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Pregnancy-Related Workplace Accommodations: Know Your Rights

Results achieved in prior matters are not meant to be a guarantee of success as the facts and legal circumstances vary from matter to matter.

Pregnant employees are protected by both New Jersey State and federal law from discrimination and are entitled to reasonable accommodations because they are pregnant.

The Pregnant Workers Fairness Act

The Pregnant Workers Fairness Act ("PWFA") is a federal law that requires private and public employers, with 15 or more employees, to make reasonable accommodations for a qualified employee's or applicant's known limitations (physical or mental) related to, affected by or arising out of pregnancy, childbirth or related medical conditions irrespective of whether those conditions qualify as a disability. These include but are not limited to current or past pregnancy, childbirth, miscarriage, stillbirth, postpartum depression, edema, high blood pressure, gestational diabetes, infertility and fertility treatment, placental conditions, lactation, use of contraception, menstruation, abortion, among other conditions. The accommodations cannot cause an undue hardship on the covered entities' business operations.

For an applicant or employee's accommodation to be considered by an employer, the employee must make their limitation known to the employer by communicating to the employer or the employer's representative. The physical or mental condition that is limiting the employee can fall within any of the following categories:

- an impediment or problem that may be modest, minor and/or episodic;
- a need or problem related to maintaining the employee's health or the health of the pregnancy; or
- seeking health care related to pregnancy, childbirth or a related medical condition itself.

Limitations can include avoiding certain exposures or chemicals, avoiding working in certain temperatures, avoiding certain physical tasks such as lifting or standing, or needing to attend medical appointments for pregnancy, childbirth or related conditions.

An employee or applicant for employment qualifies for a reasonable accommodation under the PWFA in two ways:

1) they can currently perform the essential functions (fundamental duties and responsibilities) of the job with or without a reasonable accommodation; or

2) they cannot currently perform the essential functions of the job with or without a reasonable accommodation so long as: the period of inability is temporary, the employee will be able to perform the essential functions in the near future and the inability to perform the essential functions can be reasonably accommodated.

If an employee is pregnant, it is to be assumed that the employee could perform the essential functions of their job "in the near future" because they will be able to perform the essential functions generally within 40 weeks of the temporary suspension of an essential function.

For the temporary suspension of the essential function for conditions other than a current pregnancy, the determination of whether the employee will be able to perform the essential functions “in the near future” will be determined on a case-by-case determination.

What is a reasonable accommodation?

A reasonable accommodation is a change or adjustment in the work environment or the way things are usually done at work to allow employees to continue working. Reasonable accommodations sought by pregnant employees may change throughout the course of the employee’s pregnancy or after childbirth.

Some examples of reasonable accommodations under the PWFA include, but are not limited to:

- frequent breaks
- temporary reassignment
- work-from-home
- schedule adjustments
- different uniform or safety equipment
- permitting food or drink
- light duty
- job restructuring
- temporary suspension of one or more essential functions
- leave to attend medical appointments
- leave to give birth and recover
- leave to recover from other medical conditions related to pregnancy or childbirth

The final rule expressly states that four (4) accommodations are presumptively reasonable and should be granted without any documentation:

- additional restroom breaks
- food and drink breaks
- permission for water and other drinks to be kept nearby and accessible
- for the employee to sit or stand as needed

What constitutes an undue hardship?

An employer is only required to provide accommodations that do not cause the employer an undue hardship. An employer suffers an undue hardship from an employee’s accommodation if the accommodation will result in significant operational difficulty or expense.

Factors for an employer to consider to determine whether the temporary suspension of an essential function will cause an undue hardship:

- consideration of the length of time that the employee will be unable to perform the essential function(s)
- whether there is work for the employee to accomplish
- the nature of the essential function(s), including frequency
- whether the employer has provided other employees in similar positions who are unable to perform the essential function(s) of their positions with temporary suspensions of those functions
- whether there are other employees, temporary employees or third parties who can perform or be temporarily hired to perform the essential function(s) in question
- whether the essential function(s) can be postponed or remain unperformed for any length of time, and if so, for how long

What does a request for an accommodation look like?

There are no specific words an applicant or employee must use to request an accommodation. Casual conversations can trigger accommodation obligations. For example, an employee sharing the news that they are pregnant can be sufficient for an employer to be put on notice that the employee will need reasonable accommodations and to trigger the interactive process. If an accommodation is not obvious or evident, an employee must identify the limitation requested and the adjustment or change at work requested due to the limitation. An employee failing to complete specific paperwork or speak to a designated company representative is not grounds to delay or deny an employee an accommodation under the PWFA, unless very specific criteria are met.

What does an employer need to do in response to a request for an accommodation?

Employers who are aware of an applicant or employee's need for an accommodation associated with pregnancy, childbirth or related medical conditions must engage in the interactive process and must do so with expediency. The interactive process is a communication back and forth between the employer and the employee to identify the employee's known limitation, the adjustment or change needed at work for the limitation and potential reasonable accommodations. The PWFA recognizes that most accommodations can be provided quickly and the interactive process often will consist of only a brief conversation or email exchange. Regardless, the employer is obligated to promptly respond to a request for an accommodation.

In evaluating the accommodation requested, generally the employer must provide the accommodation, or an effective alternative accommodation, unless providing the accommodation would cause an undue hardship to the employer's business. To the extent an employer requires additional time to respond to a needed accommodation, the PWFA recommends as a best practice that the employer grant an interim accommodation to avoid unnecessary delay or further impact the employee.

Can an employer require a doctor's note?

Employers are generally prohibited from requesting documentation concerning an employee's request or need for a reasonable accommodation under the PWFA, unless the request that an employee obtain a provider's note is reasonable under the circumstances. More specifically, an employee's need for accommodation ought not to require a provider's note when:

- the requested accommodation is obvious
- the employer already has sufficient information to support a known limitation related to pregnancy
- when the request for one of the four expressed reasonable accommodations outlined above
- when the request is related to lactation accommodations
- when the accommodation is available to other employees seeking the same accommodation for non-PWFA related reasons and documentation is not required

If the requested accommodation is not obvious or the employer needs additional information to ensure it is providing the proper accommodation, the employer is limited to requesting the following information:

- confirming the existence of the physical or mental condition
- confirming the condition is related to, affected by or arising out of pregnancy, childbirth or related medical conditions
- a description of the needed adjustment or change at work due to the limitation

The PWFA does not allow an employer to require an employee seeking an accommodation to be examined by a health care provider selected by the employer.

Unpaid Leave is a Last Resort

Employers are expressly prohibited from requiring pregnant employees to take a paid or unpaid leave if another reasonable accommodation can be provided. Essentially, requiring an employee to take leave is a last

resort available only if there are no other reasonable accommodations that can be provided absent undue hardship.

The PWFA prohibits:

Coercion, intimidation, threats, harassment or interference with any individual in the exercise or enjoyment of rights under the PWFA or with any individual aiding or encouraging any other individual in the exercise or enjoyment of rights under the PWFA. Employers are also prohibited from retaliating against any employee, applicant or former employee because they opposed acts or practices made unlawful by the PWFA or have made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing related to the PWFA.

The PWFA permits:

Employees to bring a private right of action against their employer for alleged violations of the PWFA. If the employer can show it made good faith efforts to identify and make a reasonable accommodation that would provide an “equally effective opportunity” to the qualifying employee and not cause an undue hardship for the employer will be able to assert a defense.

Workplace Protection for Breastfeeding Employees

The New Jersey Law Against Discrimination protects employees from discrimination by employers against breastfeeding mothers, In addition, employers must provide breastfeeding employees with reasonable break time and a suitable room or other location with privacy to express breast milk for one year after the birth of a child. Employers are specifically forbidden from requiring employees to use a restroom to express breast milk. The New Jersey law applies to employers of all sizes.

Protecting the Legal Rights of Pregnant Employees

If you're pregnant, recovering from childbirth, or facing a related health condition and your employer is denying you fair accommodations or pressuring you to take leave, you have legal rights. The employment attorneys at Wilentz, Goldman & Spitzer P.A. are here to protect those rights and help you secure the adjustments and respect you deserve in the workplace. **Contact us today for a confidential consultation.**

To speak with an attorney about your legal options, please call: 732-352-9858.