Congress Expands Federal Protections for Pregnant Workers

August 31, 2023
Number 33

Written by:
Gabriella D. Flowers
Partner
Sacramento Office
gflowers@lozanosmith.com

Angela J. Okamura
Associate
Los Angeles Office
aokamura@lozanosmith.com

The United States Congress recently passed the Pregnant Workers Fairness Act (PWFA), a new federal law that requires covered employers to provide "reasonable accommodations" for a worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer "undue hardship." The PWFA, which applies to public and private employers with fifteen or more employees, became effective on June 27, 2023.

Reasonable Accommodations under the PWFA

Under the PFWA, employers must only reasonably accommodate "known" conditions of the pregnant employee. Therefore, to receive such accommodations, employees will generally need to communicate their limitations to their employer.

Employers must then engage in the interactive process with the employee. This includes meeting and discussing the requested accommodations with the employee and accommodating them in a manner that allows them to perform the essential functions of their job to the extent such accommodations will not cause the employer "undue hardship." An "undue hardship" is significant difficulty or expense for the employer.

The U.S. Equal Employment Opportunity Commission (EEOC) defines reasonable accommodations as "changes to the work environment or the way things are usually done at work." For example, reasonable accommodations might include allowing the employee to sit more, receive closer parking, work flexible hours, receive appropriately sized uniforms and safety apparel, receive additional break time to use the bathroom, eat, drink water, and rest, and be excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy.

Employer Prohibitions

Under the PWFA, it is unlawful for an employer to:

- Require an employee to accept an accommodation without first engaging in a discussion about the accommodation with the worker;

- Deny a job or other employment opportunities to a qualified employee or applicant based on the person's need for a reasonable accommodation;
- Require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working;
- Retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
- Interfere with any individual's rights under the PWFA.

Documentation of Medical Condition Limited Under the PWFA

Critically, the PWFA does not explicitly require medical documentation or verification from a health care provider establishing the employee's need for an accommodation. The EEOC, which administers and enforces the PWFA, recently issued a proposed rule which, if adopted as written, would clarify that an employer is not required to seek supporting documentation from the employee, and if it does, it is only permitted to do so if it is reasonable to require documentation to determine whether to grant the requested accommodation. Moreover, the proposed rule provides that the documentation itself must be reasonable. It must describe or confirm: (1) the physical or mental condition; (2) that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and (3) that a change or adjustment at work is needed for that reason.

The Notice of Proposed Rulemaking was published on August 11, 2023, with public comments welcome for 60 days.

Impact of the PWFA on California's Fair Employment and Housing Act

Existing law under California's Fair Employment and Housing Act (FEHA), which predates the PWFA, requires employers with at least five employees to provide eligible employees, upon request, with reasonable accommodations for a condition related to pregnancy, childbirth, or related medical condition, *upon the advice of their health care provider*. Reasonable accommodations could include transfer of the employee to a less strenuous or less hazardous position, if requested.

The main difference between the PWFA and FEHA is that FEHA contemplates input from the employee's health care provider on the need for accommodations, where the PWFA does not. Thus, employers will need to be mindful of this change going forward when engaging in the interactive process with pregnant employees or employees recovering from childbirth or related conditions.

Takeaways

The PWFA does not replace FEHA. Rather, the PWFA expands and provides concrete examples of reasonable accommodations that may be provided to eligible employees and also limits the ability of an employer to require medical documentation from a qualifying employee when evaluating potential accommodations. Employers should review and update their policies and collective bargaining agreements regarding reasonable accommodations for pregnant employees and employees recovering from childbirth or related conditions to ensure they are consistent with the PWFA.

If you have questions about the PWFA, reasonable accommodations, or for help with any labor and employment issues, please contact the authors of this Client News Brief or an attorney at one of our eight offices located statewide. You can also subscribe to our podcasts, follow us on Facebook, Twitter and LinkedIn or download our mobile app.

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

Lozano Smith
ATTORNEYS AT LAW