



Episode 53: “Breaking Down the Pregnant Workers Fairness Act”

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[Ari Kwiatkowski]: Hi, everyone, this is a *Barclay Damon Live* broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

[Ari]: Hey, everyone. Welcome to episode 53, “Breaking Down the Pregnant Workers Fairness Act.” This is a solo episode today, so it’s just me. And I think we’re just going to go through this new legislation. If you’re an employer in New York or even an employee, you probably have heard a little bit about this. It’s a new federal law. And we’re really going to dig in and talk about it today. But before we do, I would be remiss if I did not mention a fun fact about myself since I subject all my guests to giving a fun fact about themselves. I was wracking my brain before I signed on and I couldn’t... I’m really scraping the bottom of the barrel about what’s interesting about me, but I will share that before I went to law school, I worked in the insurance industry locally and I was a licensed insurance agent. I was licensed in a few states. So, you know, I’m not sure how interesting that is, but it’s definitely a fun fact about me and something that we probably haven’t talked about on the podcast before.

[Ari]: So I also wanted to mention, before we get into the substance of the episode today, that the Labor & Employment podcast is back on YouTube. So if YouTube is one of your favorite listening platforms or if you like watching podcasts, getting the visual while you’re at work or doing something else around the house, we are back on YouTube. So you can find us on YouTube. In any event, guys. Let’s talk about the Pregnant Workers Fairness Act. So as I mentioned a couple minutes ago, the Pregnant Workers Fairness Act—we’ll call it the PWFA—is a new federal antidiscrimination statute. And, you know, we’ve talked about plenty of these on the podcast already. We’ve talked about the ADA, Title VII, all of... pretty much all of the antidiscrimination statutes in the federal space. But the Pregnant Workers Fairness Act is a new law that requires covered employers to provide reasonable accommodations to pregnant workers due to the pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an undue hardship.

[Ari]: And we’ll talk about that in a few minutes. But basically think the ADA but for pregnant workers. I also wanted to mention that covered employers under the PWFA are employers that have 15 or more employees. So pretty similar to a number of the other federal antidiscrimination laws. And like Title VII and the ADA, the PWFA will be enforced by the EEOC. The new law goes into effect June 17th of this year and prior to that time, the EEOC will issue some proposed guidance. They do this for every federal law that they enforce. And chances are, if you’re an employer in New York, you’re pretty familiar with that guidance or you’ve read some piece of it at some point. And the EEOC has said that they will accept charges under the PWFA after June 17th. So makes pretty good sense. But I wanted to point out and let you guys know that like the other federal antidiscrimination laws, this one will also be enforced by the EEOC. So if you’re listening, you might be wondering, well, how is this different from other laws, federal laws that exist? Because if you’re an employer or you’ve been a pregnant worker, you may know that there are other federal laws that offer protections. One of those is Title VII, which if you’re listening to this podcast regularly or you’re new to the podcast, you may even know that Title VII prohibits sex discrimination, including pregnancy discrimination. So Title VII prevents employers from discriminating against employees on the basis of their sex, including pregnancy and related conditions, and that the ADA prohibits discrimination based on a disability relating to pregnancy. So, diabetes

for instance, a pregnant worker as a result of the pregnancy develops diabetes, that would be a disability contemplated by the ADA. But as you might know, pregnancy itself is not a disability under the ADA.

[Ari]: So how is it different? The PWFA applies only to accommodations a pregnant worker may need as a result of being pregnant. So we have these other federal statutes that prohibit discrimination on the basis of disability and the basis of sex. So you cannot treat an employee differently based on those protected characteristics. But this... the PWFA kind of fills a hole and really prohibits discrimination in the form of denying a pregnant worker an accommodation that is necessary as a result of pregnancy or a pregnancy-related condition. So I think, you know, that's kind of an explanation why it's different, why this new law is different. I think it's also helpful to provide you guys with some examples of what accommodations might be necessary under this new law. And the EEOC has actually come out on their website with a few examples. According to the EEOC, examples of accommodations could be, you know, allowing the pregnant worker the ability to sit or drink water, receive closer parking to the employer's facilities, have more flexible hours, provide the pregnant employee with additional break time to use the bathroom or rest, and to be excused from strenuous activities. So if the job is very physical, maybe providing some accommodation where the pregnant worker does not have to lift anything heavy, things like that, things of that nature. And like the ADA, the PWFA mandates that an employer must provide the accommodation unless it would cause the employer an undue hardship.

[Ari]: We've talked about "undue hardship" in the context of the ADA a few times on the podcast. I think most commonly it came up when we were dealing with mandatory vaccination laws, things of that nature. But you know, an undue hardship under the PWFA similar to the ADA, is significant difficulty or expense for the employer. So, you know, if you have been on the receiving end of a charge or a complaint as it relates to disability discrimination, you know that the undue hardship or... proving an undue hardship can be a little difficult. If you have a pregnant worker who simply requires a couple additional restroom breaks or requests, a couple of additional restroom breaks, something that, you know, you will take into consideration as an employer. And it may be difficult to argue that would cause an undue hardship. So that's kind of a rundown of what the EEOC has said thus far about the Pregnant Workers Fairness Act. And there are a few other things that, according to the EEOC, the new law prevents. Under the new law covered employers—again, employers that have 15 or more employees—cannot require an employee to accept an accommodation without a discussion about the accommodation between the worker and the employer. So like the ADA, there has to be some sort of an interactive, an interactive process where you as the employer are discussing the accommodation with the employee. You can't just simply force the accommodation on the employee without discussing it with them.

[Ari]: According to the EEOC, covered employers also cannot deny a job or other employment opportunities to a qualified employee or applicant based on the person's need for a reasonable accommodation. Again, I think these are really things that we've seen before in the context of the other federal statutes, like the ADA, like Title VII. Under the PWFA an employer cannot require an employee to take leave if another reasonable accommodation can be provided, that would permit the employee to keep working. I think that's an important one, but I also don't think that that's particularly surprising. Basically, the new law says that if there's some other accommodation that can be provided to the employee, that is not requiring the employee to take leave, that the employer should pursue that and provide that accommodation instead. And of course, like any other federal antidiscrimination law, the PWFA prohibits retaliation against an individual for reporting or opposing unlawful discrimination under the statute or participating in what the law calls a PWFA proceeding or like an investigation, for example, of a complaint. And there's also the catchall provision, again, like most in most other federal antidiscrimination statutes, that an employer cannot interfere with any other rights that an employee may have under the PWFA. So I think, you know, that's really what we know right now. It's a very new law. It was just passed in, I believe, early January or mid-January. So, you know, it's not something that's been out there for a particularly long time. But I will say that I think that the EEOC will probably issue guidance on this in the next couple of months. Just under the statutory and regulatory scheme, the EEOC is required to allow a comment period for the public to comment on the proposed guidance and regulations.

[Ari]: So, you know, I think we'll be seeing more on this over the next couple of months, and we will definitely keep you guys updated. But I did want to just give you guys kind of a preview, this is really a preview

to the PWFA. And breaking down what we know so far. But there will definitely be more to come on this, and I will definitely keep you updated. Thanks so much for listening today, guys. I really appreciate it. In our next episode, we're going to break down the new Federal Pump Act, kind of similar; it affords additional protections for workers who are breastfeeding or expressing milk in the workplace. Another new law. I'll definitely tell you what you need to know. In the meantime, like, follow, share, continue to listen. I'll see you guys next time.

[Ari]: The *Labor & Employment Podcast* is available on barclaydamon.com, YouTube, and all your favorite podcast streaming platforms. Like, follow, share, and continue to listen. Thanks.

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