

Insights: Alerts

EEOC Guidance Expands the Scope of the Pregnant Workers Fairness Act and Gives Rise to Subsequent Litigation

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On June 27, 2023, the Pregnant Workers Fairness Act (“PWFA”) went into effect requiring employers with 15 or more employees to provide “reasonable accommodations,” or changes at work, for a worker’s known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation would cause the employer an undue hardship. The PWFA expands existing protections against pregnancy discrimination under Title VII of the Civil Rights Act of 1964 (“Title VII”) and access to reasonable accommodations under the Americans with Disabilities Act (“ADA”). After passing the PWFA, Congress directed the EEOC to issue regulations and guidance for the PWFA within one year of the effective date. In August 2023, the EEOC issued a notice of proposed rulemaking and received approximately 100,000 comments on the proposed rule. On April 15, 2024, the EEOC issued its 408-page final rule and guidance implementing the PWFA. The rule was published April 19, 2024, on the Federal Register, and was set to take effect 60 days later, on June 18, 2024. However, on April 25, 2024, the rule was challenged in the U.S. District Court for the Eastern District of Arkansas by 17 states because of the rule’s inclusion of abortions as a pregnancy-related medical condition. The case asserts constitutional claims and seeks a preliminary injunction enjoining the EEOC and any other agency or employee of the United States from enforcing or implementing the final rule’s abortion-accommodation.

We’ve highlighted eight points employers should know about the final rule:

1. The definition of “pregnancy, childbirth, or related medical conditions” provided in the rule is very broad and covers a wide range of conditions, including a person’s decision to have or not to have an abortion, lactation, endometriosis, infertility, fertility treatments, and miscarriages. The definition of “related medical conditions” can include not only new physical and mental conditions originating during pregnancy, but also pre-existing conditions that are exacerbated during pregnancy or childbirth. Some conditions may be covered under the PWFA, even if they do not meet the definition of “disability” under the ADA. As noted, the pending litigation attacks the EEOC’s broad definition of “related medical conditions” because it includes abortion.
2. There is no requirement that the physical or mental condition that leads the employee or applicant to request an accommodation rise to a specific severity threshold.

3. The rule provides numerous specific examples of potential reasonable accommodations under the PWFA, including frequent breaks, sitting/standing, schedule changes, part-time work, paid/unpaid leave, telework, parking changes, light duty, modifications of work environment, acquiring or modifying equipment, uniforms, or devices, and adjusting or modifying examinations or policies.
4. Under the PWFA, reasonable accommodations may include temporarily suspending essential functions of a position if the employee can perform the essential functions “in the near future.” The PWFA did not define the terms “temporary” or “in the near future,” but the new EEOC rules state that “temporary” means “lasting for a limited time, not permanent, and may extend beyond ‘in the near future.’” The rule defines that when an individual is seeking an accommodation related to a current pregnancy, the term “in the near future” means “generally forty weeks from the start of the temporary suspension of an essential function.” The rule does not define “in the near future” for childbirth or related medical conditions, only noting that it does not mean indefinitely and that whether to suspend essential functions as a reasonable accommodation is determined on a case-by-case basis. Temporarily suspending an essential function of a position could have significant implications within a workplace and could require the employer to reassign the function(s) to another worker, assign other tasks to the employee receiving the accommodation to replace the essential function(s), and/or temporarily transfer the employee to a different position.
5. The rule identifies a list of accommodations that are *per se* reasonable and do not impose an undue hardship. The rule refers to such accommodations as “predictable assessment” accommodations and they include: (1) allowing an employee to carry or keep water near their work station and drink as needed; (2) allowing an employee to take restroom breaks as needed; (3) allowing an employee who works in a standing job position to sit as needed and vice versa; and (4) allowing an employee to take breaks to eat and drink as needed.
6. The EEOC’s rule discusses an “interactive process,” related to an employee’s request for accommodation, that largely tracks the ADA’s interactive process. However, the EEOC includes union representative in the categories of employee representatives who may seek accommodation on an employee’s behalf. The EEOC rule also emphasizes that due to the temporary nature of pregnancy-related conditions, addressing requests for reasonable accommodations should be done expeditiously and employers should consider granting accommodations on an interim basis while it waits for additional documentation from the employee/applicant or in evaluating the burden of the accommodation sought.
7. The EEOC rule provides a different standard from the ADA for supporting medical documentation. Under the rule, an employer may obtain a medical documentation only if it is reasonable under the circumstances to determine if the employee has a qualifying condition and needs an adjustment or change at work due to the limitation. The final rule includes a prohibition on employers’ seeking supporting documentation in five instances: (1) when the limitation and need for a reasonable accommodation is obvious; (2) when the employer already has sufficient information to support a known limitation related to pregnancy; (3) when the request is for one of the four “predictable assessment” accommodations; (4) when the request is for a lactation accommodation; and (5) when employees without known limitations under the PWFA receive the requested modification under the employer’s policy or practice without submitting supporting documentation.
8. Finally, the rule outlines five prohibited practices under the PWFA: (1) failure to provide reasonable accommodations; (2) requiring an employee or applicant to accept an accommodation; (3) denying equal

employment opportunities; (4) requiring the employee to take leave when other accommodations are available; and (5) taking adverse action against a worker for seeking or using a reasonable accommodation.

Final Thoughts for Employers

As identified above, the effective date of the final rule is currently June 18, 2024. While pending litigation may ultimately change, or otherwise impact, this effective date, the PWFA itself remains in place. Further, there are steps that employers can take to ensure compliance with the statute and any rule that ultimately goes into effect. Employers should consider the company's approach to providing pregnancy-related accommodations, particularly related to the "predictable assessments" accommodation and newly-covered conditions such as endometriosis, fertility treatments, and miscarriages. Employers should review their accommodation policies and determine whether existing policies need updating or whether their company should create specific pregnancy or childbirth-related accommodation request procedures and processes. Lastly, employers should ensure that personnel are informed of, and trained on, the changes in addressing pregnancy-related accommodations now governed by the PWFA and the EEOC's new rule.

Our team will continue to monitor any additional updates or material put out by the EEOC or federal courts where PWFA litigation is pending and update this Legal Alert accordingly. If you have any questions about the new rule or this alert, please feel free to contact the member of our Labor and Employment team with whom you are regularly in contact.