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Employee Benefit Plan Review

Key Points California Employers Need to Know About New Federal Pregnancy Accommodation Requirements

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Employers face significant new pregnancy accommodation requirements thanks to federal regulations under the Pregnancy Workers Fairness Act (PWFA) that recently took effect. But did you know that California employers – most of which are already subject to fairly stringent requirements under the state's Pregnancy Disability Leave (PDL) law – also face additional obligations? This article summarizes the interplay of these two critical laws.

Background

- The PWFA requires employers with 15 or more employees to provide reasonable accommodations for 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."
- California's PDL, which covers employers with 5 or more employees, also addresses accommodation and leave requirements for pregnant employees.
- The federal and state statutes act together to strengthen and further define pregnancy-related workplace protections.

Interplay of the Laws

There are several notable points California employers need to know about the interplay of these laws.

The PWFA Temporarily Suspends the "Essential Functions" of an Employee's Position

In one of the most critical distinctions, an employee may be "qualified" under the PWFA even if they cannot perform one or more essential functions of their job – which is not the case under the state PDL. Specifically, the PWFA requires employers to temporarily suspend the essential functions of a position if the qualified employee's inability to perform the essential functions is:

- Temporary;
- If the employee can perform the essential functions "in the near future" – defined

as within the 40 weeks from the suspension of the essential functions; and
- The employee's inability to perform the essential functions can be reasonably accommodated without an undue hardship.

California employers must be aware that they may be required to reasonably accommodate a pregnant employee by suspending their essential job functions in certain situations, unless it is an undue hardship to do so.

The regulations note this does not mean the essential functions of a pregnant employee must always be suspended for 40 weeks, or that if a pregnant employee seeks the temporary suspension of an essential function for 40 weeks it must automatically be granted. However, California employers must be aware that they may be required to reasonably accommodate a pregnant employee by suspending their essential job functions in certain situations, unless it is an undue hardship to do so.

The PWFA Provides a More Expansive Definition of What Constitutes a "Reasonable Accommodation"

The PWFA specifically outlines certain accommodations that are almost always deemed reasonable (termed "predictable assessments") and which, according to the EEOC, will not cause an employer undue hardship in nearly all cases. These predictable assessments include allowing the employee:

- To carry or keep water near and drink, as needed;
- To take breaks to eat and drink, as needed;
- To take additional restroom breaks, as needed; and
- To sit when work requires standing and stand when work requires sitting, as needed.

The PWFA also includes examples of other likely reasonable accommodations that do not quite rise to the level of a predictable assessment. These include the use of a closer parking space, modifications to uniforms/dress codes, schedule changes, telework, light duty, and making existing facilities accessible or modifying the work environment.

The PWFA also includes examples of other likely reasonable accommodations that do not quite rise to the level of a predictable assessment. These include the use of a closer parking space, modifications to uniforms/dress codes, schedule changes, telework, light duty, and making existing facilities accessible or modifying the work environment. While these accommodations would likely be considered reasonable under California's PDL, the PWFA removes uncertainty as to whether these accommodations should generally be considered reasonable.

Employers must be mindful of these possible reasonable accommodations and obligation to provide such accommodations when necessary. An undue hardship defense likely would not hold up if the issue is litigated.

The PWFA Imposes Greater Limitations With Respect to What Documentation Employers May Request During the Interactive Process

Under the PWFA, an employer is not required to seek supporting documentation from an employee or applicant who requests an accommodation. If requested, it is only permitted if "reasonable" under the circumstances. The PWFA details several examples where it is not reasonable for the employer to request supporting documentation or medical certification:

- When the known limitation and need for reasonable accommodation is obvious;
- When the employee/applicant has already provided sufficient information, such as a prior medical certification;
- When the employee attests to being pregnant and requests a predictable assessment; and
- For lactation/pumping accommodations.

Additionally, the PWFA regulations state that an employer cannot justify failing to make or delay providing a reasonable accommodation based on the employee's failure to provide supporting documentation unless, among other things, the employer provides "sufficient time" (which is not defined) to obtain and provide the documentation. In contrast, the PDL notes that medical documentation generally must be provided within 15 calendar days.

Also, while the PWFA allows employers to request documentation that "confirms the physical or mental condition," California employers may

not inquire into any specific medical conditions.

Practically, California employers should consider both PDL and the PWFA in evaluating whether and what medical documentation is necessary and permitted when assessing a request for a pregnancy-related accommodation.

Action Items

California employers should take the following steps to ensure compliance with California's PDL and the federal PWFA:

1. Ensure your handbook and policies regarding the interactive process and pregnancy-related reasonable accommodations are up to date.
2. Provide clear guidance to managers and supervisors on the interactive process and requests for accommodation that relate to pregnancy. Consider instructing managers and supervisors to escalate pregnancy-related accommodation requests to Human Resources if they are unsure about how to assess or respond to the request.
3. Inform your managers and supervisors of their obligation to provide certain notices and engage in the interactive process with pregnant employees when it becomes apparent that a pregnant employee may need an accommodation.
4. Ensure Human Resources is well trained on the particular aspects of the PWFA and provide training to ensure they are competent in handling pregnancy-related accommodation requests.

Conclusion

In California, we are used to having more restrictive employment laws compared to many other states and federal law – but do not forget about the PWFA because it could be a costly error! As always, it is a good idea to connect with your labor and employment attorney before denying an accommodation request related to pregnancy, childbirth, or related medical conditions.

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