EEOC ANNOUNCES PREGNANCY ACCOMMODATION FINAL RULE

April 25, 2024

On June 27, 2023, the Pregnant Workers Fairness Act ("PWFA") went into effect. The U.S. Equal Employment Opportunity Commission ("EEOC") has now issued its final regulation to carry out the law, which goes into effect on June 18, 2024.

BACKGROUND: THE PWFA AND VIRGINIA HUMAN RIGHTS ACT PROTECTION FOR PREGNANCY AND RELATED CONDITIONS

PWFA

The PWFA, which went into effect last year, generally requires a covered entity to "make reasonable accommodations to the *known limitations* related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." A covered entity includes private employers and public sector employers (state and local governments) that have fifteen (15) or more employees. The PWFA also applies to Congress and Federal agencies, and to employment agencies and labor organizations.

Under the terms of the PWFA, a "known limitation" means 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." Importantly, such a physical or mental condition is not required to meet the definition of disability under the Americans with Disabilities Act of 1990 ("ADA").

The PWFA does not replace other federal, state, or local laws that are more protective of job applicants and employees with respect to pregnancy, childbirth, or related medical conditions. Thus, the EEOC will continue to process charges involving a lack of accommodation regarding pregnancy, childbirth, or related medical conditions under Title VII and the ADA in addition to the PWFA and applicable state laws.

Virginia Human Rights Act

Since 2020, Virginia's Human Rights Act ("VHRA") has required "reasonable accommodation to the known limitations of a person related to pregnancy, childbirth, or related medical conditions, unless a covered employer can demonstrate that the accommodation would impose an undue hardship on the employer." Under the VHRA, an employer is defined as

“any person, or agent of such person, employing five or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year” and “reasonable accommodation” is broadly defined as more frequent or longer bathroom breaks, breaks to express breast milk, access to a private location other than a bathroom for the expression of breast milk, acquisition or modification of equipment or access to or modification of employee seating, a temporary transfer to a less strenuous or hazardous position, assistance with manual labor, job restructuring, a modified work schedule, light duty assignments, and leave to recover from childbirth. Thus, some employers who are not subject to the PWFA will be subject to the VHRA and many employers will be required to comply with both laws.

The VHRA requires the following to be considered when determining whether an accommodation constitutes an undue hardship on the employer: (1) hardship on the conduct of the employer's business, considering the nature of the employer's operation, including composition and structure of the employer's workforce; (2) the size of the facility where employment occurs; and (3) the nature and cost of the accommodations needed. The fact that the employer provides or would be required to provide a similar accommodation to other classes of employees creates a rebuttable presumption that the accommodation does not impose an undue hardship on the employer.

EEOC FINAL RULE

Pregnancy, Childbirth, and Related Medical Conditions

The EEOC’s final rule adopts a very broad definition of “pregnancy, childbirth, and related medical conditions,” which includes:

. . . current pregnancy; past pregnancy; potential or intended pregnancy (which can include infertility, fertility treatment, and the use of contraception); labor; and childbirth (including vaginal and cesarean delivery). “Related medical conditions” are medical conditions relating to the pregnancy or childbirth of the specific employee in question. The following are examples of conditions that are, or may be, “related medical conditions”: termination of pregnancy, including via miscarriage, stillbirth, or abortion; ectopic pregnancy; preterm labor; pelvic prolapse; nerve injuries; cesarean or perineal wound infection; maternal cardiometabolic disease; gestational diabetes; preeclampsia; HELLP (hemolysis, elevated liver enzymes and low platelets) syndrome; hyperemesis gravidarum; anemia; endometriosis; sciatica; lumbar lordosis; carpal tunnel syndrome; chronic migraines; dehydration; hemorrhoids; nausea or vomiting; edema of the legs, ankles, feet, or fingers; high blood pressure; infection; antenatal (during pregnancy) anxiety, depression, or psychosis; postpartum depression, anxiety, or psychosis; frequent urination; incontinence; loss of balance; vision changes; varicose veins; changes in hormone levels; vaginal bleeding; menstruation; and lactation and conditions related to lactation, such as low milk supply, engorgement, plugged ducts, mastitis, or fungal infections. This list is non-exhaustive.

Communicate to the Employer and Interactive Process

Under the EEOC’s final rule, in order to seek an accommodation, “the employee or the employee's representative need only communicate to the covered entity that the employee needs an adjustment or change at work due to their limitation (a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions).” The communication may be made to “a supervisor, a manager, someone who has supervisory authority for the employee or who regularly directs the employee's tasks (or the equivalent for an applicant), human resources

personnel, or another appropriate official." The employer must then engage in an informal, interactive process to "identify the known limitation under the PWFA and the adjustment or change at work that is needed due to the limitation, if either of these is not clear from the request, and potential reasonable accommodations. There are no rigid steps that must be followed."

Undue Hardship

An employer is not required to provide an accommodation if it would cause "undue hardship." In general, "undue hardship under the PWFA means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth" below:

(i) The nature and net cost of the accommodation needed under the PWFA;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type, and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The 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.

Reasonable Accommodations

Some examples of possible reasonable accommodations under the PWFA include:

- Additional, longer, or more flexible breaks to drink water, eat, rest, or use the restroom;
- Changing food or drink policies to allow for a water bottle or food;
- Changing equipment, devices, or workstations, such as providing a stool to sit on, or a way to do work while standing;
- Changing a uniform or dress code or providing safety equipment that fits;
- Changing a work schedule, such as having shorter hours, part-time work, or a later start time;
- Telework;
- Temporary reassignment;
- Temporary suspension of one or more essential functions of a job;
- Leave for health care appointments;
- Light duty or help with lifting or other manual labor; or
- Leave to recover from childbirth or other medical conditions related to pregnancy or childbirth.

Seeking Supporting Documentation

Lasty, the EEOC limits when an employer may seek supporting documentation from an employee who requests accommodation under the PWFA. An employer may seek such documentation *"only when* it is reasonable under the circumstances for the covered entity to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and needs an adjustment or change at work due to the limitation." Examples of when it is not reasonable to seek supporting documentation may be found here: https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act.

CONCLUSION

Under the PWFA, covered entities must engage in an interactive process and provide reasonable accommodations for employees experiencing pregnancy, childbirth, and related medical conditions unless such an accommodation would pose an undue hardship on the covered entity. We recommend that employers review and, if necessary, update their employment policies regarding pregnancy accommodations to ensure that these policies comply with the PWFA in additional to other federal and state laws that address pregnancy accommodations, including Title VII, the ADA, and the VHRA or similar state laws.

If you have any questions or need further guidance regarding pregnancy accommodations, please contact a member of Hancock Daniel's Labor & Employment team.