

# 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

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*,<sup>1</sup> 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

anti-discrimination/harassment policy. (If you don't have one, creating one is your next assignment!)

Don't wait to learn of a firefighter/medic pregnancy to start this preplanning process. Start today.

**2. Post-birth: Know the rules, including federal and state law, and human resources/personnel rules.**

The PWFA provides for reasonable accommodation of lactation. At about the same time that the PWFA was passed, Congress passed the PUMP Act, which became effective on December 29, 2022.

Here's a summary of PUMP Act requirements:

- Break time to pump breast milk for one year after birth.
- Workplace "private space" to pump—not a bathroom. It's defined as "a place, other than a bathroom, which is shielded from view and free from intrusion from coworkers and the public."
- The private space is available when needed.
- A temporary space is OK, provided that it meets the "private space" standards.
- The accommodations cover all employees, regardless of status.

The PUMP Act amends the Fair Labor Standards Act, which means that it's enforced by the U.S. Department of Labor (DOL). An employee can file a DOL complaint and file suit against the employer at the same time. For lactation-space issues, an employee can sue the employer after giving the employer 10 days' notice of the violation.

**The Effects Pregnancy and Childbirth Have on Women**

According to the CDC, the most common causes of pregnancy-related deaths (deaths within one year of childbirth) between 2011 and 2014 were the following:

- Cardiovascular diseases.
- Medical conditions often reflecting preexisting illnesses.
- Infection or sepsis.
- Hemorrhage (excessive bleeding after giving birth).
- Cardiomyopathy (disease of the heart muscle that makes it harder for your

heart to pump blood to the rest of the body).

- A blockage in one of the pulmonary arteries in the lungs often caused by blood clots that travel to the lungs from the legs (thrombotic pulmonary embolism).
- Stroke.
- High blood pressure (hypertensive) disorders of pregnancy.
- Amniotic fluid embolism (a rare but serious condition that occurs when amniotic fluid or fetal material, such as fetal cells, enters the mother's bloodstream).
- Anesthesia complications.

**Preplanning to Accommodate Post-Birth Conditions**

Fire service leaders should incorporate accommodation of post-birth conditions into their preplans. Again, tracking progress via "check-in" meetings that track with OB/GYN visits is the most effective way to create reasonable accommodations and return-to-work plans. Here are a few items to keep in mind:

- **Understand how a legally required accommodation need may mean extending a leave of absence.** The PWCA provides that workers will have a right to reasonable accommodations that are medically necessary during *or after* pregnancy, so your responsibility to

provide an interactive process in collaboration with the new mother continues.

- **Understand that the ability to return to full duty cannot be a requirement. "Reasonable accommodation" prevails, so be prepared to discuss possible accommodations.** Some departments required that post-birth, the firefighter/medic must choose between returning to full duty without medical limitation and leave from duty. That's no longer legal. The PWFA protects the post-birth firefighter/medic experiencing childbirth-related medical conditions. The department is obligated to continue the reasonable job accommodations process (including the undue hardship exception). The PWFA requirement that the reasonable accommodation be identified through an interactive process also continues.

- **Establish return-to-work training and physical conditioning programs if you haven't already got them in place.** Figure 1 offers a return-to-work assessment used by the Fairfield (CT) Fire Department.

Experience demonstrates that having company officers vacate their office for intermittent use as a lactation space often creates more problems than it solves. It's also useful to note that a "reasonable accommodation" for assignment to a

**Figure 1. Fairfield (CT) Fire Department OSHA/Job Performance Requirements**

Review and identify all missed licenses and OSHA training during period of absence and develop a refresher plan (may not be able to complete in time).
Complete a mask fit test to ensure proper seal.
Review personal protective equipment (PPE) and self-contained breathing apparatus (SCBA) and ensure that any braces or accommodations function properly and do not interfere with protective qualities of PPE.
Perform standard FFD evolutions—charged hoseline advancement.
Perform standard FFD evolutions—ground ladder work with roof vent.
Perform standard FFD evolutions—SCBA practical in vision-obscured conditions.
Perform a window bailout, inspect, and repack system.
Return-to-work training and physical conditioning programs should be developed in consultation with a firefighter/medic's physician.

particular station may constitute an “undue hardship” if that station cannot accommodate a lactation space that meets Department of Labor standards.

Let your pregnancy preplan effort begin! ■

#### REFERENCES

“Firefighter Physical Ability Job Function Overview,” *International Association of Fire Chiefs: A Fire Department’s Guide to Implementing NFPA 1582*. [bit.ly/3vR6eei](https://bit.ly/3vR6eei).

“Gold Standard: Fire Department Family Planning/ Reproductive Health Policy Kit,” *The Beltane Guild*. [thebeltaneguild.org/policies](https://thebeltaneguild.org/policies).

“Reproductive Health,” *Science Alliance*. [bit.ly/47WizBn](https://bit.ly/47WizBn).

Job Accommodation Network. [askjan.org](https://askjan.org).

“Job Accommodations,” U.S. Department of Labor. [bit.ly/4bpZnZJ](https://bit.ly/4bpZnZJ).

“Know Your Rights: Workplace Discrimination is Illegal,” Poster, U.S. Equal Employment Opportunity Commission, 2023. [eoc.gov/poster](https://eoc.gov/poster).

“Reproductive Health and the Fire Service,” *Women in Fire*, October 1, 2021. [bit.ly/3vQsdNP](https://bit.ly/3vQsdNP).

“What You Should Know About the Pregnant Workers Fairness Act,” U.S. Equal Employment Opportunity Commission, 2023. [bit.ly/3vllqdt](https://bit.ly/3vllqdt).

**JOHN RUKAVINA** is director of Public Fire Safety Services, an executive consulting and teaching service. He began his fire service career in Minnesota. In 1984, he was appointed fire chief of St. Joseph, Missouri, and served as interim city manager for seven months. In 1986, he assumed the role of fire chief in Asheville, North Carolina, and, in 2000, became the director of public safety in Wake County, North Carolina (Raleigh area). He earned his law degree while serving as a volunteer firefighter. He was a charter participant in the National Fire Academy’s Executive Fire Officer program. He is a FEMA Fellow at Harvard’s Kennedy School of Government and is a Center for Public Safety Excellence Chief Fire Officer.

**ALISA ARNOFF** is a founding member of the Chicago law firm of Scalabrino & Arnoff, LLP, which specializes in employment and labor law. She has substantial courtroom experience in employment discrimination, harassment, retaliation, breach of contract and wrongful discharge disputes, wage and unemployment security, and wage-hour matters. She consults regularly on fire/EMS personnel matters throughout the country. She is a member of the International Association of Fire Chiefs Bullying, Harassment and Workplace Violence Prevention Task Group and teaches courses offering strategies and tactics for confronting bullies in the fire service.

John Rukavina will present “Is Your Department Ready for a Pregnant Firefighter/Medic?” at FDIC International in Indianapolis, Indiana, on Monday, April 15, 2024, 11:00 a.m.-12:30 p.m., and Friday, April 19, 2024, 10:30 a.m.-12:15 pm.

Alisa Arnoff will present “Personnel Law for the New Company Officer” on Monday, April 15, 2:00 p.m.-3:00 p.m., and Wednesday, April 17, 10:30 a.m.-12:15 p.m.

85.TXT - 1/2 ISLAND