Highlights of the EEOC's Final Regulations on the Pregnant Workers Fairness Act

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On April 15, 2024, the Equal Employment Opportunity Commission ("EEOC") issued its final regulations interpreting the Pregnant Workers Fairness Act ("PWFA"). The PWFA became effective on June 27, 2023, and the regulations took effect this week on June 18, 2024. On Friday, a federal court in Arkansas denied a motion for a preliminary injunction that would have prohibited the implementation of the regulations, finding that the attorneys general who sued did not have standing to pursue the claim. A district judge in Louisiana, however, has ruled that the EEOC "exceeded its statutory authority" and was not authorized by Congress to regulate abortion-related issues. Litigation surrounding the regulations continues as the EEOC has appealed the injunction issued in an earlier case brought by the state of Texas that prohibited the EEOC from enforcing the PWFA against the state as an employer, but employers need to pay attention to the statute and these regulations.

The PWFA ensures that workers experiencing pregnancy, childbirth, or related medical conditions, such as fertility treatments, postpartum depression, abortions, or pregnancy loss, have the right to reasonable accommodations in the workplace. The PWFA covers employers (as well as unions and employment agencies), employees, applicants, and former employees. The EEOC's final rule is vast, but there are ten topics of note for employers.

1. **Accommodated Pregnancy-Related Conditions:**

The EEOC's regulations expand an employer's obligation to accommodate pregnancy-related conditions beyond what the Americans with Disabilities Act ("ADA") requires for disabilities. The definition of "Covered Conditions" is broad and requires employers to offer reasonable accommodations for employees' "known limitations" based on "physical or mental condition(s) related to, affected by, or arising out of pregnancy, childbirth, or other related medical conditions." Section 1636.3(b)(15) states that such conditions can include "current pregnancy, past pregnancy, potential or intended pregnancy (which can include infertility, fertility treatments, and use of contraception) and labor and child delivery (including vaginal delivery and cesarean section)." There is no requirement that the conditions rise to the level of disability as defined under the ADA.

Pregnancy-related limitations include "a need or a problem related to maintaining a pregnant employee's health or health of the pregnancy." The EEOC provides a non-exhaustive list of related medical conditions, which includes breastfeeding and pumping, low milk supply, miscarriage, stillbirth, having (or choosing not to have) an abortion, preeclampsia, gestational diabetes, ectopic pregnancy, nerve injuries, cesarean section, anemia, dehydration, hemorrhoids, nausea, anxiety, postpartum depression, frequent urination, change in hormone levels, and menstruation. To be covered by the rule, these conditions may be "modest, minor, or episodic" but are only covered if the condition relates to pregnancy or childbirth or is exacerbated by pregnancy or childbirth (although the ADA or other civil rights statutes may also apply).

Limitations become "known" to the employer when the employee or the employee's representative has communicated the limitation to the employer. It is important to note that this communication can occur through an informal conversation between an employee and an employer. The employee must identify both the limitation and the adjustment or change at work due to the limitation. An employee's representative can include a family member, friend, healthcare provider, union representative, or other representative. The limitation may be communicated to a supervisor, manager, someone who has supervisory authority for the employee or who regularly directs the employee's tasks, human resources personnel, or other appropriate official. Once an employer "knows" of an employee's limitation, it should engage in an "interactive process" with the employee or applicant where the parties communicate about the known limitation and the adjustment needed at work.

"Reasonable accommodation" has the same meaning under the PWFA as under the ADA. "Reasonable accommodations" can include:

- more frequent work breaks
- seating for jobs that require standing, or standing for jobs that require sitting
- schedule changes or reduction in hours
- paid or unpaid leave
- remote work
- a reserved parking space
- light duty
- worksite modifications to make the workplace more accessible
- job restructuring
- equipment, uniforms, or device adjustments.

An accommodation must be effective in that it meets the qualified employee's needs to remove a work-related

barrier and it provides an employee with an equal employment opportunity to benefit from all privileges of employment.

An unnecessary delay by an employer in providing accommodation may constitute a violation of the PWFA, even if an employer ultimately provides a reasonable accommodation. To decrease the likelihood of unnecessary delay, an employer can provide an interim accommodation if that accommodation is not leave or time off that the employee did not request.

With lactation, the regulations state that employers must provide breaks and a sufficient workspace to employees who need to pump. The PWFA and the federal PUMP for Nursing Mother's Act require employers to allow breaks to lactating employees "each time such employee has a reasonable need" to express breast milk for up to three years following childbirth. Employees must receive thirty minutes of paid break time for expressing breast milk for their nursing child outside of using other paid break time or mealtimes if they choose. New York employers are also guided by the New York Nursing Mothers in the Workplace Act, which has similar requirements.

2. **Qualified Employees:**

Both the ADA and the PWFA only require employers to accommodate "qualified employees." The ADA defines "qualified employees" as those who "can perform all of the essential functions of the job with or without accommodation." However, under the PWFA, an employee who is unable to perform the essential functions of the job may still be "qualified" if (1) their inability to perform all of the essential functions is "for a temporary period," (2) they would be able to perform the essential functions "in the near future," and (3) the inability to perform the essential functions could be reasonably accommodated. The employer may be required to permit the employee to replace the essential functions they cannot perform with other work, assign the employee to light duty, or temporarily assign them to a vacant role if doing so would not cause undue hardship.

"Temporary" and "near future" are not defined by the PWFA or the EEOC. "Temporary" can include a time period that extends beyond the "near future," and "near future" is determined on a case-by-case basis. For a current pregnancy, "near future" is generally defined as forty weeks from the start of the temporary suspension of an essential function. For conditions other than a current pregnancy, "near future" is not defined as any particular length of time, but if any employee needs indefinite leave, the employee therefore cannot perform the essential job functions in the "near future."

3. **Undue Hardship and "Predictive Assessments":**

The PWFA adopts the ADA standard of undue hardship of accommodations on employers, which is an individualized assessment of “significant difficulty or expense incurred by the covered entity (employer).” The EEOC's final rule provides some considerations to determine if an accommodation causes undue hardship on the employer:

- The nature and net cost of the accommodation.
- The financial resources of the facility, the number of people employed at the facility, and the effect on expenses and resources.
- The type of operations of the covered entity.
- The impact of the accommodation on the operation of the facility, including on the ability of other employees to

perform their duties and the impact of the facility's ability to conduct business.
- How long the employee will be unable to perform the essential function.
- Whether there is other work for the employee to accomplish during that time period.
- The nature of the essential function needing accommodation, including its frequency; whether the employer has ever temporarily suspended the same essential function for other employees; whether there are other employees, temporary employees, or third parties who can perform or be hired to perform the essential functions; and whether the essential functions can be postponed or remain unperformed for any length of time.

The EEOC final rule outlines four types of accommodation requests (“Predictive Assessments”) that, in "virtually all cases," do not impose an undue hardship:

- Allowing an employee to carry or keep water near and drink as needed.
- Allowing an employee to take additional restroom breaks as needed.
- Allowing an employee whose work requires standing to sit or whose work requires sitting to stand.
- Allowing an employee to take breaks to eat and drink as needed.

4. **Supporting Documentation:**

The PWFA is more rigorous than the ADA regarding when an employer can require supporting documentation for requests. Under the PWFA, employers may only request supporting documentation when it is "reasonable under the circumstances," and then they may only request "reasonable documentation," which is "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; and (3) describe the change or adjustment at work needed due to the limitation." Further, an employer may not require that an employee submit to an examination by a healthcare provider of the employer’s choosing.

An employer is not permitted to ask for supporting documentation before allowing any of the Predictive Assessments. Further, the EEOC clarifies that where there is a known limitation, the need for reasonable accommodation is "obvious," and if the employee confirms both the obvious limitation and the need for reasonable accommodation, then requesting documentation is unreasonable.

The EEOC adds other situations where it would not be reasonable to request documentation:

- When the employer already has sufficient information that the employee has such a condition and needs an accommodation due to that condition.
- When the accommodation is related to lactation, specifically, pumping at work or nursing during working hours when the child is in close proximity to the employee.
- When the requested accommodation is available to other employees without supporting documentation.

5. **Leave as an Accommodation:**

The EEOC final rule also states that if there is another onsite accommodation available, it is unlawful to require an employee to take leave unless the employee selects or requests leave as the reasonable accommodation. For this reason, employers should carefully document what accommodations were offered to each requesting employee and what accommodations were selected. If an employee is granted leave, the employee is entitled to return to the

same position unless holding the position open would impose undue hardship on the employer. But remember that, under the Family and Medical Leave Act, there is no “undue hardship” qualification on returning an employee to the same or similar position.

6. **Family Members:**

The PWFA does not require employers to provide accommodations to an employee when the employee's partner, spouse, or family member—not the actual employee—has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.

7. **Other Laws:**

The EEOC final rule provides that the PWFA does not invalidate or limit the powers, remedies, or procedures available under any federal, state, or local law that provides greater or equal protection for individuals affected by pregnancy, childbirth, and related medical conditions.

8. **Religious Exception:**

The PWFA does "not apply to a religious corporation, association, educational institution, or society" with respect to "the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." An employer must assert this exception as a defense, and it will be considered on a case-by-case basis.

9. **Remedies:**

An employee's remedies under the PWFA mirror those under Title VII of the Civil Rights Act and include injunctive relief (restraining an employer from taking certain actions) and other equitable relief, compensatory and punitive damages, and attorney's fees. Employers that demonstrate good faith efforts to work with employees to identify and make reasonable accommodations have an affirmative defense to money damages. It is important that employers document these discussions and any accommodations that are offered to their employees.

10. **Employer Tips:**

Train supervisors about the PWFA. First-level supervisors may be particularly likely to receive accommodation requests and should be trained in how to respond, including how to avoid retaliating against those who request an accommodation.

Some limitations may be minor and may require accommodations that are easy to make.

A worker may need different accommodations as the pregnancy progresses, as they recover from childbirth, or as their related medical conditions improve or worsen.

This article is not a comprehensive review of the EEOC's Pregnant Workers Fairness Act Final Rule, and there may be other implications applicable to your business. If you have any questions or would like further information on the PWFA, please contact anyone on our Employment Practice Team.

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