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ARTICLES & INSIGHTS

ABOUT THE AUTHOR

Connie Elder Carrigan is a partner in the firm, with a practice concentration in Business Law. Her focus is assisting clients with issues regarding employment law, business advice and litigation, construction law, equipment leasing and creditor bankruptcy. Connie has lectured on topics ranging from employment law, bankruptcy, and equipment leasing to construction law.

Has The Time Arrived For Enactment Of More Expansive Rights For Pregnant Workers?

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Under the guidance of the Biden administration, the United States Congress continues to move forward with legislation that is intended to provide greater protections to workers. One such bill which has been introduced during prior terms dating back to 2012 is the Pregnant Workers Fairness Act (PWFA). The bill passed the United States House of Representatives in September of 2020 but died on the Senate floor. On May 14, 2021, the House of Representatives again passed the PWFA with sizeable bipartisan support and its prospects for passage are much more favorable than in years past. Democrats and Republicans each hold 50 seats in the Senate, and Vice President Kamala Harris has the tie-breaking vote, although 60 votes are needed to break a filibuster.

While they provide certain protections against workplace discrimination for pregnant employees and applicants, neither Title VII of the Civil Rights Act of 1964 nor the Pregnancy Discrimination Act of 1978 (PDA) provides any right to workplace accommodations on the basis of pregnancy. Reasonable accommodations under the Americans with Disabilities Act (ADA) are available only for qualified workers with disabilities, including those disabilities related to pregnancy.

In the seminal case of *Young v. UPS,* the United States Supreme Court held that when an employer accommodates workers who are similar to pregnant workers in their ability to work, the employer cannot refuse to accommodate pregnant workers who need accommodation simply because it is more expensive or less convenient to accommodate pregnant women. The *Young* decision was seen as an important victory for pregnant workers, but the multi-step balancing test it established created a great deal of uncertainty about the conditions under which the PDA requires accommodations on the basis of pregnancy. Not only was it challenging for pregnant workers to know what other accommodations the employer made for their colleagues, but the employer also had no affirmative obligation to create an accommodation for such workers even if one was possible. The PWFA removes that uncertainty by obligating employers to make reasonable accommodations for pregnancy and related conditions with no requirement that the pregnant employee first identifies a non-pregnant worker who received similar accommodations.

The legislation is designed to align with the ADA by triggering an interactive process once an employee or applicant who is pregnant, has pregnancy-related conditions, or has recently given birth requests an accommodation in order to perform the essential functions of her position. Such accommodations might include providing stools for pregnant employees who must stand for long periods in their position, permitting more frequent bathroom breaks, or reassigning heavy lifting duties for such employees. Leave may be provided as an accommodation if the interactive process is not successful in identifying a reasonable accommodation within the workplace.

To date, 31 states and the District of Columbia have passed legislation that contains protections similar to those outlined in the PWFA. That being the case, it is important for employers to not only keep up to date regarding the enactment status of this federal legislation, but they should also ensure they are knowledgeable about state laws that provide similar protections to workers who are pregnant or who have pregnancy-related conditions. Employers should further be prepared to revise their ADA policies in the event this legislation is enacted into law.

If you have questions about this new legislation or any other employment-related matter, please call Connie Carrigan at (919) 250-2119 or e-mail her at ccarrigan@smithdebnamlaw.com.

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