**Why Employers Should Care About Women’s Health And Its Impact On Workplace Policies**

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Between quiet hiring, quiet quitting, and loud quitting, who can keep up with the “newest” workplace trend? Employers must keep apprised of these trends, however, as they impact employee morale and could ultimately lead to resignations. One way employers can try to combat employee turnover is by finding unique ways to support their current employees. Many employers, albeit unintentionally, overlook a large portion of their current workforces’ needs. In 2022, the labor force participation rate for women was 56.8%,[[1]](#footnote-1) and women over forty account for 55% of all working women.[[2]](#footnote-2) Despite this, a large number of women are forced to either leave or reduce their participation in the workforce every year due to women’s health issues such as endometriosis, fertility issues, and menopause. Because these topics are generally considered taboo, particularly in the workplace, women are hesitant to discuss with their employers how these issues impact their mental and/or physical health.

As the culture shifts to destigmatize these fundamental health issues, some employers are providing unique benefits to support their employees including menstrual leave, menopause leave, and surrogacy benefits. However, employers should consider certain legal ramifications associated with implementing policies related to women’s health. This article will discuss various laws implicated by policies related to women’s health and fertility as well as the recently enacted Pregnant Workers Fairness Act (PWFA), which provides additional workplace protections to employees and applicants affected by pregnancy, childbirth, or related medical conditions.

**Benefits Related to Surrogacy**

With respect to surrogacy, some employers provide monetary assistance for certain expenses employees incur either by being or using a surrogate while others offer paid or unpaid leave for the surrogate, which would fall under regular pregnancy leave policies (*i.e.*, the Family Medical Leave Act, PWFA, employer specific policies, etc.). However, employers need to be mindful of benefits laws as employers cannot pay for the cost of medical benefits for surrogates who are not employees or dependents under their health plans. Additionally, employers need to be careful as surrogacy laws can differ among states and countries. For example, some states, like Nebraska and Michigan, do not allow compensated surrogacy and other states, like Louisiana, impose civil and criminal penalties against anyone found to be participating in the process. While Florida allows compensated surrogacy, it is only available to married couples. Accordingly, before implementing surrogacy policies, employers should carefully consider how they can craft a policy while minimizing their potential exposure to liability.

**Benefits Related to Menopause and/or Menstrual Leave**

 Although not widely offered in the United States, some employers offer employees menopause and/or menstrual leave. These policies vary from providing employees with a set number of paid days off per year (separate from personal, sick, or vacation time), to accommodating requests for flexible working arrangements (*e.g.*, more breaks, a temporary change in work hours, flexibility to work from home, etc.). However, some legal issues could arise from such policies. For example, if leave is only offered to women, does this invite a sex or gender discrimination claim? Could menopause leave lead to an age discrimination claim? Additionally, because Florida provides individuals with a constitutional right to privacy, there are important privacy considerations that could limit the documentation/information employers require from employees to prove entitlement to such leave. Regardless of whether employers want to provide these benefits to employees, employers should be mindful that conditions related to menstruation (*i.e.,* polycystic ovary syndrome, endometriosis, etc.) might qualify as a disability under the Americans with Disabilities Act (ADA) and a reasonable accommodation might be necessary to allow the employee to perform the essential functions of the job.

**Benefits Related to Miscarriages, Stillbirths, and Terminating Pregnancies**

 Although many employers have policies related to pregnancy, employers might consider including policies relating to miscarriages or stillbirths. While employers may allow employees to utilize bereavement leave or sick time or take unpaid time off when this occurs, many states, including Florida, do not require employers to provide bereavement leave or sick time. Even if employers do not enact any policies related to time off for miscarriages or stillbirths, they need to be aware that if the miscarriage or stillbirth was severe enough to substantially limit a major life activity, the employee may need a reasonable accommodation under the PWFA or ADA.

Moreover, after the *Dobbs* decision,[[3]](#footnote-3) many states enacted laws restricting or outright banning abortions. For example, in Florida, except under two limited circumstances, it is a felony for any person to perform or actively participate in the termination of a pregnancy where the fetus is more than fifteen weeks. Because this law is relatively new, it is unclear what constitutes “active participation” in the termination of a pregnancy. Other states have attached civil and criminal penalties to those aiding and abetting the termination of a pregnancy. As such, employers should consult with employment counsel to navigate the workplace complexities relating to terminating a pregnancy including coverage of reproductive health care under their health plans and whether policies reimbursing travel expenses to obtain such procedures could expose them to liability.

**The Pregnant Workers Fairness Act**

The PWFA took effect on June 27, 2023, and requires employers with fifteen or more employees to provide “reasonable accommodations” to a worker’s known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause an undue hardship. Because pregnancy is not always considered a disability under the ADA, and many states do not require accommodations for pregnant workers, this law expands pregnant workers’ rights in many states. Notably, the PWFA does not replace any federal, state, or local laws that are more protective of workers affected by pregnancy, childbirth, or related medical conditions. On August 11, 2023, the United States Equal Employment Opportunity Commission (EEOC) published proposed PWFA regulations. The proposed regulations provide an employee can be “qualified” within the meaning of the PWFA even if the employee cannot perform one or more essential functions of the job, provided three conditions are met: (1) the inability to perform an essential function(s) is for a temporary period; (2) the essential function(s) could be performed in the near future; and (3) the inability to perform the essential functions(s) can be reasonably accommodated. Among other things, the proposed regulations also identify several reasonable accommodations for pregnant employees and provide a non-exhaustive list of conditions falling within the scope of the PWFA (*i.e.*, past pregnancy, potential pregnancy, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, abortion, etc.).

In light of the EEOC’s proposed regulations, employers should consider whether they have knowledge about any limitations related to an employee’s pregnancy, childbirth, or related medical conditions and whether they need to engage in the interactive process. Employers should also consult with employment counsel to carefully navigate the nuances and ramifications of this new law.

**Conclusion**

While none of these fundamental women’s health issues are new, they have only become a topic of conversation in *some* workplaces in the last few years. Implementing benefits related to women’s health and fertility could reduce turnover and retain talent, which ultimately saves employers time and money. While the PWFA appears designed to mitigate issues affecting women’s health to keep women in the workforce, it will have a significant impact on employers. Moreover, because policies related to women’s health often implicate various legal issues, to the extent employers want to enact their own policies, it is not necessarily as straightforward as it sounds. Therefore, before implementing any policies relating to women’s health, employers are well advised to consult with employment counsel to discuss what laws they need to consider before enacting these policies and whether such policies might expose them to liability.

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1. *Labor Force Participation Rate for Women Highest in the District of Columbia in* 2022, U.S. Bureau of Labor Statistics (March 7, 2023), *https://www.bls.gov/opub/ted/2023/labor-force-participation-rate-for-women-highest-in-the-district-of-columbia-in-2022.htm* [↑](#footnote-ref-1)
2. Caroline Castrillon, *Why it’s Time to Address Menopause in the Workplace*, Forbes (March 22, 2023), https://www.forbes.com/sites/carolinecastrillon/2023/03/22/why-its-time-to-address-menopause-in-the-workplace/?sh=21f8d42a1f72 [↑](#footnote-ref-2)
3. *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215, 142 S. Ct. 2228 (2022) (overturning *Roe v. Wade* and holding there is no constitutional right to terminate a pregnancy prior to the date of viability and states have the power to regulate the legality of abortions). [↑](#footnote-ref-3)