact that members of Congress find it necessary to amend the PDA to award reasonable accommodations is clearly evidence that the PDA does not currently provide these rights.” (Memorandum of Commissioner Constance Barker to the other Commissioners, dated May 23, 2014 re: Draft Enforcement Guidance on Pregnancy Discrimination and Related Issues Circulated for Review and Comment, April 14, 2014). Similarly, Commissioner Lipnic stated that the pendency of the Pregnant Workers’ Fairness Act provides “compelling evidence that the PDA, as in effect today, does not entitle all pregnant workers to this accommodation. Equally important, it suggested to me that if our laws are to be extended to provide protection for pregnant workers, that should – indeed, must – be through the action of Congress.”
The Guidance discusses the requirements of the PDA and then evaluates the applicability of the Americans with Disabilities Act (ADA) to pregnancy. The PDA contains two fundamental requirements: (1) employers may not discriminate against employees on the basis of pregnancy, childbirth, or related medical conditions; and (2) women affected by pregnancy, childbirth or related medical conditions must be treated the same as “other persons not so affected but similar in their ability or inability to work.” The EEOC’s interpretation of the second requirement has been greeted with some alarm, and Commissioners Barker and Lipnic view it as affording preferential treatment to pregnant employees, rather than treating them the same as other employees, as the PDA commands.

Much of the Guidance sets forth non-controversial positions on what types of actions are prohibited or required by the PDA, including that (1) employers cannot take an adverse employment action that is motivated by a woman’s past or present pregnancy, childbirth or related medical condition or by a woman’s fertility or childbearing capacity; (2) employers cannot take an adverse employment action against a pregnant employee due to concern about her health and safety if the employee is able to perform her job; (3) harassment based on pregnancy is prohibited; and (4) parental leave (not related to pregnancy or childbirth) must be equally available to mothers and fathers.

Other aspects of the Guidance are highly controversial. The Guidance reflects the EEOC’s very broad interpretation of the PDA’s “similar in their ability or inability to work” language. One such example concerns the availability of light-duty positions, the issue addressed in the Young case. The Guidance states that an employer may not follow a policy that provides light duty only to employees who have been injured on the job, because that policy would treat a pregnant employee who was similar in her ability/ inability to work differently because of the source of her limitations. Yet, limiting a light-duty program to employees injured on the job arguably does not discriminate against employees because they are pregnant. It would also exclude non-pregnant employees who have limitations not caused by on-the-job injuries.

The Guidance also provides that Title VII requires that an employer’s health insurance plan must cover prescription contraceptives on the same basis as other prescription medication that is used for preventive care. It is unclear, however, what effect the Supreme Court’s recent decision in Burwell v. Hobby Lobby Stores, Inc., et al., will have on this point. As the Guidance recognizes, certain employers might be exempt from this requirement under the Religious Freedom Restoration Act or the First Amendment.

The Guidance recognizes lactation as a pregnancy-related medical condition, and states that an employer may not treat lactating employees less favorably than non-lactating employees and must provide lactating employees the same flexibility as it provides other employees with similarly limiting medical conditions (such as with respect to schedule changes or use of sick leave for routine medical appointments).

Perhaps the most controversial section of the Guidance addresses the interplay between the PDA and the ADA. It has long been recognized that pregnancy itself is not a disability under the ADA. The EEOC notes that the ADA Amendments Act of 2008 (ADAAA) broadened the scope of the definition of disability, and made clear that temporary impairments may constitute disabilities. The Guidance reasons that pregnancy-related impairments therefore can be disabilities. As examples, the Guidance references pregnancy-related sciatica, gestational diabetes and pregnancy-related anemia, among other conditions.

Going further, the Guidance suggests that a pregnant employee is entitled to reasonable accommodations even for a routine pregnancy that is not a disability, if the pregnancy causes a work restriction. For example, the EEOC takes the position that if a pregnant employee has a restriction on lifting because of her pregnancy, she should be compared to an individual who has a lifting restriction due to a back-related disability, and should be similarly entitled to a reasonable accommodation absent undue hardship. As Commissioner Lipnic observed, the Guidance seems to “back-door” the ADA’s reasonable accommodation requirements into the PDA. Commissioner Lipnic believes that this is a “dramatic departure from the Commission’s prior position, and perhaps more important, contravene[s] the statutory language of the PDA.”

The EEOC’s Guidance ends with a list of best practices, which “may go beyond federal non-discrimination requirements” and which include the following:
• Have a strong policy that outlines the requirements of the PDA and the ADA and which addresses the types of conduct that could constitute unlawful discrimination based on pregnancy, childbirth and related medical conditions. The policy should also provide multiple avenues of complaint.

• “Train managers and employees regularly about their rights and responsibilities” under the PDA.

• Respond to and investigate complaints of pregnancy discrimination promptly and take corrective action, if appropriate.

• Make hiring and other employment decisions without regard to assumptions about women affected by pregnancy, childbirth or related medical conditions.

• Do not ask questions about an applicant’s or employee’s pregnancy status or childbearing plans.

• Provide parental leave after the birth of a child to similarly situated men and women on the same terms.

• Incorporate pregnancy-related harassment into the company’s anti-harassment policy.

• Review any light-duty policies to ensure that they “provide pregnant employees access to light duty that is equal to that provided to people with similar limitations on their ability to work.”

• “State explicitly in any written reasonable accommodation policy that reasonable accommodations may be available to individuals with temporary impairments, including impairments related to pregnancy.”

As for the two issues that are awaiting action by the Supreme Court and Congress (whether a light-duty position must be provided to a pregnant employee and whether pregnant employees are entitled to reasonable accommodations for pregnancy-related restrictions), employers must decide whether to follow the EEOC’s Guidance on those points or to wait for word from the Supreme Court and Congress. The Guidance is not law. Predictably, however, if the EEOC receives a charge of pregnancy discrimination before the Supreme Court or Congress has acted, it will enforce the provisions in its Guidance and expect employers to comply. Employers that decide to take a wait-and-see approach may risk unwanted attention and scrutiny from the EEOC.

ENDNOTES

1. It should be noted that the facts leading to the Young case preceded the effective date of the ADAAA.

2. Several states and municipalities have passed laws requiring accommodations for pregnant employees.