

LOCAL EVERYWHERE

Pregnancy Accommodations: Navigating Difficult, Yet Common Scenarios to Keep Employers Compliant

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Littler[®]



Presented by



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Agenda

- What is the intent of the PWFA?
- What does PWFA require?
- What are the key pieces You need to worry about?
- Case Studies!
- Quick Hits

In the meantime, a few housekeeping items . . .

PWFA

Pa-WIFFA

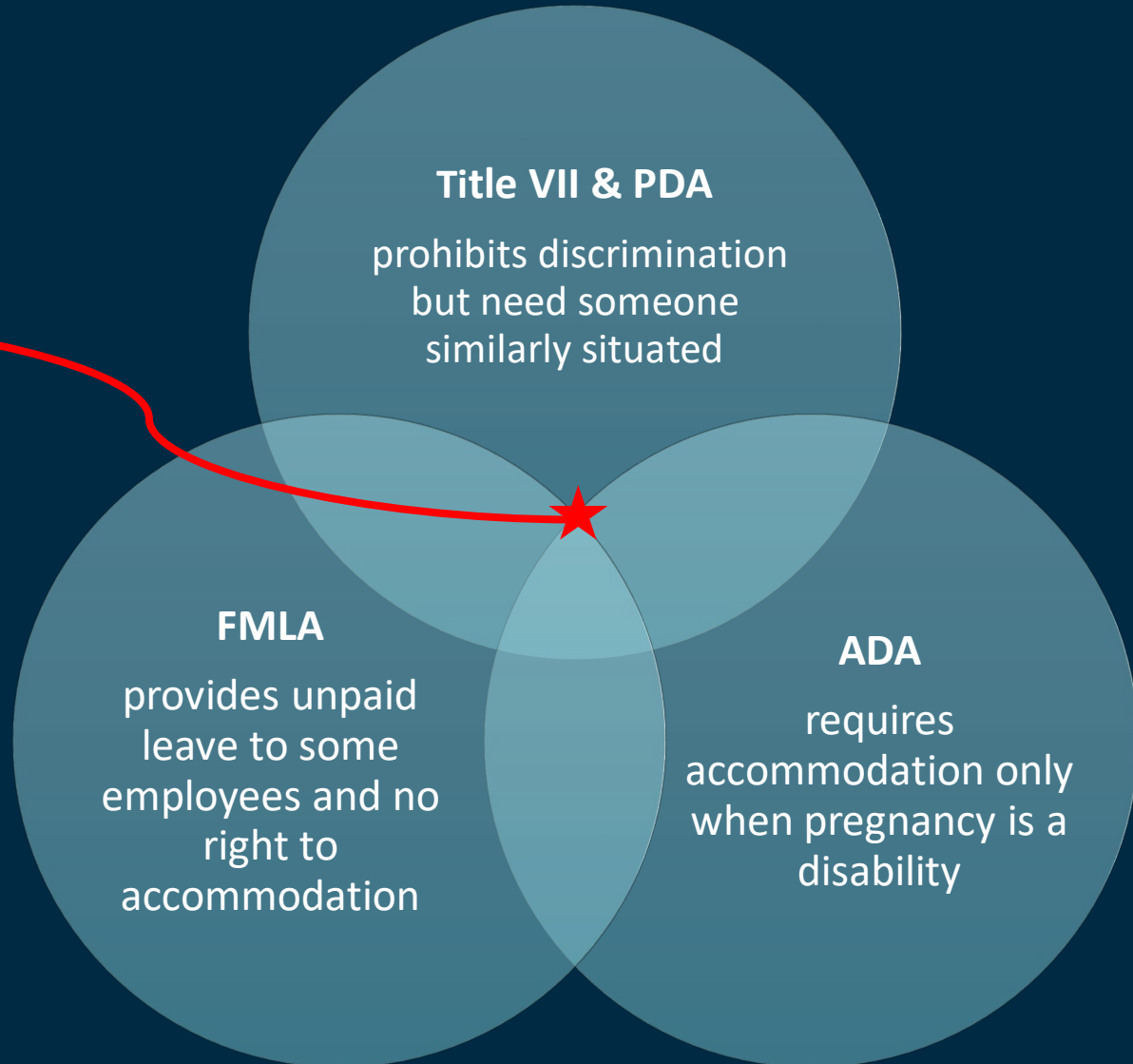


Why Did PWFA Become Law?

- It is intended to **fill in the gaps** between Title VII (as amended by PDA), ADA, and FMLA
- It prevents women from being forced out on unpaid leave or out of their jobs

Rep. Nadler: “to eliminate discrimination and promote women’s health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition.”

**The Gap
PWFA Filled:
Pregnancy**



What Does the PWFA Do?

Requires an interactive process between employers and qualified employees and applicants to determine appropriate reasonable accommodations.

Requires employers to make reasonable accommodations for qualified employees and applicants affected by pregnancy, childbirth, or related medical conditions.

Who Does it Cover?

Qualified employee:

- An employee or job applicant who can perform the essential functions of the employment position, **except** that an employee or applicant shall be considered qualified if—
 - The inability to perform an essential function is for a temporary period;
 - The essential function could be performed in the near future; *and*
 - The inability to perform the essential function can be reasonably accommodated.

Covered employer:

- Applies to employers with 15 or more employees

Known Limitation:

- Physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or the employee's representative has communicated to the employer, whether or not the condition meets the definition of disability under the ADA
- “Limited” = modest/minor/episodic impairment

Is This Just Another Version of the ADA?

Similarities

- Interactive Process
- Reasonable accommodation
- Undue hardship

Distinctions

- No requirement of “impairment” that “substantially limits” a “major life activity” – covers *temporary* conditions
- May not require an employee to take paid or unpaid leave if another reasonable accommodation is available

KEY DIFFERENCE: the PWFA deems an individual impaired by pregnancy, childbirth, or related medical conditions “qualified” and entitled to reasonable accommodation, *even if unable to perform essential job functions for a temporary period*, as long as that function can be performed *in the near future* and otherwise accommodated

Examples of Accommodations During Pregnancy Cited by the EEOC



- Redistributing marginal functions the pregnant employee cannot perform
- Altering how an essential function is performed (i.e., sitting versus standing)
- Modification of workplace policies (i.e., employee able to have water bottle at desk, though normal policy is not to have any liquids at workstation)
- Use of equipment or devices (e.g., a stool to sit on periodically), and potentially purchasing such items
- Modified work schedules
- Leaves of Absence

Non-Exhaustive List of Reasonable Accommodations

- Frequent Breaks
- Sitting/Standing
- Schedule changes, part time work, and paid and unpaid leave
- Remote work
- Reserved Parking
- Light Duty
- Making Existing Facilities accessible or modifying work Environment
- Job Restructuring
- Acquiring or Modifying Equipment, Uniforms or Devices
- Adjusting or Modifying examinations or Policies

Sample Scenario

An activity director at a nursing home requests a reasonable accommodation for some physical aspects of her job (such as lifting) to prevent having another miscarriage



Sample Scenario

A hardware assembler's doctor recommends that she not work more than an eight-hour shift or lift more than 20 pounds due to gestational diabetes and the threat of pre-term labor



Break Time!

Reasonable Accommodation Considerations

- Missy, pregnant and diagnosed with pregnancy-induced diabetes
- Requests 15-minute breaks every 90 minutes for restroom breaks, eating/drinking and to stand from her workstation
 - Missy is part of a project team in the middle of an intense working sessions. When Missy takes a break, so does the team.

Do we have to offer the breaks?

Do they have to be that long?

Is there anything else we can do?

Predictable Assessments



Predictable Assessments – Four Specific Accommodations Deemed Reasonable by the EEOC:

1. Allowing employee to carry water and drink, as needed, in the employee's work area
2. Allowing employee to take additional restroom breaks
3. Allowing employee whose work requires standing to sit and vice versa
4. Allowing employee to take breaks, as needed, to eat and drink

Reasonable Accommodation Considerations

Back to Missy. What are our considerations?

- Her requests = predictable assessments
- Can we ask if they need to be 15 minutes?
- Can we ask if there are other ways to accommodate?
- What if Missy says that she could do all this in 5 minutes (every 90) if she could work from home?
- Does the temporary nature affect our analysis?



What Does the Interactive Process Look Like?

- Interactive Process
 - Notice of need for accommodation can be verbal or written, can be by an employer or a representative, and need only identify: 1) the relevant limitation; and 2) the need for an adjustment
 - Notice = Triggers the interactive process
 - Can ask for completion of an “accommodation request” form but can’t require
 - Proposed regs require employees act expeditiously on a request and promotes the concept of “interim accommodation”
 - Accommodation even if the employer requires additional information
 - Basis for an employer to contest a claim of undue delay in granting accommodation
 - Rationale: In many instances the accommodation should be “obvious”

Undue Hardship



Reasonable accommodation is not required if providing the accommodation would impose an undue hardship on the employer's business operations

- Undue hardship refers to an action that fundamentally alters the nature or operation of the business or is unduly costly, extensive, substantial, or disruptive

Undue Hardship Factors

The **nature and net cost** of the accommodation.

The overall **financial resources** of the employer.

The **number of employees** employed by the employer.

The **number, type, and location** of the employer's facilities.

The employer's **operation**, including:

Composition, structure, and functions of the workforce; and

Geographic separateness and administrative or fiscal **relationship of the facility** where the accommodation will be provided.

Employer's Operations

- The employer's **operation**, including:
 - composition, structure, and functions of the workforce; and
 - geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.



Factors Establishing Undue Hardship

- Significant losses in productivity because work completed by less effective, temporary workers or overburdened employees working overtime who may be slower and more susceptible to error
- Increased burden on management staff required to find replacement workers, readjust workflow, readjust priorities in light of absent employee, or do the work themselves
- Other employees are required to work above and beyond own job duties to cover the work
- Deferred projects



Factors Establishing Undue Hardship

- Lower quality and less accountability for quality
- Less responsive client service and increased client dissatisfaction
- Lost sales
- Increased stress on overburdened co-workers
- Lower morale



Additional Undue Hardship Considerations - EEOC proposed regulations

The proposed regulations provides more specific guidance:

1. The length of time that the employee will be unable to perform the essential function
2. Whether there is work for the employee to accomplish by allowing the employee to perform all the other functions of the job, transferring the employee to a different position, or otherwise
3. The nature of the essential function, including its frequency

But wait, There's more!

4. Whether the employer has temporarily suspended the performance of essential job functions for other employees in similar positions
5. Whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function
6. Whether the essential function can be postponed or remain unperformed for any length of time and, if so, for how long

Case Studies!

Case study #1: Light Duty

- Peggy: Team lead on the “picker” line, quasi-management and picker, 6 months’ pregnant
- December 2023:
 - Doctor’s note: Peggy cannot perform any “strenuous” labor, job should be limited to non-physical duties, and must be seated in job 90% of day
 - Duration: For remainder of pregnancy and recovery from childbirth
- Your light duty policy
 - Only for on-the-job injuries
 - Pays less than current position
 - 60-day limit
- Current light duty positions available in labeling area; recent four-week assignment given to employee recuperating from workplace injury
- John, your manager, to you: “If we do this for Peggy, we gotta do it for everyone. And then no one will wanna work.”

Are you obligated to provide the accommodation?

Case study #2: Remote Work

- Susie: IT analyst in sales department, works on the programming team
- Desk job, but includes ongoing team meetings
- Close knit team, though Susie is a bit of a loner
- Five months' pregnant
- Doctor: Put Susie on bed rest for two weeks, directed her thereafter to work from home; states that the “commute is difficult for her”
- Hybrid-workplace: Employees work in-person two days/week; three days remotely
- Susie requests remote work

Are you obligated to provide the accommodation?

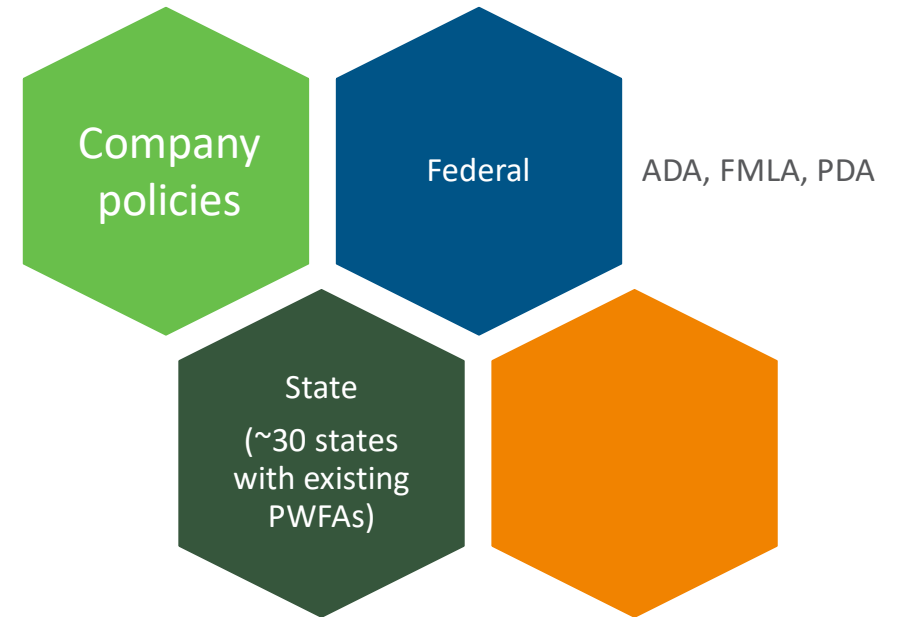
And How do you address the issue of Susie's commute?

Case study #3: Performance Expectations

- Joanie: Sales account representative, works on the sales team
- Took extensive leave during pregnancy for anxiety, morning sickness
- Returned from parental leave in September 2023, just not herself
- Doctor: Post-partum depression, needs to reduce her schedule by 25%, Fridays off
- Supervisor, Sue Menaught, reports to you:
 - Joanie not meeting account goals
 - Cold-calls are down 40% since her return
 - Her sales are down over 32%
- Sue Wants to discipline Joanie because she's not meeting metrics

Can you safely discipline Joanie?

Interaction with Other Laws



FMLA & PWFA

Both address conditions related to childbirth

– before, during and after

FMLA provides for unpaid job-protected leave

PWFA provides on-the-job accommodations





“Related To Pregnancy” is *Really* Broad!

- *What exactly does “related to pregnancy” mean?*
 - Expansive Definition of Physical and Mental Conditions Before, During and After Pregnancy
 - Includes current pregnancy, past pregnancy, potential pregnancy, lactation, use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, abortion
 - Also preexisting conditions exacerbated by pregnancy and childbirth
 - No level of Severity Required
 - Covers conditions that do not rise to the level of disability as defined in the ADA

Eliminating Job Functions, Really?

- *How does PWFA impact “qualified employee” concept we understand from ADA?*
 - Temporary Elimination of Essential Functions
 - Employees and applicants who, with or without reasonable accommodation, cannot perform an essential function for a temporary period if the employee or applicant:
 - is or is expected to be able to perform the essential function “in the near future” and
 - the inability to perform the essential function can be reasonably accommodated
 - “In the Near Future” – undefined in the PWFA, proposed definition in regulations -
 - ‘Generally, 40 weeks’ from start of temporary suspension of essential functions
 - Another 40-week period begins after return to work after leave (and maybe 52 weeks?)

Is It All or Nothing on the Accommodation?

- *What if the requested accommodation would cause an undue hardship?*
 - **Partial Grant** of Reasonable Accommodation Request
 - Even if an employer cannot grant an accommodation absent undue hardship, it must still provide accommodation up to the point that it does create an undue hardship
 - Example: if eliminating an essential function can be done for a few weeks, but it would be an undue hardship if eliminated for several months, the essential function must be eliminated for a few weeks



Surely We Can Require Documentation, right?

- *Can an employer require medical documentation?*

- Limited Opportunities to Request Documentation: Only seek medical documentation to support a request for accommodation if it is reasonable under the circumstances
- Reasonable documentation – confirms the physical or mental condition, confirms that it is related to, affected by, or arises out of pregnancy, childbirth or related conditions, and confirm that a change or adjustment is needed (and for how long?)
- Cannot seek certification:
 1. When the limit and need for accommodation is obvious,
 2. When the employer already has sufficient information,
 3. When the request is for one of the four “Predictive Assessment” de facto reasonable accommodations, and
 4. When the request is for a lactation accommodation.

Policy and Forms

- Jeff, are you recommending a standalone pregnancy accommodation policy?

Yes

- How about a medical certification form (different from ADA)?

Yes



Can't We Just Put the Employee on Leave?

- PWFA says employers cannot force employee to accept accommodation other than one “arrived at through the interactive process.” What does that mean?
- Can't we just put the employee on leave and deal with this another day?



Jeff's ADA Master Class

March 5-7, 2024

THREE Days of ADA Goodness!

- Three Days: 3.5 hours, 3.5 hours, 2 hours
- Topics:
 - When does an employee's medical condition become a disability, and should you care?
 - Interactive process and what this process requires
 - Determine whether an accommodation is reasonable
 - Make appropriate medical inquiries
 - Effectively manage leaves of absence, remote work, light duty and more as a reasonable accommodation
 - The intersection of ADA, FMLA and worker's compensation
 - Tricky ADA Hiring Issues
- We'll send you home with:
 - An ADA workbook
 - PowerPoint slides
 - Link to the recording!

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In a World Where You Can Be Anything, Be Kind

By [Jeff Nowak](#) on November 1, 2023

POSTED IN [FMLA](#)

Halloween 2023 was a tough day in our house.

Every year, the holiday approaches with a great deal of parental anxiety not because we fret over what costume our 9-year-old daughter will select for the day.

Sheesh, that's the easy part.

The hard part?

Waiting [hopelessly] for an invite from even one kid in her class to go trick-or-treating.

Every year, we follow the same routine. In early October, we start with hope that this year will be different. Hope begins to fade in the latter part of the month, where it becomes clear that an invite just isn't coming.

Our daughter is extremely shy and, at times, struggles with friendships. She



ABOUT JEFF



Jeff Nowak is a shareholder at Littler Mendelson P.C., the world's largest

employment and labor law practice representing employers. Jeff has two decades of experience advising and litigating on behalf of employers on a wide range of complex employment law matters and is a recognized leader on FMLA and ADA issues, helping employers develop comprehensive strategies to achieve compliance with employee leave and accommodation issues.

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Other Resources

- Job Accommodation Network (www.askjan.org)
- Disability Management Employer Coalition (www.dmec.org)
- EEOC guidance: <https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act>
- Proposed PWFA regulations: <https://www.federalregister.gov/documents/2023/08/11/2023-17041/regulations-to-implement-the-pregnant-workers-fairness-act>





***“You’re a Mean One,
Grumpy Boss!”***

(by Weird AI Nowak)

Sung to the tune
“You’re a Mean One, Mr. Grinch!”

You're a Mean One, Grumpy Boss
You deny every accommodation deal,
You won't let pregnant workers rest,
You don't care how they feel,
Grumpy Boss!

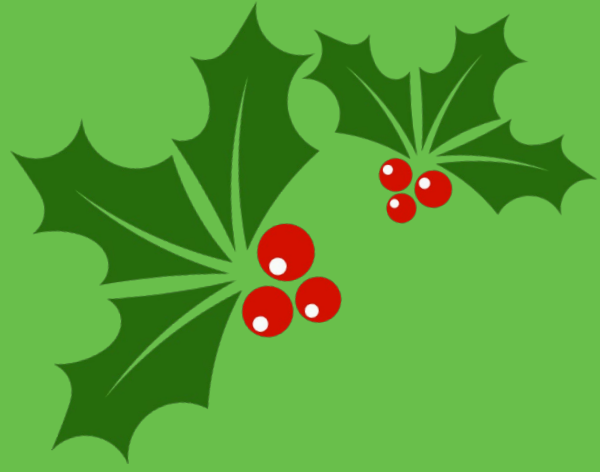
You're peculiar, Grumpy Boss
You won't let moms take breaks,
You won't adjust their schedules,
Even when they're cold and get the shakes,
Grumpy Boss!

The best three words from your pregnant employees that make you shudder, and I quote:

I'll.
Work.
Remote.

You're so demanding, Grumpy Boss
You say there's no light duty!
You force them on leave,
Then fire them with no reprieve,
Grumpy Boss!

*Your desk is an appalling dump heap,
filled with accommodation requests
for water breaks to which you've never responded,
mangled up in tangled up knots!*



Happy Holidays!

From your friends at Littler

Your Webinar Hosts




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