

Denial of Employment Opportunities Due to Pregnancy, Childbirth, Related Medical Conditions, or Breastfeeding

- OHR Enforcement Guidance 18-01 -



Date: September 28, 2018

SUBJECT

Protecting Pregnant Workers Fairness Act (PPWFA) – Denial of Employment Opportunities

PURPOSE

This enforcement guidance provides an explanation of one of the less well-known provisions of the Protecting Pregnant Workers Fairness Act (PPWFA). For guidance on the PPWFA in general, see OHR Enforcement Guidance 17-02.

A. What does PPWFA say about pregnancy and employment opportunities?

The PPWFA says that an employer **cannot deny employment opportunities** to an employee or applicant **based on that person's need for reasonable accommodations** due to pregnancy, childbirth, related medical conditions, or breastfeeding.¹

B. What does it mean to “deny employment opportunities” under PPWFA?

Denial of employment opportunities refers to an employer's failure to give employees or applicants a fair chance in hiring, promotions, transfers, raises, and other similar employment decisions. Employers **must fairly consider** all qualified employees and applicants in employment decisions regardless of their status of being pregnant or having recently given birth. This means limiting consideration to only relevant job qualifications and standards.

Note: This provision does **not** mandate preferential treatment for a person who needs or has requested reasonable accommodations under the PPWFA. This provision simply requires an employer to fairly consider such a person in employment decisions in the same manner as if the person did not need or request reasonable accommodations.

C. What are some examples of reasonable accommodations?

If an employee or applicant needs or requests a reasonable accommodation, the employer **must engage in a timely and interactive process** to determine if a reasonable accommodation can be made. Some examples include:²

- a) More frequent or longer breaks;
- b) Time off the recover from childbirth;
- c) The acquisition or modification of equipment or seating;

¹ See D.C. Code § 32-1231.03(3).

² See D.C. Code §§ 32-1231.01(2)(A)-(H).

- d) The temporary transfer to a less strenuous or hazardous position or other job restructuring, such as providing light duty or a modified work schedule;
- e) Having the employee refrain from heavy lifting;
- f) Relocating the employee's work area;
- g) Providing private non-bathroom space for expressing breast milk; and
- h) Time off due to pre-birth complications.

D. Are there any exceptions to this provision?

Yes. As with the rest of the PPWFA, there is an **undue hardship exception**.³ An employer may refuse an accommodation if such accommodation would impose an undue hardship on the employer. The **burden is on the employer** to show that providing the requested accommodation is in fact an undue hardship.

An undue hardship means an action that requires significant difficulty or expense for the employer, considered in relation to factors such as the size of the business and its financial resources.

E. What are some examples of the PPWFA in practice?

EXAMPLE 1: Leslie is pregnant and has been experiencing regular fatigue. She is still able to do her job, but her boss is worried that Leslie will lose steam and soon become less effective. So, when Leslie requests that she be able to take more breaks during the day, her boss decides to stop considering her for an upcoming promotion because it would be too much of a risk.

The employer has likely violated the PPWFA by refusing to consider Leslie based on her pregnancy and request for a reasonable accommodation. If the employer also refused Leslie's request without being able to show undue hardship, that would be a separate PPWFA violation.

EXAMPLE 2: Tina recently gave birth. She works in a small office with ten other people and when she returned to work, she asked her supervisor if she could work reduced hours for a while in order to recover from birth complications. Tina provided a note from her healthcare provider with a consistent recommendation. The owner is annoyed at Tina for even asking, but he grants Tina's request. However, he also decides that Tina's request indicates a lack of commitment to the office and writes her off as not being deserving of a potential raise during upcoming performance reviews.

The employer has **likely violated** the PPWFA, even though it made a reasonable accommodation. The failure to consider Tina for a raise on the merits of her work and instead making a decision based on her request for accommodation is a violation of this provision.

EXAMPLE 3: Ziwe is a highly respected senior associate at a large law firm. After 9 years of experience, she is in line to be considered for a partner position in the fall. Ziwe gave birth in late spring and returned to the office in early August. Upon her return, Ziwe requests that she be given time and a small, clean, private space in which to express and store breast milk. The firm's partners agree and

³ See D.C. Code § 32-1231.01, .02(c).

provide adequate space and a small fridge. In the fall, as previously discussed, Ziwe is interviewed by the firm's partner committee to be considered for the new position along with a few other candidates. Ultimately, after long deliberations, another comparable attorney with 9 years of experience, who had consistently brought in new clients, is selected for partnership instead of Ziwe.

The employer has **likely not violated** the PPWFA, unless there is evidence that the partners did not truly consider Ziwe. However, as long as she was considered for the promotion on the merits and her accommodation did not influence the decision, there was no violation.

F. What are some best practices to avoid violating this provision?

The Equal Employment Opportunity Commission (EEOC) has developed a list of best practices related to pregnancy discrimination in hiring, promotion, and other employment decisions.⁴ The same practices should be used by District employers to ensure compliance with the PPWFA and related federal laws.

- **Focus** on the applicant's or employee's **job qualifications**. Do not ask about pregnancy status, family plans, or other related topics during interviews or performance reviews.
- Develop **specific, job-related qualification standards** that accurately reflect the requirements of the position and can be objectively analyzed. If consistently applied, this will minimize stereotyping and discrimination.
- Ensure that all job openings and promotions are communicated to all eligible employees.
- Make conscious efforts to **disregard stereotypes and assumptions** about women affected by pregnancy or childbirth.
- When comparing employees' or applicants' work histories, focus only on relevant experience and accomplishments.
- Make sure employment decisions are **well-documented** and explained to affected persons experience, there may not be an inference of discrimination.

⁴ See U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance on Pregnancy Discrimination and Related Issues (June 25, 2015).