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YOUNG AND THE RESTLESS EEOC:
EXPANDING EMPLOYER DUTIES FOR PREGNANT EMPLOYEES

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Has the EEOC given birth to a pregnancy superclass? Is pregnancy a disability or its own protected class? The answer remains unsettled.

Title VII makes it an unlawful employment practice to discriminate because of an individual’s sex. (1) The terms because of sex or on the basis of sex include but are not limited to because of or on the basis of pregnancy. (2) 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.

The Pregnancy Discrimination Act (PDA) prohibits discrimination based on pregnancy, childbirth, or related medical conditions. While this apparently plain directive seems benign, the PDA has caused considerable confusion and conflicting outcomes in the courts, notably on the issue of just what constitutes discrimination because of “pregnancy, childbirth, and related medical conditions.” Adding to this uncertainty is the recent position taken by the EEOC in its 2014 Guidance. Consistent with the Commission’s ever-expanding interpretations on the scope of the federal anti-discrimination laws, the 2014 Guidance enlarges the protections for pregnant workers and broadens the approach the Commission recommends that employers take in handling the issues arising among their pregnant workforce. For example, the Guidance clarifies that the PDA prohibits discrimination not only against pregnant women, but also against women with past pregnancies or who may or intend to become pregnant. The Guidance also warns that it is illegal to discriminate based upon stereotypes of pregnant women’s job capabilities or commitment, even in cases where the employer is acting on the good faith belief that its actions are in the employee’s or
the child’s best interest. Since the 2014 Guidance, the Supreme Court decided the case of Young v. UPS, 575 U.S. ___, 135 S. Ct. 1338 (2015). As discussed below, this case heralds a new regime for employers in addressing pregnant workers, although it creates considerably more questions than it purports to answer. In this material, the authors will review the history of the PDA and notable interpretative case authority pre-Young, as well as the EEOC’s 2104 Guidance, the Young case itself, and future implications for employers based upon these developments.

I. History of the Pregnancy Discrimination Act

Geduldig v. Aiello, 417 U.S. 484 (1974) Held that exclusion of medical benefits for pregnant women under California’s disability insurance program did not constitute sex discrimination and as such was not a violation of equal protection. However, in his dissent, Justice Brennan challenged the majority’s refusal to apply a stricter standard of scrutiny to an issue involving gender-based classifications.

General Electric v. Gilbert, 429 U.S. 125 (1976) Held, relying on Geduldig v. Aiello, that a disability plan did not violate Title VII by excluding pregnancy related disabilities. Again, Justice Brennan argued in dissent that the disability plan conflicted with the purposes of Title VII, and that the Court should have adhered to a guideline established by the EEOC offering more protection against sex discrimination than Title VII alone.

Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) Held that a policy of denying sick leave pay to employees disabled by pregnancy while providing such pay to
employees disabled by other non-occupational sickness or injury does not per se violate Title VII unless the exclusion is a pretext for sex discrimination.

In response to the above cases, Congress passed the Pregnancy Discrimination Act of 1978 ("PDA") as an amendment to Title VII, to further prohibit sex discrimination on the basis of pregnancy. Specifically, the following language was added to the end of Section 701 of the Civil Rights Act of 1964:

"(k) The 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; and 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, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion."1

By enacting the PDA, Congress sought to make clear that "[p]regnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be afforded the same rights, leave privileges and other benefits, as other workers who are disabled from working."2 The PDA requires that pregnant employees be treated

1 42 U.S.C. 2000e(k).

the same as non-pregnant employees who are similar in their ability or inability to work.³

Similarly, in passing the implementing regulations Congress specified as follows:

**Employment policies relating to pregnancy and childbirth**

(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of title VII.

(b) Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities. Health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from an abortion, are not required to be paid by an employer; nothing herein, however, precludes an employer from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

(d)(1) Any fringe benefit program, or fund, or insurance program which is in effect on October 31, 1978, which does not treat women affected by pregnancy, childbirth, or related medical conditions the same as other persons not so affected but similar in their ability or inability to work, must be in compliance with the provisions of § 1604.10(b) by April 29, 1979. In order to come into compliance with the provisions of

1604.10(b), there can be no reduction of benefits or compensation which were in effect on October 31, 1978, before October 31, 1979 or the expiration of a collective bargaining agreement in effect on October 31, 1978, whichever is later.

(2) Any fringe benefit program implemented after October 31, 1978, must comply with the provisions of § 1604.10(b) upon implementation. 4

**Coverage**

Like Title VII, the PDA applies to employers with 15 or more employees. Women have 180 days to file a charge (unless extended by state law).

**Cases interpreting the PDA – with varying results**

*Ensley-Gaines v. Runyon, 100 F.3d 1220 (6th Cir. 1996)*  
Plaintiff employee filed a claim against her employer for refusing to grant her benefits available to temporarily disabled employees while she was pregnant. As an employee of the Postal Service, her duties included lifting and dumping trays of letters on to a conveyer belt and other tasks which required her to stand. When she became pregnant with lifting and standing limitations, she requested full-time, temporary light duty status which her employer refused, giving her only four hours of light duty and requiring her to use sick time for the remaining four hours. Defendant had a policy to give the greatest consideration for employees requiring light duty, however, they maintained they were not bound by law to assign light duty. Limited duty was only available to workers injured on the job which would allow for compensation to employees. Plaintiff provided evidence that other employees with similar restrictions, yet not due to pregnancy, were granted favorable

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4 29 CFR § 1604.10.
light duty restrictions. The lower court granted summary judgment in favor of defendant, but in light of the evidence the Court of Appeals reversed, vacated, and remanded.

**Urbano v. Cont'l Airlines, Inc., 138 F.3d 204 (5th Cir. 1998)** abrogated by Young v. United Parcel Serv., Inc., 575 U.S. ___, 135 S. Ct. 1338 (2015). Plaintiff worked for Continental Airlines as a ticketing sales agent, a job which required her to regularly lift luggage more than 20 pounds. When she became pregnant and her doctor ordered her to lift no more than that weight, she requested a transfer to a non-lifting service representative position. Continental denied her request because their policy granted light-duty assignments only to those who suffered an occupational injury. As such, plaintiff was forced to use her accrued leave time and then take unpaid leave. The lower court granted summary judgment, determining that under a disparate treatment theory, plaintiff failed to provide evidence establishing a genuine issue as to whether she was qualified for transfer into a light-duty position because she had not sustained a work related injury and that Continental treated her like any other employee, mimicking the pregnancy-blind policy standard used in other Circuits. The Court of Appeals agreed, affirming the motion for summary judgment. The Supreme Court denied certiorari.

**Reeves v. Swift Transp. Co., 446 F.3d 637, 638 (6th Cir. 2006)** abrogated by Young v. United Parcel Serv., Inc., 575 U.S. ___, 135 S. Ct. 1338 (2015). Plaintiff was terminated from employment as a truck driver when her pregnancy restricted her from carrying out job tasks. She requested light duty for about two weeks on a daily basis after being restricted by her doctor, at which point her employer terminated her because
they had no work for her to do. Swift had a policy of providing light duty work only to employees who sustained on the job injuries. Evidence showed that plaintiff never sustained an on the job injury, and no employees were assigned light duty unless receiving an on the job injury. The lower court granted summary judgment in favor of defendant, noting that plaintiff failed to prove the light duty policy was a pretext for pregnancy discrimination. The Court noted that to hold otherwise would result in the Court affording pregnant women more benefits and better treatment than non-pregnant employees. The Court of Appeals affirmed summary judgment.

Doe v. C.A.R.S. Prot. Plus, Inc., 527 F.3d 358 (3d Cir. 2008), order clarified, 543 F.3d 178 (3d Cir. 2008) This was a case of first impression, as plaintiff asked the court to extend the protections of the PDA to termination of employment for undergoing surgical abortion. Evidence before the court showed that defendant had inconsistent leave policies that varied from one employee to the next. Plaintiff had a series of doctor appointments prior to needing a medically necessary abortion, followed by the abortion. She was terminated ostensibly because she failed to call in to work each day of the absence. Defendant claimed that all employees were required to call in every day they were absent, however evidence showed some employees were not terminated for failure to call in. The Court of Appeals found that abortion was a “related medical condition” for purposes of the PDA and there was sufficient evidence of pre-text based on conflicting evidence as to whether defendant received calls from plaintiff's husband and was aware of her impending absence. Reversed and remanded.
Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540 (7th Cir. 2011) abrogated by Young v. United Parcel Serv., Inc., 575 U.S. __, 135 S. Ct. 1338 (2015). Plaintiff was employed by Beverly Healthcare as an activity director in a nursing home. When she experienced pregnancy related complications, she was put on temporary bed rest and subsequent light-duty restrictions which her employer refused to accommodate. After her employment was terminated, she brought suit. Defendant claimed, and the lower court agreed, that an employment policy only allowing light duty for work related injuries was pregnancy-blind, and therefore non-discriminatory. The court also held that plaintiff failed to produce evidence that a similarly situated, non-pregnant employee was treated more favorably. The Court of Appeals affirmed summary judgment.

E.E.O.C. v. Houston Funding II, Ltc., 717 F.3d 426 (5th Cir. 2013) Plaintiff alleged she was terminated because she was lactating and wanted to express milk at work upon her return from leave. Defendant claimed she was terminated for “job abandonment.” The district court granted summary judgment in favor of defendant, finding that, as a matter of law, discharging a female employee because she is lactating or expressing milk does not constitute sex discrimination. In reversing and remanding, the Court of Appeals held that plaintiff’s claim states a cognizable sex discrimination claim, and for the purposes of the PDA, lactation is a “related medical condition” of pregnancy.

Latowski v. Northwoods Nursing Center, 549 F. App’x 478 (6th Cir. 2013) Employer required plaintiff to get a doctor’s note once they discovered her pregnancy, and when the doctor imposed restrictions on lifting, she was terminated. Company
policy required employees to be able to lift a certain amount of weight, with the ability to be placed on light duty for a work-related injury. Although plaintiff conceded that the policy was facially non-discriminatory, she also presented evidence that defendant treated other similarly situated non-pregnant employees better by allowing them to work light duty despite having similar lifting restrictions. Defendant's argument was an economic-based policy of refusing to accommodate restrictions arising from injuries suffered outside the workplace. The court held that a jury could find that such a policy, together with several statements that revealed discriminatory animus against pregnant woman, was enough for plaintiff to demonstrate pretext. Reversed and remanded.

Ames v. Nationwide Mut. Ins. Co., 760 F. 3d 763 (8th Cir. 2014) Plaintiff argued that defendant failed to provide a lactation room and had unrealistic expectations about her work production, which in turn forced her to resign from her job. Defendant argued and the court agreed, that plaintiff was unable to prove constructive discharge, that her supervisor's expectations were not unreasonable and were evenly applied, as were defendant's policies on access to lactation rooms. Summary judgment affirmed.
II. History of EEOC guidance

In 2007, the EEOC issued an Enforcement Guidance: Unlawful Treatment of Workers with Caregiving Responsibilities (2007) explaining the circumstances under which discrimination against employees with caregiving responsibilities might constitute discrimination based on sex and/or violate the ADA if based on a family member’s disability. The Guidance was supplemented in 2011 to identify “best practices” and encourage flexible workplace policies. The accommodation of pregnant and post-partum women is addressed throughout this publication.

On July 1, 2014, the Supreme Court agreed to review Young v. UPS, the 4th Circuit case which held that the PDA did not require employers to offer light duty to pregnant employees with work restrictions, even if light duty was available for certain non-pregnant employees with restrictions. Just two weeks later, on July 14, 2014 the EEOC released an Enforcement Guidance on Pregnancy Discrimination and Related Issues (2014). The Guidance was criticized as “premature” by many given the anticipated decision in Young, as well as the pending Pregnant Workers Fairness Act.

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Specifically, the Guidance states that employers must make light duty, as well as other benefits, available to pregnant employees if it is made available to non-pregnant employees with similar restrictions and seemingly imports by direct reference the ADA's reasonable accommodation obligation under a disparate treatment analysis.

The EEOC's Guidance provides primarily for the following:

(1) an employer policy of providing light duty only to employees with on-the-job injuries violates the PDA (note that no federal circuit court has adopted this proscription prior to Young);

(2) an employer must provide accommodations to an employee with a normal and otherwise healthy pregnancy;

(3) certain employer inquiries, comments or discussions regarding an employee's pregnancy or potential pregnancy are indicative of discrimination; and

(4) an employer health insurance plan must cover prescription contraceptives on the same basis as prescription medications that prevent medical conditions other than pregnancy.

The Guidance addresses the vast array of federal workplace laws relating to pregnancy and associated conditions, including not only the PDA, but also the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, the Affordable Care Act, the Family and Medical Leave Act, and Executive Order 13152 (prohibiting discrimination in federal employment based on parental status). The Guidance is the
EEOC's definitive position on pregnancy discrimination and its clear message is that pregnant employees are entitled to accommodation under the PDA and the ADA.

The expected short-term effect of the Guidance will be more aggressive enforcement of pregnancy-related accommodation claims. Courts, to one degree or another, are likely to give deference to the Guidance and the changes posited in the Guidance substantially alter the employer's duties to pregnant employees.⁷

The Guidance is composed of four sections addressing the PDA and ADA and their application to pregnancy and related conditions. The Guidance concludes with a bullet-point list of the EEOC's recommendations that employers take to comply with the EEOC's view of the law.

Premised on the PDA's requirement that pregnant individuals be treated the same as others similar in their abilities or inabilities to work, the Guidance advances several controversial positions, read in conjunction with the ADA, regarding required accommodations. These tenets provide that impairments arising from pregnancy may be eligible for accommodation. The Guidance provides in this regard:

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⁷ It should be noted, however, that following the March 2015 decision in *Young*, the cover page of the Guidance and related documents now contain the following "disclaimer": Certain portions of the *Enforcement Guidance on Pregnancy Discrimination and Related Issues* are affected by the Supreme Court's decision issued on March 25, 2015 in *Young v. UPS*. The Commission is studying the decision and will make appropriate updates.
Incorporating the concepts of "reasonable accommodation" and "undue hardship" into the analysis of an accommodation request, the PDA requires accommodations for pregnant women, without respect to the severity of the pregnancy-related work limitations, if the types of accommodations are provided to other employees with similar abilities or inabilities to work. The Guidance offers examples of what the Commission considers reasonable accommodations for restrictions arising out of pregnancy.

The ADA requires accommodation of pregnancy-related disabilities, regardless of their relationship to a healthy and routine pregnancy. The EEOC states in this regard that "an impairment's cause is not relevant in determining whether the impairment is a disability," a pronouncement that may well obviate the ADA regulations stating that pregnancy is not an impairment. For example, it follows from this guideline that conditions present in most pregnancies to one degree or another, such as morning sickness, ataxia or balance issue, fatigue and changes in body size, may indeed qualify for accommodations under the ADA.

In a preemptive strike against the claims asserted in Young, the EEOC asserts that an employer may not confine light duty to only those suffering from workplace injuries and to the exclusion of pregnant employees. The Guidance announces that employers should abandon policies requiring different treatment for employees injured on the job and employees with similar disabilities due to pregnancy. In doing so, the EEOC explicitly rejects contrary circuit case authority.
Pregnancy-related impairments that impose work restrictions will be substantially limiting for ADA qualification purposes, even if temporary. In this regard, employer leave policies may disparately impact pregnant women, such as sick leave.

Other positions advanced in the Guidance include (1) that employers that provide health insurance must provide prescription contraceptives in health plans; (2) that GINA may be violated if an adverse employment action is taken to avoid insurance costs arising from the genetic impairments of the employee's child; (3) that lactation must be accommodated; and (4) the timing of inception of coverage that must be provided for fertility treatments unique to women. The Guidance also addresses what the EEOC considers to be permissible forms of parental leave policies.

While existing case authority accepted the premise that employees receiving their accommodations under laws other than the PDA are not appropriate comparators for plaintiffs suing under the PDA, the Commission does not agree. Accommodation may be required under the PDA so long as accommodation is required for a comparator under the ADA.

Although the great breadth of the Guidance is dedicated to expanding the rights of pregnant employees, it does provide employers with a few safe harbors for proving compliance. The Guidance contains several examples of compliance which may provide employers with direction and arguments that their decisions are permissible.

In March, the Supreme Court issued its opinion in Young v. UPS, 575 U.S. ___, 135 S. Ct. 1338 (2015). The divided Court (5-1-3) authored a new standard for interpreting Pregnancy Discrimination Act claims.

**New test:** A plaintiff alleging pregnancy discrimination denial of accommodation must a prima facie case, like McDonnell Douglas, showing that she (1) belongs to protected class; (2) sought accommodation; (3) employer did not accommodate; and (4) employer did accommodate other "similar in their ability or inability to work." The employer can then offer a legitimate non-discriminatory reason for denying accommodation. This reason cannot be that it is more expensive or less convenient to add pregnant woman. The plaintiff must then offer evidence of pretext. A plaintiff can reach a jury if she shows sufficient evidence that the policies impose a significant burden on pregnant workers and the legitimate reason is not strong enough to justify this burden.

UPS employed Peggy Young as a parcel sorter. Her job description required that she be able to lift at least 70 pounds. When she became pregnant in 2006, her doctor restricted her from lifting more than 20 pounds during the first 20 weeks of pregnancy and 10 pounds for the remainder. UPS informed Young that she could not work because the company required drivers in her position to be able to lift parcels weighing up to 70 pounds. As a result, Young was placed on leave without pay and subsequently lost her employee medical coverage. Young asked for a light-duty assignment, which UPS provided to workers injured on the job and in other situations. UPS said no, stating that since pregnancy was not an on-the-job injury, that she did not qualify for light duty.

Young sued, claiming that was a violation of the PDA. Young claimed that her co-workers were willing to help her lift any packages weighing over 20 pounds and that
UPS had a policy of accommodating other, non-pregnant drivers. At the time, UPS accommodated (1) drivers who were injured on the job; (2) drivers who lost their Department of Transportation certifications; and (3) drivers who suffered from a disability under the Americans with Disabilities Act.

UPS argued that its policy did not discriminate against pregnant women. Its decision not to provide an accommodation to Young was non-discriminatory because it followed a company policy that does not take pregnancy into account, a so-called "pregnancy-blind" policy. The company noted that Congress enacted the PDA by amending the definition of a federal statute that barred sex discrimination, making it clear that pregnancy discrimination is included in the definition of discrimination "because of sex."

Under Title VII, a company policy does not constitute sex discrimination as long as the policy does not target women or have a disproportionate impact on women. UPS argued that its policy did not discriminate because pregnant women could still get an alternative assignment, provided they were injured on the job. UPS argued that Young’s reading of the law meant that a pregnant woman could get light duty no matter what, while, for instance, a woman injured by lifting her child at home would not be entitled to the same treatment. UPS contended that Young’s position required treating pregnant women with a special status at the expense of women who are not pregnant. That, according to UPS, cannot be what Congress intended. The District Court granted summary judgment and the Fourth Circuit Court of Appeals affirmed that ruling.

The majority opinion in Young, authored by Justice Breyer, reversed the Fourth Circuit, but did not agree with Young’s proffered interpretation. Young claimed that employers
are required to accommodate pregnant women when they provide an accommodation to any other non-pregnant employee who is similar in ability to work. The majority rejected this approach. Instead, the Court articulated a high legal burden employers will have to meet in order to justify their policies or practices that provide accommodations to some categories of employees, but not to pregnant women. The Court then remanded the case to the lower court to determine whether UPS could meet such burden in its case.

The majority addresses the statute's language which says that pregnant women must be "treated the same for all employment related purposes . . . as other persons not so affected, but similar in their ability or inability to work." The second clause "as persons not so affected but similar in their ability or inability to work" only makes sense as clarifying that pregnancy discrimination is to be treated as sex discrimination, not anything more. The majority's opinion in Young holds that there may be some situations in which employers can accommodate some groups of employees, without also accommodating pregnant employees, but then creates a test so strict that it in effect eliminates employers' ability to do just that.

Under a "disparate treatment" theory of liability an aggrieved employee must show that she has been intentionally discriminated against. The majority in Young held that to make this showing, the employee must demonstrate that the employer's policies impose a "significant burden" on pregnant workers, and that the employer has not raised a "sufficiently strong" reason to justify that burden. But what is a "significant burden," and what is a "sufficiently strong" reason for imposing it? The majority offers no further
elucidation other than Justice Breyer’s comment, “why, when the employer accommodated so many, could it not accommodate pregnant women as well?”

Justice Alito concurred in the judgment but not in the majority’s new standard formulation. He noted that UPS’s policy permitted light duty work in three categories: (1) for on-the-job injuries, (2) for those with ADA disabilities; and (3) for those who lost their DOT certification due to medical condition or injury. Alito argued that UPS’ policy failed because it did not justify why pregnant workers were treated differently than other workers who lost their DOT certification due to medical conditions. UPS’ policy would accommodate workers who lost their DOT certification but not pregnant workers. Alito reasoned that this fact showed that “it is not at all clear that [UPS] had a neutral business ground for treating pregnant drivers less favorably than at least some of its non-pregnant drivers who were reassigned . . . .”

Justices Scalia, Kennedy and Thomas issued a scathing dissent. Writing for the dissent, Justice Scalia took the majority to task for inventing a new regime out of whole cloth. “Inventiveness posing as scholarship,” he quipped, noting that his disagreement with the majority is “fundamental.” Scalia points out that the majority’s new test “bungles” the historical Title VII standards for disparate treatment and disparate impact in fashioning the new test which provides for a showing that pregnant women may establish disparate treatment by showing the effects of the employer’s policy fall more

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8 Id. at 10 (Alito, concur).

9 Id. at 1, 11 (Scalia, dissent).

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harshly on pregnant women. "Disparate-treatment and disparate-impact claims come with differences of liability, different defenses, and different remedies," notes Scalia, in what may be a harbinger to inventive claims.10 "Today's decision can thus serve only one purpose: allowing claims that belong under Title VII's disparate-impact provision to be brought under its disparate-treatment provisions instead."11 Scalia also alludes to the vagaries of the terminology employed by the majority. In addressing the new standards of "significant burden on pregnant workers" and "sufficiently strong justification," Scalia writes that it is a "grotesque effects-and-justifications inquiry into motive." "Even if the effects and justifications of policies are not enough to show intent to discriminate under ordinary Title VII principles, they could (Poof!) still show intent to discriminate for purposes of the pregnancy same-treatment clause. Deliciously incoherent."12

What the dissent exposes is that the new test conflates the Title VII standards, which leaves open the question of what evidence is necessary and what damages and defenses are applicable. In addition, the dissent shows that the new test uses language, such as "significant burden" and "sufficiently strong justification," which provide little guidance to employers and which will be subject to Circuit interpretation in the future.

10 Id. at 8.
11 Id. at 10.
12 Id. at 9.
A likely outcome from *Young* is that an employee may be able to show that a significant burden exists by providing evidence that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers. Policies that provide accommodations or light duty to certain categories of employees, but not to pregnant women, will likely be found to impose a significant burden on pregnant employees. As to evaluating the strength of an employer's justification for imposing such a burden, the Court warned that the employer's reason "normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those . . . whom the employer accommodates." The majority offered no further guidance on how an employer might demonstrate the strength of its justification.

**IV. Implications and the PWFA**

**EEOC Guidelines on Best Practices**

The EEOC provides a long list of Best Practices for compliance. Employers should strongly consider understanding these examples and implementing policies and procedures with these in mind. Highlights include:

- Review anti-discrimination, benefits, leave of absence, light duty, and accommodation policies to make necessary changes, including particularly a process for addressing accommodation requests by pregnant employees. Establish procedures for determining what accommodations are necessary and appropriate.

- Leave policies should be reviewed and revised, notably parental leave must be offered to similarly situated men and women on the same terms. Light duty policies that apply to some categories of employees, such as those with on-the-job injuries, should apply also to pregnant women.
• Make sure the business reasons for employment actions, and policy and procedure provisions, are well documented.

• Train managers and human resources personnel on pregnancy-related laws and regulations regarding employees' rights and employers' responsibilities under the PDA, the ADA, and other statutes, particularly those related to the duty to accommodate restrictions related to pregnancy, childbirth, or lactation.

• In taking employment action, train managers and human resource personnel to focus on qualifications in employment decisions, as opposed to planned pregnancy, pregnancy, recent pregnancy, or caregiver status. In this regard, employers should consider developing specific, job-related qualification standards for each job position that reflect the duties of the position.

• Train managers and human resource personnel to take pregnancy discrimination complaints very seriously and particularly regarding retaliation.

• Disclose information about fetal hazards to applicants and employees and accommodate any requests for reassignments to the extent feasible.

Employers should consider reviewing other workplace policies to ensure compliance with both the PDA and the ADA mandates to provide accommodations to pregnant women. Employers in cities and states that have pregnancy accommodation laws will need to ensure compliance with those laws, which may be more expansive. Employers should also review their scheduling and attendance policies to ensure pregnant women are not disfavored.

**Pregnant Workers Fairness Act**

With the law of pregnancy accommodation becoming more complex, some lawmakers are advancing a bill to clarity the rules called the federal Pregnant Workers Fairness Act

The law would amend the PDA to express require employers to grant reasonable accommodations to pregnant workers. Some states have already passed pregnancy accommodation laws.

The PWFA declares it an unlawful employment practice for employers, employment agencies, labor organizations, and other specified entities to: (1) fail to make reasonable accommodations to known limitations related to the pregnancy, childbirth, or related medical conditions of job applicants or employees, unless the accommodation would impose an undue hardship on such an entity’s business operation; (2) deny employment opportunities based on the need of the entity to make such reasonable accommodations; (3) require such job applicants or employees to accept an accommodation that they choose not to accept; or (4) require such employees to take leave if another reasonable accommodation can be provided to their known limitations.

The PWFA sets forth enforcement procedures and remedies under the Civil Rights Act of 1964, Congressional Accountability Act of 1995, Government Employee Rights Act of 1991, and the rights and protections extended to presidential offices. Lastly, the PWFA directs the EEOC to issue regulations to carry out this Act, including the identification of reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions. One can imagine that those regulations would follow the 2014 Guidance in large part.
To eliminate discrimination and promote women's health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition.

IN THE SENATE OF THE UNITED STATES

May 14, 2013

Mr. Casey (for himself, Mrs. Shaheen, Mr. Blumenthal, Mr. Leahy, Mr. Harkin, Mrs. Murray, Mr. Lautenberg, Mrs. Gillibrand, Mr. Franken, and Mr. Murphy) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions
A BILL

To eliminate discrimination and promote women's health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Pregnant Workers Fairness Act'.

SEC. 2. NONDISCRIMINATION WITH REGARD TO REASONABLE ACCOMMODATIONS RELATED TO PREGNANCY.

It shall be an unlawful employment practice for a covered entity to--

(1) not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a job applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;

(2) deny employment opportunities to a job applicant or
employee, if such denial is based on the need of the covered entity to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of an employee or applicant;

(3) require a job applicant or employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation that such applicant or employee chooses not to accept; or

(4) require an employee to take leave under any leave law or policy of the covered entity if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of an employee.

SEC. 3. REMEDIES AND ENFORCEMENT.

(a) Employees Covered by Title VII of the Civil Rights Act of 1964.--

(1) In general.--The powers, procedures, and remedies provided in sections 705, 706, 707, 709, 710, and 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4 et seq.) to the Commission, the Attorney General, or any person, alleging a violation of title VII of that Act (42 U.S.C. 2000e et seq.) shall be the powers, procedures, and remedies this title provides to the Commission, the Attorney General, or any person, respectively, alleging an unlawful employment practice in violation of this title against an employee described in section 5(2)(A), except as provided in paragraphs (2) and (3).
(2) Costs and fees.--The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes of the United States (42 U.S.C. 1988), shall be the powers, remedies, and procedures this title provides to the Commission, the Attorney General, or any person, alleging such a practice.

(3) Damages.--The powers, remedies, and procedures provided in section 1977A of the Revised Statutes of the United States (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this title provides to the Commission, the Attorney General, or any person, alleging such a practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes of the United States).

(b) Employees Covered by Congressional Accountability Act of 1995.--

(1) In general.--The powers, remedies, and procedures provided in the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) to the Board (as defined in section 101 of that Act (2 U.S.C. 1301)), or any person, alleging a violation of section 201(a)(1) of that Act (2 U.S.C. 1311(a)(1)) shall be the powers, remedies, and procedures this title provides to that Board, or any person, alleging an unlawful employment practice in violation of this title against an employee described in section 5(2)(B), except as provided in paragraphs (2) and (3).

(2) Costs and fees.--The powers, remedies, and procedures
provided in subsections (b) and (c) of section 722 of the Revised Statutes of the United States (42 U.S.C. 1988), shall be the powers, remedies, and procedures this title provides to that Board, or any person, alleging such a practice.

(3) Damages.--The powers, remedies, and procedures provided in section 1977A of the Revised Statutes of the United States (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this title provides to that Board, or any person, alleging such a practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes of the United States).

(4) Other applicable provisions.--With respect to a claim alleging a practice described in paragraph (1), title III of the Congressional Accountability Act of 1995 (2 U.S.C. 1381 et seq.) shall apply in the same manner as such title applies with respect to a claim alleging a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)).

(c) Employees Covered by Chapter 5 of Title 3, United States Code.--

(1) In general.--The powers, remedies, and procedures provided in chapter 5 of title 3, United States Code, to the President, the Commission, the Merit Systems Protection Board, or any person, alleging a violation of section 411(a)(1) of that title, shall be the powers, remedies, and procedures this title provides to the President, the Commission, such Board, or any person, respectively, alleging an unlawful employment practice in violation of this title against an employee.
described in section 5(2)(C), except as provided in paragraphs (2) and (3).

(2) Costs and fees.--The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes of the United States (42 U.S.C. 1988) shall be the powers, remedies, and procedures this title provides to the President, the Commission, such Board, or any person, alleging such a practice.

(3) Damages.--The powers, remedies, and procedures provided in section 1977A of the Revised Statutes of the United States (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this title provides to the President, the Commission, such Board, or any person, alleging such a practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes of the United States).

(d) Employees Covered by Government Employee Rights Act of 1991.--

(1) In general.--The powers, remedies, and procedures provided in sections 302 and 304 of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e-16b, 2000e-16c) to the Commission, or any person, alleging a violation of section 302(a)(1) of that Act (42 U.S.C. 2000e-16b(a)(1)) shall be the powers, remedies, and procedures this title provides to the Commission, or any person, respectively, alleging an unlawful employment practice in violation of this title against an employee described in section 5(2)(D), except as provided in paragraphs (2) and (3).
(2) Costs and fees.--The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes of the United States (42 U.S.C. 1988) shall be the powers, remedies, and procedures this title provides to the Commission, or any person, alleging such a practice.

(3) Damages.--The powers, remedies, and procedures provided in section 1977A of the Revised Statutes of the United States (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this title provides to the Commission, or any person, alleging such a practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes of the United States).

(e) Employees Covered by Section 717 of the Civil Rights Act of 1964.--

(1) In general.--The powers, remedies, and procedures provided in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) to the Commission, the Attorney General, the Librarian of Congress, or any person, alleging a violation of that section shall be the powers, remedies, and procedures this title provides to the Commission, the Attorney General, the Librarian of Congress, or any person, respectively, alleging an unlawful employment practice in violation of this title against an employee or applicant described in section 2(2)(E), except as provided in paragraphs (2) and (3).

(2) Costs and fees.--The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes of the United States (42 U.S.C. 1988) shall be
the powers, remedies, and procedures this title provides to the
Commission, the Attorney General, the Librarian of Congress, or
any person, alleging such a practice.

(3) Damages.--The powers, remedies, and procedures provided
in section 1977A of the Revised Statutes of the United States
(42 U.S.C. 1981a), including the limitations contained in
subsection (b)(3) of such section 1977A, shall be the powers,
remedies, and procedures this title provides to the Commission,
the Attorney General, the Librarian of Congress, or any person,
alleging such a practice (not an employment practice
specifically excluded from coverage under section 1977A(a)(1)
of the Revised Statutes of the United States).

(f) Prohibition Against Retaliation.--No person shall discriminate
against any individual because such individual has opposed any act or
practice made unlawful by this title or because such individual made a
charge, testified, assisted, or participated in any manner in an
investigation, proceeding, or hearing under this title. The remedies
and procedures otherwise provided for under this section shall be
available to aggrieved individuals with respect to violations of this
subsection.

SEC. 4. RULEMAKING.

Not later than 2 years after the date of enactment of this Act, the
Commission shall issue regulations in an accessible format in
accordance with subchapter II of chapter 5 of title 5, United States
Code, to carry out this Act. Such regulations shall identify some
reasonable accommodations addressing known limitations related to
pregnancy, childbirth, or related medical conditions that shall be
provided to a job applicant or employee affected by such known
limitations unless the covered entity can demonstrate that doing so
would impose an undue hardship.

SEC. 5. DEFINITIONS.

As used in this Act--

(1) the term "Commission" means the Equal Employment
Opportunity Commission;

(2) the term "covered entity"--
   (A) has the meaning given the term "respondent"
in section 701(n) of the Civil Rights Act of 1964 (42
U.S.C. 2000e(n)); and
   (B) includes--
      (i) an employing office, as defined in
section 101 of the Congressional Accountability
Act of 1995 (2 U.S.C. 1301) and section 411(c)
of title 3, United States Code;
      (ii) an entity employing a State employee
described in section 304(a) of the Government
1220(a)); and
      (iii) an entity to which section 717(a) of
the Civil Rights Act of 1964 (42 U.S.C. 2000e-
16(a)) applies;
(3) the term "employee" means--
   (A) an employee (including an applicant), as
defined in section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f));

(B) a covered employee (including an applicant), as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301);

(C) a covered employee (including an applicant), as defined in section 411(c) of title 3, United States Code;

(D) a State employee (including an applicant) described in section 304(a) of the Government Employee Rights Act of 1991 (12 U.S.C. 1220(a)); or

(E) an employee (including an applicant) to which section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(a)) applies;

(4) the term "person" has the meaning given such term in section 701(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(a)); and

(5) the terms "reasonable accommodation" and "undue hardship" have the meanings given such terms in section 101 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111) and shall be construed as such terms have been construed under such Act and as set forth in the regulations required by this Act.

SEC. 6. RELATIONSHIP TO OTHER LAWS.

Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State
or political subdivision of any State or jurisdiction that provides
greater or equal protection for workers affected by pregnancy,
childbirth, or related medical conditions.
5 for the Road

Pregnancy Discrimination Act Claims After Young

Brent Bean
Moderator
HAWKINS PARNELL THACKSTON & YOUNG LLP
Atlanta, GA

Lindsey Hazelton
HANCOCK ESTABROOK, LLP
Syracuse, NY

1. Take a thorough look at workplace policies to ensure compliance with both the Pregnancy Discrimination Act and the Americans with Disabilities Act's mandates to provide accommodations to pregnant women. Make sure any state laws providing enhanced protection are also considered.

2. Review anti-discrimination, benefits, leave of absence, light duty, and accommodation policies to make necessary changes to ensure they are compliant. Make sure the business reasons for policy changes and employment actions are well documented.

3. Establish procedures for determining what accommodations are necessary and appropriate. This will include defining specific job-related requirements.

4. Train supervisors and human resource personnel about how to recognize and respond to pregnant employees' need for accommodation. Train on rights and responsibilities under the PDA, the ADA, and other statutes that bear on pregnancy, and specifically on the duty to accommodate restrictions related to pregnancy, childbirth, or lactation. Take pregnancy discrimination complaints very seriously and protect employees who complain from retaliation.

5. Focus on qualifications in employment decisions rather than planned pregnancy, pregnancy, recent pregnancy, or caregiver status.

Recognize that the Commission will be stepping up enforcement and govern yourselves accordingly.