

BABIES ON BOARD

*A Practical Overview of
the Laws Affecting
Pregnancy and the
Workplace*



From Discrimination to Accommodation

Federal Laws

- Title VII of the Civil Rights Act of 1964
- Pregnancy Discrimination Act of 1978
- Americans with Disabilities Act (1990)
- Family and Medical Leave Act of 1993
- Patient Protection and Affordable Care Act (2010)
- Providing Urgent Maternal Protections for Nursing Mothers Act (2022)
- Pregnant Workers Fairness Act (2023)

South Carolina's State Laws

- South Carolina Pregnancy Accommodation Act (2018)
- South Carolina Lactation Support Act (2020)



Title VII of the Civil Rights Act of 1964

Makes it illegal for employers to discriminate against employees on the basis of the employee's race, color, sex, national origin, or religion.





Title VII – Sex Discrimination

- Prohibited discrimination based on sex in **all** areas of employment
 - Hiring
 - Firing
 - Pay
 - Promotions
 - Benefits
 - Training
 - Etc.



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Title VII – Sex Discrimination

- Under Title VII Sex Discrimination is more than just gender-based discrimination. “Sex” also includes
 - Pregnancy
 - Childbirth
 - Medical conditions related to childbirth



Title VII – Pregnancy Discrimination

- Prohibits discrimination based on based on pregnancy, childbirth or related medical conditions;

AND

- Requires covered employers to treat a worker affected by pregnancy, childbirth, or related medical conditions the same as other workers similar in their ability or inability to work

Title VII – Discrimination and Pregnancy

- Under Title VII “pregnancy” discrimination can be based on multiple pregnancy related concerns including:
 - Current pregnancy
 - Past pregnancy
 - Potential pregnancy
 - Medical condition related to pregnancy or childbirth (breastfeeding/lactation)
 - Abortion (choice for or against)
 - Birth control

Title VII – Accommodations

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- Covered employers only need to provide accommodations to pregnant workers if other non-pregnant workers receive the same accommodations for similar limitations on their ability to work

EXMPLE: Pregnant manufacturing worker who is unable to stand for long periods of time to complete work tasks, under Title VII, would only be able to receive a chair to sit and work if a non-pregnant worker would be provided with a chair to address their inability to stand long periods of time

**** Non-pregnant worker does **not** have to be the opposite sex ****





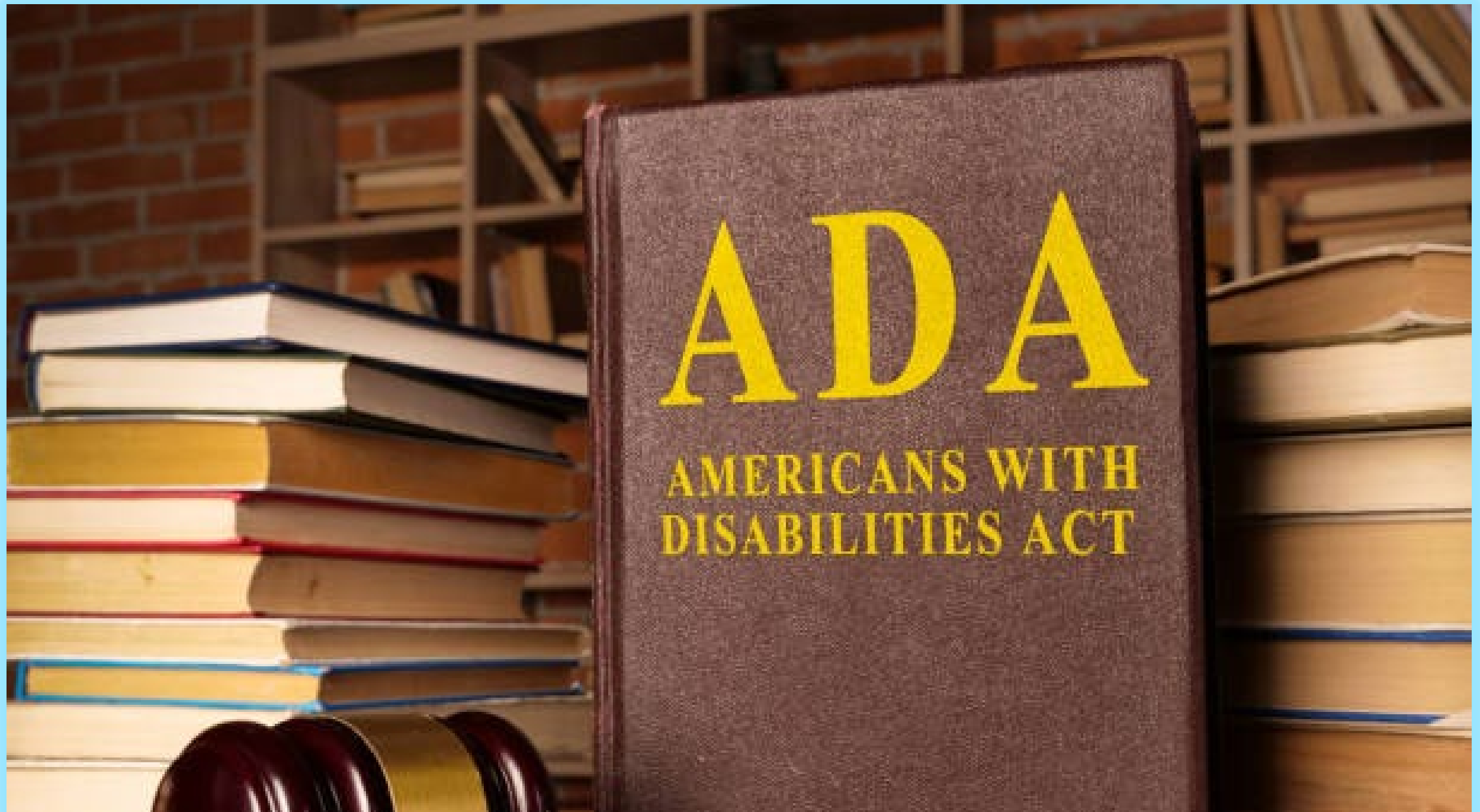
**PREGNANCY
DISCRIMINATION
ACT**

Pregnancy Discrimination Act

- Pregnancy Discrimination Act (PDA) essentially amended Title VII to expressly provide that discrimination on the basis of pregnancy, childbirth or related medical conditions constituted sex discrimination
- Continues to provide the same protections of Title VII and prohibits an employer from refusing to hire a woman because of a pregnancy-related condition as long as she is able to perform the major functions of her job

ADA

AMERICANS WITH
DISABILITIES ACT



Americans With Disabilities Act

- The ADA was initially enacted in 1990
 - Prohibits employment discrimination against a qualified individual with a disability **AND** requires the employer to make reasonable accommodations to enable an employee or applicant to perform the essential functions of his/her position

*** ADA protections apply to full time, part-time and probationary employees ***

- Amended in 2008 and is now known as the Americans With Disabilities Act Amended Act or ADAAA
 - The ADAAA expanded the protections of the ADA by changing the definition of “disability” to make it easier for individuals to establish that they have a disability under the law
- ADA/ADAAA only applies to “covered employers” ~ 15 or more employees

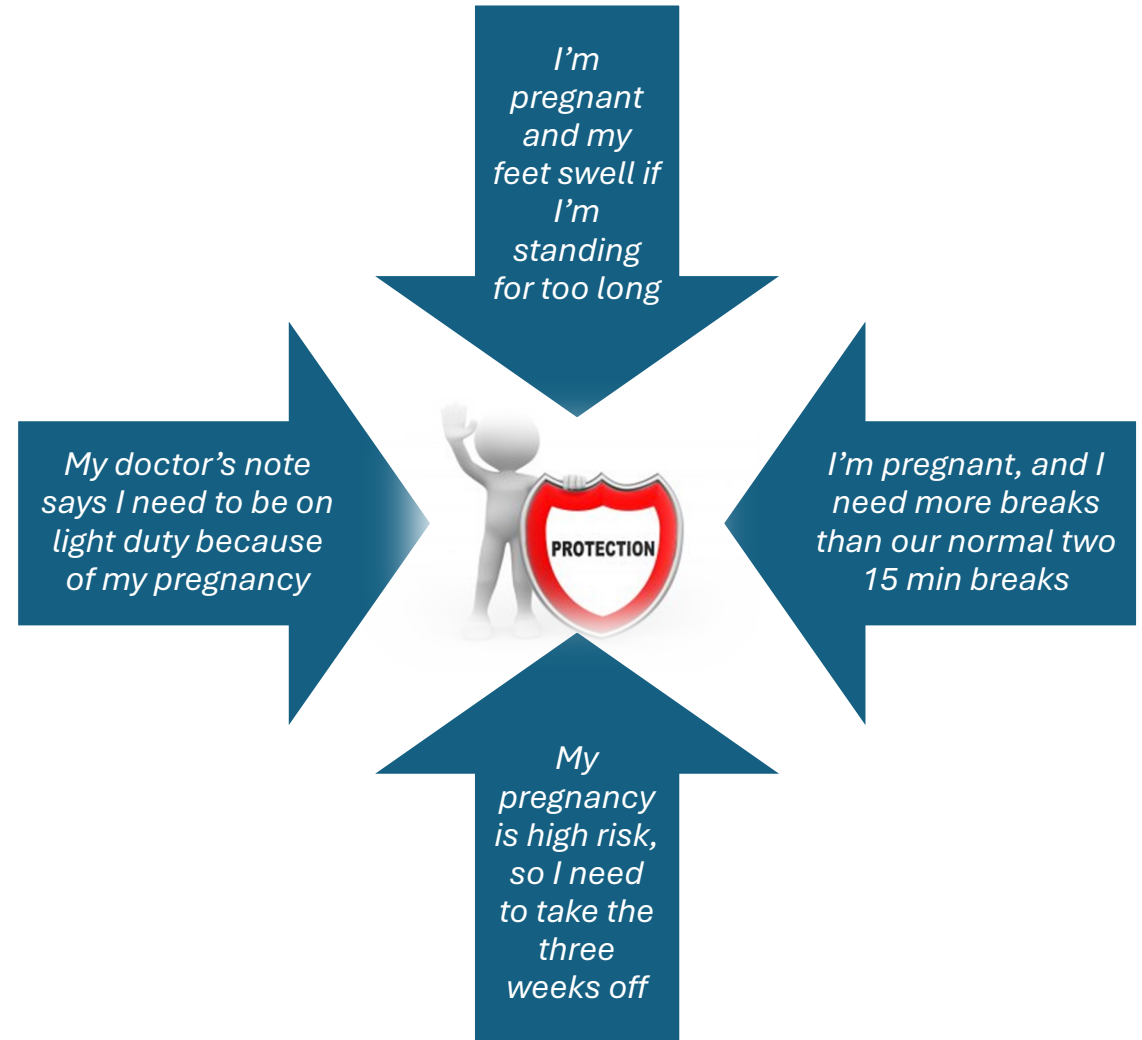


ADA/ADAAA – Disability and Pregnancy

- ADA/ADAAA define a disability as:
 - An impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment
- ADAAA's expanded definition *practically* means:
 - Impairment = something outside the norm
 - Substantially limits = means “sort of” limits
 - Major life activity = if humans do it, it is probably a major life activity (**REALLY** broad)
- Pregnancy is not in and of itself considered a disability under the ADA/ADAA
 - Some pregnancy related conditions may qualify as a disability

ADA/ADAAA Protection Triggers

- ADA/ADAAA protections are triggered any time:
 - An employee says they have a disability and need an accommodation
 - Employee expresses challenges with performing specific tasks or complying with a work rule because of an impairment
 - Employee requests leave for a particular impairment they have
 - Employee provides a return-to-work (RTW) note with restrictions



ADA/ADAAA – Accommodations Requirement

ADA/ADAAA requires covered employers to provide reasonable accommodations to a person with a disability if the reasonable accommodations would not cause an undue hardship for the employer

Employer required to engage in Interactive Process with the employee prior to offering any accommodations, unless the necessary accommodation is obvious

ADA/ADAAA – Interactive Process

Interactive Process requires good faith communication with the employee to determine “reasonable accommodations”



Employers should:

Analyze job involved and determine its purpose and essential functions

Consult with employee to determine their specific limitations based on their disability and how reasonable accommodations could overcome their limitations

Consider the employee's preference and select and implement the most appropriate accommodation for BOTH employee and employer

Monitor the accommodation after implementation!

ADA/ADAAA – Reasonable Accommodations

Employer only required to accommodate a “known” disability of a qualified applicant or employee

- Applicant/Employee is a “qualified individual” with a disability if she can perform the “essential functions” of the job with or without reasonable accommodations

Accommodations must be made on an individual basis

If employee does not request accommodations, the employer not required to provide one

Accommodations must be provided unless the requested accommodation would constitute an “under burden” on the employer



ADA/ADAAA – Undue Hardship

- “Undue Hardship” is not specifically defined under the ADA/ADAAA
- Undue hardship is more of an analysis on a case-by-case basis for the requested accommodation
- Factors to consider include:
 - Nature and cost of the accommodation needed/requested*
 - Overall financial resources of the employer; total number of employees; the effect of the accommodation on the employer’s resources
 - Type and location of employer’s facility, if multiple facilities are available
 - Impact of the accommodation on the operation of the facility

***Denial of accommodation cannot be based on cost alone**

ADA/ADAAA – Accommodation Examples

- Reasonable accommodations for pregnancy or pregnancy related disability could be:
 - Extra breaks, flexible break times
 - Extended lunch
 - Amended food/drinking policies or prohibitions
 - Changing work equipment or workstations (chair, stool, or standing desk)
 - Changing uniform or dress code policy/requirements
 - Reassignment
 - Light duty
 - Remote work
 - Extended leave
 - **Under the ADA additional leave, even after all leave has been exhausted, can be a reasonable accommodation**

A top-down view of a desk with a dark wood grain. A silver stethoscope is on the left. A pair of glasses is at the top. A black pen with a gold nib is at the bottom right. A white document is the central focus, with the text 'FMLA' in large bold letters and 'FAMILY MEDICAL LEAVE ACT' in smaller letters below it.

FMLA
FAMILY MEDICAL LEAVE ACT

Family and Medical Leave Act of 1993



- FMLA provides eligible employees of covered employers with up to 12 weeks of unpaid, job protected leave for certain “qualifying” medical conditions of the employee and close family members.
 - To be a “covered employer” the entity must have 50 or more employees for at least 20 workweeks in the current or preceding calendar year
- Employees health benefits are maintained during the FMLA leave in the same manner as when the employee was working
- There are no accommodations under FMLA, only time off from work
 - Light duty or other job modifications to coerce an employee on FMLA to return to work *can be construed as a violation or interference with FMLA*

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FMLA – Employee Eligibility Requirements

- In order for an employee to be eligible for FMLA leave the employee must:
 - Work for a qualified employer
 - Been employed for over 12 months, AND within the past 12 months must have worked at least 1250 hours
 - Work at a site, or within 75 miles of a site, with at least 50 employees
-



FMLA Leave and Pregnancy

- Employee can take FMLA leave for several reasons related to pregnancy
 - Birth, adoption or foster care placement of a child
 - To care for a child, or spouse after childbirth
 - A serious health condition resulting from childbirth
- FMLA leave taken for the birth or foster placement of a child must be taken within 12 months of the birth or placement
- FMLA leave can be taken in consecutive weeks, or intermittently
 - * An employee taking intermittent FMLA leave can be placed on light duty without the employer violating FMLA policy



Power to Pump

More workers now have the right to break time and private space to pump during the workday.



Nursing Workers Employment Protections

The Fair Labor Standards Act (FLSA) requires employers to provide reasonable break time for an employee to express breast milk for their nursing child for one year after the child's birth.

Under the FLSA both the "Patient Protection and Affordable Care Act" and the "Providing Urgent Maternal Protections for Nursing Mothers Act" (PUMP Act) provide protections for nursing mothers in the workplace

Patient Protection and Affordable Care Act PUMP Act

The 2010 Patient Protection and Affordable Care Act amended the FLSA's protections to provide that in addition to the break time requirement, employers must also:

Provide nursing mothers with a private place to express breastmilk, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public.



In 2022 the PUMP Act extended these protections to additional classes of employees who were initially expressly excluded under the Affordable Care Act

Agricultural workers, nurses, teachers, truck and taxi drivers, home care workers and managers





Pregnant Workers Fairness Act

Pregnant Workers Fairness Act

The Pregnant Workers Fairness Act (PWFA) is the newest law addressing pregnancy in the workplace

The PWFA requires ALL covered employers to make reasonable accommodations for known limitations related to pregnancy, childbirth, or related medical condition of a job applicant or employee, unless doing so would impose an undue hardship.



PWFA Inception

- PWFA was signed into law by President Joe Biden on December 29, 2022, and became effective on June 27, 2023.
- Congress passed the PWFA to cover ALL pregnant workers because some were still losing their jobs, or otherwise being discriminated against, under Title VII and the ADA due to some loopholes, but in large part, confusion or misunderstanding of the laws
- The PWFA uses many terms and concepts from Title VII and the ADA in order to provide a more direct route to reasonable accommodations
- EEOC final rules for the PWFA were issued on April 15, 2024

PWFA – Covered Employer

- Any **person** who is engaged in an “industry affecting commerce” who has fifteen or more employees for twenty or more calendar weeks in the current or preceding calendar year
 - Term “Person” includes individuals, government agencies, political subdivisions, labor unions, partnerships, associations and corporations
 - Industry Affecting Commerce – any activity, business or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce



PWFA – Qualified Employee/Applicant

- PWFA defines a qualified employee the same as in the ADA
 - An employee or applicant who, with or without reasonable accommodations, can perform the essential functions of the job
 - Any current employee seeking reasonable accommodations with meet this requirement
- PWFA adds a second prong which comes into play after an employee/applicant request reasonable accommodations in order to perform essential functions of the job
 - Prong 2:
 - Employees/applicants who cannot perform the essential functions of a job are STILL qualified if:
 - The inability to perform is temporary
 - The essential function can be performed in the near future
 - The inability to perform the essential function can be reasonably accommodated

* These factors are not defined by the statute, so will likely be covered in the regulations, or created by subsequent case law

** The “near future” rule/element is generally 40 weeks – meaning any temporary suspension of an essential job function for less that 40 weeks will not disqualify an employee/applicant





PWFA – Reasonable Accommodations

- PWFA definition of “reasonable accommodations” is the same as the definition in the ADA
 - Generally, a reasonable accommodation is:
 - Any change in the work environment; or
 - Any change in the way things are customarily done
 - An accommodation is “reasonable” if it seems plausible or feasible
 - Accommodations must also be effective
 - Must help the employee/applicant overcome their limitations





PWFA – Known Limitations

- Under the PWFA a known limitation is defined as:
 - A physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee’s representative has communicated to the employer whether or not such condition meets the definition of disability from the ADA.

PWFA – Undue Hardship

- Undue hardship under the PWFA – same definition as the ADA
- *Generally* means significant difficulty or expense
 - Look at many factors to determine the level of difficulty and expense
 - Overall cost of the accommodation
 - Overall financial resources of facility
 - Facility set-up
 - Impact of accommodation on the smooth operation of the facility



PWFA and Interactive Process in Action

PWFA requires employers to engage in the interactive process as does the ADA

Practical operation of the Interactive Process:

- Employee/applicant notifies employer of pregnancy, childbirth or related medical condition
- Employee requests reasonable accommodations
- Employer and employee discuss possible accommodations that will assist the employee (actual interactive process)
- Rule out accommodations that create “undue hardships”
- Implement reasonable accommodation




PWFA – Prohibited Practices

- PWFA has 5 prohibited practices
 - Denial of reasonable accommodations
 - Require acceptance of an accommodation not derived through interactive process
 - Deny employment because of requirement to provide reasonable accommodations
 - Require an employee to take leave when a reasonable accommodation will address the employee's known limitation
 - Take any adverse employment actions against an employee or applicant for requesting reasonable accommodations

Cannot retaliate against employee for requesting or using PWFA protections, and cannot coerce or interfere with employee exercising rights under the PWFA





PWFA – Reasonable Accommodations Examples

- PWFA reasonable accommodations are similar to ADA accommodations
 - Changing policies related to food or drinks
 - Changing equipment – chair, stools, standing desks
 - Additional, longer or flexible breaks
 - Changing uniform requirements or dress code policies
 - Changing work schedule – reduced hours, part-time, adjusted start/stop times
 - Remote work
 - Leave for appointments etc.
 - Light duty
 - Leave to recover from childbirth



Legal Challenges to PWFA

There have been four lawsuits filed to challenge the PWFA

- **State of Texas v. Department of Justice** – February 27, 2024
- **State of Tennessee et al v. EEOC** – May 13, 2024
- **State of Louisiana v. EEOC** – June 17, 2024
- **Conference of Catholic Bishops v. EEOC** – June 17, 2024



PWFA Litigation

State of Texas v. Department of Justice – February 27, 2024

- State files suit against the federal government claiming that Congress violated the US Constitution by passing the Consolidates Appropriations Act without a quorum
- Federal District Court ruled that Congress improperly passed the PWFA because it relied on 2020 COVID-19-Pandemic-era rule that permitted non-present members of Congress to be counted as present to satisfy the quorum count and vote by proxy
- The scope of the injunction was narrow as it only enjoined the EEOC and DOJ from enforcing the PWFA against the state of Texas and its agencies, not private employers or other governmental employers



PWFA Litigation

State of Tennessee, et al v. EEOC – May 13, 2024

- April 18, 2024, Attorneys General from 17 states, Including South Carolina, filed lawsuit challenging the constitutionality of the PWFA
- Main contention was that the PWFA required employers to provide employees with reasonable accommodations for abortions
- Case was dismissed (without prejudice) by the Federal Judge in June for lack of standing.

PWFA Litigation

State of Louisiana v. EEOC and ***US Conference of Catholic Bishops v. EEOC*** – June 17, 2024

- Attorneys Generals from Louisiana and Mississippi, along with the United States Conference of Catholic Bishops, filed a separate law in Louisiana challenging the PWFA for the same reasons
- Louisiana Federal District Court granted a preliminary injunction on the PWFA's enforcement regarding “elective abortions”
- Enjoined EEOC from:
 - Initiating an investigation that claims a covered employer failed to provide an employee with accommodations for an “elective abortion”
 - Issuing any Notice of Right to Sue for failing to accommodate for a “elective abortion”





South Carolina Pregnancy Laws

South Carolina Pregnancy Accommodation Act

- Signed by Governor Henry McMaster on May 17, 2018
- Requires employers with 15 or more employees to provide reasonable accommodations to employees and applicants for medical needs arising from pregnancy, childbirth, or related medical conditions

South Carolina Lactation Support Act

- Signed on June 25, 2020
- Requires that any employer, regardless of size, permit employees reasonable opportunities to express milk in a private place, other than a toilet stall.



SC Paid Parental Leave Act

- Signed into law on May 12, 2023, by Governor Henry McMaster
- Allows for full time school district employees to receive either six week or two weeks of paid leave at 100% of the District's employee's base pay
- The six weeks or two weeks leave depends on whether or the district employee is the parent who is “primarily responsible for furnishing the care and nurture of their child”
- The six weeks of leave applies to “primarily responsible” parents of adopted children or biological children
- Parents of foster children are eligible for two weeks of paid leave



Questions, Comments, Rude Remarks...??





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