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THE PREGNANT WORKERS FAIRNESS ACT: IS YOUR WORKPLACE READY FOR PREGNANCY ACCOMMODATIONS? PART 1 OF 2

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While Title VII, the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA) already offer some protections for pregnant workers, the new federal Pregnant Workers Fairness Act (PWFA) fills in some key gaps. In a nutshell, it tells employers to treat pregnancy-related conditions as temporary disabilities that qualify for accommodations – no need for the pregnant employee to prove a separate ADA-qualifying disability. The PWFA requires employers to offer a broad range of potential accommodations like modified work schedules, lifting assistance, additional food and bathroom breaks, temporary reassignment, and more. It also requires accommodating conditions related to pregnancy, such as menstruation, miscarriage, and abortion. As with the ADA, employers can deny an accommodation under the PWFA if it would cause an undue hardship. The Equal Employment Opportunity Commission (EEOC) issued its final PWFA rules on April 15, 2024. ***They take effect on June 18, 2024***. To understand employers' new obligations under the PWFA and how they differ from those under the ADA, read on.

THE BACKSTORY

Title VII of the Civil Rights Act of 1964 (Title VII), as originally enacted, prohibited sex discrimination. But it didn't say anything about pregnancy, despite widespread discrimination against women who were or could become pregnant. It took the 1978 Pregnancy Discrimination Act, amending Title VII, to make discrimination based on pregnancy, childbirth, or related medical conditions unlawful. The 1993 Family and Medical Leave Act (FMLA) allows eligible pregnant employees and

their spouses to use its job-protected leave provisions to cover pre-natal appointments and to take up to twelve weeks of leave to bond with a newborn. The ADA provides no protection for pregnant employees since pregnancy itself is not a disability.

Enter the PWFA, making it unlawful for employers to deny reasonable accommodations to known pregnancy or childbirth limitations or limitations from related medical conditions – unless the accommodation would pose an undue hardship on the employer's operations. While the PWFA borrows concepts like "reasonable accommodation" and "undue hardship" from the ADA, there are crucial differences employers must understand to comply with the new regulations.

AN OVERVIEW OF THE PREGNANT WORKERS FAIRNESS ACT

The main provisions of the PWFA are these:

1. Employers must provide reasonable accommodations to qualified employees and job applicants with known limitations due to pregnancy, childbirth, and related medical conditions, unless it would pose an undue hardship on the employer's operations.
2. Employers must engage in a timely, good faith interactive process with pregnant workers to determine appropriate reasonable accommodations.
3. Temporary leave can qualify as a reasonable accommodation, but an employer cannot force a pregnant employee to take leave if another reasonable accommodation can be provided, unless the employee prefers the leave.
4. The PWFA explicitly prohibits discrimination based on pregnancy, childbirth, or related medical conditions. This includes discrimination in hiring, pay, job assignments, promotions, firing and more.

The EEOC's new PWFA regulations implement the broad protections of the PWFA statute. Let's take a closer look at the regulations.

Who's Covered?

While the PWFA applies to all federal and state agency employers, not every local government is subject to it. Like Title VII and the ADA, only local government employers with 15 or more employees fall under the PWFA.

What Counts as a Limitation?

A PWFA limitation is separate and distinct from an ADA-covered disability. Like an ADA impairment, a PWFA limitation can be a physical or mental condition that causes a problem affecting an employee's ability to perform their job duties, but unlike the ADA, here the condition or problem may be modest, minor, and/or episodic. And unlike the ADA, a PWFA limitation may be temporary, likely to resolve after childbirth.

The term "limitation" also includes any problem related to maintaining the mother's health or the health of her pregnancy and includes attending medical appointments related to the pregnancy or to a related medical condition (see below on "related medical condition"). The idea is to head off more

extensive accommodations down the road by allowing employees to seek medical care early. On limitations, *see* 29 CFR § 1636.3(a)(2).

What Conditions are Covered?

You might think you know what *pregnancy* and *childbirth* mean, but under the PWFA, these terms have a broader scope. They cover not only current pregnancies and childbirth, but past and future pregnancies. Thus, the PWFA covers infertility and fertility treatments on one hand, and contraception on the other. Childbirth includes both vaginal delivery and caesarian sections. These are examples, not exhaustive definitions.

What is a "related condition?" The PWFA regulations give a long, non-exclusive list of related conditions rather than defining them outright. Some examples have an obvious connection to pregnancy and childbirth: miscarriage, stillbirth, the decision to have or not have an abortion, ectopic pregnancy, preeclampsia, gestational diabetes, morning sickness, issues involving breast-feeding and lactation, and post-partum depression. Interestingly, menstruation is also included. Despite not arising out of pregnancy, it is clearly related to it.

Other conditions arising out of pregnancy may be less obvious. Due to hormonal changes that occur during pregnancy and after childbirth, women frequently develop carpal tunnel syndrome, chronic migraines, changes in vision, and anxiety, to name a few more examples given in the regulations. In addition, the EEOC's interpretive guidance following the regulations points out that pre-existing conditions may be exacerbated by pregnancy, as in this example:

> " . . . an employee may have had high blood pressure that could be managed with medication prior to pregnancy, but once the employee is pregnant, the high blood pressure may pose a risk to the employee or their pregnancy such that the employee needs bed rest."

The scope of the PWFA is expansive. Some conditions might also qualify for FMLA leave, if the employee meets its eligibility requirements. Some might also qualify as ADA disabilities requiring accommodation. But regardless of the applicability of the FMLA or ADA, all limitations related to pregnancy, childbirth and related medical conditions – whether listed in the examples or not – must be accommodated under the PWFA. On related conditions, *see* 29 CFR § 1636.3(b).

Defining Qualified Employees: the PWFA v. the ADA

Like the ADA, the PWFA requires employers to make accommodations for *qualified* employees or applicants. And like the ADA, the PWFA defines a qualified employee as one "who, with or without reasonable accommodation, can perform the essential functions of the employment position." The similarities end there.

Unlike the ADA, under the PWFA, an employee is still "qualified" even if there is no accommodation

that will allow them to perform an essential function of their job so long as their inability to carry out that function is not expected to last more than approximately 40 weeks (a full-term pregnancy's typical length). Note, though, that the 40-week time limit only applies to a current pregnancy. Other conditions may require a shorter or longer time period. Also unlike the ADA, under the PWFA, an employee remains a "qualified employee" despite being unable to perform an essential function if *temporarily suspending* that essential function would allow the employee to perform the remaining essential functions of the position.

Yes, that's right. Under the ADA, suspending an essential job function is not a required accommodation. If there is no reasonable accommodation that would allow an employee to perform an essential job function, the employee is not a "qualified individual" and may be dismissed if another position cannot be found for them. **The PWFA is different in that suspending an essential job function until the employee is able to resume its performance is a reasonable accommodation that an employer must allow unless it causes an undue hardship.** On qualified employees under the PWFA, *see* 29 CFR § 1636(f). On qualified individuals under the ADA, *see* 29 CFR § 1630.2(m).

Defining Essential Functions

For defining essential functions, the EEOC borrows directly from the ADA's definition. Essential functions are the fundamental, core job duties of the job – not the marginal ones. While job descriptions can be relevant, the EEOC's interpretive guidance emphasizes that the key factor is "whether employees in the position actually are required to perform the function," as well as whether the function needs to be performed during the accommodation period. Other considerations include the amount of time that the employee would normally spend on the function during the accommodation period, what happens if it is not performed, whether other employees are qualified to perform that function, and the experience of both former and current employees in that or similar positions. On essential functions under the PWFA, s*ee* 29 CFR § 1636.3(g)(1). On essential functions under the ADA, *see* 29 CFR § 1630.2(n).

responding to an accommodaton request

Before any accommodation is required, an employee (or a spouse, family member or friend) must notify her employer about the pregnancy-related limitation. Like the FMLA, the PWFA requires an employee to do no more than provide basic notice that she needs an accommodation. The regulations allow the employee to communicate this *orally* ***or*** *in writing* to a supervisor, department head, human resources, ***or*** any other appropriate official like a manager or administrator. Where there is no manager or administrator, the notice requirement would also be satisfied by informing the governing board of the unit of local government. Employees may, but don't have to, follow the steps outlined in the

organization's personnel policy. Just like FMLA leave requests, no special words are needed to trigger the employer's obligations. An employee doesn't even have to specify whether a condition relates to pregnancy itself, childbirth or to a related issue, or whether it is a mental or physical limitation. Once an employee puts her employer on notice of a pregnancy, childbirth, or related limitation, the employer's PWFA responsibilities kick in. On communicating with the employer, see 29 CFR § 1636.3(d).

When an employer knows that an employee has a limitation arising out of pregnancy, childbirth, or a related medical condition and that an accommodation is needed, the PWFA requires both parties to engage in an informal but interactive process to determine if there is a reasonable accommodation that will help the employee while not imposing an undue hardship on the employer. Part II of this blog post series discusses the interactive process and reasonable accommodations under the PWFA.

Documentation Requirements

For ADA accommodations and FMLA leave, employers usually seek documentation or certification of the employee's condition before proceeding further. This is also allowed under the PWFA, but only when reasonable. If the condition and need for accommodation is obvious, a request for documentation is unreasonable and is prohibited by the PWFA – the employee's self-confirmation suffices. The same is true when the employee requests one of the predictable assessments (see below) – self-confirmation is good enough. The EEOC believes that the limitation and the need for accommodation will usually be made clear through the interactive process, so discussions about possible accommodations should not be postponed until documentation is provided.

However, when it is not obvious to an employer that the employee's limitation arises out of pregnancy, childbirth, or a related medical condition, employers can reasonably request confirmation of the employee's physical or mental condition and a description of the workplace adjustment that is needed from a health care provider. But there is no opportunity for a second opinion under the PWFA, nor may an employer require an employee to see a provider of the employer's choosing. The employer may not even require the use of a particular form. On documentation under the PWFA, *see* 29 CFR § 1636.3(l).

Confidentiality

Although the PWFA regulations do not have specific provisions about confidentiality, the EEOC says that the ADA's confidentiality provisions apply to the PWFA as well. The ADA provides that medical information obtained from an employee must be kept in separate forms and files apart from the regular personnel file, treated as a confidential medical record. Supervisors and managers are only entitled to know the necessary restrictions on the employee's work or duties and any required accommodations – not all their medical details. *See* 29 CFR § 1630.14(d)(4)(i).

These same restrictions on access to confidential medical information apply when employees provide documentation related to pregnancy, childbirth, or associated medical conditions under the PWFA's interactive process. Employers must safeguard this sensitive information just as they would for ADA disability information.

CONCLUSION

The PWFA regulations are complex. As a reminder, local government employers with 15 or more employees are covered by the PWFA. As such, they must provide reasonable accommodations to any employee with a physical or mental limitation that results from pregnancy, childbirth, or related conditions. Where an employee's limitation or need for a change to their work situation is not obvious, employers may seek confirmation from a health care provider, but the EEOC has indicated that documentation and confirmation should be the exception, not the rule.

In Part 2 of the series, we'll take a closer look at the interactive process and at finding a reasonable accommodation. We'll also look at the high standard that must be met to show that an accommodation will cause an undue hardship.