BCLPatWork.com

KEYS TO THE PREGNANT WORKERS FAIRNESS ACT AND IMPLEMENTING REGULATIONS

May 15, 2024

SUMMARY

The Equal Employment Opportunity Commission ("EEOC") recently issued regulations implementing the Pregnant Workers Fairness Act (the "PWFA"). Although the PWFA has been in effect for almost a year, the regulations serve to emphasize its broad scope and provide a reminder about important differences between the PWFA and another federal statute that requires workplace accommodations, the Americans with Disabilities Act (ADA).

The PWFA applies to private and public employers with 15 or more employees and does not replace federal, state, or local laws that are more protective of employees or applicants affected by pregnancy, childbirth, or related medical conditions. Training will be critical as the landscape involving pregnancy-related accommodations continues to develop. Below are some "keys" to the PWFA and its regulations.

KEY POINTS OF EXPANSIVENESS

The PWFA requires employers to provide reasonable accommodations for **pregnancy, childbirth or related medical conditions**. The regulations make clear that this phrase includes a broad range of conditions, including current and past pregnancies, infertility, the use of contraception, gestational diabetes, miscarriage, abortion[1], post-pregnancy conditions such as postpartum depression and lactation issues, and even pre-existing conditions that are exacerbated by pregnancy.

An employee's physical or mental condition relating to pregnancy does not have to rise to the level of a "disability" as set forth in the ADA, but simply must relate to, be affected by, or arise out of pregnancy, childbirth or related medical conditions, and can be minor or episodic.

An employee's communication of a **known limitation** need not be in writing or use any specific format and can be made by an employee or the employee's representative (family member, friend,

union representative, health care provider, or “other representative”) with or without permission from the employee (such as when the employee is incapacitated).

Reasonable accommodations under the PWFA are simply changes in the work environment or the way things are usually done at work. While not an “entitlement” statute like the FMLA – accommodations under the PWFA are not guaranteed and are subject to an undue burden analysis – the EEOC nonetheless takes the position that certain accommodation requests should be subject to **predictable assessments**, meaning that such requests typically should be granted as a matter of course:

- Allowing an employee to carry or keep water near and drink, as needed;
- Permitting an employee to take additional restroom breaks, as needed;
- Allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and
- Allowing an employee to take breaks to eat and drink, as needed.

Additionally, while the following accommodations are not included in the “predictable assessments” list, the comments to the regulations indicate that these adjustments likely would be reasonable and therefore should be provided under most circumstances:

- Modifications to uniforms or dress codes;
- Minor modifications to workstations (e.g., permitting a fan or chair);
- Permitting the use of a workstation closer to a bathroom or lactation space, or farther away from environmental hazards (e.g., heat, fumes, or toxins);
- Use of a closer parking space in an employer-provided parking facility;
- Permitting eating or drinking at a workstation or nearby location where food or drink is not usually permitted;
- Rest breaks as needed;
- Providing personal protective equipment;
- 16 prenatal and postnatal medical appointments; and
- 8 weeks of leave (does not have to be paid).

As under the ADA, requests for accommodation under the PWFA are subject to an individualized analysis using the “interactive process.” However, the EEOC has stated that it expects that many

PWFA accommodations can be granted after simple exchanges of information between employees or applicants and employers, such as brief conversations or emails.

The PWFA does not mandate or guarantee paid or unpaid “maternity” leave, and the EEOC has indicated that in most cases, an employee’s right to leave would be governed by the Family and Medical Leave Act (FMLA), applicable state law, and/or an employer's existing policies. Nonetheless, the EEOC has also indicated that leave **may** be a reasonable accommodation under the PWFA, albeit not an accommodation that can be forced on an employee. Thus, employers should be prepared to receive accommodation requests for leave during pregnancy and/or following delivery. When considering whether to grant such a request, the employer should consider whether granting the employee’s request for leave would constitute an undue hardship.

KEY DIFFERENCES BETWEEN THE PWFA AND THE ADA

THE PWFA’S DEFINITION OF QUALIFIED INDIVIDUAL IS BROAD

Unlike under the ADA, to be a qualified employee (or applicant) under the PWFA, the individual **does not** have to be able to perform **all** essential functions of the position with or without a reasonable accommodation. Rather, an individual who is unable to perform one or more essential functions is still covered by the PWFA so long as the inability is temporary, the employee can perform the essential functions in the near future, and the temporary inability to perform the essential function can be reasonably accommodated. “In the near future” generally means at the end of 40 weeks for a current pregnancy, and is determined on a case-by-case basis for all other conditions.

“REASONABLE ACCOMMODATION” UNDER THE PWFA MAY INCLUDE REMOVING ESSENTIAL FUNCTIONS

The result of the foregoing definition of “qualified individual” under the PWFA is that employers may have to remove even essential functions from an employee’s job if the employee is temporarily unable to perform such functions, even if such inability lasts the employee’s entire pregnancy. Accordingly, while the ADA does not require reassignment of essential functions to other employees, the PWFA specifically includes the possibility of reassignment to “other employees, temporary employees, or third parties who can perform or be hired to perform the essential function” as a consideration when determining whether the temporary suspension of an essential function creates an undue hardship.

PERMISSIBLE REQUESTS FOR SUPPORTING MEDICAL DOCUMENTATION ARE LIMITED UNDER THE PWFA

Medical documentation supporting the need for accommodation, the accommodation(s) requested, and the anticipated duration of the need **may only be required** when it is **reasonable under the circumstances** to determine whether the employee has a physical or mental condition that is related

to, affected by, or arising out of pregnancy, childbirth, or related medical conditions and needs an adjustment or change at work as a result of the limitation. In the typical situation, employees may **self-confirm** their condition (such as pregnancy) and the necessary accommodation. Seeking documentation for one of the predictable assessments described above is not likely to be found reasonable.

In circumstances where it is permissible to request supporting medical documentation, employees must be given a reasonable amount of time to submit the documentation, and should not be required to have their health care provider complete a specific form. The regulations allow for documentation to be provided by a broad range of health care providers, including doulas, lactation consultants, midwives, physical therapists, and psychologists. Employers typically should grant interim accommodations while waiting to receive the documentation.

KEY POINTS FOR SUPERVISOR TRAINING

The EEOC emphasizes that employees should be able to obtain accommodations by communicating with the employer representative(s) with whom they would normally consult if they had questions or concerns about work matters, and that the process for granting accommodation requests should be straightforward. In other words, employers must anticipate that employees can and will go directly to their immediate supervisors to express their need for a pregnancy-related accommodation, and supervisors should be in a position to recognize and even grant certain requests without further necessary action on the part of the employee.

As a result, while Human Resources staff must become familiar with the PWFA, it is imperative that **front line supervisors also receive training**, on such key concepts as:

- Pregnancy – and a pregnancy-related condition – is a protected class.
- Individuals who are pregnant or have pregnancy-related conditions must be treated *better* than other employees, meaning their accommodation requests must be considered and granted if they are reasonable and do not create an undue burden.
- Accommodation requests may be made directly to supervisors. Typically, a simple conversation or e-mail exchange will be sufficient for employers to obtain all the information needed to determine the appropriate reasonable accommodation.
- Certain accommodations should be presumed to be reasonable and should be granted without a detailed process, e.g., providing extra food, drink and bathroom breaks and allowing an employee to sit / stand as necessary.
- In many cases, medical certification will not be necessary and should not be requested unless reasonably necessary to determine the length of the limitation or parameters of the requested accommodation (e.g., lifting or climbing restrictions).

- Leave may be a type of reasonable accommodation, but on the other hand, cannot be forced on the employee if other accommodations are available that will allow the employee to continue working.
- The supervisor must **promptly** engage in the interactive process with the employee, inform Human Resources, and grant interim accommodations if the requested accommodation requires review. Unnecessary delays in granting an accommodation that are in effect a denial due to the short-term nature of the condition are considered stand-alone violations of the PWFA.
- Pregnancy-related information is confidential health information; even if the employee chooses to share certain information with colleagues, supervisors must keep health-related information confidential.

CONCLUSION

The PWFA and its regulations broadly require reasonable workplace accommodations for employees with pregnancy and pregnancy-related limitations. While the regulations are currently being challenged, first, in a lawsuit filed by a group of Republican state attorneys general, and again this week, by the states of Louisiana and Mississippi, these challenges are narrow and focused on the inclusion of abortion as a pregnancy-related condition for which accommodation may be necessary. BCLP will continue to monitor this litigation and any other challenges to the EEOC's regulations.

Please reach out to your BCLP contact for assistance with policy language, training, and compliance questions.

---

[1] While the EEOC includes abortion in the definition of "related medical conditions" that qualify for accommodation, the EEOC clarified in its comments to the new regulations that neither the PWFA nor the regulations require an employer to pay for an abortion, and noted that the accommodation most likely to be sought with respect to abortion is time off to attend a medical appointment or for recovery, which isn't required to be paid time off.

MEET THE TEAM

Christy E. Phanthavong

Chicago

christy.phanthavong@bclplaw.com
+1 312 602 5185

Jennifer A. Goltermann

St. Louis

jenny.goltermann@bclplaw.com
+1 314 259 2805

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be "Attorney Advertising" under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP's principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.

© 2024 Bryan Cave Leighton Paisner LLP.