EEOC Accepts Charges Under New Pregnant Workers Fairness Act

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On June 27, 2023, the Pregnant Workers Fairness Act (PWFA) went into effect.
According to the House Committee on Education and Labor Report, "when pregnant workers do not have access to reasonable workplace accommodations, they are often forced to choose between their financial security and a healthy pregnancy." In an effort to promote the economic well-being of working mothers and their families, the PWFA was enacted to ensure pregnant workers have access to reasonable accommodations. The law was signed by President Biden on December 9, 2022. The U.S. Equal Employment Opportunity Commission (EEOC) is now taking complaints of alleged violations occurring on or before June 27. Complainants will be permitted to file a lawsuit for violations of the PWFA within 90 days of the conclusion of the EEOC administrative process.

The PWFA requires that covered employers (including both public and private sector employers who employ at least 15 employees, Congress, federal agencies, employment agencies, and labor organizations) provide "reasonable accommodations" to employees as may be necessitated by pregnancy, childbirth, or related medical conditions, unless the employer can demonstrate that such "reasonable accommodation(s)" would cause undue hardship on the operation of the business. Notably, the PWFA is an accommodation statute, not a nondiscrimination statute. Claims of discrimination continue to be covered by Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act of 1978, and the Americans with Disabilities Act (ADA). While the ADA provides for reasonable accommodations for people with disabilities, it does not expressly require reasonable accommodations for pregnancy. The PWFA now expressly requires accommodations for "known limitations" related to pregnancy, childbirth, and/or related medical conditions.

The first question becomes, what is a "known limitation" that would require an accommodation to be provided? Pregnancy, in and of itself, is not a "limitation" requiring an accommodation, and the PWFA does not specify which conditions may constitute "known limitations." Rather, the PWFA defines such as a "… physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, that the employee or employee's representative has communicated to the employer …" Notably, the PWFA is clear that such limitations need not meet the definition of disability to require an employer to provide reasonable accommodations.

What is unclear from the statutory language is what information, if any, an employer may request to determine whether or not a "known limitation" exists. A strict interpretation would imply that any communication by an employee or her representative of a limitation requiring accommodation would be sufficient. Some limitations may be obvious, such as morning sickness or increased fatigue, while others may be less obvious, such as gestational diabetes or pregnancy-related carpal tunnel syndrome. Until regulations are adopted to provide

more guidance, employers should use extreme caution and obtain fact-specific legal advice before questioning any non-obvious limitations communicated by an employee.

Once a limitation has been identified, the second step will be to determine reasonable accommodations. The PWFA defines the term "reasonable accommodation" as having the same meaning as that term is construed by the ADA and its ensuing regulations. However, while the PWFA requires the EEOC to implement regulations including examples of reasonable accommodations to address known limitations related to pregnancy, childbirth, or related medical conditions, the Committee on Education and Labor Report identified examples of "reasonable accommodations" specifically applicable to the PWFA, as follows:

1. the ability to sit or drink water;
2. closer parking;
3. flexible hours;
4. appropriately sized uniforms and safety apparel;
5. additional break time to use the bathroom, eat, and rest; and
6. excusal from strenuous activity and/or activities that involve exposure to compounds not safe for pregnancy.

Similarly, leave is a potential reasonable accommodation under the PWFA, including time off to recover from delivery, although an employer may not require a qualified employee to take leave, paid or unpaid, if an alternative reasonable accommodation can be provided. When considering leave as an accommodation, employers should be mindful of the Family Medical Leave Act (FMLA). The FMLA provides for 12 weeks of unpaid protected leave, and leave as an accommodation should be counted toward the 12-week period. If an employee needs leave as an accommodation pursuant to the PWFA, the employer should also provide requisite notice pursuant to the FMLA.

Like the ADA, the PWFA requires employers to engage in an "interactive process" when considering an employee's request for reasonable accommodations. The examples from the Committee on Education and Labor are mere suggestions for reasonable accommodations to an employee's limitations related to pregnancy, childbirth, or related medical conditions, though it is notable that this is the first time we are seeing some of these examples as inclusive of a "reasonable accommodation." When an employee makes a request for accommodations, the employer and employee must meet to discuss what reasonable accommodations are available to meet the employee's needs. If an employer can demonstrate that a requested accommodation would impose an undue hardship on the operation of the business, covered employers may not be required to provide the requested accommodations; however, the employer must engage in an interactive process with the employee to consider possible alternatives. Given the specific set of examples provided by the Committee on Education and Labor, it would be advisable to think creatively and to make every good-faith effort to arrive at a resolution.

With respect to "undue hardship," as we await more specific regulations, we can look to the ADA's definition for factors to be considered in determining whether an accommodation would impose an undue hardship on a covered entity. Some factors to be considered include the nature and cost of the accommodation needed, the number of persons employed, and the overall financial resources of the covered entity. The "undue hardship"

bar is a high one and employers should proceed cautiously when considering denial of a requested accommodation.

Employers must reference state law in order to compare the obligations under state and federal law to ensure compliance. For example, entities with Louisiana operations may note that the PWFA's provisions mostly mirror the Louisiana Pregnancy Law, which was enacted in 2021. Therefore, the obligations set forth in the PWFA may not be new to some Louisiana employers. One difference is which employers are considered "covered" under each law. In Louisiana, employers with 25 or more employees are covered, whereas the federal statute only requires 15 or more employees. Thus, the new federal law will encompass more employers in Louisiana.

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*Summer Law Clerk **Madeline Earles** assisted in the crafting of this alert.*

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