LABOR AND EMPLOYMENT LAW
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What to Expect When Your Employee is Expecting...and Beyond!

Today, an employee shares joyous news and says, "I'm expecting and due in 20 weeks!" You respond with congratulations, but then start thinking about all the new pregnancy-related legal protections you must comply with. Look no further, here are some highlights on what to expect when your employee is expecting…and beyond.

The Highlights:

Federal

You likely already know the basics. You know that many employees can invoke the Family and Medical Leave Act (FMLA) for unpaid leave for pregnancy-related serious health conditions and to bond with their baby. You are also likely aware that the Americans with Disabilities Act (ADA) comes into play when pregnant employees face pregnancy-related impairments that satisfy the ADA's definition of "disability." Separately, you know that Title VII prohibits sex-based discrimination, where pregnancy or conditions stemming from pregnancy are governed under that umbrella. Finally, you know that the Pregnancy Discrimination Act (PDA), generally protects applicants and employees from adverse employment action because of pregnancy or related conditions. The PDA also prohibits harassment based on pregnancy and prohibits retaliation.

Here are some new developments on the federal level:

- **The Pregnant Workers Fairness Act (PWFA) and Proposed Regulations**
  - *PWFA:* Effective June 27, 2023, the PWFA covers employers with at least 15 employees and provides additional protections for pregnant and postpartum employees and applicants. The PWFA is modeled after the ADA but has a few notable differences.
    - *Qualified Employees:* The PWFA differs from the ADA in that it takes into consideration the "temporary" nature of the pregnancy related condition when determining that an employee is "qualified" under the PWFA. Here, an employee or applicant is considered qualified if: any inability to perform an essential function is temporary; the individual can perform the essential function in the near future; the individual's inability to perform the essential function can be reasonably accommodated.
    - *Disability v. Known Limitation:* Moreover, under the PWFA, a pregnant worker's impairment does not have to meet the definition of a "disability" under the ADA before they may claim protection. The PWFA requires accommodations for a "known limitation," which is 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 whether or not such condition meets the definition of disability under the ADA.[1]

1 42 U.S.C. 2000gg(4).

- *Reasonable Accommodations:* The PWFA prohibits employers from denying a reasonable accommodation to a qualified individual with a known limitation, absent undue hardship; prohibits an employer from requiring an individual to accept an accommodation other than one arrived at through the interactive process; and prohibits requiring a qualified employee with a known limitation to take leave, either paid or unpaid, if another effective reasonable accommodation exists, absent undue hardship. Some examples of reasonable accommodations in the workplace for pregnant or recovering employees are additional break times for water or food; reserved parking; flexible working hours; job restructuring; temporarily suspending one or more essential function; telework.

- *Proposed PWFA Regulations:* On Aug. 7, 2023, the Equal Employment Opportunity Commission (EEOC) released proposed regulations under the PWFA. Comments on the proposal are due 60 days after official publication in the Federal Register, which is scheduled to be Aug. 11, 2023.

  The proposed regulations are expansive. Here are a few notable areas:

  - *Defining Pregnancy, Childbirth or Related Medical Conditions:* The proposed regulations define this phrase to include current and past pregnancy, potential pregnancy, lactation, use of birth control, menstruation, infertility and fertility treatments, endometriosis, stillbirth, miscarriages, choosing to not have an abortion and even pre-existing conditions that intensify with pregnancy or childbirth (e.g., anxiety, high blood pressure, carpal tunnel syndrome). The list is non-exhaustive.

  - *Qualified Employees:* As for qualified employees, the proposed regulations also define "temporary" and "near future." The EEOC proposes defining "temporary" as "lasting for a limited time, not permanent, and may extend beyond 'in the near future.'" As per the proposed regulations, the term "near future," is defined as "generally forty (40) weeks from the start of the temporary suspension of an essential function." Here, if a worker is unable to perform one or more of the essential duties of their job due to pregnancy, childbirth or a related medical condition, if that person is or is expected to be able to perform the essential duties in 40 weeks and the employer can reasonably accommodate the inability to perform that function, the person will be considered a "qualified" employee or applicant under the PWFA. The 40-week period may restart once the employees returns to work after 40 weeks. The EEOC is considering extending this period to 52 weeks.

  - *Predictable Assessments:* The proposed regulations also consider de facto reasonable accommodations which do not require an individualized assessment. Referring to these as predictable assessments, the EEOC proposes four specific accommodations that are considered reasonable by default such as allowing an employee to carry water and drink, as needed, in the employee's work area; allowing an employee to take additional restroom breaks; allowing an employee whose work requires standing to sit and vice versa; allowing an employee to take breaks, as needed, to eat and drink.

  - *Interim Reasonable Accommodations:* Because pregnancy-related conditions are temporary, the EEOC contemplates that employers provide an accommodation on an interim basis while conducting the interactive process. The EEOC reminds employers who do not provide such interim reasonable accommodations that an unnecessary delay in the

interactive process or providing a reasonable accommodation may lead to liability under the Act even if the reasonable accommodation is eventually granted.

- *Documentation:* The EEOC is also looking to limit the documentation that employers may require, reminding employers that such requests could be considered unlawful coercion or retaliation.

- **The Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act)**

  The PUMP Act, which went into effect on Dec. 29, 2022 impacts employers with 50 or more workers. The law updated the 2010 Breaktime for Nursing Mothers law. The PUMP Act requires that employers provide nursing employees, include teleworking nursing employees, a reasonable break time each time that the employee has need of a break to pump while lactating. This right is available for up to one year after the child's birth. (Note that it is likely that an employee need not be the birthing parent to receive a lactation accommodation as parents may decide to induce lactation when adopting a newborn baby.) Additionally, The PUMP Act provides that time spent expressing milk is considered hours worked if the employee is not completely relieved from work or is interrupted during the entire pumping break.

  Further, employers must provide a space that is private, shielded from view and the space itself cannot be a restroom stall or a toilet. The location must be functional as a space for expressing milk, but employers are not required to create permanent, dedicated spaces for nursing employees. If the space is not dedicated to the nursing employees' use, it must be available when the employee needs it in order to meet the statutory requirement.

New York

Effective June 7, 2023, the Nursing Mothers in the Workplace Act also expanded the rights of nursing mothers. Here, an employer is required to provide reasonable unpaid break time or allow employees to use rest periods or meal breaks to express milk as often as the employee reasonably has need to. An employer must provide an employee at least 20 minutes for each unpaid break, but must allow more time if an employee needs it. An employee may also use their regular paid break time or meal time to pump breast milk, but there is no requirement to do so. An employee may choose to take these breaks right before or after their regularly scheduled paid break or meal periods. For example, an employee can take a 30-minute lunch break and then take a 20-minute break to pump breast milk directly after their lunch break, for a total of 50 minutes. The law allocates these protections for nursing employees for up to three years following childbirth.

The law provides detailed requirements for lactation rooms, which cannot be a bathroom or toilet stall. The designated lactation room must be: reasonably close to the work area, well lit, shielded from view, free from intrusions and furnished with a chair, a surface to work on, nearby access to running water, and an electric outlet if the workplace is supplied with electricity. Employers must provide access to refrigeration to store milk, if the workplace has access to refrigeration. Employers must provide the above within five days of the employee making the request for reasonable accommodation. Finally, employers are required to provide employees with the NYS Department of Labor's written policy on the rights of nursing mothers to express breast milk in the workplace both upon hire and annually thereafter, and to employees upon returning to work following the birth of a child.

What Next?

There is a lot to unpack here, so it is important to take baby steps. Let's start with the basics: review and update your policies and forms; consistently apply these policies; and train your supervisors on the interactive process, reasonable accommodations and other protections under these laws. As always, we are here to help you deliver thoughtful and compliant responses to your employees.

If you have any questions about the information presented in this blog post, please contact Nihla F. Sikkander, any attorney in Bond's labor and employment practice or the Bond attorney with whom you are regularly in contact.

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