August 2014

Weil

Employer Update

Succession Planning In Compliance With Age Discrimination Act

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According to the U.S. Census Bureau, by 2020, 25 million Baby Boomers, who make up more than 40 percent of the U.S. labor force, will be exiting the workforce in large numbers.[1] With many of the most experienced employees poised to leave the workforce in the coming years, many employers are, or soon will be, facing the need to plan for this seismic demographic shift.

Courts have long recognized that employers have a legitimate interest in planning their future workforce, and identifying and grooming successors for the current leadership is a necessary exercise that does not, by itself, violate the law. However, because the successors typically are younger than the senior leaders they replace, succession planning should be undertaken with an eye toward the potential legal issues that may arise, particularly age discrimination claims.

In this article, we discuss some of the legal issues employers should consider as part of their succession planning, and we offer suggestions for how employers may engage in this exercise while minimizing the legal risk.

The Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating against employees or potential employees who are age 40 or older because of their age. 29 U.S.C. §§ 623(a)(1), 633. There is a popular misconception that if an employer replaces one worker who is at least age 40 with another worker who is also at least age 40, there is no risk of legal exposure. But ADEA liability may exist even where the new employee is also in the class protected by the ADEA if the employee who was replaced was replaced "because of" his age. *See, e.g., O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996).

Avoid incorrect assumptions

While older workers may assert claims under the ADEA after they are replaced by younger workers, courts nevertheless have recognized the legitimacy of an employer's interest in planning for its future workforce. For example, when making a hiring or promotion decision, an employer may have a legitimate interest in ensuring that the candidate selected is committed to remaining in the position for a minimum period of time, to ensure a return on the employer's training investment or to avoid the

disruption of frequent turnover.[2] *See, e.g., Lee v. Rheem Mfg. Co.*, 432 F.3d 849, 853-54 (8th Cir. 2005) (question to applicant about how long he planned to work reflected "legitimate business concerns" and was not direct evidence of age discrimination); *Raskin v. Wyatt Co.*, 125 F.3d 55, 63 (2d Cir. 1997) (company "had a legitimate reason to confirm the plaintiff's interest in a career change notwithstanding the possibility that [the plaintiff] would have the option of taking early retirement").

Courts generally recognize that employers have legitimate business reasons to be concerned about employees' expected tenure, even though expected tenure may correlate with age.

Likewise, if current management is approaching retirement, the company may need to take steps to ensure continuity and a smooth transition at the retirement date. Courts generally recognize that employers have legitimate business reasons to be concerned about employees' expected tenure, even though expected tenure may correlate with age.[3] *See Lee*, 432 F.3d at 853 (although applicant's "expected years of work is related to his age, 'factors other than age, but which may be correlative with age, do not implicate the prohibited stereotype, and are thus not prohibited considerations'").

For example, in *Misner v. Potter*, 2009 WL 1872598 (D. Utah June 26, 2009), the court declined to infer that the employer was "concern[ed] that [its] executives [were] 'greying'" simply because the employer was concerned "about losing executives to retirement" and had implemented a succession plan to address those concerns. The employer's succession plan involved establishing "pools" of candidates to be considered for upper management positions when they became vacant. When a 56-year-old employee was not selected for any of the pools, he sued, alleging that he had not been selected because of his age. The employee pointed to the employer's "oft-stated concern that a high percentage of its executives were at or approaching retirement eligibility" as evidence that the employer was engaged in an "organizational-wide push to identify younger potential successors." But absent evidence that the employer "believed that potential replacements for retiring executives should be of any particular age," the court held that "observing that a high percentage of management could retire and seeking to have ready replacements to ensure business continuity is not the same as trying to push out older executives because of stereotypes about age."

However, because "[a]ge, unlike sex or race, is frequently correlated with legitimate employer concerns such as the impact on an organization of an aging workforce," employers must "walk [a] fine line between legitimate employer concerns and age discrimination." *Johnson v. Harvey*, 2007 WL 201225, at *2 (E.D. Ark. Jan. 24, 2007). In particular, employers must be careful not to conflate expected tenure and age by, for example, making assumptions about expected tenure based on age.

For example, in *Sharp v. Aker Plant Services Group, Inc.*, 726 F.3d 789 (6th Cir. 2013), a 52 year old former employee of a manufacturer of technology parts alleged that he was selected for inclusion in a reduction in force (RIF) because of his age. He alleged that when he asked why he was chosen for the RIF over a younger employee, his manager said that he had been grooming the younger employee to replace another employee in the plaintiff's age range who, according to the manager, likely would be retiring around the same time as the plaintiff. The manger allegedly explained that staggering retirements by about ten years was important to ensure business continuity. Although the plaintiff said that he planned to work for another 15 years before retiring, the manager allegedly responded that the company needed "to bring in younger people [and] train them." While the court recognized that an employer may have legitimate business concerns

that are correlated with age, it explained that "the proposed age-correlated factor cannot be a proxy for age, else it is unlawful." Because the manager had "in essence stated that [the company's] succession plan was to hire or retain younger workers at the expense of older workers" based on the assumption that "the former would stay with the company longer than the latter," the court found that the otherwise legitimate business concern for "potential longevity with the company" was, in this case, really just "a proxy for age."

The lesson from *Misner* and *Sharp* is that employers may legitimately be concerned about "potential longevity with the company" and may take steps to plan for anticipated retirements, but that employers may not assume an expected tenure based on stereotypes about age. Indeed, younger workers may leave "relatively soon after being hired," so "favoring applicants because of their youth" does not effectively address concerns about "brain drain" resulting from retirements. *Johnson*, 2007 WL 201225, at *4.

Asking about retirement

If employers should refrain from assuming that employees will retire at a certain time based on their ages, are employers entitled to ask their employees when they plan to retire? In short, yes, but employers should exercise care as to how they broach the topic.

Many courts have recognized that employers must be permitted to ask employees about their retirement plans. *See, e.g., Moore v. Eli Lilly & Co.*, 990 F.2d 812, 818 (5th Cir. 1993). The Seventh Circuit has declared that "a company has a legitimate interest in learning its employees' plans for the future, and it would be absurd to deter such inquiries by treating them as evidence of unlawful conduct." *Colosi v. Electri-Flex Co.*, 965 F.2d 500, 502 (7th Cir. 1992).[4]

But the key is that any inquiries about retirement plans must be "reasonable." *Moore, 990 F.2d at 818*. Employers should refrain from referencing the employee's age when asking about future plans.[5] Also, courts have noted that "repeated and/or coercive inquiries" may be impermissible. *See Greenberg v. Union Camp Corp.*, 48 F.3d 22, 28 (1st Cir. 1995).[6]

If an employee indicates that he or she may be retiring soon, courts have held that an employer has a right to receive a clear answer about the employee's plans. For example, in *Woythal v. Tex-Tenn Corp.*, 112 F.3d 243 (6th Cir. 1997), rumors were circulating that a particular engineer at the company "was considering retirement," and some employees testified that the employee told them that he planned to retire. The employee's supervisor asked him "several times" what his plans for the future were, but found the employee's "answers evasive." The employee alleged that the repeated inquires about his future plans were designed to pressure him to retire, but the Sixth Circuit rejected this contention, holding that the employer had a "legitimate concern" in making sure that the company had proper coverage, and that the inquiries were repeated simply because the supervisor never "got a straight answer."

Employers must be careful not to conflate expected tenure and age by, for example, making assumptions about expected tenure based on age.

When employees answer inquiries about their retirement plans, employers must be careful about how they respond. Expressing disapproval may be deemed to have a coercive effect. *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 913 (2d Cir. 1997) (decision maker "expressed surprise and disbelief when Lightfoot said he wanted to work until he was seventy years old").

Suggestions for Employers

When engaging in succession planning, employers should take several points into consideration:

- Do not presume an employee's retirement plans based on age.

- Ensure that candidates of all ages are considered in the succession plan.
- Ask employees at all levels of seniority what their short- and long-term goals are.
- Refrain from targeted inquiries to individual employees about "retirement plans" unless there is an indication that the employee may be retiring soon, and the employer needs a particular amount of advance notice for business reasons.
- When asking about employees' future plans, be careful not to cross the line into pressuring any employees to retire. Do not reference the employee's age. If an employee says that he or she has no plans of retiring soon, do not express surprise or disapproval and do not revisit the issue frequently within the same timeframe.
- Consider whether any particular employment practices driven by succession planning may have a disparate impact on the basis of age.
- Consider additional requirements that may be imposed by state and city law that may be more restrictive than federal law.

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1. *See* http://www.dol.gov/odep/pdf/NTAR_Employer_Strategies_Report.pdf.
2. If an employer is going to ask any candidate selected to commit to remain in the position for a minimum period of time, the employer may wish to make that period of time no longer than needed to achieve a legitimate business interest. Employees may argue that the employer's seeking a commitment from candidates to remain in the position for a minimum period of time may have a disparate impact on older workers. Accordingly, employers should be prepared to justify the length of the time period with a legitimate business reason that could not be accomplished with an alternative process that does not have a disparate impact. Furthermore, even on a disparate treatment claim, if the employer is unable to justify the length of the time period by a legitimate business reason, a plaintiff may seek to establish that the employer's request for a minimum time period commitment is merely a pretext for ageist stereotypes.
3. While the ADEA generally prohibits the imposition of mandatory retirement ages, 29 U.S.C. § 623(f)(2), it allows employers to impose a mandatory retirement age on certain executives and employees in high-level policymaking positions under certain narrowly specified circumstances. 29 U.S.C. § 631(c).
4. *See also Lefevers v. GAF Fiberglass*, 667 F.2d 721 (6th Cir. 2012) (finding that no evidence that employer suggested that the plaintiff should retire, "but that they merely inquired generally about his, and others', plans regarding retirement").
5. *See Woythal v. Tex-Tenn Corp*., 112 F.3d 243, 247 (6th Cir. 1997) (noting that employer did not reference employee's age).
6. *See also Jones v. Oklahoma City Public Schools*, 617 F.3d 1273, 1281 n. 6 (10th Cir. 2010) (questioned three times about retirement plans).

EEOC Enforcement Guidance Clarifies the Contours of the Pregnancy Discrimination Act and Other Related Laws

By Gary D. Friedman and Ami G. Zweig

For the first time in more than 30 years, the Equal Employment Opportunity Commission has issued new enforcement guidance on the subject of pregnancy discrimination. The catalysts for the issuance of the Enforcement Guidance on Pregnancy Discrimination and Related Issues (the "Enforcement Guidance")[1] on July 14, 2014 appear to have been, among other items, a nearly 40 percent increase since 1997 in the filing of pregnancy discrimination charges, a 2008 study finding that "pregnancy discrimination complaints have risen at a faster rate than the steady influx of women into the workplace[,]" and the 2008 passage of the Americans with Disabilities Amendments Act, which expanded the protections afforded to individuals with disabilities under the Americans with Disabilities Act (ADA). Other contributing factors included confusion among courts and practitioners over the scope of the Pregnancy Discrimination Act (PDA), particularly with respect to the distinction between discrimination on the basis of pregnancy and discrimination on the basis of caregiver status, increasing challenges to policies that adversely impact pregnant women in the workplace, and the Fourth Circuit's hotly debated decision in *Young v. United Parcel Serv., Inc.*, 707 F.3d 437 (4th Cir. 2013), which the U.S. Supreme Court will hear next term.

Though the Enforcement Guidance may not blaze any new trails, it attempts to clarify areas of confusion and address common misperceptions regarding the PDA, and stakes several strident positions on issues under the PDA that as yet remain unresolved. With pregnancy discrimination lawsuits on the rise, including one that will soon be heard before the Supreme Court in *Young v. UPS*, employers must carefully review their policies and practices as they relate to pregnancy, and leaves of absence and accommodations generally, to ensure compliance with a statue that contains many nuances.

Statutory Background and Prior Guidance

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination with respect to any terms or conditions of employment because of, *inter alia*, sex. In 1978, responding in large part to the Supreme Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) that an exclusion of pregnancy-related disabilities from GE's disability benefits plan did not violate Title VII, Congress passed the PDA, which amended Title VII to state that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions;

The PDA not only prohibits discrimination based on current pregnancy, but also prohibits discrimination based on *past* pregnancy, *potential or intended* pregnancy, or *medical conditions related to* pregnancy or childbirth.

and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes … as other persons not so affected but similar in their ability or inability to work[.]"[2] Five years later, in 1983, the EEOC published a Compliance Manual chapter on pregnancy discrimination. Since then, the EEOC had not provided any comprehensive updates on the subject of pregnancy discrimination until this past month's Enforcement Guidance, which supersedes the Compliance Manual chapter and incorporates the many developments over the past three decades in this area of the law.[3]

Overview of the Enforcement Guidance

Coverage of the PDA

Much of the Enforcement Guidance focuses on delineating the boundaries of what the PDA does and does not cover. The precise breadth of the PDA's coverage may not always be obvious, as a PDA claim must be tied to pregnancy but need not be tied to *current* pregnancy. Rather, as the Enforcement Guidance explains, the PDA not only prohibits discrimination based on current pregnancy, but also prohibits discrimination based on *past* pregnancy, *potential or intended* pregnancy, or *medical conditions related to* pregnancy or childbirth.

Discrimination Based on Potential Pregnancy

Claims of discrimination based on current pregnancy, including stereotypes about pregnant employees, may often be relatively easy to recognize as implicating the PDA. For example, the Enforcement Guidance explains that it would be unlawful for an employer to "refuse to hire a pregnant woman based on an assumption that she will have attendance problems or leave her job after the child is born." That concept is fairly straightforward. But what about employers who make employment decisions, rooted in these same stereotypes or assumptions about pregnant women, with respect to a non-pregnant female who has expressed a desire to become pregnant? That too could be unlawful under the PDA, which, as the Enforcement Guidance explains, also prohibits discrimination based on potential or intended pregnancy. For that reason, the EEOC suggests that "employers should not make inquiries into whether an applicant or employee intends to become pregnant." Thus, questions designed to elicit whether a woman is "looking forward to starting or enlarging a family" would run afoul of the Enforcement Guidance and might be used as evidence of disparate treatment of pregnant employees. For the avoidance of doubt, the EEOC warns employers that it "will generally regard such an inquiry as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant worker."

According to the Enforcement Guidance, the prohibition of discrimination based on potential pregnancy also extends to such situations as discrimination based on contraceptive use, which the EEOC says is "necessarily" prohibited in light of the fact that "[c]ontraception is a means by which a woman can control her capacity to become pregnant[.]" For example, the EEOC opined that "providing health insurance that excludes coverage of prescription contraceptives … but otherwise provides comprehensive coverage" can constitute unlawful discrimination "on the basis of gender" "[b]ecause prescription contraceptives are available only for women[.]" However, the fact that the EEOC referred to this situation as a violation of "Title VII" for discrimination "on the basis of gender" suggests that while it would fall under the coverage of Title VII's prohibition on sex discrimination, it might not necessarily fall under the coverage of the PDA's prohibition on pregnancy discrimination – a subtle, yet important, distinction. In addition, recognizing the U.S. Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) that the Patient Protection and Affordable Care Act's contraceptive mandate violated the Religious Freedom Restoration Act (RFRA) in some circumstances, the EEOC clarified that its Enforcement Guidance "does not address whether certain employers might be exempt from Title VII's requirements under the First Amendment or the RFRA."

Discrimination Based on Past Pregnancy

The breadth of the PDA's coverage may be particularly difficult to decipher when considering a claim of discrimination based on *past* pregnancy. In explaining that the PDA is not limited to claims based on current pregnancy, the Enforcement Guidance quotes from a District of Colorado decision that "[i]t would make little sense to prohibit an employer from firing a woman during her pregnancy but permit the employer to terminate her the day after delivery if the reason for termination was that the woman became pregnant in the first place."[4] Indeed, this situation is similar to that alleged by the EEOC in a litigation filed on August 7, 2014, *EEOC v. Savi Technology, Inc.* (E.D. Va.), in which the Commission claims

that the defendant unlawfully rescinded an offer of employment less than 24 hours after learning that the applicant had recently given birth and had pregnancy-related surgery.

Of course, most situations will not be as clear-cut as this example, and many women in the workplace fall under the category of "formerly pregnant." So how is a court to assess whether an adverse employment action taken against a formerly pregnant woman was taken *because of* that woman's past pregnancy, such that it would fall under the scope of the PDA? There is no bright line delineating when an adverse employment action taken against a formerly pregnant woman will no longer put the employer at risk for a PDA claim, but the Enforcement Guidance states that "[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." Still, the Enforcement Guidance warns that "[a] lengthy time difference between a claimant's pregnancy and the challenged action will not necessarily foreclose a finding of pregnancy discrimination if there is evidence establishing that the pregnancy, childbirth, or related medical conditions motivated that action."

Notably, the EEOC acknowledges that "[i]t may be difficult to determine whether adverse treatment following an employee's pregnancy was based on the pregnancy as opposed to the employee's new childcare responsibilities." While the former would fall under the coverage of the PDA, the latter, as the EEOC explains, could constitute a Title VII violation "where there is evidence that the employee's gender or another protected characteristic motivated the employer's action." For this proposition, the EEOC cites to its prior Enforcement Guidance, issued May 23, 2007, on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities" (the "Caregiver Guidance"),[5] in which the EEOC explained, *inter alia*, that although caregiver status is not itself a protected category, "[e]mployment decisions that discriminate against workers with caregiving responsibilities are prohibited by Title VII if they are based on sex or another protected characteristic, regardless of whether the employer discriminates more broadly against all members of the protected class." Though no bright line exists delineating where the PDA ends and where caregiver discrimination begins, an illustrative example is that while some courts have explained that requests for extended maternity leave to care for the medical needs of a newborn child are not protected by the PDA,[6] the EEOC's Caregiver Guidance clarified that denying male employees' requests for childcare-related leave while granting female employees' requests for childcare-related leave could constitute unlawful discrimination on the basis of gender plus caregiver status in violation of Title VII.

Discrimination Based on Medical Conditions Related to Pregnancy or Childbirth

Another core tenet of the PDA is its requirement that employers treat women with *medical conditions related to pregnancy or childbirth* "the same as others who are similar in their ability or inability to work but are not affected by pregnancy, childbirth or related medical conditions." This requirement often comes into play in the context of leave of absence policies: the Enforcement Guidance explains that *uniform* application of a leave policy does not constitute unlawful disparate treatment, but a policy that restricts leave could form the basis of a disparate impact claim if it disproportionately impacts pregnant women and is not job related or consistent with business necessity. The Enforcement Guidance further explains that the protection of women with medical conditions related to pregnancy or childbirth can also, under some circumstances, extend to protect women who are lactating or breastfeeding, or who have had (or are contemplating having) an abortion.

One aspect of the PDA that has confounded many courts and employers is whether the PDA requires employers to take affirmative steps to ensure "equal treatment," the way they must in order to provide certain accommodations under Title VII for religious beliefs and under the ADA. The Enforcement Guidance explains that when a pregnant employee is temporarily unable to perform the functions of her job, her employer must treat her "the same as it treats other employees similarly unable to perform their jobs, whether by providing modified tasks, alternative

assignments, leave, or fringe benefits." Significantly, the Enforcement Guidance provides that that an employer may not shirk this requirement 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) [,]" and states that the EEOC "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." This aspect of the Enforcement Guidance is particularly noteworthy because less than two weeks before the Enforcement Guidance was issued, the U.S. Supreme Court granted certiorari in *Young v. United Parcel Serv., Inc.*, No. 12-1226 (U.S. July 1, 2014) on the question of whether, and in what circumstances, the PDA requires an employer that provides work accommodations to non-pregnant employees with work limitations to provide comparable work accommodations to pregnant employees who are similar in their ability or inability to work. Thus, the forthcoming Supreme Court decision next term in *Young v. UPS* could lend support to, or potentially reject, the position staked out by the EEOC in its Enforcement Guidance.

The contours of this EEOC-endorsed requirement may, at times, be difficult for an employer to navigate. On the one hand, the Enforcement Guidance confirms that "if an employer's light duty policy places certain types of restrictions on the availability of light duty positions, such as limits on the number of light duty positions or the duration of light duty assignments, the employer may lawfully apply those restrictions to pregnant workers, as long as it also applies the same restrictions to other workers similar in their ability or inability to work." That is consistent with the basic proposition that, as the Enforcement Guidance notes, "Title VII does not … require an employer … to treat pregnancy-related absences more favorably than absences for other medical conditions." On the other hand, an employer that rejects a pregnant employee's request for light duty work should be sure that the rejection is consistent with its uniformly applied policy or practice, because even "[i]n the absence of pregnancy-related statements evidencing animus, a pregnant worker may still establish a violation of the PDA by showing that she was denied light duty or other accommodations that were granted to other employees who are similar in their ability or inability to work."

Other Laws Affecting Pregnant Employees

The Enforcement Guidance also discusses certain other laws besides the PDA that may affect pregnant employees, in particular, the ADA (and its recent amendments) and the Family and Medical Leave Act (FMLA). The ADA prohibits discrimination on the basis of disability (defined as an impairment that substantially limits one or major life activities), and requires employers to provide reasonable accommodations to employees with disabilities (absent undue hardship to the employer). The Enforcement Guidance explains that "[a]lthough pregnancy itself is not an impairment within the meaning of the ADA, and thus is never on its own a disability, some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA[.]" Even though these impairments are only temporary, if they substantially limit a major life activity, they will trigger coverage under the ADA, and the employer will be obligated to provide reasonable accommodations to the pregnant employee. Of course, according to the EEOC, the PDA independently requires employers to provide certain accommodations, such as light duty work, to employees with pregnancy-related medical conditions, if the employer provides such accommodations to non-pregnant employees similar in their ability or inability to work (which the ADA might require the employer to do, depending on whether the comparator employee's impairment substantially limits a major life activity). This interplay between the ADA and the PDA, with respect to accommodations for pregnant workers, is an area that may be explored by the Supreme Court in *Young v. UPS*.

While Title VII and the PDA only require employers to provide pregnancy or parental leave if such leave is provided to similarly situated employees for reasons unrelated to pregnancy or parental status, "the FMLA does require covered employers to provide such leave." Specifically, the FMLA allows eligible

employees to take "up to 12 workweeks of leave during any 12-month period" for reasons including, for example, the birth and care of the employee's newborn child. While an employee is on FMLA leave, the employer must maintain the employee's existing level of coverage under a group health plan, and when the employee returns from FMLA leave, the employer must restore the employee to his or her original job or to an equivalent job. Thus, the FMLA is another critical law affecting pregnant employees as well as new parents, whether male or female.

Finally, the Enforcement Guidance lists certain other laws that affect employees who are pregnant or have caregiving responsibilities. For example, Executive Order 13152 prohibits discrimination in federal employment based on parental status, and Section 4207 of the Patient Protection and Affordable Care Act requires reasonable break time, in a private place, for nursing mothers to express breast milk. Moreover, various state and local laws are more expansive than the federal protections for pregnant employees and new parents, such as the California law requiring employers to provide up to four months of unpaid pregnancy disability leave.

Best Practices for Employers

As evidenced by the EEOC's decision to issue new enforcement guidance and the Supreme Court's decision to grant certiorari in *Young v. UPS*, the jurisprudence surrounding pregnancy discrimination has evolved a great deal since the PDA was first enacted in 1978, and is continuing to be developed. Close familiarity with the requirements and intersection of the PDA, the ADA, and the FMLA, among other laws, is essential for employers with pregnant workers. To that end, the Enforcement Guidance provides a list of "suggestions for best practices that employers may adopt to reduce the chance of pregnancy-related PDA and ADA violations and to remove barriers to equal employment opportunity." In addition to staying apprised on the continuing developments in this area of the law, employers should review and consider the EEOC's suggested best practices, but are not required to implement them, as the EEOC acknowledges that these are "proactive measures that may go beyond federal non-discrimination requirements[.]" The EEOC's suggested "best practices" include, for example, the following:

- "Develop, disseminate, and enforce a strong policy based on the requirements of the PDA and the ADA" and "[t]rain managers and employees regularly about their rights and responsibilities related to pregnancy, childbirth and related medical conditions." These are commonsense best practices that are advisable for all employers, although employers should be commercially reasonable in assessing how regular and in-depth these trainings should be.
- "Respond to pregnancy discrimination complaints efficiently and effectively" and "[p]rotect applicants and employees from retaliation." These too are commonsense best practices that apply universally.
- "Do not ask questions about the applicant's or employee's pregnancy status, children, plans to start a family, or other related issues during interviews or performance reviews." This practice is also advisable for all employers, and is one that employers should remind their managers and supervisors about, as even seemingly innocent questions ("how are your kids doing?") could be interpreted in unintended ways, especially during such formal settings as interviews or performance reviews.
- "Ensure that job openings, acting positions, and promotions are communicated to all eligible employees." While it is not always practicable to post every job opening, doing so is a best practice as a general matter. Employers should develop a policy with respect to job openings, and then apply that policy consistently.
- "When reviewing and comparing applicants' or employees' work histories for hiring or promotional purposes, focus on work experience and accomplishments and give the same weight to cumulative relevant experience that would be given to workers with uninterrupted service." In other words, employers should not treat prior

leaves of absence as a demerit when evaluating an employee's or applicant's work history. Focus on what the employee accomplished while on the job – not what the employee missed out on while on leave.

- "If there is a restrictive leave policy (such as restricted leave during a probationary period), evaluate whether it disproportionately impacts pregnant workers and, if so, whether it is necessary for business operations." Policies that have a disproportionate adverse effect on women leave employers vulnerable to class claims for discrimination under a disparate impact theory – the kind of high-stakes litigation that any employer would want to avoid.
- "Ensure that employees who are on leaves of absence due to pregnancy, childbirth, or related medical conditions have access to training, if desired, while out of the workplace." This suggestion may or may not be practicable, as employers generally do not engage in "training" of employees who are on leaves of absence, but at a minimum, employers should have a contact person who can answer any questions that employees may have about their leave periods (whether pregnancy-related or not).
- "Ensure light duty policies are structured so as to provide pregnant employees access to light duty equal to that provided to people with similar limitations on their ability to work" and "[t]emporarily reassign job duties that employees are unable to perform because of pregnancy or related medical conditions if feasible." Employers may gain clarity on their obligations regarding light duty work for pregnant employees after the Supreme Court decides *Young v. UPS*, but regardless of how the Court decides, employers should strive to follow these suggestions, at least when feasible.
- "Have a process in place for expeditiously considering reasonable accommodation requests made by employees with pregnancy-related disabilities," "[t]rain managers to recognize requests for reasonable accommodation," and "[i]f a particular accommodation requested by an employee cannot be provided, explain why, and offer to discuss the possibility of providing an alternative accommodation." Whether dealing with pregnant employees or non-pregnant employees with ADA-qualifying disabilities, engaging in a good faith, interactive process with the employee may result in a reasonable accommodation that benefits all parties, and even if it does not, it will enhance the employer's chances of prevailing if the employee files suit challenging the employer's refusal to accommodate.

Navigating the requirements of the PDA and other pregnancy-related laws is not always easy, but employers who familiarize themselves with the core principles of these laws, and who consult with counsel when necessary, will maximize the likelihood of avoiding pregnancy discrimination in the workplace, and will put themselves in an advantageous position if and when a pregnancy-related issue or litigation arises.

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1. Available at http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#fn25.
2. 42 U.S.C. § 2000e(k).
3. *See* July 14, 2014 Press Release, *EEOC Issues Updated Enforcement Guidance on Pregnancy Discrimination and Related Issues*, available at http://www.eeoc.gov/eeoc/newsroom/release/7-14-14.cfm.
4. *Donaldson v. Am. Banco Corp., Inc.*, 945 F. Supp. 1456, 1464 (D. Colo. 1996).
5. Available at http://www.eeoc.gov/policy/docs/caregiving.html.
6. *See, e.g., McNill v. N.Y.C. Dep't of Corr.*, 950 F. Supp. 564, 571 (S.D.N.Y. 1996).

Employer Update is published by the Employment Litigation and the Executive Compensation and Employee Benefits practice groups of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

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