Employers Will Face More Pregnancy Accommodation Requests Under New Federal Law

Description

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The new Federal Pregnant Workers Fairness Act ("PWFA"), effective June 27, 2023, purports to expand current federal protections by requiring certain employers to provide "reasonable accommodations" to a worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an "undue hardship on the operation of the business."

Discrimination based upon pregnancy is already prohibited by federal law. Title VII of the Civil Rights Act of 1964 was amended long ago by the Pregnancy Discrimination Act ("PDA"), requiring employers to treat employees affected by pregnancy, childbirth, or related conditions in the same manner as other employees with impairments in similar situations. The Americans with Disabilities Act ("ADA") also provides protections relating to pregnancy or childbirth that may be considered a disability, as defined by the ADA. The Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act") requires reasonable, paid break time for employees to express breast milk each time the need arises, for a two-year period.

The PWFA applies to all employers with 15 or more employees. Under the PWFA:

- A "known limitation" is defined by the PWFA as a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee has communicated to the employer, whether or not such condition meets the definition of disability set forth in the ADA;
- "Reasonable accommodations" are changes to the work environment or the way things are usually done at work and the PWFA defines reasonable accommodation the same as it does under the ADA. The law does not contain examples of reasonable accommodations but they are expected to be set forth in the regulations that the law directs the Equal Employment Opportunity Commission ("EEOC") to issue on the PWFA. However, the EEOC has already issued answers to frequently asked questions containing examples of possible reasonable accommodations taken from the House Committee on Education and Labor Report on the PWFA. These include the ability to sit or drink water; receive closer parking; have flexible hours; receive appropriately sized uniforms and safety apparel; receive additional break time to use the bathroom, eat, and rest; take leave or time off to recover from childbirth; and be excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy workers.
- An "undue hardship" on the employer's operations is something that would cause significant difficulty or expense for the employer. In making a hardship determination, it is likely that the EEOC will follow ADA precedent in allowing, but not requiring, factors – such as the nature and costs of the accommodation, the financial resources and size of the business, and the impact of the accommodation on business operations – to be taking into account.

As with accommodations for disability or religious reasons, the employer must engage with the employee in an interactive process to attempt to arrive at a mutually workable accommodation. The employer is not permitted to:

- Require an employee to accept an accommodation without a discussion about the accommodation between the worker and the employer;
- Deny a job or other employment opportunities to a qualified employee or applicant based on the person's need for a reasonable accommodation;
- Require an employee to take leave if another reasonable accommodation can be provided that would let

the employee keep working;
- Retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
- Interfere with any individual's rights under the PWFA.

The majority of states already explicitly require that employers provide pregnancy accommodations. For example, under Rhode Island law, it is unlawful for any employer of four or more employees to refuse to reasonably accommodate an employee's condition related to pregnancy, childbirth, or related medical conditions unless doing so would pose an undue hardship on the company's "program, enterprise or business." Similar protections exists in Massachusetts, where employers with six or more employees must provide a reasonable accommodation for an employee's pregnancy or any condition related to the employee's pregnancy, including, but not limited to, lactation, or the need to express breast milk for a nursing child, if the employee so requests, unless the employer can demonstrate that the accommodation would impose an undue hardship. Like many states, the Rhode Island and Massachusetts laws actually go further than the PWFA. For example, both state laws require notice of the right to accommodations be given to employees upon hire and also upon first learning an employee is pregnant.

Even in states without state law protections, employees were often afforded accommodations under the existing PDA and PUMP Act, as employers typically granted leave, light duty, and other accommodations to employees with medical impairments due to the ADA, workers' compensation rules, and other laws, which in turn required similar accommodations for impairments caused by pregnancy.

However, unlike the PDA, the PWFA creates no ambiguity regarding when an accommodation must be provided and requires no comparators. Because of this, employees everywhere – even in states where the law creates no substantial change – will feel more entitled to make pregnancy accommodation requests and will be more educated as to their right to not only make run of the mill leave and expression of breast milk accommodation requests, but also accommodations for things like special uniforms and working from home. In addition, plaintiffs' attorneys in states without state law protections will become more likely to file suit based upon failure to accommodate pregnancy given they will not have to show other employees with impairments received similar accommodations to prevail.

Employers are well advised to ensure that both their supervisors and human resources professionals have a clear understanding of how pregnancy accommodation requests must be handled. Partridge Snow & Hahn Partners Michael A. Gamboli and Alicia J. Samolis are ready to answer any related questions. For additional information and resources, visit Employment & Labor.

Date Created
June 23, 2023