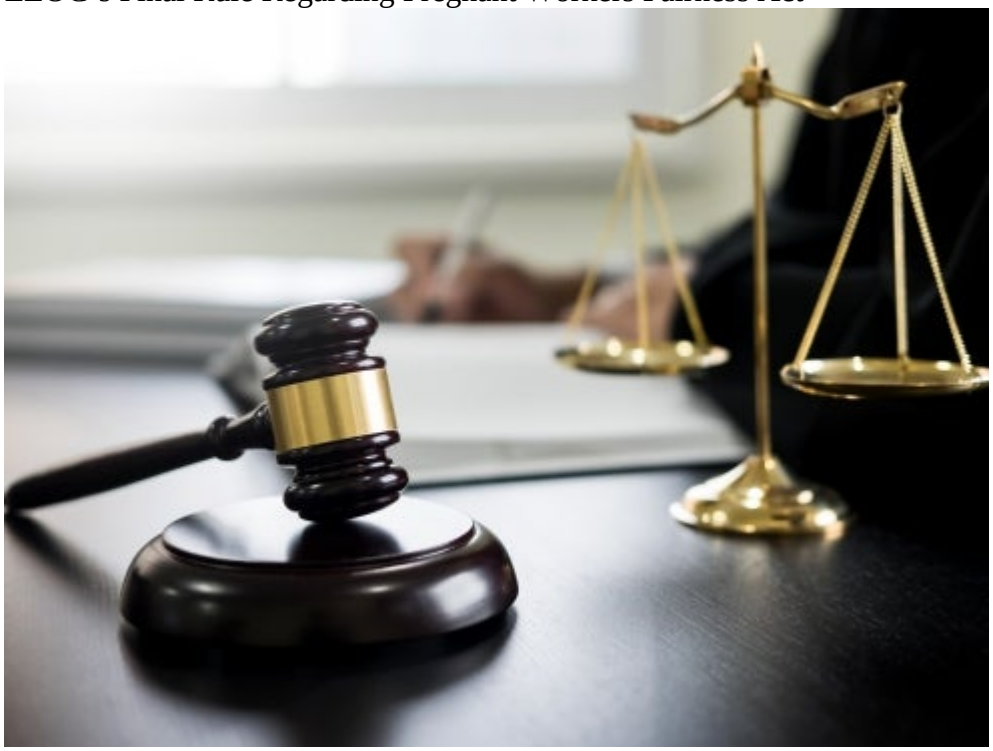
Updates
April 23, 2024
EEOC’s Final Rule Regarding Pregnant Workers Fairness Act



On April 15, 2024, the U.S. Equal Employment Opportunity Commission (EEOC) issued its Pregnant Workers Fairness Act (PWFA) Final Rule, scheduled to take effect on June 18, 2024.

The Final Rule largely leaves in place the expansive protections for applicants and employees outlined in the Proposed Rule published on August 11, 2023. The EEOC also issued Interpretive Guidance on the Pregnant Workers Fairness Act (Interpretive Guidance) that includes examples of physical or mental conditions commonly associated with pregnancy or childbirth, possible reasonable accommodations, and situations where an employer's actions could violate the PWFA.

EEOC Chair Charlotte Burrows said, "The bottom line is that no one should have to risk their job or their health just because they are pregnant, recovering from childbirth or dealing with a related medical condition."

What Is the PWFA?

As we have detailed previously, the PWFA requires employers with at least 15 employees to provide reasonable accommodations to qualified employees with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions absent undue hardship on the operation of the business of the covered entity. Importantly, the PWFA goes beyond the Americans with Disabilities Act (ADA) by establishing new and different standards governing an employer's obligation to provide "reasonable accommodations" for an employee's limitations. However, the regulations draw heavily on court decisions and agency interpretations of Title VII and ADA.

The Final Rule

The 408-page Final Rule breaks down the requirements for an employee to be eligible for PWFA protections, which include:

- **Known.** An impairment is "known" where the employee, or the employee's representative,[1] communicates the limitation(s) to the employer; the regulations include supervisors, managers, human resources personnel, persons having supervisory authority or who regularly direct the employee's tasks, or "another appropriate official" as other points of contact for employees. Importantly, the employee's communication need not be written, use any specific form, or contain "magic" words for the limitation to be deemed "known."
- **Limitation.** A limitation is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. Unlike the ADA, the PWFA does not require that a limitation "substantially limits a major life activity" to qualify for protections. Rather, the physical or mental condition may be "a modest, minor, and/or episodic impediment or problem." The EEOC has made clear that this includes planned and unplanned medical appointments and that employers should broadly construe whether an employee has a qualifying "limitation."
- **Related to, affected by, or arising out of.** The Final Rule supplies broad applicability to the PWFA; thus pregnancy, childbirth, or related medical conditions do not need to be the sole, the original, or even a substantial cause of the physical or mental condition causing the limitation. When an employer doubts whether the condition falls within the PWFA's reach, the EEOC recommends that the employer engage in the interactive process to learn more.
- **Pregnancy, childbirth, and related medical conditions** are terms already used in Title VII, as amended by the Pregnancy Discrimination Act (PDA), and that the PWFA Final Rule purports to give the same meaning as it has in the PDA-amended Title VII context. The Interpretive Guidance provides a nonexhaustive list of examples, which includes current pregnancy, past pregnancy, potential or intended pregnancy (which can include infertility, fertility treatments, and the use of contraception), labor and childbirth (including vaginal delivery and cesarean section), lactation (including breastfeeding and pumping), miscarriage, stillbirth, having or choosing not to have an abortion, preeclampsia, gestational diabetes, and HELLP (hemolysis, elevated liver enzymes, and low platelets) syndrome.
- **Qualified employee and reasonable accommodations.** The PWFA expands these definitions from the traditional ADA analysis. Where an employee who could not perform an essential function of the job would not qualify for ADA protections, the PWFA requires that employers temporarily[2] suspend an essential function that the employee cannot then perform but would be able to in the near future.[3] In those situations, the Interpretive Guidance suggests that the work may be shifted to a colleague while the employee's workload is supplemented with functions the employee can perform. The Interpretive Guidance also provides a nonexhaustive list of reasonable accommodations that employers and employees should consider during the interactive process, including frequent breaks, sitting/standing, telework, providing a reserved parking space, and altering the essential functions of the job, among others.
- **Undue hardship,** which is defined the same way as under the ADA.
- **Requesting supporting documentation.** The PWFA limits an employer's ability to request supporting documentation to those situations where it would be "reasonable under the circumstances" to find out if the condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions and needs adjustments at work to accommodate the limitation. Documentation requests may only seek documentation that is reasonable. The Interpretive Guidance notes that it would be unreasonable to seek documentation in certain situations, such as where the condition and limitation are obvious, known, are for "predictable assessments,"[4] involve lactation, or when the requested modification is one that employees without limitations would ordinarily receive without documentation.

Opposition to the Final Rule

EEOC Commissioner Andrea Lucas, who voted against adopting the rule, issued a 15-page statement outlining her opposition, arguing that the Final Rule "broaden[s] the scope of the statute in ways that, in my view, cannot reasonably be reconciled with the text."

Lucas continued, stating "the rule fundamentally errs in conflating pregnancy and childbirth accommodation with accommodation of the female sex, that is, female biology and reproduction. The Commission extends the new accommodation requirements to reach virtually every condition, circumstance, or procedure that relates to any aspect of the female reproductive system." Lucas continued, stating, "The Commission chose not to structure the final rule in a manner that realistically allows for severability of its objectionable provisions from its reasonable and rational components."

In line with Commissioner Lucas' opposition, court challenges can be expected.

What's Next?

Employers should ensure both that they are providing leave in accordance with the Final Rule and that their policies are up to date. Employers should consider training their human resource personnel on how to best handle requests for accommodations and should seek guidance from counsel to ensure compliance.

Endnotes

[1] The term "employee's representative" encompasses any representative of the employee, including a family member, friend, union representative, healthcare provider, or other representative. The representative need not have the employee's actual permission before communicating with the employer about the limitation, depending on the situation, such as where the employee is incapacitated.

[2] Temporary means "lasting for a limited time, not permanent, and may extend beyond 'in the near future.'"

[3] "In the near future" is defined to mean "generally 40 weeks from the start of the temporary suspension of an essential function" (*i.e.*, the duration of a full-term pregnancy), though the definition may differ depending on factors such as the known limitation and the employee's position.

[4] Predictable Assessments are a limited number of simple modifications that do not impose an undue hardship, such as allowing the employee to drink water as needed, take additional restroom breaks, sit as needed, or to take breaks to eat or drink as needed.

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