> Client Alert

Employers Take Note: Pregnant Workers Fairness Act Goes Into Effect Today

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The Pregnant Workers Fairness Act ("PWFA") goes into effect nationwide on June 27, 2023. Under the PWFA, employers *must* provide employees with accommodations for known limitations related to pregnancy, childbirth or related medical conditions unless the accommodation would cause the employer undue hardship.

Relationship to Existing Laws

Employers in many locales are already required to provide accommodations to pregnant employees; more than 30 state and local jurisdictions, including New York State and New York City, have existing laws requiring accommodations for pregnant workers, which remain in full force and effect. Some state laws regarding paid sick leave, lactation and protection from discrimination on the basis of body size or caregiver status also provide additional support to pregnant employees or those who have recently given birth based on other statutory protections.

Congress nonetheless passed the PWFA to close the gap in coverage between several existing federal laws. Under Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended by the Pregnancy Discrimination Act in 1978, it has long been unlawful to take adverse action against employees on the basis of sex, including due to pregnancy. However, the Supreme Court has interpreted Title VII to only require pregnancy-related accommodations under limited circumstances.

Similarly, although some pregnant workers are disabled within the definition of the Americans with Disabilities Act ("ADA") and could request reasonable accommodations pursuant to that statute, courts have long held that a normal, healthy pregnancy is not a disability under the ADA. Additionally, while the Family and Medical Leave Act ("FMLA") requires that employees be given job-protected unpaid leave to treat a serious health condition or following the birth of a child, some workers may not qualify for FMLA leave due to their length of employment or the size of the workforce employed by their employer. Thus, Congress passed the PWFA to create broader protections for pregnant workers and those who have recently given birth.

Scope of the PWFA

Although the PWFA goes into effect on June 27th, the U.S. Equal Employment Opportunity Commission ("EEOC" or "Commission"), the agency responsible for enforcing the PWFA, has not yet issued guidance regarding enforcement of this new law. The EEOC is expected soon to issue its notice of proposed rulemaking and open the public comment period for PWFA regulations, with a final rule implemented by December 29, 2023. However, the EEOC will begin accepting charges alleging violations of the PWFA on June 27, 2023 for conduct occurring on or after that date, so it is essential that employers swiftly comply with the PWFA, even in advance of the Commission's proposed rulemaking.

"Qualified Employees" under the PWFA

The PWFA applies to employees and job applicants experiencing limitations related to pregnancy, childbirth, or a related medical condition. Although the EEOC has not yet expressed how it will interpret "related to" or "a related medical condition," employers can anticipate that this term will be interpreted similarly to the EEOC's interpretation of identical language in other statutes, and will likely include a host of conditions related to pregnancy, such as back pain, weight gain, preeclampsia, gestational diabetes, recovery from childbirth and lactation.

To qualify for an accommodation under the PWFA, an employee need not be substantially limited in a major life activity as is required under the ADA. Any pregnancy-related limitation, regardless of severity, will likely qualify for an accommodation under the PWFA.

Another key difference from the ADA is that where the ADA requires employers to accommodate only those employees who can perform the essential functions of the job with or without an accommodation, under the PWFA, an employee remains qualified if she:

1. Has a temporary inability to perform an essential function of her job;
2. Could perform that function in the "near future"; and
3. The inability to perform that function can be reasonably accommodated.

The law does not explicitly define "temporary" or "near future," and the EEOC's forthcoming guidance will likely specify how the Commission will interpret such terms.

"Known Limitation"

The PWFA only requires that employers provide accommodations when an employee is experiencing a "known limitation," which the statute specifies occurs when the employee or her representative has communicated to the employer that the employee is experiencing a limitation related to pregnancy, childbirth or a related condition. Indeed, the PWFA does *not* suggest that an employer inquire whether an employee or applicant is pregnant or intends to become pregnant, and employers should refrain from asking such questions as mandated under other anti-discrimination legislation.

An employee does not need to use any "magic words" to inform the employer of a limitation due to pregnancy or to request an accommodation under the PWFA. Employers may wish to provide additional training for supervisors and managers to ensure that informal requests, such as a request to use the bathroom more frequently due to pregnancy, are handled in compliance with the PWFA. As with the ADA, medical documentation should be requested only when absolutely necessary, maintained in confidence, and stored separately from other personnel documents.

Reasonable Accommodations under the PWFA – An Interactive Process

As with accommodations under the ADA, because each pregnant worker's needs may be different, an employer should avoid a "one size fits all" approach to pregnancy-related accommodations. Employers are required under the PWFA, as under the ADA, to engage in an ***interactive process*** to identify an accommodation that suits both the employer and the employee. The interactive process need not be attenuated – if an employee requests permission to sit due to pregnancy-related back pain, and the employer provides a chair and permits the employee to sit whenever necessary, the interactive process is deemed fulfilled.

Some examples of accommodations for pregnant employees, include, but are not limited to:

- Later or more flexible start times to accommodate pregnancy-related morning sickness;
- Temporary light-duty assignment;
- Remote work;
- Permitting a pregnant employee to drink water or carry light food as needed, even if employees are ordinarily prohibited from eating and drinking in the workspace;
- Providing a chair or stool, even if employees are ordinarily expected to stand when interacting with customers;
- More frequent restroom breaks, or a workstation closer to the restroom;
- If uniforms are required, allowing the employee to change uniform sizes more frequently than scheduled, or permitting the employee to wear other work-appropriate clothing; and
- Time off to attend pregnancy-related medical appointments or a brief leave to recover from childbirth, even if the employee has exhausted her leave balance or is ineligible for FMLA.

Additional Prohibitions

The PWFA also prohibits employers from requiring that a pregnant employee accept an accommodation other than one that is reached through the interactive process. Similarly, an employer cannot require that a pregnant employee take leave, whether paid or unpaid, if there is another suitable accommodation that could be provided to the employee. To the extent a leave of absence is the *employee's choice*, employers must not prevent employees from exercising their rights to take leave under the FMLA or other statutes that permit such protected leave.

Moreover, under the PWFA, an employer cannot deny employment opportunities to a qualified applicant on the basis of pregnancy or a related condition, including because the employer expects that the employee might request an accommodation under the PWFA. Employers also cannot retaliate against employees who request accommodations due to pregnancy or child birth.

Undue Hardship

The PWFA defines "undue hardship" in the same manner as the ADA. Undue hardship is intended to be a reasonable but is nonetheless a high threshold to establish, and thus should take into account, among other things, the impact an accommodation will have on the employer's business, as well as the cost to the employer of providing the accommodation to the employee given the size and success of an employer's business operations.

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The Morrison Cohen LLP Labor & Employment Law team is available to help employers navigate their compliance with the PWFA and related statutes, and to provide counseling and assistance in navigating accommodation requests and updating employment handbook policies, as well as providing guidance on all other workplace issues that arise from time to time.