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Pregnant Workers Fairness Act

On June 18, 2024, the Equal Employment Opportunity Commission's ("EEOC") final rule regarding the Pregnant Workers Fairness Act ("PWFA") will go into effect. The PWFA requires employers to provide reasonable accommodations to workers for conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. "Relating to" pregnancy includes abortion-related healthcare; however, an employer-provided health plan is not required to pay for or cover specific treatments or procedures, including abortions.

The PWFA applies to all public or private employers with 15 or more employees, regardless of the industry. Importantly, employees need not have been employed for any specific period of time to be entitled to an accommodation under the PWFA.

Requesting Reasonable Accommodations

Similar to the Americans with Disabilities Act ("ADA"), an employee may request a variety of reasonable accommodations under the PWFA, including, but not limited to, frequent breaks, sitting and standing accommodations, schedule changes, part-time work, unpaid leave (unless otherwise provided for by the employer's policies), remote work, light duty, parking changes, and modifying work functions or environments.

An employer is permitted to seek medical documentation of the need for accommodation unless the need is obvious, the employer already has sufficient information to support a pregnancy-related condition, the request is for a lactation accommodation, or the accommodation is available without documentation for other employees seeking it for non-PWFA reasons.

Unlike the ADA, the EEOC guidelines specify four "predictable" accommodations that are presumed to be reasonable and not impose an undue hardship:

- Allowing an employee to carry or keep water near and drink, as needed
- Allowing 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.

The EEOC expects employers to grant the foregoing accommodations in almost every circumstance without requiring documentation specifying the need.

In the most notable departure from the ADA, the PWFA requires employers to provide an accommodation *even if the employee cannot currently perform an essential function of the job*, so long as the limitation is for a "temporary period" and the essential function can be performed by the employee "in the near future," which the guidance indicates would typically be no more than 40 weeks, absent unusual circumstances. This standard differs from the ADA, which does not require an employer to accommodate any employee who cannot perform the essential functions of their role.

Further, employers may not require that an employee be examined by a healthcare provider of the employer's choosing. The healthcare provider who conducts an examination for purposes of certifying an accommodation need not be the employee's primary care provider, but can be any provider who is familiar enough with the employee's circumstances to provide the necessary information.

Undue Hardship

The EEOC treats undue hardship under the PWFA in a similar manner as under the ADA. An undue hardship poses a significant difficulty or expense to the employer's business, relative to the employer's overall resources. A non-exhaustive list of factors the employer may consider in making this determination includes the nature and cost of the accommodation, the overall financial resources of the employer, the overall size of the business and number of employees, the number, type and location of the employer's facilities, the type of operations of the facilities, and the impact of the accommodations upon those operations and other employees.

Examples of undue hardships include accommodations that would be unduly costly, extensive, substantial or disruptive, or that would fundamentally alter the nature or operation of the business. For instance, the EEOC guidance indicates that a dental hygienist requesting the ability to work remotely would fundamentally alter the operation of the business and could be denied. The employer should offer a different accommodation, such as part-time work or another reasonable accommodation.

Employer Takeaways

- Update handbooks to include information about accommodation under the PWFA, and update the federal anti-discrimination poster to the latest version, which includes information about employee rights under the PWFA.
- Informal conversation will trigger an employer's obligation to accommodate—no special words or paperwork may be required.
- Certain minor accommodations should be granted in nearly all situations.
- An employer may be required to reassign an essential function of the employee's role for a "temporary period."
- Employers may not request medical certification when the need for accommodation is obvious or an employer already has sufficient information of a limitation related to pregnancy.
- Remember that the PWFA does not preempt state law that provides equal or greater protection and provides benefits in compliance with the most favorable applicable law.

If you have any questions about the EEOC's new guidance on the Pregnant Workers Fairness Act, please contact your Kutak Rock attorney or a member of the firm's National Employment Law Group. You may also visit us at www.kutakrock.com.