INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
2024 MID-YEAR CONFERENCE

Developing a Policy to Implement the Pregnant Workers Fairness Act

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Key Terms for Your Municipality's PWFA Policy

PREGNANT WORKERS FAIRNESS ACT ("PWFA")

Requires covered entities to provide reasonable accommodations to a qualified employee's known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause an undue hardship on the operation of the business of the covered entity

Pub. L. 117-328

- Signed Dec. 29, 2022
- Effective June 27, 2023
- Enforced by EEOC
- EEOC published interim rule Aug. 11, 2023
- Final rule published April 19, 2024, effective in 60 days

Need for Pregnant Workers Fairness Act: Federal Protections Prior to PWFA

Pregnancy Discrimination Act of 1978 (Title VII)

Americans with Disabilities Act of 1990

Family and Medical Leave Act of 1993

Need for Pregnant Workers Fairness Act: Urgency of Reasonable Accommodations for Pregnant Workers

Economic security for women and families

Maternal and fetal health

PWFA: Key Terms

Requires covered entities to provide reasonable accommodations to a qualified employee's known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause an undue hardship on the operation of the business of the covered entity

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PWFA Key Term: Covered Entity

42 U.S.C. 2000gg(2)-(3)

Includes private and **public sector employers with at least 15 employees,** Congress, Federal agencies, employment agencies, and labor organizations

PWFA Key Term: Qualified

42 U.S.C. 2000gg(g)

1636.3(f)

Employee who, with our without reasonable accommodation, can perform the essential functions of the employment position…

PWFA Key Term: Qualified

42 U.S.C. 2000gg(g)

1636.3(f)(2)

EXCEPT, an employee or applicant who cannot perform an essential function is qualified if:

a) any inability to perform an essential function is for a **temporary period**;

b) the essential function could be performed in the **near future**; and

c) the inability to perform the essential function **can be reasonably accommodated.**

Temporary = Lasting for a limited time, not permanent, and may extend beyond the near future

In the near future = If the employee is pregnant, generally within forty (40) weeks from the start of the temporary suspension of the essential function

Determine whether essential function can be performed “in the near future” when the employee asks for each accommodation that requires suspension of one or more essential functions

Leave does not count as time when an essential function is suspended, for purposes of determining whether an employee is "qualified"

Can be reasonably accommodated:

Employee performs all other functions;

Employee performs new, additional functions;

Employee temporarily transferred, reassigned;

Light or modified duty

Etc

PWFA Key Term: Known Limitation

42 U.S.C. 2000gg(4)

1636.3(a)

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 ADA

PWFA Key Term: Known Limitation
Physical or Mental Condition

Broad construction

No specific level of severity required—impediment or problem may be modest, minor, and/or episodic

Includes needs or problems related to worker maintaining health or health of pregnancy

Includes worker seeking health care related to pregnancy, childbirth, or related medical condition (such as regular pre-natal appointments/monitoring)

PWFA Key Term: Known Limitation

Related to, Affected by, or Arising Out of

Should be obvious!

If it's not obvious, the employer may request information from the employee regarding the connection

Conversation rather than requirement to obtain documentation from a healthcare provider, in most cases

PWFA Key Term: Known Limitation

Pregnancy, Childbirth, or Related Medical Conditions

Non-exhaustive list at 1636.3(a)(2)(c), includes:

- Current pregnancy
- Past pregnancy
- Lactation
- Use of birth control
- Menstruation
- Endometriosis
- Miscarriage
- Stillbirth
- Having or not having abortion
- Infertility/fertility treatment

PWFA Key Term: Known Limitation

Communicated to the Employer

1636.3(a)(2)(d)

Two parts to request under PWFA

1. Employee or representative must **identify the limitation** that is the physical or mental condition, **and** that it is **related to, arising out of, or affected by pregnancy, childbirth, or a related medical condition**; and

2. Employee or representative must indicate they **need adjustment or change at work**

PWFA Key Term: Known Limitation
Communicated to the Employer
1636.3(a)(2)(d)

WHO: Supervisor, manager, someone with supervisory authority or who regularly directs the employee's tasks, human resources personnel, or another appropriate official, or by following covered entity's policy to request an accommodation

Should be able to obtain accommodations by **communicating with the people who assign them daily tasks and whom they would normally consult with questions or concerns**, since many accommodations under PWFA should be straightforward

PWFA Key Term: Known Limitation

Communicated to the Employer

1636.3(a)(2)(d)

Should be permitted to seek accommodations through **multiple avenues and means**

Need **not** be in writing, be in a specific format, use specific words (including identifying a medical condition or using medical terms) in order to be "communicated to the employer"

PWFA Key Term: Reasonable Accommodation

42 U.S.C. 2000gg(7)

1636.3(h)

Making a reasonable accommodation is a form of non-discrimination

Means by which **barriers to equal employment opportunity** of employees or applicants with known limitations under PWFA **are removed**

Must be **reasonable** (ie, feasible or plausible) and **effective** to meet needs of employee or applicant (ie, by removing the barrier to provide equal opportunity in the workplace)

PWFA Key Term:
Reasonable Accommodation

Like ADA, includes:

Modifications or adjustments to job application process to allow applicant to be considered for the position

Modification or adjustment to work environment

Modification or adjustment to manner in which work is done

Modification or adjustment that enables employee to enjoy equal benefits and privileges of employment

<u>Unlike ADA</u>, <u>also</u> includes:

Modification or adjustment that allows employee to temporarily suspend one or more essential functions of the position

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PWFA Key Term: Reasonable Accommodation
Examples (1636.3(i))

Frequent breaks
Light/modified duty
Sitting/standing
Accessible facilities
Schedule changes, part-time work
Job restructuring
Leave

Temporary suspension of essential function
Telework
Parking
Changes to policies
Changes to equipment, uniforms, or devices

PWFA Key Term: Reasonable Accommodation

Leave (1636.3(i)(3))

If the employee requests leave as an accommodation and there is no other accommodation that does not cause an undue hardship, the employer must consider providing leave as an accommodation under PWFA, even if the employee is not otherwise eligible for leave or has exhausted all other leave

PWFA Key Term: Reasonable Accommodation
Leave (1636.3(i)(3))

Employers cannot *require* qualified employees to take leave unless no other reasonable accommodation can be provided

PWFA Key Term: Reasonable Accommodation

Leave (1636.3(i)(3))

Don’t have to provide paid leave beyond which employee is otherwise entitled (accrued, disability policy, etc)

Employee gets to choose whether to use paid or unpaid leave to same extent other employees using leave for other reasons may choose

PWFA Key Term: Reasonable Accommodation
Leave (1636.3(i)(3))

Adjust or prorate production standards to account for reduced work time if leave is the reasonable accommodation

Employee entitled to return to same position if qualified on return (unless holding it open is undue hardship)

Employee entitled to continued health insurance benefits while on PWFA leave to same extent as employees on similar leave

PWFA Key Term: Reasonable Accommodation

Lactation (1636.3(i)(4))

Breaks, space for lactation, and other related modifications required by PUMP Act

Accommodations related to pumping during work hours

Accommodations related to nursing during work hours

Other accommodations

PWFA Key Term: Reasonable Accommodation

Lactation: Pumping Area (1636.3(i)(4)(ii))

- Reasonable proximity
- Not a bathroom
- Shielded from view
- Free from intrusion
- Regularly cleaned
- Has electricity
- Appropriate seating
- Surface for pump
- Proximity to sink, running water, and fridge

PWFA Key Term: Undue Hardship

42 U.S.C. 2000gg(7)
1636.3(j)

Same meaning as given in Section 101 of ADA:

Significant difficulty or expense incurred by covered entity

PWFA Key Term: Undue Hardship

Factors to be considered when in determining whether an accommodation would pose under hardship (1636.3(j)(2)):

- Nature and net cost of the accommodation
- Overall financial resources and employees of the facility involved in providing the accommodation, and effect on expenses and resources
- Overall financial resources and size (ie, employees, facilities) of the covered entity
- Type of operation or operations of the covered entity
- Impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business

PWFA Key Term: Undue Hardship
Predictable Assessments (1636.3(j)(4))

Reasonable accommodations that do not impose undue hardship when requested by employee due to pregnancy in virtually all cases:

- Allowing an employee to carry water and drink, as needed, in employee's work area
- Allowing an employee additional restroom breaks
- Allowing an employee whose work requires standing the ability to sit and vice versa
- Allowing an employee breaks, as needed, to eat and drink

PWFA Key Term: Undue Hardship

Temporary Suspension of Essential Function (1636.3(j)(3))

Additional factors that may be considered:

- Length of time employee or applicant unable to perform
- Whether there will be work for the employee or applicant to accomplish
- Nature of the essential function, including its frequency
- Whether others in similar positions who are unable to perform essential functions of their position have been provided temporary suspension of those functions
- If necessary, whether other employees or third parties can temporarily perform the essential function, if necessary
- Whether the essential function can be postponed or remain unperformed for any length of time, and if so for how long

PWFA Key Term: Undue Hardship

Employer claiming an accommodation causes undue hardship must consider whether there are other accommodations that will not

If employer can provide part of an accommodation without undue hardship, then employer must provide accommodation up to point of creating an undue hardship

Employers cannot establish undue hardship based on assumptions or speculation that other employees might seek the same accommodation or the employee in question might seek another accommodation in the future

If employer receives multiple requests for same or similar accommodation, it must evaluate and provide reasonable accommodations up to the point doing so becomes an undue hardship

PWFA Key Term: Interactive Process

42 U.S.C. 2000gg(7)

1636.3(k)

Reasonable accommodation to address the known limitation(s) of a qualified employee **must** be arrived at through **interactive process**

Generally, it means a discussion or two-way communication between an employer and an employee or applicant to identify a reasonable accommodation.

Failure to engage in interactive process is violation

PWFA Key Definitions: Interactive Process

When an employee with a known limitation has requested a reasonable accommodation and appropriate accommodation cannot readily be identified, employer should:

1. Analyze particular job involved and determine its purpose and essential functions
2. Talk to the employee to determine what kind of accommodation is necessary given the known limitation
3. Identify potential accommodations and assess effectiveness each would have, in consultation with the employee
4. Consider employee preference and select and implement the accommodation that is most appropriate for employee and employer

PWFA Key Term: Reasonable Documentation *(1636.3(l))*

Can request "reasonable documentation" when it is **reasonable to require under the circumstances** to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical condition and needs adjustment or change at work

When requiring documentation is reasonable under the circumstances, can only require **documentation that itself is reasonable**

PWFA Key Term: Reasonable Documentation *(1636.3(l)(2))*

Minimum necessary documentation that describes or confirms:

1. The physical or mental condition;
2. That it is related to, affected by, or arising out of pregnancy, childbirth, or related medical condition; and
3. That a change or adjustment at work is needed for that reason

PWFA Key Term: Reasonable Documentation *((1636.3(l)(1))*

It is **not reasonable** to request documentation when:

1. Limitation and need are **obvious and employee provides self-confirmation**
2. You already have **sufficient information** of limitation and need
3. When a pregnant worker requests an accommodation identified by the PWFA as a **predictable assessment**
4. Limitation involves **lactation** (unless accommodation is full-time remote work)
5. Employees **without known limitation** did not provide documentation

PWFA Prohibited Practices

42 U.S.C. 2000gg-1(1)

1. Failing to provide reasonable accommodation, which includes:
   - Unnecessary delay
   - Not considering suspending essential function
   - Denying based on lack of supporting documentation
   - Not choosing accommodation that provides equal opportunity

2. Requiring worker to accept accommodation that was not arrived at through the interactive process

PWFA Prohibited Practices

42 U.S.C. 2000gg-1(1)

Denying employment opportunities based on need to make a reasonable accommodation

Requiring an employee to take leave if another accommodation can be provided absent undue hardship

Taking adverse action against an employee on account of their requesting or using a reasonable accommodation

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