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Regulating the Response to Pregnancy

Your secretary tells you that she is pregnant, that she is experiencing morning sickness and that she wants to work from home every morning. What do you do? What do you need to know?

Public school students and employees who are pregnant or who experience pregnancy-related conditions have numerous protections and rights with which principals need to be familiar. The laws that provide these protections and rights include the Pregnant Workers Fairness Act, 42 U.S.C. § 2000gg, *et seq.*; *et seq.*; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, including the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k); Title IX, 20 U.S.C. § 1681; the Pennsylvania Human Relations Act, 43 P.S. §§ 951, *et seq.*; the Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq.*; the Family and Medical Leave Act, 29 U.S.C. 2601, *et seq.*; Section 504, 29 U.S.C. §794; and regulations promulgated under each of these statutes. Indeed, two sets of federal regulations recently went into effect that add complexity to how requests for pregnancy-related accommodations must be handled: **(1)** the new Title IX regulations, 34 C.F.R. Part 106; and **(2)** the new regulations under the Pregnant Workers Fairness Act (PWFA), 29 C.F.R. Part 1636. Each of these statutes and regulations must be understood in order for a principal to know what to do when their secretary asks for accommodations, such as working remotely due to morning sickness.

I. Anti-Discrimination, Anti-Retaliation and Anti-Harassment Laws

a. "On the basis of sex"

Pregnancy and pregnancy-related conditions is a protected classification which means that school districts and their employees cannot discriminate or retaliate based on the pregnancy or related conditions of an employee or student. As the United States Supreme Court said long ago, "discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983). In 1978, Congress passed the Pregnancy Discrimination Act (PDA) as an amendment to the sex discrimination section of Title VII of the Civil Rights Act of 1964. The PDA provides:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . .. 42 U.S.C.S. § 2000e.

Under Title IX and the Pennsylvania Human Relations Act (PHRA), discrimination, retaliation and harassment on the basis of sex, including on the basis of pregnancy and pregnancy-related conditions, are prohibited.

b. Pregnancy and Pregnancy-Related Conditions as Disabilities

Pregnancy and pregnancy-related conditions may be "disabilities" if they meet any of the definitions of

a "disability" under such laws as the Americans with Disabilities Act (ADA) or Section 504. Both the ADA and Section 504 prohibit discrimination, retaliation and harassment of employees or students with disabilities that result from pregnancy or pregnancy-related conditions.

c. Pregnancy and Pregnancy-Related Conditions As "Serious Health Conditions"

Pregnancy and pregnancy-related conditions may constitute a "serious health condition" under the Family and Medical Leave Act (FMLA) when they meet the definition of the term "serious health condition." It is hard to imagine when pregnancy and pregnancy-related conditions would not meet the definition of a serious health condition.

II. Accommodating Pregnancy and Pregnancy-Related Conditions.

Some of the anti-discrimination laws, in addition to acting as a shield protecting against unlawful discrimination, retaliation and harassment, function as a sword requiring certain affirmative accommodations and mandating certain procedures and processes regarding those accommodations. It must be stressed that procedure and process are as important as substance.

a. Accommodations under the ADA and Section 504

Under the ADA and Section 504, if a woman has a physical or mental impairment that substantially limits a major life activity and requests an accommodation, the school district must engage in an "interactive process" and must, as a result of the interactive process, provide reasonable accommodations that are necessary to enable the employee to perform the essential functions of her job. As one court succinctly said, "Under the ADA, an employer is not required to eliminate an essential function of a job as an accommodation." *Groark v. City of Chi.*, 2000 U.S. Dist. LEXIS 20487, *18-20 (N.D. Ill. July 19, 2000). Engaging in the interactive process is legally important and the failure of the school district to engage in the interactive process may lead to legal liability. *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999).

Under the ADA and Section 504, depending upon circumstances, the following are the kinds of accommodations that might have to be provided to an employee who is pregnant or suffering the effects of a pregnancy-related condition.

1. Workplace Modifications, including:

- **Accessible Workspaces:** Adjusting desks, installing ramps or modifying doorways for wheelchair access.
- **Ergonomic Furniture:** Providing adjustable chairs, desks or computer equipment for employees with mobility impairments or back conditions.
- **Rearranging the Physical Layout:** Moving desks or workstations to accommodate individuals who use mobility devices.

2. Flexible Scheduling

- **Modified Work Schedules:** Allowing for part-time hours, flexible start/stop times, or additional breaks for employees who need medical treatments, rest periods or accommodations for energy fluctuations.
- **Telework/Remote Work:** Offering the option to work from home if the essential job functions can be performed remotely.

3. Modified Job Duties

- **Job Restructuring:** Reassigning non-essential duties or altering how tasks are performed to accommodate limitations.
- **Light Duty or Temporary Reassignment:** Assigning less physically demanding tasks to employees recovering from illness or injury.

4. Assistive Technology

- **Alternative Input Devices:** Keyboards, mice or other equipment designed for individuals with physical disabilities.

5. Leave Policies

- **Extended Medical Leave:** Providing unpaid leave beyond the employer's typical leave policy as a reasonable accommodation for recovery or treatment.
- **Intermittent Leave:** Allowing employees to take leave on a sporadic basis for medical treatment or flare-ups of a disability.

6. Transportation and Parking

- **Accessible Parking Spaces:** Reserving spaces near the entrance for employees with mobility impairments.

7. Workplace Policies Adjustments

- **Modified Dress Code:** Allowing alternative clothing or footwear for employees with medical conditions that require flexibility (e.g., orthotic shoes, compression garments).
- **Service Animals:** Permitting employees to bring service animals into the workplace to assist with their disability.

8. Medical Devices and Accommodations for Treatment

- **Private Rest Areas:** Creating spaces for employees to administer medication, manage treatments or take breaks related to their condition (e.g., lactation).
- **Adjustable Lighting:** Modifying lighting to accommodate conditions like migraines or light sensitivity.

9. Reassignment to a Vacant Position

- **Job Transfer:** If no accommodation can allow the employee to perform their current job, reassigning

them to a vacant position for which they are qualified may be necessary.

10. Modifications for Mental Health Impairment

- **Quiet Workspaces:** Offering a noise-free or distraction-limited environment for individuals with anxiety, Post-Traumatic Stress Disorder (PTSD) or sensory processing issues.

11. Breaks for Stress Management

- **Short Breaks:** Allowing short breaks throughout the day for employees to engage in coping mechanisms like meditation or breathing exercises.

This list of potential accommodations is not exhaustive and other accommodations may have to be provided to enable the employee to perform the essential functions of the job.

b. Accommodations under the FMLA

The only type of accommodation required by the FMLA is the right to take leaves of absence that are either taken in a block or intermittently as requested by an eligible employee where the employee meets the terms and conditions for such leaves.

c. Accommodations under the PWFA

The PWFA was enacted on June 27, 2023, to protect the rights of pregnant workers and those affected by childbirth or related medical conditions. The PWFA mandates that employers, including school districts, provide reasonable accommodations to employees for pregnancy, childbirth or related medical conditions unless doing so would pose an undue hardship on the school district. This law fills in the gaps left by previous legislation, such as the Pregnancy Discrimination Act and the ADA, by specifically addressing the need for reasonable accommodations for pregnant workers. Importantly, the kinds of accommodations required, and procedures allowed under the PWFA, are different than those of the ADA and Section 504. The most significant difference is that under the PWFA there will be times when an employee must be excused from the performance of an essential function.

Importantly, new regulations were recently promulgated to implement the PWFA. The regulations were published on April 15, 2024, and became effective June 18, 2024. 29 U.S.C. Part 1636. The PWFA prohibits an employer from failing to make reasonable accommodation to the known limitations of qualified employees or applicants, absent undue hardship. The final rule, like the proposed rule, sets out additional considerations for covered entities and employees in complying with this provision. Under the final rule, there are many specific rules with which school districts must comply, including the following:

1. Unnecessary delay in making a reasonable accommodation is prohibited.
2. An employee is not required to accept an accommodation. (However, if an employee rejects a reasonable accommodation that they need in order to be "qualified" under the PWFA then that employee will not be considered qualified.)
3. The school district cannot justify failing to make a reasonable accommodation or the unnecessary delay in providing a reasonable accommodation based on the employee failing to provide supporting documentation unless: **(1)** the school district seeks the supporting documentation; **(2)** seeking supporting documentation is reasonable under the circumstances as set out in the regulations; **(3)** the supporting documentation is reasonable documentation as defined in the regulations; and **(4)** the school district provides the employee with sufficient time to obtain and provide the documentation.
4. When choosing among effective accommodations, the school district must choose an accommodation that provides a qualified employee equal employment opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges as are available to the average employee without a known limitation who is similarly situated.
5. The PWFA prohibits the school district from requiring a qualified employee to accept an accommodation other than one arrived at through the interactive process.
6. The PWFA prohibits school districts from denying employment opportunities to a qualified employee if the denial is based on the employer's need to make a reasonable accommodation for the known limitation of the employee or applicant.
7. The PWFA prohibits school districts from requiring a qualified employee with a known limitation to take leave, either paid or unpaid, if another effective reasonable accommodation exists, absent undue hardship.
8. The PWFA prohibits school districts from taking adverse action in terms, conditions or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation for a known limitation.

In order for an employee to be protected under the PWFA, the employee must be "qualified." There are two definitions. First, the PWFA uses language from the ADA: thus, "an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position" is qualified. Second, the PWFA allows an employee or applicant to be qualified even if they cannot perform one or

more essential functions of the job if the inability to perform the essential function(s) is "temporary," the employee could perform the essential function(s) "in the near future" and the inability to perform the essential function(s) can be reasonably accommodated. The terms "temporary," "in the near future" and "can be reasonably accommodated" are not defined in the statute.

The regulations define the term "temporary" as lasting for a limited time, not permanent, and may extend beyond "in the near future." If the employee is pregnant, it is assumed under the regulations that the employee could perform the essential function(s) "in the near future" because they could perform the essential functions within 40 weeks of the temporary suspension of the essential function. But the final rule's definition does not mean that the essential function(s) of a pregnant employee must always be suspended for 40 weeks, or that if a pregnant employee seeks the temporary suspension of an essential function(s) for 40 weeks it must be automatically granted. Whether the employee could perform the essential function(s) "in the near future" in situations other than when the employee is pregnant is determined on a case-by-case basis.

The regulations discuss the meaning of the PWFA's requirement that the inability to perform the essential function(s) can be reasonably accommodated. For some positions, this may mean that one or more essential functions are temporarily suspended (with or without reassignment to someone else) and the employee continues to perform the remaining functions of the job. For other positions, some of the essential functions may be temporarily suspended (with or without reassignment to someone else) and the employee may be assigned other tasks to replace them. In yet other situations, one or more essential functions may be temporarily suspended (with or without reassignment to someone else) and the employee may perform the functions of a different job to which the employer temporarily transfers or assigns them, or the employee may participate in the employer's light or modified duty program. Throughout this process, as with other reasonable accommodation requests, a school district may need to consider more than one alternative to identify a reasonable accommodation that does not pose an undue hardship.

In terms of "essential function" the PWFA regulations use the same definition as found in the ADA. In general terms, it means the fundamental duties of the job. Similarly, "reasonable accommodation" is another term borrowed from the ADA, by the PWFA, meaning a change in the work environment or how things are usually done. The regulations provide specific examples of possible reasonable accommodations under the PWFA, including:

- Frequent breaks.
- Sitting/standing.
- Schedule changes, part-time work and paid and unpaid leave.
- Telework.
- Parking.
- Light duty.
- Making existing facilities accessible or modifying the work environment.
- Job restructuring.
- Temporarily suspending one or more essential functions.
- Acquiring or modifying equipment, uniforms or devices.
- Adjusting or modifying examinations or policies.

"Undue hardship" is yet another term borrowed by the PWFA from the ADA. It means significant difficulty or expense for the operation of the school district. In order to address that under the PWFA the school district may have to accommodate an employee's temporary inability to perform an essential function(s), the regulations add additional factors that may be considered when determining if the temporary suspension of an essential function(s) causes an undue hardship. These additional factors include: consideration of the length of time that the employee will be unable to perform the essential function(s); whether there is work for the employee to accomplish; the nature of the essential function, including its frequency; whether the employer has provided other employees in similar positions who are unable to perform the essential function(s) of their positions with temporary suspensions of those functions and other duties; if necessary, whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function(s) in question; and whether the essential function(s) can be postponed or remain unperformed for any length of time and, if so, for how long.

The regulations identify a limited number of simple modifications that will, in virtually all cases, be found to be reasonable accommodations that do not impose an undue hardship when requested by a pregnant employee. These "predictable assessments" in the final rule are: **(1)** allowing an employee to carry or keep water near and drink as needed; **(2)** allowing an employee to take additional restroom breaks as needed; **(3)** allowing an employee whose work requires standing to sit and whose work requires sitting to stand as needed; and **(4)** allowing an employee to take breaks to eat and drink as needed.

"Interactive process" is another term borrowed from the ADA, and the regulations explain that the "interactive process" is a method to help the school district and employee identify potential reasonable accommodations. It means a discussion or two-way communication between an employer and an employee.

Under the regulations, school districts are not required to seek "supporting documentation" from an employee who requests an accommodation. If the school district decides to seek supporting documentation, it is only permitted to do so if it is reasonable to require documentation under the circumstances to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth or related medical conditions and needs a change or adjustment at work due to the limitation. The regulations provide examples of when it would not be reasonable for the employer to require documentation. The definition of "reasonable documentation" means the minimum documentation that is sufficient to: **(1)** confirm the physical or mental condition; **(2)** confirm the physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth or related medical conditions (together with **(1)** "a limitation"); and **(3)** describe the change or adjustment at work needed due to the limitation.

The regulations explain how an employee may request a reasonable accommodation. The employee must identify the limitation (the physical or mental condition related to, affected by, or arising out of pregnancy, childbirth or related medical conditions) and that the employee needs an adjustment or change at work due to the limitation. There are no "magic words" that need to be used by the employee.

d. Accommodations under Title IX

Neither Title IX nor the regulations under Title IX contain provisions using the word "accommodations." Instead, Title IX focuses on prohibiting unlawful discrimination, retaliation and harassment on the basis of sex, including **(1)** pregnancy, childbirth, termination of pregnancy or lactation; **(2)** medical conditions related to pregnancy, childbirth, termination of pregnancy or lactation; and **(3)** recovery from pregnancy, childbirth, termination of pregnancy, lactation or related medical conditions. However, there are several rules that effectively require accommodations. For example, the Title IX regulations provide that school districts "must treat pregnancy or related conditions as any other temporary medical conditions for all job-related purposes, including commencement, duration and extensions of leave; payment of disability income; accrual of seniority and any other benefit or service; reinstatement; and under any fringe benefit offered to employees by virtue of employment." 34 C.F.R. § 106.57(c). If accommodations are provided for such temporary medical conditions, they must be provided for pregnancy and related conditions. The Title IX regulations also provide:

> ***(d)*** *Voluntary leave of absence. In the case of a recipient that does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient must treat pregnancy or related conditions as a justification for a voluntary leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status held when the leave began or to a comparable position, without decrease in rate of compensation, loss of promotional opportunities or any other right or privilege of employment.*
>
> ***(e)*** *Lactation time and space.*
>
> > ***(1)*** *A recipient must provide reasonable break time for an employee to express breast milk or breastfeed as needed.*
> >
> > ***(2)*** *A recipient must ensure that an employee can access a lactation space, which must be a space other than a bathroom that is clean, shielded from view, free from intrusion from others, and may be used by an employee for expressing breast milk or breastfeeding as needed.*

34 C.F.R. § 106.57(c) and (d).

III. A Principal's Response to the Secretary's Request

At the start of this article, you were asked what to do when your secretary tells you that she is pregnant and wants to work from home every morning due to morning sickness. In light of the rules discussed in this article, it is my recommendation that principals:

1. Notify the human resources department in writing of the secretary's pregnancy and request for the accommodation.
2. Follow up to ensure that the human resources department has engaged in the interactive process and made a determination regarding the accommodations being provided.
3. Document the interactive process and follow-up actions.
4. If the secretary asks for things that have not been provided, or that are different, notify the human resources department again, and do so in writing.

IV. Conclusion

Public school employees and students who are pregnant and/or who experience pregnancy-related conditions have numerous rights which require not only considerations and protections but also affirmative accommodations. These laws and regulations subject school districts to serious liability for failing to adhere to the aforementioned considerations and processes. Therefore, school principals need to be familiar with these laws and regulations so as not to run afoul of them. ■