

Addressing Pregnancy Discrimination and the Pregnant Workers Fairness Act (“PWFA”) in the Sports Industry and Workplace

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FACTS ABOUT PREGNANCY DISCRIMINATION

Today, nearly 70% of women work during their pregnancies.

Recent survey found that the majority of women who worked during pregnancy needed some type of accommodation. While accommodation needed were often minor, an estimated 250,000 women are denied accommodations related to their pregnancies each year.

74% of pregnancy discrimination charges with EEOC result in no monetary benefit to the charging party

Of the 23% of charges that receive monetary benefit, average benefit is only \$17,976 with a median benefit of \$8,000.

Pregnancy discrimination affects women in low wage physically demanding occupations, high wage occupations, and even workplaces dedicated to supporting women.

DEARICA HAMBY

- Dearica Hamby is a three-time WNBA All-Star, two-time Sixth Women of the Year winner, and an Olympic bronze medalist.
- She has accused the WNBA and her former team, the Las Vegas Aces, of discriminating and retaliating against her while she was pregnant, culminating in her trade to the Los Angeles Sparks in January 2023.
- In her recently filed lawsuit, Ms. Hamby alleges that “Defendant’s decision to trade [her] was motivated by [her] announcement that she was pregnant after signing her contract extension.”
- *Hamby v. WNBA* Case No. 2:24-cv-01474 USDC D. Nev.



RACHEL MOUNTIS

- Erin Murphy, was a senior employee at a multinational commodity trading company.
- She was belittled on the trading floor during her pregnancy.
- After returning from maternity leave, she was told to pump milk in a supply closet.



OTISHA WOOLBRIGHT

- Otisha Woolbright asked her big box retailer employer if she could stop lifting heavy trays when she got pregnant.
- Her manager told her that she had seen Demi Moore do a flip on TV when she was nearly full-term so pregnancy was “no excuse.”
- She had to continue lifting and got hurt on the job. After her injury, her employer gave her the accommodation she originally requested., she got hurt.
- She was terminated a few weeks later after she asked about parental leave.



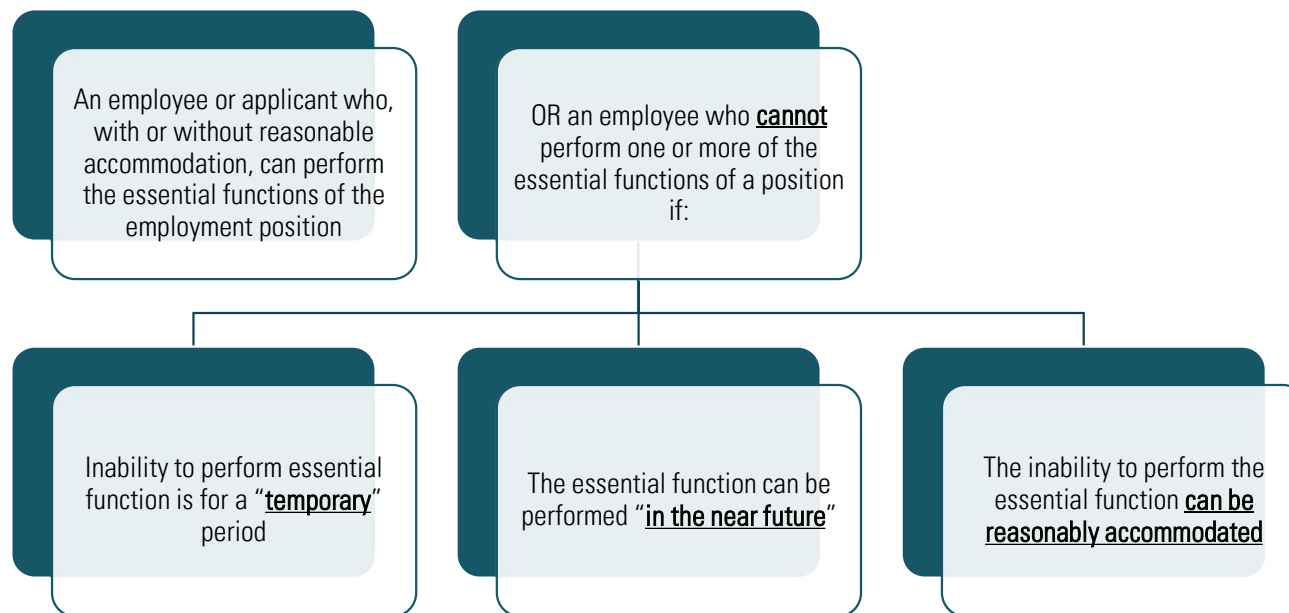
- What you need to know about the **Pregnant Workers Fairness Act**



WHAT IS THE PWFA?

- The Pregnant Workers Fairness Act is a law that gives “qualified” workers with known limitations
 - related to,
 - affected by, or
 - arising out of pregnancy, childbirth, or related medical conditions
- the right to reasonable accommodations absent undue hardship on the employer.

WHO IS A “QUALIFIED” WORKER?





COVERED CONDITIONS

- Actual pregnancy
 - but also trying to get pregnant (including *in vitro* fertilization)
- Termination of pregnancy
 - including contraception, miscarriage, stillbirth, and abortion
- Childbirth
- Postpartum Period
- Lactation
- Just about any physical or mental condition with any relationship to pregnancy. This also includes preexisting medical conditions that may be exacerbated by pregnancy or childbirth.

REASONABLE ACCOMMODATION UNDER PWFA

- Employee (or representative) must **inform** the employer that she has a **pregnancy-related condition** that requires **accommodation**.
- “Representative” could be a family member, friend, health care provider, union representative, or other appropriate person.
- Employer cannot require that the request be submitted on a particular form and cannot require the employee to undergo a pregnancy test.
- Communication can be informal - no “magic words” required.
- “Employer” is notified if the employee or her representative notified anyone from the supervisor level up.





EXAMPLES OF REASONABLE ACCOMMODATION

- Additional, longer or more flexible breaks
- Allow a worker to have a water bottle or food
- Changing equipment or workstations
- Changing a uniform or providing safety equipment that fits
- Changing a schedule – shorter hours, part time work, later start time
- Telework
- Temporary reassignment
- Leave for appts with health care professionals
- Light duty or help
- Leave to recover from childbirth

LEAVE AS AN ACCOMMODATION



- Appointments before, during after pregnancy
- Recovery from childbirth
- Other reasons related to pregnancy, childbirth, or related medical conditions
- If EE has exhausted leave under FMLA, state laws, or policy, leave is still available under PWFA absent undue hardship.

UNDUE HARDSHIP ANALYSIS

Must be a significant difficulty or expense.

- Considering the resources and circumstances of a particular employer in relationship to the cost or difficulty of providing an accommodation



UNAVAILABLE

*INTERACTIVE
PROCESS
UNDER PWFA*

An employer is prohibited from requiring employee to take an accommodation other than one arrived at through the interactive process.

*PROHIBITED
EMPLOYMENT
PRACTICES*

- An employer **MUST NOT**
 - Deny a reasonable accommodation to a qualified employee or applicant absent undue hardship
 - Require a qualified employee or applicant affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process
 - Deny an employment opportunity to a qualified employee or applicant because it will have to provide a reasonable accommodation
 - Require an employee to take leave – paid or unpaid – if another reasonable accommodation can be provided to the known limitations under the PWFA
 - Take an adverse action in terms, conditions, or privileges of employment against a qualified employee or applicant on account of the employee requesting or using a reasonable accommodation

DON'T DO THIS STUFF EITHER

Unnecessarily delay providing pregnancy-related accommodations

- Interim accommodations are strongly encouraged by the EEOC and referred to as a “best practice”

Deny reasonable accommodation based on a lack of supporting documentation

Deny equal employment opportunity based on EE's need for accommodation

- If an EE doesn't meet the employer's normal productivity criteria because of the accommodation that was granted, the employer cannot penalize her for that on her performance evaluations or with respect to opportunities or benefits that are based at least in part on performance-related criteria

DOCUMENTATION: WHAT YOU CAN AND CAN'T ASK FOR

- An employer can request documentation confirming that the employee is pregnant UNLESS the pregnancy is obvious and the employee self-confirms the pregnancy.
- An employer can also request documentation confirming that some other medical condition is pregnancy-related.
- An employer can request documentation that describes the adjustments to the employee's job duties or work environment that are needed, including an estimate of the length of time that the adjustments may have to be in place.
- An employer has the right to request that documentation come from a health care provider.

BUT... "confirm" means exactly that. All the employer has a right to request is "confirmation" of the pregnancy or that the employee's medical condition is pregnancy-related. Yes or no. No details. The employer cannot require the employee to complete a form for this purpose.

PREDICTABLE ASSESSMENTS OR “GIMMES”

Workplace accommodations that the EEOC says will *almost never* be an undue hardship for the employer and for which documentation can *almost never* be sought.

Allowing the employee to carry or keep drinking water nearby.

Allowing the employee to take extra bathroom breaks.

Allowing the employee to sit (if in a standing job) or to stand (if in a sitting job).

Allowing the employee to take extra breaks for eating or drinking.



If the employee self-confirms her pregnancy and needs a “predictable assessment” accommodation, then the employer will *almost always* have to grant the accommodation without seeking documentation.



The same principle also applies to lactation accommodation – either to pump or nurse if the baby is in “close proximity” to the workplace.



SIOBHAN ROY

- Shiv is a production worker and has asked for light duty work because she cannot lift heavy boxes because of her pregnancy. The employer has a light duty program for workers with on-the-job injuries that excuses them from lifting heavy packages.
 - Known limitation
 - Qualified – performance of essential function can be temporarily suspended
 - Must provide absent undue hardship



OLIVIA POPE

- Olivia needs 12 weeks of leave to recover from childbirth but Olivia doesn't qualify for FMLA. Olivia will be able to do her job after recovering from childbirth.
 - Known limitation – recovery from physical effects of childbirth and needs a change in working conditions.
 - Qualified – will be after LOA

EVE POLASTRI

- Eve is a new employee at headquarters. She needs time off to attend therapy appointments for postpartum depression.
- Eve has not accrued enough PTO yet to cover the time away for the appointments.
 - Known limitation – need change in how work is done
 - Qualified – with leave to attend appts. Can be unpaid leave – employer has to provide absent undue hardship



WHAT SHOULD EMPLOYERS DO?

Train supervisors about the PWFA. First level supervisors may be more likely to receive accommodation requests than others.

USE THE INTERACTIVE PROCESS.

- Remember that the worker doesn't have to have a severe condition
- Remember that accommodations can be simple
- Remember that the worker may need different accommodations as the pregnancy progresses, they recover from childbirth, or the related medical condition improves or worsens

THANK YOU!



ENDNOTES

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