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THE PREGNANT WORKERS FAIRNESS ACT: IS YOUR WORKPLACE READY FOR PREGNANCY ACCOMMODATIONS? PART 2 OF 2

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This is the second part of an exploration of the Pregnant Workers Fairness Act (PWFA). In the first part of this series, we explored the types of pregnancy-related conditions covered under the Pregnant Workers Fairness Act (PWFA) and the requirements around notification, documentation, and confidentiality. Now, let's dive into the heart of the matter: how employers can navigate the process of finding reasonable accommodations and understanding when they may be excused from offering one. With the Equal Employment Opportunity Commission's final PWFA regulations set to take effect on June 18, 2024, it's crucial for employers with 15 or more employees to understand their obligations under the Act. The range of possible accommodations for pregnant workers is broad: modified work schedules, lifting assistance, additional breaks, and even the temporary suspension of an essential job function. And accommodations do not only have to be made for pregnant employees: the PWFA also requires reasonable accommodation of conditions related to pregnancy and childbirth, such as menstruation, post-partum depression, and carpal tunnel syndrome.

FINDING A REASONABLE ACCOMMODATION

The Interactive Process

The PWFA requires employers to engage in an informal, interactive process with any employee seeking an accommodation for a limitation caused by pregnancy or a related condition. It is a violation of the PWFA for an employer to adopt (or deny) an accommodation without having gone through the interactive process.

In requiring participation in an interactive process, the PWFA mirrors the ADA. There are no particular steps the employer must follow, as befits the "informal" description of the process. But as the term "interactive" implies, the process should involve a back-and-forth dialogue between the employer and employee, identifying both the limitation and the requested adjustment to the employee's job duties in more detail, if necessary, and then brainstorming possible reasonable accommodations. *Compare* the PWFA regulation at 29 CFR § 1636.3(k) with the ADA regulation at 29 CFR § 1630.2(o)(3).

Employers should not delay initiating the interactive process. The regulations make clear that an unnecessary delay in providing a reasonable accommodation can be a violation of the PWFA even if the employer ultimately provides one. *See* 29 CFR § 1636.4(a)(1).

What Is a Reasonable Accommodation Under the PWFA?

A reasonable accommodation is a modification or adjustment to a job, the work environment, or the way things are usually done at the worksite or during the hiring process, made to enable an employee with a limitation to perform essential job functions or participate in the job application process.

Reasonable accommodations under the PWFA could include (but are not limited to):

- modifying or adjusting the work environment or how a position is usually performed;
- temporarily suspending certain essential functions and/or modifying duties to allow a pregnant employee to continue working; or
- modifying the job application process to enable qualified applicants to be considered.

See 29 CFR § 1636.3(h)(1).

Reasonable Accommodation: Some Specific Examples

The EEOC has listed several specific examples of accommodations for some of the most frequently occurring limitations arising out of pregnancy, childbirth, and related medical conditions. But this list merely illustrates possibilities—it doesn't cover every situation. Just like disabilities under the ADA, these conditions manifest differently in different individuals. An accommodation that is reasonable for one employee may not be reasonable for another with seemingly similar issues. Here are some of the EEOC's examples:

- *additional restroom, drinking, eating, or rest breaks;*
- *sitting for standing jobs and standing for sitting jobs;*
- *carrying water as needed throughout the workday;*
- making facilities readily accessible and usable;
- job restructuring;
- part-time or modified schedules;
- reassignment to a vacant position;
- providing equipment, uniforms, devices, or aids that assist with lifting or carrying;
- adjusting examinations or policies;
- offering paid leave and/or additional unpaid leave;
- providing light or modified duty assignments;
- allowing remote work arrangements;
- "adjustments to allow an employee or applicant to work without increased pain or increased risk to the employee's or applicant's health or their pregnancy;"
- temporarily suspending certain essential functions of the employee's job; and
- providing reserved parking spaces.

Many of these examples will be familiar to those who have been involved in providing ADA accommodations. The first three examples are italicized because the PWFA regulations deem them "predictable assessments," although they might better be called "predictable accommodations." Essentially, the EEOC says that these accommodations will almost always be reasonable. It is hard to imagine otherwise, unless an employer can show an undue hardship. But as discussed below, the undue hardship standard is not easy to satisfy. On predictable assessments under the PWFA, *see* 29 CFR § 1636.3(j)(4).

The EEOC's interpretive guidance that follows the regulations offers many more examples of limitations related to pregnancy, childbirth, and related medical conditions and possible reasonable accommodations. Employers and employees should consult it for a better understanding of these concepts and for ideas of how a reasonable accommodation might be made in a specific situation.

Leave as a Reasonable Accommodation

The PWFA regulations devote several paragraphs to paid or unpaid leave as a potential accommodation. A few key points:

- Leave can only qualify as an accommodation if it is temporary and will allow the pregnant employee to return to her original job or equivalent position.
- An employer cannot force leave on an employee when another reasonable accommodation is available. But if the employee prefers leave, it's a permissible accommodation.
- During leave taken as an accommodation, the employee accrues seniority and benefits just as if actively employed.
- Pregnant employees must be treated the same way other employees on a leave of absence are treated. This means applying the same leave policies and procedures for pregnant employees as an employer does for other employees who have a temporary inability to perform their job functions.
- Remember, the FMLA may also apply if the employee is eligible for FMLA leave, requiring compliance with both laws.

See here and here on leave.

Accommodating Nursing Mothers

The PWFA incorporates but does not expand on the requirements of the 2022 PUMP Act (Providing Urgent Maternal Protections for Nursing Mothers Act). Both the PUMP Act and the PWFA regulations require employers to:

- provide any additional break time a nursing mother needs to pump milk;
- provide the employee with a private place to pump that is not a bathroom and is reasonably close to the employee's work area;
- ensure that the pumping space has both a place to sit and a surface on which to place the pump;
- ensure that the pumping space is regularly cleaned, has electricity, is reasonably close to a sink, and has running water and a refrigerator to store the pumped milk.

Just as an employee who takes FMLA leave to bond with a newborn doesn't need to provide any sort of certification for the leave, here too, an employee who needs a lactation accommodation cannot be required to provide any outside certification. Self-certification is enough. S*ee* 29 CFR § 1636.3(l)(1)(iv).

Deciding on the Accommodation

Those familiar with the ADA know that when the ADA interactive process reveals two or more equally effective accommodations, the employer has the right to choose which one to implement. The ADA regulations encourage making the employee's preference the primary consideration, but grant the employer ultimate discretion. The regulations acknowledge that an employer may opt for the least expensive option, the one that is easiest to provide, or the one causing the least disruption to the workplace or hardship on other employees. *See* 29 CFR § 1630.9(d) and Appendix at 1630.9.

The EEOC has incorporated the same provisions into the PWFA, with one twist. As with the ADA, the PWFA requires identifying accommodations through an employer-employee interactive process (remember that it is a violation of the PWFA for an employer to offer an employee an accommodation

without first engaging in the interactive process). Under both statutes, an employee is not required to accept the accommodation the employer decides to provide.

Here's the twist. Under the ADA, if an employee cannot perform the essential functions of the position without the accommodation, they will no longer be considered qualified. *In contrast, under the PWFA regulations, an employee is still "qualified" if her inability to perform a job function will only be temporary and will be able to be performed in the near future.* In other words, even if an employee covered by the PWFA rejects the reasonable accommodation her employer chooses, if she is likely to be able to perform the essential function within 40 weeks or so, she is still "qualified". She may not be dismissed. On "qualified" under the PWFA, *see* 29 CFR § 1636.3(f)(2). On "qualified" under the ADA, *see* 29 CFR § 1630.2(m) and the EEOC's Interpretive Guidance to the ADA regulations for § 16.30(m).

WHEN AN ACCOMMODATION POSES AN UNDUE HARDSHIP

In defining undue hardship for PWFA purposes, the EEOC once again borrows from its ADA regulations. Under both laws, undue hardship means significant difficulty or expense for the employer, considering factors like:

- the accommodation's nature and net cost;
- the overall financial resources of the specific facility where the employee works (where the employer has multiple worksites);
- the employer's overall financial resources and overall size;
- the type of operation of the employer, including the composition, structure, and functions of its workforce; and
- the accommodation's impact on the employer's operations, including the impact on the ability of other employees to perform their duties and the impact on the employer's ability to conduct its business.

See 29 CFR § 1630.2(p) [ADA] and 29 CFR § 1636.3(j)(1) and (2) [PWFA].

But the PWFA goes further than the ADA, the difference again stemming from its focus on temporary limitations on an employee's ability to perform her job duties, compared with the ADA's coverage of long-term disabilities only.

Recall that under the PWFA, possible reasonable accommodations include the temporary suspension of an essential function of an employee's job (unlike the ADA). If suspending an essential function is the only possible accommodation, it must be provided to the employee unless the following factors show it to be an undue hardship:

- the length of time that the employee will be unable to perform the essential function;
- whether other work exists for the employee to do;
- the nature of the essential function, including how frequently it is performed;
- whether essential functions have been temporarily suspended for other employees in similar positions;
- whether there are other employees to perform the essential function or whether temporary employees or third parties can be hired; and
- whether the essential function can be postponed or remain unperformed for any length of time.

See 29 CFR § 1636.3(j)(3). The bar for establishing undue hardship is high when it comes to accommodating pregnant employees' temporary limitations.

REMEDIES AND ENFORCEMENT

In general, the PWFA's enforcement provisions follow those of Title VII, since the PWFA prohibits a form of employment discrimination. Employees who are denied an accommodation, coerced into accepting an accommodation imposed outside the interactive process, or facing retaliation for asserting their rights under the PWFA may file a charge with the EEOC and potentially sue in federal court once the EEOC process concludes. Available remedies include compensatory damages, back pay, reinstatement, and more.

STEPS FOR LOCAL GOVERNMENTS

Before the PWFA regulations become effective on June 18, 2024, local government employers, guided by their human resources staff, should amend their personnel policies to reflect the requirements of the PWFA. There are four important steps to take:

1. Adopt a new reasonable accommodation policy specifically addressing accommodations related to pregnancy, childbirth, and related medical conditions like infertility and postpartum disorders. This policy should explain the PWFA's accommodation requirements and provide examples of potential reasonable accommodations, including the possibility of eliminating an essential function of an employee's job. It should also outline the interactive process for determining accommodations, including the people in your organization who should be parties to the discussion. Who will it include in addition to the employee? The manager, department head, immediate supervisor, and/or human resources personnel? The policy should make clear the confidentiality requirements for all involved.
2. Update any anti-discrimination and EEO policies. There is no requirement that a local government employer have such policies. But if you have one, amend the policy so that it explicitly prohibits discrimination based on pregnancy, childbirth, and related conditions.
3. Revise leave policies as needed to reflect that PWFA leave may be paid or unpaid and that if leave is provided as a reasonable accommodation, employees accrue seniority and other benefits during the leave. Be clear that PWFA leave is not unlimited but is expected to be for a duration of no more than approximately 40 weeks.
4. Once your policies are updated, train all department heads and supervisors on the new PWFA requirements, the interactive process, and on how to handle accommodation requests. Remember that notification of the need for accommodation is satisfied by an

employee telling her supervisor, department head, or other appropriate person in the organization. These folks need to be prepared to handle such notifications.