Congress Continues Bipartisan Efforts to Pass Pregnancy Accommodation Law – What Can Employers Do to Prepare?

Insights
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Republicans and Democrats in Congress are surprising all of us once again by working together in an effort to pass a law requiring employers to offer reasonable accommodations for pregnant employees. Efforts surrounding the Pregnant Workers Fairness Act (PWFA) mark the second time in recent months that Congress — and more specifically, the Senate — considers a law aimed at protecting employees in a bipartisan manner. What would this proposed law require if passed, what are its chances of becoming law – and more importantly, what should you be doing to prepare?

Bill Gains Momentum in Senate

The House of Representatives passed the PWFA (H.R.1065) on May 14, 2021 by an overwhelmingly bipartisan vote of 315-101. However, the companion bill (S.1486) was not placed on the Senate Legislative Calendar for a full consideration until September 30, 2021. It has remained on the Senate's calendar since then, and no vote has taken place.

However, recent activity indicates that the bill could be gaining momentum. Senators from both sides of the aisle – Bob Cassey (D-PA) and Bill Cassidy (R-LA) – are leading the bipartisan push to pass the PWFA. At present, six Democrats and six Republicans have cosponsored the bill, with the most recent cosponsors signing on on February 9.

With Congress recently passing the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, as well as slight glimmers of unity the nation is feeling following President Biden's State of the Union Address, the Senate may seek to capitalize on the feeling of comradery by passing the PWFA in the coming weeks. Additionally, recent social media attention may drive the Senate's focus back to the PWFA and encourage swift action by senators who seek the public's favor in an election year.

What is the PWFA?

The PWFA would prohibit employment practices that discriminate against making reasonable accommodations for qualified employees affected by pregnancy, childbirth, or related medical conditions. A "qualified employee" is defined as "an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the position, with specified exceptions."

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exceptions.

The specific employment practices prohibited by the PWFA are:

- Failing to make reasonable accommodations to known limitations of such employees unless the accommodation would impose an undue hardship on an entity's business operation;
- Requiring a qualified employee affected by such condition to accept an accommodation other than any reasonable accommodation arrived at through an interactive process;
- Denying employment opportunities based on the need of the entity to make such reasonable accommodations to a qualified employee;
- Requiring such employees to take paid or unpaid leave if another reasonable accommodation can be provided; and
- Taking adverse action in terms, conditions, or privileges of employment against a qualified employee requesting or using such reasonable accommodations.

In other words, the PWFA would require employers to consider employee and applicant accommodation requests related to pregnancy, childbirth, or related medical conditions in the same manner that it assess accommodation requests for other medical conditions. The PWFA would also require that employers provide reasonable accommodations to qualified employees, not just *any* accommodation. Additionally, the PWFA would prohibit employers from requiring a leave of absence for qualified employees when a different reasonable accommodation option is available. Finally, the act would prohibit retaliation against employees who seek and/or take a reasonable accommodation related to their pregnancy, childbirth, or related medical condition.

What About Other Similar Federal Laws?

The goal of the PWFA is to expand protections for pregnant workers who need an accommodation to perform their job duties. Currently, the Pregnancy Discrimination Act (PDA) simply prohibits discrimination against individuals because they are pregnant. This law says that employers cannot terminate or treat pregnant employees differently than other employees. In terms of the accommodations space, this generally means that employers must accommodate pregnant employees like they would accommodate other employees that are similar in their inability to work.

Pregnant workers also have no refuge under the Americans with Disabilities Act (ADA). This law does not include pregnancy in its definition of an "impairment," meaning that pregnancy is not a disability under the ADA. Therefore, existing law says that pregnant workers can only obtain an accommodation if they have a qualifying medical condition under the ADA, and pregnant workers who do not have any qualifying medical conditions are not entitled to an accommodation.

Thus, the PWFA would bridge the gap in federal law by requiring that employers provide reasonable accommodations to individuals who are pregnant, have recently undergone childbirth, or have a medical condition related to such pregnancy and childbirth.

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What Should Employers Do to Prepare?

While the PWFA would be an expansion of employees' rights under federal employment law, many states and cities already have some sort of expanded pregnancy accommodation law. In fact, 30 states and five cities require certain employers to provide some form of accommodations to pregnant employees.

- For example, California's Fair Employment and Housing Act (FEHA) specifically provides that it is unlawful for an employer "to refuse to provide reasonable accommodation for an employee for a condition related to pregnancy, childbirth, or a related medical condition."
- Similarly, in Louisiana, employers are prohibited from "failing or refusing to make reasonable accommodations for employees with medical needs causing limitations arising from pregnancy, childbirth, or related medical conditions, where such limitations are known to the employer, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer."
- In Virginia, "employers must make reasonable accommodations to the known limitations of a person for pregnancy, childbirth or related medical conditions (including lactation), unless providing such an accommodation would impose an undue hardship on the employer."

Thus, if you are an employer in one of the many states or cities that already requires you to make accommodations for pregnancy-related medical conditions, your practices may not need to change much, or at all.

However, if you live in a state where employers are not currently required to offer reasonable accommodations to employees who are pregnant or recently gave birth to a child, you may want to start considering how to implement such a process in your business. In general, this will mean expanding your accommodations review process to include requests related to pregnancy, childbirth, and related medical conditions.

Conclusion

We will monitor developments related to this legislation and provide updates as warranted, so make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our Employee Leaves and Accommodations Practice Group.

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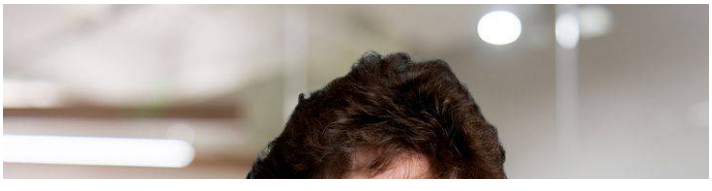

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