March 2024- Print Pages 3/24/24, 1:02 PM

FDIC INTERNATIONAL PREVIEW

Is Your Department Ready for a Pregnant Firefighter/Medic?

BY **JOHN RUKAVINA AND ALISA ARNOFF**

YOU HAVE PREPLANNED to prepare your firefighters and medics for high-risk situations—hazmat events, major structure fires, mass-casualty events. However, have you and your department preplanned for a firefighter/medic pregnancy, childbirth, and return to work?

Firefighter pregnancy and the first months after the birth of a firefighter's baby can be among the most complex personnel issues a fire chief will ever confront. A new law, the Pregnant Workers Fairness Act (PWFA), went into effect in June 2023. Not long before that, the Providing Urgent Maternal Protections for Nursing Mothers Act (The PUMP Act) became law in December 2022.

This article will help you preplan a firefighter pregnancy event, educate you on firefighter reproduction issues in the firefighting environment, and guide you through the complexities of how the law will shape your department's pregnant-firefighter policy options.

Pregnancy Preplanning Framework

Here's our pregnancy preplanning framework. Have this in place before you need it. You can always modify it as needed.

1. Pre-birth: Know the rules, including the new federal and state law, and human resources/personnel rules.

First, check your state's laws and rules regarding workplace pregnancy and post-birth accommodations for employees. Most states have such laws. If the state law is stricter than federal laws, state law governs. If your state law is weaker than federal law—or if your state has no pregnancy/post-birth accommodation laws—then federal law applies. Also double check on whether your county and other governing municipality have any laws of their own.

Certain issues relating to pregnancy, pregnancy-related conditions, and childbirth have not been addressed in great detail under federal law. For example, until the passage of the Pregnancy Discrimination Act (PDA) in 1978, pregnancy discrimination was not prohibited by the Civil Rights Act of 1964, or what we commonly refer to as Title VII. But, the PDA prohibited discrimination only against pregnant workers; it did not require employers to accommodate pregnancy or pregnancy-related conditions.

The Americans with Disabilities Act (ADA) does not consider pregnancy itself a disability or an impairment. It requires only ADA employer accommodation if a pregnant worker suffers a pregnancy- or post-birth-related disability.

The Family and Medical Leave Act (FMLA) provides for up to 12 weeks of leave for birth and adoption during any 12-month period, in addition to caring for a family member suffering a "serious health condition" or recovering from one's own serious health condition. But FMLA provides no additional protection for pregnant or post-childbirth workers.

The new PWFA closes the gaps in the existing federal legal framework by requiring employers to "reasonably accommodate" employees who are pregnant, have recently undergone childbirth, or have a medical condition related to the pregnancy or birth. It applies ADA job-accommodation protections for workers who are experiencing pregnancy, childbirth, or pregnancy-related conditions in the form of "reasonable job accommodations" unless doing so would impose an "undue hardship," which is a standard borrowed from the ADA. The PWFA also requires that the reasonable accommodation be identified through an "interactive process," meaning a collaboration between the employee and the employer.

The PWFA applies to government employers regardless of size and private employers with 15 or more employees. (This includes applicants.) If your agency is a municipal, state, or federal agency, you are covered, period. If your agency is, for example, a private nonprofit corporation fire department, a private ambulance service, or an industrial employer, the 15-rule threshold applies. Some examples of "reasonable accommodation" under the PWFA include the following:

- Ability to sit.
- Ability to drink water.
- Access to closer parking.
- Flexibility in work hours/modified schedule.
- Reassignment (minimum qualifications and essential functions).
- Modified workplace policies.
- Paid/unpaid leave (job held open).
- Job restructuring.
- Refrigerator for lactation space.
- Provision of appropriately-sized uniforms/safety gear.
- Additional break time for bathroom use, eating, and resting.
- Use of leave to recover from childbirth.
- Excuse from "strenuous activities."
- Unusual/unprotected exposure to compounds not safe for pregnancy (an example of reasonable accommodation as a continuing process).

The concept of "undue hardship" is important for all parties involved to understand. It's possible that a proposed reasonable accommodation could impose significant costs on an employer, violate

https://digital.fireengineering.com/fireengineering/march_2024/Print_s...?start=84&end=85&prettyPrint=true&articlePrintMode=false&articleTitle= Page 1 of 2

local-government rules or ordinances, or violate the provisions of a collective bargaining agreement (in legalese, an "undue hardship"). But when does that proposed reasonable accommodation cross the "undue hardship" line? In *Groff v. USPS* (decided in June), the Supreme Court set the following standards: "substantial increased costs in relation to the conduct of [the employer's] particular business."

Here are the critical elements for an "undue hardship" claim:

The employer will need to demonstrate how much cost or disruption a proposed accommodation would involve and measure that against the size, budget, staffing, and other relevant ability-to-pay factors. If the fire department is part of local government, the accommodation's impact will be measured against the impact on the local government—not just the fire department.

- The employer cannot rely on potential or hypothetical hardship when faced with an accommodation request.
- If the proposed accommodation has been authorized in a substantially similar organization (another fire department, for example) and has proved to be an effective accommodation that did not impose an undue hardship on that employer, that accommodation experience would be difficult to refuse.
- According to the Equal Employment Opportunity Commission (EEOC), the federal agency responsible for enforcing the PWFA, "Temporary costs, voluntary shift swapping, occasional shift swapping, or administrative costs do not constitute undue hardships, even if they technically inflict some burdens on employers." In *Groff*, the Supreme Court also recognized that "substantial costs extend beyond financial expenditures and can also include effects on coworkers that have ramifications for the conduct of the employer's business." For example, the Court affirmed that violating employees' contractual seniority rights would pose an undue hardship to the employer.

The following are considered PWFA "don'ts":

- Failing to make reasonable accommodations to known limitations unless the accommodation would impose an "undue hardship" on operations. (Hint: Resist the urge to play doctor. Focus on accommodations.)
- Requiring acceptance of an accommodation not reached by an interactive process. The employer and employee can look at alternative accommodations, but the employer can't arbitrarily dictate the accommodation.
- Denying employment opportunity to avoid making a reasonable accommodation.
- Requiring paid or unpaid leave if another reasonable accommodation can be provided.
- Taking any adverse action regarding terms, conditions, or privileges of employment in response to employee request or use of reasonable accommodations.

It's also a violation of FMLA to require an employee to disclose pregnancy when it's detected—although more than a few fire departments still include such a requirement in their rules and regulations or as part of a collective-bargaining agreement.

Here are some best practices to incorporate into your everyday operations:

- **Identify a department liaison for the pregnant firefighter/medic.** It's a best practice to have one department member serve as the liaison/point of contact for a pregnant firefighter/medic. It reduces the possibility of mixed messages and crossed wires. And it's easier to fully educate one member on the ins and outs of the PWFA, the PUMP Act (more to come), and other regulations.
- **Learn about firefighter/medic pregnancy in general terms.** The references presented at the end of this article are excellent resources for education of fire service leaders and members.
- **Be ready to familiarize your employee's OB/GYN with the firefighting environment and the tasks a firefighter is called on to do.** When you learn that one of your firefighter/medics is pregnant, give the firefighter/medic a copy of International Association of Fire Chiefs' *A Fire Department's Guide to Implementing NFPA 1582* and ask her to share it with her OB/GYN physician, particularly the "Firefighter Physical Ability Job Function Overview."
- **Be ready to discuss reasonable accommodation options with a pregnant firefighter/medic through the interactive process.** Fire service leaders can accomplish several pregnancy policy goals via a full review of the new firefighter/medic pregnancy rules with department staff and discussion of possible accommodations. (A tip: This will prepare you to deal with ADA/FMLA return-to-work issues for any firefighter.) For example, the chief/director of training may have more thoughts on reasonable-accommodation options than the fire chief. It's also better leadership practice to involve the management team in developing compliance strategies with the new rules than for the chief to simply announce them.
- **Be ready to set up a timetable of "check-in" meetings to review a firefighter's pregnancy/medical status.** The best check-in meeting schedule is one that tracks with a pregnant firefighter/medic's OB/GYN visits. That link will facilitate adjusting accommodations to a pregnant firefighter/medic's changes in physical abilities over the course of a pregnancy.
- **Be prepared to address "knucklehead" conduct.** Share your pregnant firefighter/medic preplan with everyone in the department as it is developed. You can do this via station meetings; joint union/management information sessions; and any other available media, including webcasts. Encourage questions, and make sure that your members understand the ongoing relationship between firefighter work assignments, reasonable accommodations, the impact of an evolving pregnancy on those assignments and accommodations, and the fact that any comment or act that suggests discrimination or harassment of a firefighter/medic based on pregnancy/post-birth status is a violation of the department's