District of Columbia Enacts New Law Providing Increased Protections for Pregnant Workers and Nursing Mothers

by Susan Richards Salen

The District of Columbia joined Delaware, Illinois, West Virginia and Maryland by enacting legislation to give additional protections to pregnant workers. On October 24, 2014, the District of Columbia enacted the "Protecting Pregnant Workers Fairness Act of 2014" (PPWFA or the Act). Provided that Congress does not disapprove of the PPWFA, the PPWFA will become effective sometime in late 2014. The PPWFA gives pregnant employees and applicants, and recently pregnant employees (those who have recently given birth) and applicants, broad protections that might not otherwise be available to them under federal discrimination and leave laws.[1] The PPWFA requires employers to provide reasonable accommodations to pregnant (or those who have recently given birth ("recently pregnant")) employees whose ability to perform their job is affected by pregnancy, childbirth, a related medical condition or breastfeeding, unless such accommodations would work an undue hardship on the operation of the employer's business. In addition to requiring that employers provide accommodations, PPWFA requires employers to provide notice of the Act to its employees and applicants. Finally, unlike the federal Americans with Disabilities Act (ADA), which requires the disabled employee to request an accommodation, the PPWFA requires an employer to engage, in good faith and in a timely fashion, in an interactive process with any employee requesting or ***needing*** an accommodation based upon the employee's pregnancy, childbirth, related medical condition or need to express breast milk. Thus, under the language of the PPWFA, it becomes an employer's affirmative obligation to initiate a conversation with an employee whom the employer believes needs an accommodation.[2] The District of Columbia Department of Employment Services is tasked with developing regulations for the implementation and enforcement of the Act.

The type of accommodations the PPWFA prescribes are: more frequent or longer breaks, time-off to recover from childbirth, modified equipment or seating, temporary transfer to less strenuous or hazardous position, or other job restriction such as providing light duty or a modified work schedule, removal from heavy lifting requirements, relocation of employee's work area, or providing a private non-bathroom space for the expressing of breast milk. Thus, the accommodations required by the Act are quite similar to those required under the federal Family Medical Leave Act (FMLA) (time off to recover from childbirth, temporary transfers), ADA[3] (modified work schedule, light duty work, auxiliary aids, e.g. chairs, keyboards, etc.), Title VII (treating pregnancy disability in the same manner as other short-term disability) and the Fair Labor Standards Act (FLSA) (requirement to provide breaks and non-bathroom private location for expressing and location to store expressed milk), resulting in protections that are not otherwise available to employees of employers that have less than the required number of employees for these federal employment discrimination laws.

Before granting any requested accommodation, the employer may request that an employee provide a certification from her health care provider that indicates the medical advisability/need for the

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[1] For example, Title VII which prohibits sex discrimination, including on the basis of pregnancy, which applies to employers with more than fifteen (15) employees, and the Family Medical Leave Act with applies to employers with more than fifty (50) employees in a seventy-five (75) mile radius.

[2] Unless this conversation is properly broached, an employer could be accused of violating the "regarded as" prong of the ADA. Under the ADA, if an employer regards an employee as being disabled, the employer can be held to have violated the ADA without the employee ever proving that he/she was actually disabled.

[3] Some pregnancy conditions can qualify as a disability under the 2008 Amendments to the ADA.

accommodation and other information, but only ***"to the extent a certification is required for other temporary disabilities."*** This means that if the employer requires an employee who is temporarily disabled due to an accident, injury or illness to provide a medical certification before the employer grants FMLA benefits or ADA accommodations, then such a certification may be required for the pregnant employee before granting accommodations under the PPWFA.

Under the PPWFA, an employer may deny a reasonable accommodation for a pregnant employee who requests or ***needs*** an accommodation, only if the requested accommodation would impose an undue hardship on the employer. Undue hardship is described by the PPWFA as: "any action that requires significant difficulty in the operation of the employer's business or significant expense on the behalf of the employer when considered in relation to factors such as the size of the business, its financial resources, and the nature and structure of its operation." Thus, undue hardship is an affirmative defense to a claim of violation of the PPWFA and the employer will, of course, bear the burden of proof on such defense. Accommodations which an employer could reasonably foresee being requested are light duty work, a special chair or keyboard, modified work hours, not having to climb a ladder or lift heavy things; and these are not likely to impose a significant difficulty in the operation of an employer's business.

As noted above, the PPWFA requires that the employer provide notice of rights under the Act. Specifically, the employer must post a notice of PPWFA rights in English and in Spanish in a conspicuous place. In addition, such notice of rights must be provided to new employees upon commencement of employment, and to existing employees within 120 days after the effective date of the Act (October 24, 2014). The employer must provide an accurate translation of the notice to any non-English or non-Spanish speaking employee under Section 4 of the Language Access Act of 2004. Finally, a copy of the notice of rights must be provided to any employee who notifies an employer of her pregnancy or need to express breast milk.

An employee or applicant may file an administrative complaint before the District of Columbia's Department of Employment Services (DOES). DOES is charged with investigating violations and may pursue action under the District of Columbia's admin. If violations are found, the DOES may impose penalties and may award the claimant back pay, job reinstatement, attorney's fees and costs. The employee may also pursue a cause of action in a civil proceeding.

The violations of the Act are:

- Refusal to make reasonable accommodations;
- Retaliation (an adverse action) against an employee that requested or uses reasonable accommodations, such as refusing to reinstate an employee to her original job or an equivalent position with equivalent terms and conditions of employment (pay, seniority, benefits, service credits);
- Denial of employment opportunities to a job applicant if the denial is based upon the employer's need to make reasonable accommodations for known limitations;
- Forcing an employee or applicant to accept an accommodation the employee chose not to accept simply because the employer believes it is necessary; or
- Requiring that the employee take leave instead of offering an accommodation that is available that would permit the employee to continue to work.

Assuming the Act becomes law, the best practices for compliance with the PPWFA are:

- Obtain the required Notice for Posting and post this notice where other required employment notices are posted. The notice must be posted within 120 days of the Act become effective. It is anticipated that the District of Columbia will provide a suggested notice once the law becomes effective;
- Prepare and distribute a notice in English and in Spanish for distribution to all employees. This must be done within 120 days of the Act becoming effective;
- Include a PPWFA policy in your handbook; but until your handbook is updated, provide the notice to each new employee. Again, this must be done within 120 days of the effective date of the Act; and
- Have copies of the notice available, as it must be provided to any employee who notifies the employer that she is pregnant or recently pregnant.

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