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THE PREGNANT WORKERS FAIRNESS ACT AND ITS IMPLEMENTING REGULATIONS

The federal Pregnant Workers Fairness Act (the "PWFA") was enacted on June 27, 2023. Thereafter, the United States Equal Employment Opportunity Commission (the "EEOC") began the rulemaking process on regulations implementing the PWFA. On April 15, 2024, the EEOC issued those regulations, which provide guidance to employers on how to comply with the PWFA. The regulations are effective on June 18, 2024.

This alert provides a general overview of the PWFA as well as employers' obligations under the PWFA and its regulations.

What is the Pregnant Workers Fairness Act?

The PWFA requires employers with 15 or more employees to provide reasonable accommodations to an employee who has a *known limitation related to pregnancy, childbirth, or other related medical conditions*, unless the accommodation will cause an undue hardship on the employer.

The PWFA applies to job applicants and employees, regardless of how long they have worked for the employer.

What are the types of known "limitations" to which the PWFA applies?

The limitation can be physical or mental. It can be minor or episodic, which is different than the definition of "disability" under the federal Americans with Disabilities Act (the "ADA"). This means it includes things such as nausea or morning sickness, back pain, and headaches, among others. A limitation covered by the PWFA also include actions the employee undertakes for her own health or the health of her pregnancy, including avoiding certain chemicals, avoiding working in the heat, avoiding certain physical tasks (heavy lifting, running, etc.), and attending health care appointments.

The PWFA covers "related medical conditions." What does that mean?

Under the regulations, there are many possible "related medical conditions," including but not limited to miscarriage, abortion, lactation, menstruation, postpartum depression, preeclampsia, gestational diabetes, endometriosis, and changes in hormone levels.

What should an employer do if an employee requests an accommodation under the PWFA?

Accommodation requests under the PWFA should be handled in manner similar to accommodation requests under the ADA. Although generally an employee will start the process by requesting an accommodation, an employer does not necessarily need to wait for

the employee to specifically request an accommodation if a limitation is known or obvious. However, employers should not make assumptions regarding employees' limitations.

Regardless of how the employer learns of the need for a potential accommodation, once the employer has knowledge of the limitation, the employer must engage in the interactive process with the employee. This process requires the employer to have a dialogue with the employee (not a one-sided conversation) to determine if there is a reasonable accommodation that can be granted to enable the employee to perform the essential functions of her job (unless otherwise excused under the regulations).

For example, the employee may state, "I am having difficulty getting to work on time because of morning sickness." Instead of writing the employee up for every tardy, the employer may come up with a process for accommodating the late arrivals, which could include notifying the supervisor when the employee will be late due to illness or possibly adjusting her working hours while she is struggling with morning sickness.

The PWFA further contemplates that certain pregnancy-related accommodations should be predictable and not require a long or extensive interactive process. Some examples include: an employee's request to have water nearby; additional restroom breaks; breaks to eat and drink; and breaks for sitting.

Can an employer ask employees for medical documentation from their health care provider when they ask for an accommodation under the PWFA?

This depends on the circumstances. In many situations, a discussion with the employee is sufficient and supporting documentation is not needed. Like with the ADA, a request for back-up documents must be reasonable under the circumstances. For example, documentation should *not* be requested for an employee who asks for a bigger uniform to accommodate her pregnancy, nor should it be requested for a nursing mother who needs modifications to pump at work.

To the extent medical documentation is collected, it should be kept confidential and maintained in a separate confidential medical file for the employee.

What are some types of reasonable accommodations employers may be expected to provide under the PWFA?

The definition of "reasonable accommodation" in the PWFA is similar to the ADA definition; however, the ADA and the PWFA differ on whether essential functions must be temporarily excused (discussed in more detail below).

Some examples of reasonable accommodations provided by the regulations include:

- Additional, longer, or more flexible breaks to drink water, eat, rest, or use the restroom;
- Changing food or drink policies to allow for a water bottle or food;
- Changing equipment, devices, or workstations, such as providing a stool to sit on, or a way to do work while standing;
- Changing a uniform or dress code or providing safety equipment that fits;
- Changing a work schedule, such as having shorter hours, part-time work, or a later start time;
- Telework;

- Temporary reassignment (i.e., if employee is unable to perform certain strenuous activities or employee's job exposes her to compounds that are unsafe for pregnancy, then the employer may need to temporarily reassign those duties);
- Temporary suspension of one or more essential functions of a job;
- Leave for health care appointments;
- Light duty or help with lifting or other manual labor; and/or
- Leave to recover from childbirth or other medical conditions related to pregnancy or childbirth.

As noted above, one key difference between the PWFA and ADA is that the PWFA may require an employer to *temporarily excuse or eliminate* the performance of an essential job function. Unlike the ADA, under the PWFA, an employee may still be considered "qualified" under the PWFA if the inability to perform an essential job function is: (a) temporary; (b) can be performed by the employee "in the near future" (generally means 40 weeks from the start of the temporary suspension of an essential function); and (c) can be reasonably accommodated without causing an undue hardship on the employer.

What does undue hardship mean under the PWFA, and how does an employer determine if the suspension of an essential function would cause an undue hardship?

An undue hardship is something that causes significant difficulty or expense to the employer. Specifically, when evaluating whether the temporary suspension of an essential function would cause the employer an undue hardship, the employer would consider: (a) the difficulty or expense to the employer *AND* (b) the following relevant factors:

1. The length of time the employee will be unable to perform the essential function;
2. Whether there is work for the employee to accomplish if the employer suspends an essential function;
3. The nature of the essential function and its frequency;
4. Whether the employer has temporarily suspended the performance of the essential function for other employees in similar positions;
5. Whether there are other employees who can perform or be temporarily hired to perform the essential function; and
6. Whether the essential function can be postponed or remain unperformed for any length of time and for how long.

What if an employer has a male employee whose wife is on bedrest due to her pregnancy, and he is needed to care for her. Does that male employee have any rights under the PWFA?

No, in such an instance, the male employee does not have any rights under the PWFA. However, that employee may have the right to leave under the Family and Medical Leave Act, where eligible.

For more information on the PWFA and its regulations, please reach out to Henry L. Wiedrich, or another member of Cline Williams' Labor and Employment Law Section at www.clinewilliams.com.

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