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Complying with the Pregnant Workers Fairness Act: Considerations for Employers

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On December 23, 2022, Congress passed the Pregnant Workers Fairness Act (the "PWFA") as an amendment to the 2023 Consolidated Appropriations Act, which President Biden signed into law on December 29, 2022. The PWFA is set to go into effect on June 27, 2023.

The PWFA expands existing federal law with respect to the accommodation of pregnant employees in at least three significant ways.

First, prior to the passage of the PWFA, federal law only required employers to accommodate pregnant employees' medical restrictions to the extent those restrictions rendered the employees "disabled" within the meaning of the Americans with Disabilities Act (the "ADA"). The PWFA, however, requires employers to make reasonable accommodations for pregnancy-related medical conditions irrespective of whether those conditions rise to the level of a disability, as long as the accommodations do not impose an undue hardship on the employer.[1] *Second*, employers may only require employees to use leave to accommodate pregnancy-related restrictions if no other reasonable accommodations are available. (In other words, leave may only be used as a "last resort" unless, of course, the employee prefers leave as an accommodation). *Third*, pregnant employees must be provided with reasonable accommodations even if they cannot perform all essential functions of the job, as long as their inability to perform those essential functions is temporary.

Below, we provide an overview of the PWFA's requirements; explain the differences between the PWFA and existing federal and state law with respect to the accommodation of pregnancy-related medical restrictions; and summarize key takeaways for employers.

History and Overview of the PWFA

The PWFA has a lengthy history. Although the PWFA was introduced in May 2012,[2] it only passed the House on May 14, 2021 and stalled in the Senate until its December 2022 passage as an amendment to the Consolidated Appropriations Act. Over time, the PWFA garnered bipartisan support, and many organizations have endorsed it, including the U.S. Chamber of Commerce and several Fortune 500 companies.

The PWFA applies to all employers with 15 or more employees and its protections extend to "qualified employees," which include both employees and applicants.[3] The PWFA requires employers to make reasonable accommodations for pregnancy-related medical conditions as long as the accommodations do not impose an undue hardship on the employer.[4] (The definitions of "reasonable accommodation" and "undue hardship" are the same under the PWFA as under the ADA.)[5] The Act specifically prohibits employers from requiring pregnant employees "to take paid or unpaid leave if another reasonable accommodation can be provided."[6] In addition, the Act prohibits employers from denying employment opportunities to qualified employees because of their need for an

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accommodation and from taking adverse employment actions against employees based on their request for or use of those accommodations.[7] Under the PWFA, qualified employees are either (a) those who can perform the essential functions of the role with or without reasonable accommodation, or (b) those whose inability to perform an essential function of the role is temporary and can be reasonably accommodated.[8]

As for remedies, the PWFA borrows the "powers, remedies, and procedures" from Title VII for private employers.[9] Accordingly, employees may bring a private right of action against their employer after exhausting all administrative remedies, and the EEOC and the Attorney General have the same investigatory and enforcement powers under the PWFA that they have under Title VII. The PWFA provides a defense to damages for an employer facing a failure-to-accommodate claim where the employer has provided *some* reasonable accommodation: namely, the employer can avoid the imposition of damages if it demonstrates that it engaged in "good faith efforts" to identify and make a reasonable accommodation that would provide "an equally effective opportunity" to that employee and not cause an undue hardship for the employer.[10]

The Act explains that the EEOC will issue regulations, including the provision of "examples of reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions," by December 23, 2023.[11]

Interaction Between the PWFA, the ADA, and the PDA

Before the PWFA, there was no separate duty under federal law to accommodate a pregnant employee's medical restrictions. However, private employers were obligated to provide accommodations to pregnant employees in certain contexts as a result of two separate federal statutes: the Pregnancy Discrimination Act and the Americans with Disabilities Act.

The PDA

The Pregnancy Discrimination Act of 1978 (the "PDA"), which amended Title VII, prohibits discrimination on the basis of sex and provides that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions."[12] Under the PDA, "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability to work."[13]

In *Young v. UPS*, the Supreme Court explained that the PDA does not grant pregnant employees a "'most-favored-nation' status."[14] Thus, the mere fact that an employer "provides one or two workers with an accommodation" does not mean that "it must provide similar accommodations to all pregnant workers (with comparable physical limitations), irrespective of the nature of their jobs, the employer's need to keep them working, their ages, or any other criteria."[15] Instead, the traditional *McDonnell Douglas* burden-shifting framework for Title VII claims applies to claims of discrimination under the PDA. A plaintiff can state a prima facie case of discrimination under the PDA by showing that she was denied an accommodation for her pregnancy, and that the employer accommodated others who were "similar in their ability or inability to work." If and when the plaintiff makes that showing, the burden then shifts to the employer to justify its refusal to accommodate by relying on legitimate, nondiscriminatory reasons.[16] If such reasons are offered, the plaintiff can seek to show that the proffered reasons were pretextual.[17] Under the PDA, then, there is no standalone duty to accommodate a pregnant employee; instead, employers only must accommodate pregnant employees insofar as they accommodate other employees who are "similar in their ability or inability to work."

The ADA

The Americans with Disabilities Act of 1990 (the "ADA") prohibits discrimination on the

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basis of disabilities and requires covered employers to provide reasonable accommodations to qualified employees with disabilities.[18] To count as a "qualified individual" entitled to the ADA's protections, a plaintiff must be able to "perform the essential functions of the employment position" "with, or without reasonable accommodation."[19]

The ADA specifies that a "reasonable accommodation" may include "making existing facilities used by employees readily accessible to and usable by individuals with disabilities" as well as "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."[20] Some courts have held that the provision of leave also can be a reasonable accommodation under the ADA.[21] Significantly, the ADA does not require employers to provide employees with the accommodation of their choice,[22] nor does it require employers to offer employees accommodations in any preferred order (*e.g.*, to offer a job modification before offering a job reassignment).

Under the ADA, an employer has an affirmative duty to accommodate a woman's pregnancy-related medical restrictions only to the extent that they qualify as a disability.[23] "Pregnancy-related conditions can qualify" as a disability if they cause "a physical or mental impairment that substantially limits one or more major life activities of [the] individual."[24] But not all pregnancy-related conditions will cause "a substantial limitation of a major life activity."[25] The ADA therefore does not require that reasonable accommodations be provided for all pregnancy-related medical conditions; rather, those conditions must be assessed on a case-by-case basis to determine whether they qualify as a disability under the ADA.

The PWFA thus differs from both the PDA and the ADA in several important respects:

(1) Under the PWFA, a woman's pregnancy-related medical restrictions no longer must rise to the level of a disability in order to warrant accommodation (as required by the ADA), nor is the duty to accommodate a pregnant employee dependent on whether the employer accommodates other employees who are "similar in their ability or inability to work" (as required by the PDA).

(2) Under the PWFA, employers are prohibited from requiring qualified employees "to take paid or unpaid leave if another reasonable accommodation can be provided."[26] In effect, this means that employers may only *require* an employee to take leave as a last resort if there are no other reasonable accommodations that can be provided absent undue hardship. (Employers may, of course, offer leave as an accommodation to the extent the employee herself prefers leave).

(3) Under the PWFA, employers must accommodate pregnant employees even if they *cannot* perform the essential functions of their positions so long as their inability to do so is for a "temporary period" and that essential job function can performed in "the near future," if the inability to perform the essential function can be reasonably accommodated.[27] The PWFA thus goes beyond the ADA, which only requires accommodation to the extent the individual "can perform the essential functions of the employment position that [she] holds or desires."[28]

State Laws Regarding The Accommodation Of Pregnancy

Prior to the PWFA's passage, states had adopted varying approaches to the accommodation of medical restrictions resulting from pregnancy.

Five states—Alabama, Georgia, Indiana, Mississippi, and North Carolina—have no laws prohibiting discrimination on the basis of pregnancy or requiring private employers to provide accommodations for pregnant employees. In these states, prior to the passage of

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the PWFA, employers' only obligations with respect to the accommodation of pregnant employees were those imposed by the ADA and the PDA.

Six states—Alaska, Arkansas, Florida, Idaho, Wisconsin, and Wyoming—prohibit discrimination on the basis of pregnancy, but do not have specific accommodation requirements for pregnancy-related medical conditions that are applicable to private employers.[29]

Four states—Arizona, Michigan, Ohio, and Texas—require that pregnant employees be treated the same for employment-related purposes as non-pregnant persons who are similar in their ability or inability to work, but do not otherwise require the provision of reasonable accommodations for pregnancy-related medical conditions. In other words, these states have laws that closely mirror the text of the PDA insofar as they require employers to provide reasonable accommodations for pregnancy-related medical restrictions only to the extent that they provide such accommodations for similar, non-pregnancy-related medical restrictions.[30]

The remaining thirty-five states and the District of Columbia impose affirmative obligations on private employers to make reasonable accommodations for pregnancy-related medical restrictions. But these jurisdictions take varying approaches with respect to what, precisely, is required. For example, certain states require reasonable accommodations only if the employee is able to perform the essential functions of the original position with those accommodations.[31] By contrast, in other states, accommodations may be required even for employees who *cannot* perform the essential functions of a job.[32] The PWFA now will set a minimum federal "floor" as to what is required when a pregnant employee requests an accommodation. However, employers should still consider state accommodation laws to the extent they impose requirements that are more generous than those under the PWFA.

Takeaways for Employers

As the PWFA's June 23, 2023 effective date approaches, employers should consider the following:

- Review and update accommodation policies to ensure compliance with the PWFA;
- Train Human Resources and management personnel involved in evaluating accommodation requests to ensure they understand the requirements of the PWFA;
- Identify the "essential functions" of positions to determine if they may be restructured or amended temporarily for a pregnant employee in need of a reasonable accommodation, and consider documenting essential functions in job descriptions;
- Consider what types of temporary light duty assignments may be offered to pregnant employees in need of a reasonable accommodation; and
- Consider asking pregnant employees about their accommodation preferences and do not assume that a pregnant employee wants leave as an accommodation (even if paid).

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[1] Pregnant Workers Fairness Act, H.R. 2617-1626, 117th Cong. § 103(1) (signed into law December 29, 2022).

[2] H.R. 5647, 112th Cong. (introduced May 8, 2012).

[3] H.R. 2617-1626, 117th Cong. § 102(2)(B), 102(3).

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[4] *Id.* § 103(1).

[5] *Id.* § 102 (7).

[6] *Id.* § 103(4).

[7] *Id.* § 103(3), (5).

[8] *Id.* § 102(6).

[9] *Id.* § 104(a)(1).

[10] *Id.* § 104(g).

[11] *Id.* § 105(a).

[12] 42 U.S.C. § 2000e(k).

[13] *Id.*

[14] 575 U.S. 206, 221 (2015).

[15] *Id.*

[16] *See id.*

[17] *See id.* at 228.

[18] 42 U.S.C. § 12112.

[19] *Id.* § 12111(8).

[20] 42 U.S.C. § 12112(9).

[21] *See, e.g.*, *Wilson v. Dollar General Corp.*, 717 F.3d 337, 344–45 (4th Cir. 2013) ("For purposes of the ADA, 'reasonable accommodations' may comprise [of] 'permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment.'" (quoting 29 C.F.R. § 1630.2(o))).

[22] *See generally Noll v. Int'l Bus. Machines Corp*., 787 F.3d 89, 95 (2d Cir. 2015),

[23] *See, e.g.*, *Richards v. City of Topeka*, 173 F.3d 1247, 1250 (10th Cir. 1999) (explaining that the plaintiff's pregnancy, which "did not impair or substantially limit a major life activity [or] impair her ability to work," did not qualify as a disability under the ADA).

[24] *Spees v. James Marine, Inc.*, 617 F.3d 380, 396–97 (6th Cir. 2010).

[25] *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 554 (7th Cir. 2011).

[26] H.R. 2617-1626, 117th Cong. § 103(4).

[27] *Id.* § 102(6).

[28] 42 U.S.C. § 12111(8).

[29] Alaska Stat. § 18.80.220(a)(1) (unlawful for an employer to "discriminate against a person . . . in a term, condition, or privilege of employment because of the person's . . . pregnancy"); Ark. Code §§ 16-123-102(1), 107 (prohibiting discrimination "because of . . .

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gender" and defining "[b]ecause of gender" to include "on account of pregnancy, childbirth, or related medical conditions"); Fla. Stat. § 760.10(1)(a) (unlawful to "discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of . . . pregnancy"); *Stout v. Key Training Corp.*, 144 Idaho 195, 198 (2007) (prohibition against gender discrimination includes discrimination on the basis of pregnancy, interpreting Idaho Stat. § 67-5009); Wis. Stat. § 111.36 (prohibiting discrimination "against any woman on the basis of pregnancy"); Wyo. Stat. § 27-9-105 (prohibiting discrimination "in matters of compensation or the terms, conditions or privileges of employment against . . . any person otherwise qualified, because of . . . pregnancy").

[30] Ariz. Rev. Stat. § 41-1463(G) ("Women who are affected by pregnancy or childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and subsection J, paragraph 3 of this section may not be interpreted to allow otherwise."); Mich. Comp. L. § 37.2202(1)(d) (prohibiting employer from "[t]reat[ing] an individual affected by pregnancy, childbirth, or a related medical condition differently for any employment-related purpose from another individual who is not so affected but similar in ability or inability to work, without regard to the source of any condition affecting the other individual's ability or inability to work"); Ohio Rev. Stat. § 4112.01(B) ("Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work"); Tex. Lab. Code § 21.106(b) ("A woman affected by pregnancy, childbirth, or a related medical condition shall be treated for all purposes related to employment, including receipt of a benefit under a fringe benefit program, in the same manner as another individual not affected but similar in the individual's ability or inability to work.").

[31] N.M. Stat. § 28-1-2(R) ("'[R]easonable accommodation' means modification or adaptation of the work environment, work schedule, work rules or job responsibilities, and reached through good faith efforts to explore less restrictive or less expensive alternatives to enable an employee *to perform the essential functions of the job*." (emphasis added)); N.D. Century Code § 14-02.4-03.2 (illegal to fail to provide "reasonable accommodations for an otherwise qualified individual … because that individual is pregnant"); *id.* § 14-02.4-02(12) ("'Otherwise qualified person' means a person who is capable of *performing the essential functions of the particular employment* in question." (emphasis added)).

[32] For example, New Jersey law refers to the ability to perform essential job requirements only as a "factor[] to be considered" in analyzing whether the provision of a reasonable accommodation would pose an undue hardship. *See* N.J. Rev. Stat. § 10:5-12(s) ("[I]n determining whether an accommodation would impose undue hardship on the operation of an employer's business, the factors to be considered include: . . . the extent to which the accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement.").

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment practice group, or Jason Schwartz and Katherine Smith.

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