EXPECTIN G THE UNEXPECTED:

THE PREGNANT WORKERS FAIRNESS ACT (PWFA)

IT'S FRIDAY!


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WHAT IT IS NOT :

- **The PWFA only applies to accommodations**
- Other laws provide different protections for pregnant workers:
  - **Title VII**, as amended by the PDA (protects employee from discrimination based on pregnancy, childbirth or related medical conditions)
  - **ADA** (protects employee from discrimination based on disability)
  - **State laws**

OTHER EXISTING LEGAL PROTECTIONS

- Family & Medical Leave Act
- Americans with Disabilities Act and Section 504 of the Rehabilitation Act
- Fair Labor Standards Act (non-exempt workers)
- Pregnancy Discrimination Act
- PUMP Act 2010

THE FINAL RULE

1. **April 4th** – Cmm'n voted to approve
2. **April 15th** - Announced
3. **April 19th** - Published
4. **June 18th** - Effective…. Or is it?



PREGNANT WORKERS FAIRNESS ACT (PWFA)

- EEOC published Final Rule TODAY https://www.federalregister.gov/documents/2023/08/11/2023-17041/regulations-to-implement-the-pregnant-workers-fairness-act The EEOC's informal guidance, "What You Should Know About the Pregnant Workers Fairness Act" https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act and a Summary of the Final Rule: https://www.eeoc.gov/summary-key-provisions-eeocs-final-rule-implement-pregnant-workers-fairness-act-pwfa

Certain Identified Accommodations Are *Presumed* to be Reasonable

1. Additional restroom breaks,
2. Food and drink breaks,
3. Allowing water and other drinks to be kept nearby, and
4. Allowing sitting or standing, as necessary.

Tip – in your policy, you may want to provide that requests for **these** accommodations may be made in writing to the Supervisor

OTHERS NOT CONCLUSIVELY PRESUMED - BUT ARE LISTED

1. Job restructuring
2. Modifying work schedules
3. Use of paid leave
4. Reassignment to a vacant position.

(If an accomodation is listed, the EOOC thinks it is reasonable)

“Non-exhaustive list” of covered conditions

- Current pregnancy
- Past pregnancy
- Lactation (including breastfeeding and pumping)
- Use of birth control
- Menstruation
- Postpartum depression
- Preeclampsia
- Gestational diabetes
- Endometriosis
- Infertility & fertility treatments
- Miscarriage
- Stillbirth
- Abortion/choosing not to have an abortion



Employers Cannot Seek Documentation For Certain Requests When:

(1) The limitation & need for a reasonable accommodation is obvious;

(2) Employer already has enough information to support a known limitation related to pregnancy;

(3) The request is for one of the four identified reasonable accommodations already listed (i.e., added restroom breaks; food/drink breaks; beverages near their work station/area & sitting/standing as needed);

(4) The request is for a lactation accommodation; and

(5) Accommodation is available without documentation for other employees seeking the same accommodation for *non*-PWFA reasons.

Informal Requests Can Trigger Statutory Obligations:

1. Guidance accompanying the Final Rule indicates that verbal conversations with direct supervisors can create accommodation obligations
2. An employee's failure to fill out paperwork or speak to the "right" supervisor or designated department doesn't provide grounds to either delay/not provide the accommodation.
3. The initial request/statement alone may be enough to give the Employer notice - and trigger the interactive accommodation process.

‘Haste makes Safe’

- Employers must respond to requests under the PWFA with “expediency”
- Granting an “interim accommodation” reduces possible finding of “unnecessary delay”.

APPLICANTS

1. PWFA prohibits employers from refusing to hire a pregnant applicant because they *assume* that the applicant will soon need to leave to recover for childbirth.
2. The interpretive guidance notes that the accommodation process is usually more difficult; applicants may not know enough about the job to seek accommodations vs. employees.
3. Applicants/Employees May Need To Be Excused From Essential Functions For Extended Periods

No Surprise – There may be overlap with the ADA!

- The final rule acknowledges there may be circumstances where an employee may be a "qualified individual" entitled to an accommodation under *either* the PWFA or the ADA for a pregnancy-related limitation.
- Interpretive guidance emphasizes that employees aren't required to know or identify the statute under which they are requesting a reasonable accommodation
- Employers should train HR and management to identify and apply the applicable framework.

So TRAIN – and continue to train…or



DRAFTING THE POLICY

Purpose

As required by the federal Pregnant Workers Fairness Act (PWFA), City will provide reasonable accommodations to employees and applicants with limitations related to pregnancy, childbirth or related medical conditions, unless the accommodation will cause undue hardship to City's operations.

Policy

An employee or applicant may request an accommodation due to pregnancy, childbirth or a related medical condition by submitting the request in writing to Human Resources (HR).

The accommodation request should include an explanation of the pregnancy-related limitations, the accommodation needed and any alternative accommodation(s) that might be reasonable.

Depending on the nature of the accommodation, the individual may be requested to submit a statement from a health care provider substantiating the need for the accommodation.

Upon receipt of a request for accommodation, HR will contact the employee or applicant to discuss the request and determine if an accommodation is reasonable and can be provided without significant difficulty or expense, i.e., undue hardship.

While the reasonableness of each accommodation request will be individually assessed, possible accommodations include allowing the employee to:

List Possible Accommodations

- Sit while working.
- Drink water during the workday.
- Receive closer-in parking.
- Have flexible hours.
- Receive appropriately sized uniforms and safety apparel.
- Receive additional break time to use the bathroom, eat and rest.
- Take time off to recover from childbirth.
- Be excused from strenuous activities and/or activities that involve exposure to compounds deemed unsafe during pregnancy.

Leave is the “Accomodation of last resort”

(EXCEPT if employee asks/doctor orders)

An employee may request paid or unpaid leave as a reasonable accommodation under this policy; however, [City] will not require an employee to take time off if another reasonable accommodation can be provided that will allow the employee to continue to work.

NO HARASSMENT, RETALIATION, ETC…

Prohibits any retaliation, harassment or adverse action due to an individual's request for an accommodation under this policy or for reporting or participating in an investigation of unlawful discrimination under this policy.

If the internet has taught us anything, it's that you want less news and more cats.

Peter Sagal

Questions?

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