



DELAWARE

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DISCRIMINATION

Pregnant pause: General Assembly, EEOC ponder pregnancy bias

by Lauren E.M. Russell

As we noted last month, the Delaware General Assembly is currently considering legislation that would amend the Delaware Discrimination in Employment Act (DDEA) to expressly prohibit pregnancy discrimination (see "Dealing with Dover, part 2" on pg. 1 of the June issue). This news is of particular relevance because the Equal Employment Opportunity Commission (EEOC) recently announced that it's considering new enforcement guidance.

Review of the proposed legislation

The federal Pregnancy Discrimination Act (PDA), which amended Title VII of the Civil Rights Act of 1964 to expressly address pregnancy discrimination, was passed in 1978. In the intervening decades, the DDEA has been repeatedly amended without adding protection for pregnancy discrimination. The Delaware Department of Labor (DDOL) has adopted the position that Delaware law prohibits pregnancy discrimination, and Delaware employers have long accepted that position and acted accordingly. However, Delaware law itself is ambiguous on the subject.

Senate Bill 212, introduced in May 2014, proposes to amend the DDEA to expressly prohibit pregnancy discrimination. At this time, the legislation is still pending, and it's unclear whether the General Assembly will take final action on it before the close of its current session.

EEOC's enforcement guidance

In an *amicus* (friend of the court) brief filed in a lawsuit being appealed to

the U.S. Supreme Court, the EEOC indicated that it's considering issuing additional enforcement guidance on pregnancy discrimination. The agency's pronouncement signals that it intends to expand the scope of employers' obligations with respect to pregnant employees.

While the EEOC didn't expressly address the content of the proposed guidance, it appears to involve cases in which pregnancy and related limitations may constitute disabilities within the meaning of the Americans with Disabilities Act (ADA). As employers well know, the ADA Amendments Act of 2008 (ADAAA) greatly expanded the types of conditions that may be considered "disabilities" under the ADA. Among the changes was the pronouncement that temporary limitations, such as those that arise in the course of a difficult pregnancy, may now be considered disabilities that entitle an employee to reasonable accommodations. The EEOC's brief indicates that it might, in accordance with the ADAAA, take an expansive view of employers' obligations to provide reasonable accommodations to pregnant employees.

At this point, without any clarification, employers are left to speculate about what the guidance might require. But it's safe to assume that you will face expanded obligations toward pregnant employees.

Bottom line

Pregnancy discrimination, particularly claims arising from allegedly discriminatory policies and procedures, are a focus of EEOC enforcement right now. That being the case, you can expect both new guidance and a push by the EEOC to reevaluate the way employers address pregnant employees' physical limitations.

In addition, if the Delaware General Assembly amends the DDEA, the DDOL can be expected to readily consider the EEOC's revised guidance when it addresses claims of pregnancy discrimination. As a result, Delaware employers may have to adapt to notable changes when dealing with the state and federal agencies. We will continue to monitor the issue and let you know if and when the new guidance is issued.

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