MAY 25, 2023 | DISCRIMINATION, HARASSMENT & RETALIATION

Reasonable Accommodations under the Pregnant Workers Fairness Act

The Pregnant Workers Fairness Act ("PWFA") was signed by President Biden on December 29, 2022, and takes effect on June 27, 2023. The PWFA requires covered employers to provide a reasonable accommodation to the known limitations of a qualified employee related to pregnancy, childbirth, or related medical conditions unless the accommodation would pose an undue hardship on the operation of the business.

Below is a summary of the PWFA.

Who is a covered employer?

A covered employer is an employer with at least 15 employees. Employers may look to EEOC regulations related to Title VII and how courts interpret employers under Title VII for purposes of determining coverage as the PWFA explicitly references the Title VII definition of employer.

What does the PWFA require?

Under Title VII employers cannot discriminate against an employee based on pregnancy, childbirth, or related medical conditions. Likewise, employers covered by Title VII must treat an employee affected by pregnancy, childbirth, or related medical conditions the same as other workers with similar abilities or an inability to work.

The Americans with Disabilities Act ("ADA") prohibits discrimination because of disability. The ADA requires covered employers to provide qualified individuals with a disability a reasonable accommodation so long as the accommodation would not cause an undue hardship for the employer. Under the ADA, pregnancy is not a disability. However, some pregnancy related conditions may be disabilities under the law.

The PWFA fills in the gap between Title VII and the ADA—covered employers must provide a reasonable accommodation to an employee's known limitations related to pregnancy, childbirth, or a related medical condition so long as it does not pose an undue hardship.

Under the PWFA a "known limitation" is 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 whether or not such condition meets the definition of disability" under the ADA.

The term "qualified employee" also has a distinct meaning than under the ADA. Under the PWFA a "qualified employee" is an "employee or applicant who, with or without a reasonable accommodation, can perform the essential functions of the employment position, except the employee or applicant shall be considered qualified if an inability to perform an essential function is temporary for a period; the essential function could be performed in the near future; and the inability to perform the essential function can be reasonably accommodated." The terms "reasonable accommodation" and "undue hardship" have the same meaning as under the ADA and similarly require employers to undergo an interactive process to determine an appropriate reasonable accommodation.

In addition to requiring covered employers to provide a reasonable accommodation, the PWFA prohibits covered employers from:

- Requiring a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at as a result of the interactive process;
- Denying employment opportunities to a qualified employee if the denial is based on the need to make a reasonable accommodation to the known limitations related to pregnancy, childbirth, or related medical conditions;
- Requiring a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions; and
- Taking an adverse action in the terms, conditions, or privileges of employment against a qualified employee because the employee requested or used a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee.

What qualifies as a reasonable accommodation?

The House Committee on Education and Labor's Report on the PWFA provides the following examples of a reasonable accommodation:

- Being permitted to sit or drink water
- Receiving closer parking
- Having flexible hours
- Receiving appropriately sized uniforms and safety apparel
- Receiving additional break time to use the bathroom, eat, and rest
- Taking leave or time off to recover from childbirth
- Being excused from strenuous activities and/or exposure to chemicals that are not safe for pregnancy

Key Takeaways

The PWFA takes effect on June 27, 2023. The PWFA instructed the EEOC to issue regulations no later than 1 year after the PWFA was enacted. To date, the EEOC has not issued any regulations, but the Agency issued a series FAQs. The FAQs provide that the EEOC will begin accepting charges alleging violations of the PWFA on June 27. Employers would be well advised to take steps to prepare for the enforcement of the PWFA.

As a preliminary matter, it is advisable to review existing accommodations policies and ensure that they are in

compliance with the PWFA. Likewise, employers would be well advised to ensure that Human Resources professionals are well trained and understand employer obligations under the PWFA.

It is also imperative to remember that Title VII prohibits discrimination because of pregnancy. Under the ADA a qualified employee may be entitled to a reasonable accommodation before the PWFA takes effect.