Pregnant Workers Fairness Act Final Rule to Take Effect June 18, 2024

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On April 15, 2024, the U.S. Equal Employment Opportunity Commission (EEOC) issued its final rule implementing the Pregnant Workers Fairness Act (PWFA). The PWFA requires covered employers to provide reasonable accommodations to a qualified employee's or applicant's known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause an undue hardship on the employer's business. The final rule takes effect on June 18, 2024.

Which employers does the PWFA apply to?

The PWFA applies to private and public sector employers that have 15 or more employees, as well as to employment agencies and labor organizations.

What employees and applicants qualify for PWFA protection?

An employee or applicant is qualified if they can perform the essential functions of their job with or without reasonable accommodation. If an employee cannot perform the essential functions with or without reasonable accommodation, an employee may still qualify for PWFA protection as long as the inability is temporary; the employee could perform the functions "in the near future;"and the inability to perform the essential functions can be reasonably accommodated.

What could potentially qualify as a "reasonable accommodation" under the PWFA?

What constitutes as a reasonable accommodation will depend on the circumstances. The final rule notes that an employee may need different accommodations at different times during pregnancy and after childbirth. A non-exhaustive list of possible reasonable accommodations includes:

- Flexible breaks

- A change in workstations, such as providing an option to sit, or a way to do work while standing
- Flexible work schedules, such as shorter hours, part-time work, or a later start time
- Telework options
- Temporary reassignment
- Temporary suspension of one or more essential functions of a job
- Leave for health care appointments
- Light duty
- Leave to recover from childbirth or other medical conditions related to pregnancy and childbirth

What is included in "pregnancy, childbirth, or related medical conditions?"

Per the EEOC, this term includes current pregnancy, past pregnancy, potential or intended pregnancy (including fertility treatment), labor, childbirth, termination of pregnancy (including via miscarriage, stillbirth, or abortion), endometriosis, antenatal anxiety or depression, postpartum depression, menstruation, and lactation and conditions related to lactation. This list is non-exhaustive.

Can employers require that the employee or applicant provide information from their health care provider about the limitation?

Only under limited circumstances. First, an employer may not require that the employee be examined by a health care provider selected by the employer. Second, an employer's request for documentation must be reasonable under the circumstances. A request is not reasonable if the limitation and need for modification is obvious; the employer already knows about the limitation and the modification; the employee needs breaks for the bathroom or to eat or drink, needs to carry water to drink, or needs to stand if their job requires sitting or to sit if their job requires standing; or the employee is lactating and needs modification not pump at work or nurse during work hours. Finally, requests for documentation must be limited to documentation that confirms the physical or mental condition, confirms that the condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, and describes the change at work that is needed due to the limitation.

What should an employer consider in its "undue hardship" analysis under the PWFA?

An employer should generally engage in the same analysis, and interactive process, that it would use to determine an undue hardship for purposes of an ADA accommodation. Factors an employer may consider in its analysis when an accommodation request includes the temporary suspension of an essential function of the employee's job include:

- The length of time the employee will be unable to perform the essential functions of the job
- Whether there is work for the employee to do
- Whether the employer has provided other employees in similar positions who are unable to perform the essential functions of their positions with temporary suspensions of those functions

- Whether there are others who can perform or be temporarily hired to perform the essential functions in question
- Whether the essential functions can be postponed or remain unperformed for a period of time, and if so, for how long

Closing Thoughts

Shortly after the PWFA final rule was announced, 17 state Attorneys General filed a lawsuit against the EEOC, claiming that the agency's rule is unconstitutional, and then Louisiana and Mississippi filed their own suit. There is currently an injunction barring the PWFA's enforcement against the state of Texas. Employers should proceed with the expectation that the PWFA will become effective on June 18, but know that legal challenges could impact the scope and enforceability of the final rule. Contact your Vorys lawyer for questions about accommodating pregnant employees in the workplace and for the status of challenges to the final rule.