

NEW PREGNANT WORKERS FAIRNESS ACT PROVIDES PROTECTIONS FOR PREGNANCY-RELATED CONDITIONS

Date: 28 June 2023

US Labor, Employment, and Workplace Safety Alert

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Effective 27 June 2023, the Pregnant Workers Fairness Act (PWFA)¹ is a new law that closes a gap in coverage under federal law for pregnant and postpartum workers and applicants. This new law guarantees the affirmative right to receive reasonable accommodations for known limitations related to pregnancy, childbirth, or related medical conditions absent an “undue hardship” on the employer. Under the PWFA, pregnant or postpartum employees and applicants seeking reasonable accommodations are no longer required to (1) have a pregnancy-related disability or (2) identify other similarly situated employees with accommodations, as was previously required under existing federal laws governing pregnancy-related discrimination.

LIMITATIONS OF THE CURRENT LEGAL LANDSCAPE ADDRESSING ACCOMMODATIONS FOR PREGNANCY AND RELATED CONDITIONS

Prior to passage of the PWFA in December 2022, pregnant or postpartum employees and applicants were limited in their ability to obtain reasonable accommodations because of pregnancy, childbirth, or related medical conditions under federal law. Although the Pregnancy Discrimination Act of 1978 (PDA), which amended Title VII of the Civil Rights Act of 1964 (Title VII), protects employees from discrimination on the basis of pregnancy, childbirth, or related medical conditions, employees are entitled to reasonable accommodations for such conditions under the PDA *only* if they can identify other similarly situated employees in the workplace who received accommodations. Moreover, the Americans with Disabilities Act of 1990 (ADA) — which prohibits discrimination based on disability and requires that employers provide reasonable accommodations to employees with disabilities — also offers limited protections for pregnant and postpartum employees. Pregnancy itself is not a disability under the ADA, and only *some* pregnancy-related conditions meet the ADA's definition of “disability.” However, with the enactment of the PWFA, pregnant and postpartum employees and applicants who otherwise were not covered under Title VII or the ADA, or applicable state or local laws,² may now seek reasonable accommodations under federal law.

Importantly, the PWFA does not replace Title VII, the ADA, or any other federal, state, or local laws that are more protective of employees and applicants affected by pregnancy, childbirth, or related medical conditions.

INDIVIDUALS AFFORDED COVERAGE UNDER THE PWFA

As under the ADA and Title VII, the PWFA applies to private and public sector employers with 15 or more employees. The PWFA protects qualified applicants and employees of covered employers who have a “physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions” who have informed their employer of the condition.³ An employee’s condition need not be a “disability” under the ADA to trigger protection under the PWFA. However, the PWFA applies only to “qualified” applicants or employees who, with or without reasonable accommodation, can perform the essential functions of the job. Qualified individuals are protected under the new law where: (1) an inability by the individual to perform an essential job function is temporary; (2) the individual can perform the essential job function in the near future; and (3) the individual can perform the essential job function with a reasonable accommodation.

PROTECTIONS UNDER THE PWFA

Covered employers will now be required to provide reasonable accommodations to qualified employees and applicants with known limitations related to pregnancy, childbirth, or related medical conditions *unless* the employer can demonstrate that providing the accommodation would impose an undue hardship on the employer’s business operations.

Further, under the PWFA, covered employers are prohibited from:

- Requiring a qualified employee to accept an accommodation without a discussion about the accommodation between the worker and the employer (known as an “interactive process”);
- Denying a job or other employment opportunities to a qualified employee or applicant based on the individual’s need for a reasonable accommodation;
- Requiring a qualified employee to take leave, whether paid or unpaid, if a reasonable accommodation can be provided that would allow the employee to continue working;
- Retaliating against a qualified employee for requesting or using a reasonable accommodation for a known limitation related to the employee’s pregnancy, childbirth, or related medical condition;
- Retaliating against an individual for opposing or reporting unlawful discrimination under the PWFA or otherwise participating in a PWFA proceeding (including investigations into violations); or
- Interfering with any individual’s rights under the PWFA.

The PWFA’s “interactive process” requires covered employers to engage in good-faith discussions with employees requesting reasonable accommodations to address the employee’s individual needs and determine the possible reasonable accommodation(s) that may meet those needs.

The PWFA directs the Equal Employment Opportunity Commission (EEOC) to issue regulations to carry out the new law, and these regulations must provide examples of reasonable accommodations for known limitations related to pregnancy, childbirth, or related medical conditions. To date, no regulations have been proposed, and the EEOC has two years from the PWFA’s enactment to issue these regulations. Following publication, the public can offer comments and input before the regulations are finalized.

GUIDANCE ON “REASONABLE ACCOMMODATIONS”

Importantly for employers, the PWFA adopts the ADA's definition of “reasonable accommodation,” which is an adjustment or modification to a job, the work environment, or the way things are usually done at the workplace that enables an applicant or employee with a disability to have an equal opportunity to get a job and successfully perform that job to the same extent as employees without disabilities. In another nod to the ADA, covered employers and employees must work together under the PWFA's mandatory “interactive process” to identify the appropriate accommodations.

Although the EEOC has not yet issued its regulations and accompanying examples of reasonable accommodations, the EEOC has highlighted the House Committee on Education and Labor Report on the PWFA's⁴ suggestions and examples of possible reasonable accommodations, including:

- Seating or modified seating;
- Closer parking spaces;
- Appropriately sized uniforms;
- Additional break time to rest, eat, or use the restroom;
- Flexible hours;
- Leave or time off to recover from childbirth;
- Being excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy;
- Job reassignment; and
- Assistance with manual labor.

The proposed examples, which mirror examples of pregnancy-related accommodations suggested under similar state and local laws, give some insight as to the types of accommodations that the EEOC will expect from employers. Similar to the ADA, covered employers under the PWFA are not required to provide a reasonable accommodation if the employer can establish that such accommodation would impose an “undue hardship” on the employer's business operations. The PWFA also adopted the ADA's definition of “undue hardship,” defined as any action requiring “significant difficulty or expense”.

The EEOC will begin accepting charges filed under the PWFA on the law's effective date; however, the alleged conduct giving rise to the charge must have occurred on or after 27 June 2023. Protected individuals filing a charge under the PWFA also may seek relief, where applicable, under Title VII or the ADA. However, employees requiring a reasonable accommodation related to pregnancy, childbirth, or related medical conditions *prior* to 27 June 2023 may only seek relief under Title VII or the ADA, if applicable.

Importantly, the PWFA applies *only* to accommodations and not to claims of discrimination on the basis of pregnancy, childbirth, or related medical conditions. The EEOC will continue to enforce federal laws that prohibit discrimination against workers based on pregnancy, childbirth, or related medical conditions.

While many employers may already have policies in place that comply with the PWFA, covered employers should review and, if applicable, update their accommodation policies and procedures to ensure compliance with the PWFA as well as applicable state law. Further, employers should consider training managers on identifying and addressing requests for an accommodation under the PWFA as well as under Title VII and the ADA.

As covered employers navigate these new accommodation requirements, the K&L Gates Labor, Employment, and Workplace Safety practice can assist with all aspects of preparing for and maintaining compliance under the new law.

This article does not contain legal advice and should not be relied upon as providing legal advice. April Boyer is a partner and Claudia Marina Velasquez is an associate in K&L Gates' Miami office, and Erinn Rigney is a partner in K&L Gates' Chicago office, where they counsel and represent employers in connection with the firm's Labor, Employment, and Workplace Safety practice.

FOOTNOTES

¹ Pregnant Workers Fairness Act, H.R. 1065, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/1065/text>.

² Prior to the enactment of the PWFA, some states and municipalities enacted or amended laws to extend accommodations to individuals on the basis of pregnancy, childbirth, and related medical conditions, including California (Cal. Code Regs. tit. 2 § 11040), Illinois (775 ILCS 5/2-102(J)), Rhode Island (R.I. Gen. Laws § 28-5-7.4), Delaware (19 Del. C. § 711), and New York City (N.Y.C. Admin. Code § 8-107).

³ *Id.*

⁴ H. Rept. 117-27 - PREGNANT WORKERS FAIRNESS ACT, H. Rept. 117-27, 117th Cong. (2023), <https://www.congress.gov/congressional-report/117th-congress/house-report/27/1>.

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