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JLO Newsletter Summer 2024

2024 Minnesota Legislature Update

By: Mollie A. Buelow

The 2024 Session of the Minnesota Legislature has concluded with major impacts to public safety, and commerce.

PUBLIC SAFETY

Swatting - Legislation will enhance criminal penalties for swatting. Swatting involves making a fictitious emergency call that a serious crime is underway.

Straw Firearm - Legislation regarding "straw firearm purchases" – an eligible individual buying a firearm for an ineligible person - will be raised from a gross misdemeanor to a felony.

Odor of Cannabis - Peace Officers will be prohibited from using the perception of the odor of cannabis as the sole basis to search a motor vehicle.

School Resource Officers - The Legislature passed a law last year banning school resource officers and other adults from putting students in a prone position or choke hold. Law enforcement officers objected, and many school resource officers were pulled from schools. The change signed by Gov. Tim Walz clarifies that prone restraints can be used on a limited basis "to prevent bodily harm or death to the child, pupil, or another." School resource officers are subject to the limitations on using force that apply to any other peace officer – including the ban on using choke holds that applies to all officers. HF3489*/SF3534/CH78.

Disability Protections - New protections within the Minnesota Human Rights Act will include disability protections for people with life-long disabilities such as HIV, diabetes, or cancer. The new protections will allow for individuals with life-long disabilities to file a discrimination claim with the Department of Human Rights. Further disability protections will ensure that potential adoptive parents who are disabled are not denied the ability to become adoptive parents due to their disability. Further, CHIPs petitions are not allowed to be filed alleging a that a child needs protection or services based on a parent's disability.

COMMERCE

Ticket Purchases - A high-profile bill to expand the rights of online ticket buyers will become law, effective Jan. 1, 2025, requiring online bulk ticket resellers such as Ticketmaster to display "all-in pricing" to ensure ticket buyers know the total cost of a ticket up front. This bill is known as the "Taylor Swift bill". HF1989*/SF2003/CH94.

Recreational Marijuana - The broad cannabis bill gets rid of a provision in last year's recreational marijuana bill that prohibited bars and restaurants from serving a THC beverage and an alcoholic beverage to the same person within five hours. It is changed to a rule similar to alcohol sales, in that it tells servers they cannot provide intoxicants to already intoxicated patrons.

Land Sales - An environmental omnibus bill sent to the governor would require county auditors to offer land for sale on Reservation land to the Indian Reservation first, and accept the offer if it is equal to or more than the appraised value.

Service Charge- The bill requires businesses to disclose the full price of products or services, including all mandated fees at the beginning of the transaction, not at the end. A person or business will be prohibited from advertising, displaying, or offering a price for goods or services that does not include all mandatory fees or surcharges. For online retail, when a consumer views and selects either a vendor or items for purchase, a delivery platform must, prior to checkout, display in a clear and conspicuous manner that an additional flat fee or percentage will be charged. HF3438*/SF3537/CH111.

CONCLUSION

This year was a rather light legislative session, especially compared to last year when a Democratic governor and Democratic controlled House and Senate were able to accomplish many of their priorities. While the Democrats still control all three, because this is an election year, they probably had less of an appetite for passing sweeping legislation.

PREGNANT WORKERS FAIRNESS ACT: EEOC'S FINAL RULING

By Argane "Tito" Olana

In April 2024, the US Equal Employment Opportunity Commission issued its final regulation to implement the Pregnant Workers Fairness Act (PWFA). The PWFA, a federal law regulating employer's duties to provide reasonable accommodations to qualified employees' pregnancy-related limitations, went into effect on June 27, 2023. The PWFA federalized similar state laws adopted by over 30 states requiring covered entities to provide reasonable accommodation for pregnancy and other related medical conditions. The PWFA at 42 USC 2000gg03(a) directs EEOC (the Commission) to promulgate regulations to implement the PWFA. However, a recent Supreme Court ruling reigning in the power of administrative agencies might provide grounds to challenge the constitutionality of the Commission's ruling.

The PWFA, relying on Title VII of the Civil Rights Act, is an expansive protection built upon the Pregnancy Discrimination Act (PDA) of 1978. The PDA overturned *General Elec. Co. v. Gilbert*, the 1976 Supreme Court case that found an employer's plan that covered absences due to sickness and disability but did not cover absence related to pregnancy was not in violation of Title VII, thus striking down a 1972 interpretation by EEOC that incorporated pregnancy into Title VII. The PWFA is also a response to the 2015 Supreme Court's decision in *Young v. United Parcel Services,* which a congressional report found did not adequately protect workers covered by the PDA.

The PWFA states that "it shall be unlawful employment practice for a covered entity not to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medication conditions of a qualified employee unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business." The PWFA only regulates accommodations; other statutes regulate discrimination against pregnant workers. However, the EEOC borrows heavily from related statutes to implement its ruling and define specific terms. The PWFA does not limit the rights granted by other federal, state, or local laws that provide greater or equal protection.

What is a covered entity under the statute?

The PWFA defines "covered entities" using the definition of "employer" from different statutes, including Title VII and the Congressional Accountability Act of 1995. "Covered entities" under the PWFA include both public and private employers with 15 or more employees.

Who is a qualified employee?

The PWFA defines "qualified employee" as including both employees and applicants, a term they adapted from the Civil Rights Act of 1964. Since the PWFA's approach to coverage and protection follows Title VII, rather than the FMLA, employees are covered even if they have not worked for a specific length of time. An employee or applicant can be qualified if they can perform the essential functions or fundamental duties of the job with or without reasonable accommodation. If they cannot perform essential functions of the job, an employee or applicant can be qualified as long as their inability is "temporary", they could perform the function in the near future, and inability to perform can be reasonably accommodated.

What is a known limitation?

The rule defines limitation as a physical or mental condition that causes an "impediment or problem", even a minor and/or episodic, experienced by workers that result from pregnancy, childbirth, or other related medical conditions. The Commission turned down the proposed inclusion of "need" after "impediment or problem" because impediment or problem is sufficiently broad, and the statutory definition includes limitation as "a need or a problem related to maintaining their health or the health of the baby".

Since the PWFA uses the language "related to, affected or arising out of" to explain the connection between the limitation and pregnancy, the PWFA does not require that pregnancy, childbirth, or related conditions be the sole, the original, or a substantial reason for the physical or mental condition. Therefore, preexisting medical conditions worsened by pregnancy and childbirth are covered as well. Even employees who are able to perform essential functions of the job without limitation can ask for accommodation to avoid pregnancy risk or future limitations.

A limitation is "known" to a covered entity if the employee, or the employee's representative, has communicated the limitation to the covered entity. The employee is not

required to frame the communication as a request under the law; merely informing the employer is sufficient. The ruling limits the information employees are required to provide in typical ADA and FMLA packets for PWFA. Employers can request medical documentation from the employee's health care provider, but only when reasonable. However, an unnecessary delay while awaiting medical documentation can violate the PWFA.

What is reasonable accommodation, and what qualifies as an undue hardship?

The PWFA provides an exception to providing reasonable accommodations when the entity demonstrates an undue hardship. Reasonable accommodations and undue hardship have the same meaning given to those terms under the Americans with Disabilities Act of 1990. The ADA states that reasonable accommodations may include (a) making existing facilities used by employees readily accessible to and usable; and (b) 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 individuals with disabilities.

The Commission gives several other examples, including allowing telework, temporary suspension of one or more essential job functions, leave for healthcare appointments, and leave to recover from childbirth. The Commission adds that if an employer is unable to provide accommodation promptly, the Commission recommends providing temporary accommodation that reduces the limitation suffered by the employee.

The ADA defines "undue hardship" to mean an action requiring significant difficulty or expense. To determine this, the Court considers the following factors:

- The nature and cost of the accommodation needed;
- Overall financial resources of the facility or facilities involved in providing reasonable accommodation;
- Overall financial resources of the covered entity; and
- The type of operation or operations of the covered entity.

Minnesota District Courts have held that to demonstrate undue hardship, a covered entity must also demonstrate "documented good faith effort to explore restrictive or less expensive alternatives, including consultation with the affected individual." *Chino v. Lifespace Cmtys., Inc.,* 203 F. Supp. 3d 997, 1013 (D. Minn. 2016). The PWFA similarly prohibits awarding damages against employers who show a good-faith effort to accommodate their employees, even if they ultimately do not succeed.

Related medical conditions: The impact of Loper Bright on EEOC's final ruling.

The PWFA requires covered entities to provide reasonable accommodations for "pregnancy, childbirth, or related medical conditions." The terms pregnancy and childbirth are unambiguous, easy -to-understand terms. However, what are medical conditions related to childbirth and pregnancy? The Commission issued its notice of proposed rulemaking on August 11, 2023, and invited the public to comment over the next 60 days. Members of the public submitted over 98,600 comments to the Commission – almost all of them mentioning the issue of related medical conditions and abortion.

The Commission received over 54,000 comments from individuals urging them to exclude abortion from the definition of "pregnancy, childbirth, or related medical condition." The Commission also received over 40,000 comments supporting the inclusion of abortion. The supporters of excluding abortion argued that abortion is a procedure, not a medical condition. Supporters of inclusion argued that it is a health care procedure related to pregnancy, and physical and mental impediments, such as cramping, pain, and fatigue, can proceed or follow an abortion. In its final regulation, the Commission broadly defined medical conditions to include: (1) Current, past, and potential pregnancies; (2) childbirth; (3) lactation; (4) use of contraception, (5) infertility; and (6) abortions.

Tennessee, joined by sixteen other states, filed a lawsuit challenging the inclusion of abortion and how the rule addressed accommodations for some abortions. The lawsuit, heard on June 14, 2024, in Arkansas Eastern District Court, was ultimately dismissed with prejudice for lack of standing under Article 3. However, the Court wrestled with the question of whether the agency had the authority to include abortions or promulgate a final ruling. The Court relied heavily on *Chevron* to hint that the term medical condition is not unambiguous, and thus, deference to the Commission's interpretation is warranted because the interpretation was reasonable. *States of Tenn. v. EEOC*, 2024 US Dist. LEXIS 106242, at *27 (ED Ark. June 14, 2024).

Less than a week later, the United

States Supreme Court overturned the *Chevron* deference in *Loper Bright*. Justice Robert noted in his majority opinion that by overturning *Chevron*, "we do not call into question prior cases that relied on the Chevron framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of Chevron itself—are still subject to statutory stare decisis despite our change in interpretive methodology." Nonetheless, this respect for precedent will likely not apply to the dismissed lawsuit because the case was not decided on the merits by applying the *Chevron* standard. As long as the States can find a plaintiff with standing, the Commission's ruling will go to court. With the trend of forum shopping for friendly judges, coupled with the conservative justices dominating the Supreme Court, the Commission's inclusion of abortion in their ruling will likely be stricken down.

However, the rest of the rulings issued by the Commission will likely survive challenges in court. Since the definitions used in the Commission's ruling have been adapted from previous, long-standing federal statutes that have been litigated in courts for the past several decades, it is likely that the Court will not come to a statutory interpretation that is too distinct from the Commission's ruling. Nonetheless, with the less than usual respect the Court has recently shown to other long-standing precedents, one cannot be too certain of whether the Court will respect *stare decisis*.

JLO Partner Pat Skoglund Recognized as a North Star Lawyer

Congratulations to **Pat Skoglund** for being recognized as one of 736 **North Star Lawyers** who, in 2023, certified that they provided at least 50 hours of pro bono legal services annually to low-income people at no fee and without expectation of a fee.

Congratulations

Congratulations to **Joe Flynn**, **Vicki Hruby**, **Elisa Hatlevig**, **Tessa McEllistrem** and **Pat Skoglund** for being named to the 2024 list of Minnesota Super Lawyers and Rising Stars.

Super Lawyers is a Thomson Reuters business that provides a rating service of outstanding lawyers from more than 70 practice areas, who have attained a high-degree of peer recognition and professional achievement. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations. Rising Stars selections undergo the same selection process as Super Lawyers but recognizes attorneys who are 40 years old or younger, or have been practicing for 10 years or less. No more than 2.5% of lawyers in Minnesota are named to the Rising Stars list.

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About the Firm

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients.

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