Pregnancy Accommodations:

Pregnant Workers Fairness Act ("PWFA")

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On June 27, 2023, the Pregnant Workers Fairness Act ("PWFA") went into effect and forever codified the expectation on how pregnant employees are to be accommodated for in the workplace. Under the PWFA, employers are required to provide *"reasonable accommodations"* to a qualified worker's "known limitations **related to the pregnancy, childbirth, or related medical conditions**."[1] On the other hand, the ceiling for the new statute stands at accommodations that create an "undue hardship on the operation of the business" for the employer.[2]

Furthermore, the PWFA applies to almost every type of employer—both public and private sectors—that have more than 15 employees, including federal, state, local, and municipal agencies.[3]

As expected, every affected employer is probably asking: what is a "reasonable accommodation?" Well, one need look no further than the text of the new statute itself, which directly cites to the Americans with Disabilities Act ("ADA") of 1990.[4] Under the PWFA, a "reasonable accommodation" is defined to possibly include—but not necessarily limited to—the following measures:

- making existing facilities used by employees readily accessible to and usable by pregnant employees;
- job restructuring;
- part-time or modified work schedules;
- reassignment to a vacant position;
- acquisition or modification of equipment or devices;
- appropriate adjustment or modifications of examinations;
- training materials or policies;
- the provision of qualified readers or interpreters; and
- other similar accommodations for pregnant employees.[5]

Further, that employer may also inquire—in a more concerned tone—what would be considered an "undue hardship" under the PWFA. For this, we—once again—turn to the conveniently cited ADA text included in the new law, which states that an "undue hardship" is generally considered "an action requiring significant difficulty or expense."[6] To determine this "difficulty," the following factors are to be weighed by the employer:

- the nature and cost of the accommodation;
- the overall financial resources of the facility or facilities involved, including the number of persons employed, the effect on expenses and resources, or the impact upon the operation of the facility;
- the overall financial resources of the employer, including the size of the business and the characteristics of its facilities; and
- the type of operations of

1 Regan Wilkins, Associate Pending Licensure, assisted with writing this article. See 42 U.S.C.A. § 2000gg-1 (West).
2 *See Id.*
3 *See* 42 U.S.C.A. § 2000gg (West).
4 *See Id.*
5 *See* 42 U.S.C.A. § 12111(9) (West).
6 *See* 42 U.S.C.A. § 12111(10) (West).

> the employer, including the functions of the workforce and the overall geographic, administrative, or fiscal relationship of the utilized facilities to the employer.[7]

Furthermore, the PWFA also disallows employers from attempting an "end around" the reasonable accommodations requirement codified for pregnant employees. This includes prohibiting an employer from (1) requiring pregnant employees to accept accommodations that are not reasonable, (2) denying future employment opportunities to pregnant individuals due to the potential implementation of reasonable accommodations, (3) requiring pregnant employees to take a leave instead of implementing an accommodation, or (4) taking adverse employment action against pregnant employees in response to their request or usage of an accommodation.[8]

The Equal Employment Opportunity Commission ("EEOC") has also presented some examples of possible accommodations, such as being able to sit or drink water, receiving closer parking, having flexible hours, receiving additional break time to use the bathroom, taking leave or time off to recover from childbirth, or being excused from strenuous activities.[9] Furthermore, it is worth noting that a request will not always present itself as a "straightforward request" for an accommodation.[10] Nonetheless, it should be treated as such. Just as with the ADA, employers should not require employees to use "magic words" to invoke their rights under the PWFA.

Procedurally, the PWFA refers to the ADA and EEOC recommendation that employers engage in an "interactive process" with employees to determine the appropriate accommodation for a pregnant employee's requests.[11]

Simply put, this promotes the "genuine and open" collaboration between an employer and a pregnant employee to find the appropriate "middle ground" accommodation.[12] The first step of this process would be to identify the request and gather whatever information is necessary to process the request. Thereafter, the employer should openly communicate with the pregnant employee to explore possible reasonable accommodation options and may—with the permission of the pregnant employee and abiding by applicable confidentiality laws—incorporate third party advise or attention. Lastly, the employer is responsible for implementing the agreed-upon accommodation and actively monitoring the accommodation for success and/or circumstantial changes.

As you may have gleaned, the PWFA is applied on a case-by-case basis, and the applicable "reasonable accommodation" and/or "undue hardship" analysis is largely based on the business, the nature and cost of the implementation, as well as the proposed arrangement itself. While it is imperative to support pregnant employees during an exciting and extremely challenging point in their lives, the consideration of employer resources is not ignored by the Act.

Nevertheless, the Texas Attorney General has already attacked the Act on constitutional grounds with support from at least one court.

"TEXAS V. THE FEDS" AND THE COLLATERAL EFFECT ON TEXAS PREGNANT EMPLOYEES: *TEXAS V. GARLAND*.

In *Texas v. Garland*, the United States District Court for the Northern District of Texas sided with the State of Texas and found that the passage of the PWFA violated the United States Constitution's Quorum Clause, which requires a quorum of voting members in the House for the passage of congressional bills.[13] In its legal challenge, Texas sought a permanent injunction against the federal government's enforcement of the PWFA against the State.

The judicial opinion, signed on February 27, 2024, stated that less than a majority of the House of Representatives were *physically* present at the time of the PWFA's passage. While United States Attorney General Garland attempted to argue that the Constitution does not prohibit the counting of proxies—as used in PWFA's passage—to reach majority quorum, the Court found that the Quorum Clause is not a "majority *participation* requirement, but a majority-*presence* requirement."[14] Further, the Court analyzed the text, structure, history, and original

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7 *See Id.*
8 *See* 42 U.S.C.A. § 2000gg-1 (West).
9 https://www.eeoc.gov/sites/default/files/2023-05/PWFA%20%28Healthcare%20Poster%29-11_508%20FINAL.pdf
10 For example, where a pregnant employee—without expressly asking for a new work uniform or accommodations—states that "she is having difficulty with the current, required uniform due to her pregnancy."
11 *See* 42 U.S.C.A. § 2000gg(7) (West)
12 https://www.doi.gov/sites/doi.gov/files/employee-resource-effective-interactive-process.pdf
13 *See Tex. v. Garland*, No. 5:23-CV-034-H, 2024 WL 967838 (N.D. Tex. Feb. 27, 2024).
14 *See Garland*, 2024 WL 967838 at pg. 39.

understanding of the Constitution to support this controversial reasoning.[15] Finally, the Court found that Texas would suffer irreparable harm through a waiver of its sovereign immunity, cost of compliance, potential litigation, and future administrative investigations.[16]

In conclusion, the Court awarded Texas its permanent injunction and held that the federal government was enjoined from enforcing the PWFA against the State, its divisions, and agencies.[17] In response, the EEOC and the United States Department of Justice ("DOJ") filed their notice of compliance with the decision on March 6, 2024.[18]

At this point, you are probably wondering: what does this mean and how does this affect pregnant Texas workers? In short, it varies. Private employees—at the moment—still enjoy the rights ensured by the PWFA, in spite of the Court's decision. However, employees of the State cannot utilize the federal government, including the EEOC, as a means to pursue claims under the Act and must sue individually.[19] As the Court outlined, upon a request by a Texas state employee, the federal government will "send a written notice to the [pregnant employee] stating that [the office] received her charge but **cannot** accept it, investigate it, or issue a right-to sue notice..."[20] In application, this makes life a lot more difficult for pregnant state workers in Texas. While the rights ensured by the Act remain the same, the method of enforcing those rights is vastly different and less streamlined.

Another question likely rattling in the minds of Texas school officials is whether this decision has *any* impact on them. To that, the dreaded attorney answer, "it depends," is probably the appropriate response. As previously presented in the *Garland* opinion, the injunction applies to "…the State, *its divisions*, and agencies…" Political subdivisions like school districts generally are not considered divisions or agencies of the State. Therefore, the opinion likely does not apply to school district employees. They will still be able to pursue PWFA claims through the EEOC exhaustion process. Be that as it may, even if an ISD is faced with PWFA charge, it could very well use the same arguments that the State succeeded on in Garland to potentially avoid liability.

Nonetheless, while the Court's decision may be inconvenient to certain workers that service the Texas government, there is still some statutory authority which attempts to accommodate affected pregnant workers. Under the Texas Labor Code, sex discrimination in the workplace, including discrimination on the basis of pregnancy, is strictly prohibited.[21] However, the statute does not provide anywhere near the expansive rights ensured by the PWFA.

Further, other federal statutes, such as Title VII of the Civil Rights Act, the original Pregnancy Discrimination Act, or the ADA, may provide an additional avenue for a pregnant worker to receive accommodations.[22] However, many of these claims may be limited if the proposed accommodations are not offered to other similarly conditioned employees.

CAUGHT IN THE MIDDLE: WORD OF ADVICE TO TEXAS EMPLOYERS

While *Texas v. Garland* may have made the process for pregnant state workers to enforce their rights more cumbersome and less efficient, those rights—yet hindered—are still well and thriving through private action. Texas ISDs, however, should plan to faithfully adhere to the standards set by the PWFA, they may have a "back up plan" through the arguments set forth in the opinion. Before pursuing the latter, counsel should always be sought.

In summary, all Texas employers should engage in interactive, open, and transparent discussions with their pregnant employees to balance the aforementioned "reasonable accommodation" with the possible resulting "undue hardship" on the employer.

15 *See generally Garland*, 2024 WL 967838 at pp. 39-48.

16 *See Garland*, 2024 WL 967838 at pp. 49-59.

17 *See Garland*, 2024 WL 967838 at pg. 52.

18 *See Tex. v. Garland*, 5:23-cv-00034, (N.D. Tex. Mar 06, 2024) ECF No. 112

19 *See Garland*, 2024 WL 967838 at pg. 52; see generally 29 C.F.R. § 1601 (defining the procedures in place by the EEOC for filing a Pregnant Workers Fairness Act "charge" with the agency)

20 *See Id.*

21 *See generally* Tex. Labor Code Ann. § 21.106

22 *See generally* 42 U.S.C.A. § 2000e-2 (West).