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Pregnant Workers Fairness Act Passes in the House for Second Time; More Likely To Become Law

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On May 14, 2021, the United States House of Representatives passed the Pregnant Workers Fairness Act ("PWFA" or "HR 1065") for a second time. With a vote of 315-101, including support from all House Democrats and 99 Republicans, the PWFA now awaits Senate consideration.

As previously reported, the House had originally passed the PWFA on September 14, 2020 ("HR 2694"). While members of congress have introduced versions of the PWFA each term since 2012, last year was the first approval. After HR 2694 passed the House last September, by a vote of 329-73, the Senate did not consider it. The post-election introduction of the current version of the PWFA, HR 1065, however, appears more likely to become law than its predecessor. The current version has already received strong bipartisan support and, if considered, would likely receive strong support from Senate Democrats. Additionally, the PWFA seems poised to pass because the Senate has authored its own version, S1486, which was introduced by a bipartisan group of senators before being sent to the Health, Education, Labor and Pensions Committee. There are no substantive differences between HR 1065 and S1486, and the PWFA has captured widespread support from various worker advocates, civil rights groups, and business groups.

The PWFA largely tracks the accommodation requirements of the Americans with Disabilities Act ("ADA"). Like the ADA, under the PWFA, employers with 15 or more employees would be required to provide reasonable accommodations to qualified pregnant employees and employees with pregnancy related medical conditions, unless the employer can show that such an accommodation would impose an "undue hardship." The legislation defines the term "qualified employee" as "an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position, except that an employee or applicant shall be considered qualified if—

1. any inability to perform an essential function is for a temporary period;

2. the essential function could be performed in the near future; and

3. the inability to perform the essential function can be reasonably accommodated."

Examples of a pregnancy-related reasonable accommodations include additional breaks to drink

water, a stool to rest upon, limiting heavy lifting, and temporary reassignment to different work. Also like the ADA, the PWFA requires that employers engage in an "interactive process" to determine the efficacy and feasibility of a requested accommodation.

Under the PWFA, it would be unlawful for an employer to deny reasonable accommodations to a qualified employee for the "known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee." The PWFA prohibits employers from requiring a qualified employee to: (i) take paid or unpaid leave if a non-leave reasonable accommodation can be provided; or (ii) accept an accommodation that is not "reasonable." The PWFA would also make it unlawful for employers to take an adverse employment action against a qualified employee who requests or uses a reasonable accommodation related to pregnancy, childbirth or a related medical condition, or to deny employment opportunities to a qualified employee because of their need for a pregnancy-related accommodation.

As with the ADA and other anti-discrimination statutes, the PWFA would also prohibit retaliation against any employees who seek pregnancy or pregnancy-related accommodations, engage in protected activity related to the PWFA, file a charge, or assist or participate in an investigation or proceeding under the PWFA. The PWFA, however, provides an affirmative defense to employers who have made "good faith efforts" to engage in the interactive process with an employee who seeks reasonable accommodations under the PWFA.

If the PWFA is signed into law, the Equal Employment Opportunity Commission ("EEOC") would be responsible for enforcing it and issuing interpretive regulations within two years of its enactment. The rights and remedies afforded by the PWFA explicitly track those provided under Title VII of the 1964 Civil Rights Act ("Title VII"), including compensatory and punitive damages and attorneys' fees. If enacted, as currently drafted, the PWFA would become effective upon enactment.

As we previously discussed, the PWFA seeks to address some of the questions arising out of the Supreme Court's decision in *Young v. UPS*, 135 S. Ct. 1338 (2015) and subsequent EEOC guidance regarding the accommodation of pregnant workers, and to clarify employer obligations to pregnant workers.

What This Means for Employers

In the event that the PWFA is enacted, employers will need to review and update their workplace policies and procedures to ensure compliance with the new law. Because the PWFA largely tracks the ADA, employers should already be familiar with the requirements to engage in the "interactive process" and to determine the reasonable accommodations that will suit a pregnant employee's needs, while avoiding undue hardship to the employer. Many employers are considering remote work as a reasonable accommodation in the context of disability, religious, and pregnancy accommodations. Employers should also ensure that they are complying with any applicable state and local obligations concerning pregnancy accommodation. For example, both New York State and New York City already have pregnancy accommodation laws.

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