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EMPLOYMENT LAW UPDATE

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THE PREGNANT WORKERS FAIRNESS ACT

As the calendar turns yet again, this time to 2024, it is always a good idea for employers to take stock of any recent changes to employment laws to ensure continued compliance and to lessen the risk of future liability. One new significant employment law we saw come into play in 2023 at the federal level was the Pregnant Workers Fairness Act ("PWFA"). The PWFA went into effect on June 27, 2023, but the EEOC did not send its final rules to implement the PWFA to the necessary agency until December 27, 2023. At this time, we are still waiting for the final rules to be published, which will better define the contours of this new law.

It is true that there are similarities between the PWFA and the ADA, but employers would be remiss to think they are the same or to treat requests similarly under these two laws. The PWFA is much more employee-friendly and is designed to be very broad and cover a vast array of issues or problems that could arise even during a completely normal, healthy pregnancy. If only one notion is taken away from reading this article let it be this: if a pregnant employee comes to you with any issue or problem they are having with their job which is in any way related to their pregnancy…STOP. Do not treat it like an ADA issue. Pick up the phone and give us a call and we'll help you work through this new law, and the anticipated regulations. Here is a brief overview of the basics, pending the forthcoming publication of the final rules.

The PWFA applies to private and public employers, including state and local governments, with 15 or more employees. It requires employers to make reasonable accommodations to a worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an undue hardship.

A "known limitation" is a mental or physical impediment or problem related to pregnancy, childbirth or related medical conditions, including common or minor conditions that have been communicated to the employer. While some concepts in the PWFA will be familiar to those that regularly deal with the ADA, the term "known limitation" is a unique term that is not used in the ADA or other federal laws and will present an interesting issue for employers to grapple with, and for courts to refine, over time.

Unlike the ADA, there is no test to meet regarding the severity of the known limitation – it's meant to cover even uncomplicated, minor issues which may arise during a completely normal and healthy pregnancy. The proposed rule defines "limitation" as a modest, minor, or episodic impediment or problem, or that which is a need or problem related to maintaining the employee's health/the health of their pregnancy or seeking healthcare for a covered condition. As one might imagine, this is likely to encompass nearly anything and

everything. In sum, in the majority of situations employers are unlikely to make much hay arguing that something is not a "known limitation" unless they did not, in fact, know.

As to what "pregnancy" and "childbirth" mean, these include current pregnancy, past pregnancy, potential or intended pregnancy, labor, and childbirth (including vaginal and cesarean delivery). "Related medical conditions" are conditions that "relate to, are affected by, or arise out of pregnancy or childbirth." Examples in the proposed regulations include termination of pregnancy, including by miscarriage, stillbirth, or abortion; infertility; fertility treatment; lactation and conditions related to lactation; use of birth control; menstrual cycles; postpartum depression, anxiety or psychosis; vaginal bleeding; preeclampsia; pelvic prolapse; preterm labor; ectopic pregnancy; gestational diabetes; maternal cardiometabolic disease; endometriosis; changes in hormone levels; and many other conditions. Again, these are very broad, encompassing concepts meant to bring most pregnancy-related situations under the protection of the PWFA.

The concept of "undue hardship" may have to be invoked more frequently under the PWFA as it may often be the last resort for declining to provide an accommodation under the PWFA, given its otherwise pro-employee approach. Undue hardship under the PWFA has the same meaning as under the ADA – significant difficulty or expense for the operation of the employer. Remember though that an employer needs to make an individualized assessment of the specific facts and circumstances based on objective information if it desires to successfully utilize the undue hardship defense. Generalized conclusions or assumptions will typically not be enough to prevail.

There are also other critical differences. For example, unlike the ADA, an employee who cannot perform their essential duties may still be covered by the PWFA. In fact, the proposed regulations purport to require an employer to excuse performing essential job functions for up to 40 weeks for each accommodation request, unless it would impose an undue hardship on the employer. As stated in the proposed rules, an employee is still a qualified employee under the PWFA if: (1) the inability to perform an essential job function is for a temporary period; (2) the essential job function(s) could be performed in the near future (up to 40 weeks); and (3) the inability to perform the essential function(s) can be reasonably accommodated. This is a significant departure from the ADA.

The proposed regulations also make it clear that employers should strive to make the PWFA process more streamlined and expeditious, especially when it comes to routine issues such as the need to drink water or eat, more frequent bathroom breaks, and the like. There is an expectation that such accommodations be granted without more than rote confirmation by the employer. Unnecessary delays in the PWFA process, even if an accommodation is eventually provided, may violate the PWFA.

Stay tuned…when the final rules are published we will post an update.

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