An Expansion of Federal Protection for Pregnant Workers

Marianna Michael Melendez and Rudy J. Ellis III

The lack of nationwide paid parental leave and accommodations for individuals experiencing side effects from pregnancy-related medical issues in the U.S. has been a topic of conversation for several years and has gained traction in light of the upcoming election. On April 15, 2024, the Equal Employment Opportunity Commission (EEOC) issued its final regulation related to the Pregnant Workers Fairness Act (PWFA), which went into effect on June 18, 2024. However, the PWFA is not the only federal law that expanded protections to pregnant employees in 2024. The Department of Education's 2024 Amendments to Title IX offer expanded protections for students and employees in education programs or activities receiving federal financial assistance. While the scope of Title IX is limited, the PWFA ensures protections for every employee who works for a qualified employer and experiences pregnancy or related conditions.

Before the PWFA, President Joe Biden signed the Consolidated Appropriations Act into law in 2023, which introduced the PUMP for Nursing Mothers Act (PUMP Act). The PUMP Act requires employers to provide reasonable break time for an employee to express breast milk for their nursing child. This applies to the employee for up to one year after the child's birth, and for each instance, the employee needs to express breast milk. The PUMP Act provides employees with the right to a place to pump at work, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public. While the PUMP Act provided new protections in some states, it demonstrated that the federal government was only focused on women's experience post-pregnancy. The PWFA exhibits an expanded acknowledgement of the conditions employees experience with fertility treatments, whether that results in pregnancy or not.

The PWFA applies to employers with 15 or more employees. It requires qualified employers to provide reasonable accommodations for a qualified employee's or applicant's known limitations related to, affected by or arising out of pregnancy, childbirth or related medical conditions, unless the accommodation will cause the employer an undue hardship. Employers are required to engage in the interactive process, as they would for ADA accommodation requests. Qualified employees include individuals who can, with or without reasonable accommodation, perform the essential functions of the position or an individual with a temporary inability to perform the essential functions of their job and the inability to perform the essential function can be reasonably accommodated.

The PWFA defines a known limitation as physical or mental condition related to, affected by or arising out of pregnancy, childbirth or related medical conditions including:

- current, past and potential pregnancy;
- lactation;
- use of birth control;
- menstruation;
- infertility and fertility treatments;
- endometriosis;
- miscarriages and still births; and
- issues related to abortion.

An important element of the PWFA is that the employee must communicate the physical or mental condition to the employer. Theoretically, employers' accommodations are restricted by the amount of information that the employee shares. For example, employers are not required to provide accommodations for current pregnancies and endometriosis if the employee does not communicate both conditions. However, the PWFA does not require employers to seek supporting documentation from employees or applicants who request an accommodation under the PWFA. If an employer decides to seek supporting documentation, it is only permitted to do so if it is reasonable to require documentation for the employer to determine whether the employee (or applicant) has a physical or mental condition related to, affected by or arising out of pregnancy, childbirth or related medical conditions (a limitation) and needs a change or adjustment at work due to the limitation. The final rule, like the proposed rule, sets out examples of when it would not be reasonable for the employer to require documentation.

Under the final rule, when requiring documentation is reasonable, the employer is limited to requiring documentation that itself is reasonable. The final rule has modified the definition of "reasonable documentation" to now mean the minimum documentation that is sufficient to: (1) confirm the physical or mental condition; (2) confirm the physical or mental condition is related to, affected by or arising out of pregnancy, childbirth or related medical conditions (together with (1) "a limitation"); and (3) describe the change or adjustment at work needed due to the limitation. The PWFA also requires employers to keep medical information confidential in a manner mirroring the confidentiality required by the ADA.

According to the Bureau of Labor statistics, 56.8% of the U.S. workforce in 2022 were women. Providing accommodations that consider health conditions women deal with regularly breaks barriers that have previously prevented women from being more successful in their careers.

Further, the PWFA mirrors Title IX in many respects. Title IX provided similar protections to students and employees at federally funded educational institutions for several years preceding any other federal law. Title IX ensures that students and employees who have experienced pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom are treated the same as any other individual with temporary disabilities. This is most important when considering what documentation can be requested. For instance, K-12 schools and higher education institutions may not require students to provide documentation showing that a medical professional has cleared them to participate in a sport if they also do not require that of students who have temporary disabilities including broken limbs, concussions or short-term impairments, among others. When discussed in the bigger picture, it is noteworthy that Title IX offered protections to students experiencing pregnancy and related conditions before the majority of employees were provided with similar accommodations.

While the requirements of the PWFA may seem novel to some, Kentucky was surprisingly ahead of the curve in creating protections for pregnant workers. The Kentucky Pregnant Workers Act (KPWA) went into effect on June 27, 2019—almost five years before the PWFA went into effect. The KPWA requires all Kentucky employers with 15 or more employees to provide reasonable accommodations for an employee's pregnancy, childbirth and related medical conditions including, but not be limited to:

- more frequent or longer breaks;
- time off to recover from childbirth;
- acquisition or modification of equipment;
- appropriate seating;
- temporary transfer to a less strenuous or less hazardous position;
- job restructuring;
- light duty;
- modified work schedule; and
- private space that is not a bathroom for expressing breast milk.

The KPWA also dictates when determining appropriate and reasonable accommodations, the following matters must be considered:

- An employee shall not be required to take leave from work if another reasonable accommodation can be provided;
- Similar to the ADA's interactive process, and the process dictated by the PWFA, the employer and employee shall engage in a timely, good faith and interactive process to determine effective reasonable accommodations; and
- If the employer has a policy to provide, would be required to provide, is currently providing, or has provided a similar accommodation to other classes of employees, then a rebuttable presumption is created that the accommodation does not impose an undue hardship on the employer.

Under the KWPA, an employer's failure to reasonably accommodate an employee's pregnancy, childbirth and related medical conditions is deemed an unlawful employment practice, unless the employer can demonstrate undue hardship. The KWPA also requires Kentucky employers provide a written notice to its employees regarding their right to be free from discrimination in relation to pregnancy, childbirth and related medical conditions, including the right to reasonable accommodations.

According to the Bureau of Labor statistics, 56.8% of the U.S. workforce in 2022 were women. Providing accommodations that consider health conditions women deal with regularly breaks barriers that have previously prevented women from being more successful in their careers. As the cost of childcare continues to rise and the U.S. engages in vigorous debate over maternity and paternity leave, the PUMP Act, the PWFA, Title IX and the KWPA offer expanded protections for many workers.

Rudy J. Ellis III is the chair of the LBA Labor and Employment Law Section. He is a senior associate in Dinsmore & Shohl's Labor and Employment Department in Louisville and licensed to practice in Kentucky. Ellis represents a variety of businesses ranging from local companies to Fortune 500 corporations in all areas of labor and employment law, as well as general litigation.

Marianna Melendez is vice-chair of the LBA Labor and Employment Law Section. She is a University of Louisville Brandeis School of Law graduate and has been practicing labor and employment law for the last six years. Melendez is currently the staff attorney for the Jefferson County Public School's Office of Compliance and Investigations. ■