Special Report

Pregnant Workers Fairness Act Final Regulations Released

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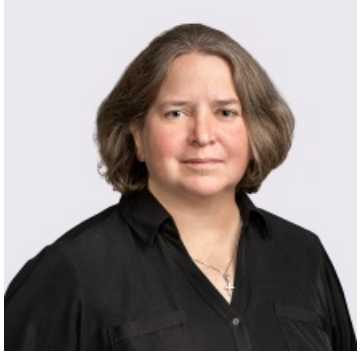

The Equal Employment Opportunity Commission (EEOC) released the text of the final regulations and interpretative guidance implementing the Pregnant Workers Fairness Act (PWFA) on April 15, 2024. The final regulations are expected to be formally published in the April 19, 2024, Federal Register and will be effective 60 days later.

The EEOC received more than 100,000 public comments, including comments from Jackson Lewis, in response to the Commission's notice of the proposed regulations issued on Aug. 11, 2023. Although largely unchanged from the proposed regulations, the final regulations provide important clarifications and insights into how the EEOC will enforce the law. Discussed below are some key points employers need to know about the final regulations.

Key PWFA Requirements

The PWFA, which went into effect on June 27, 2023, requires employers with at least 15 employees and other covered entities to provide reasonable accommodations to a qualified employee's or applicant's known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause undue hardship on the operation of the employer's business.

Qualified Employee

Under the PWFA, an employee has two ways to establish they are a "qualified employee":

1. Like under the Americans With Disabilities Act (ADA), "an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position" is qualified.

2. If an employee (or applicant) cannot perform all essential job functions even with reasonable accommodation, the employee can be qualified for accommodations under the PWFA if: (a) the inability to perform an essential job function is for a *temporary* period; (b) the essential job function(s) could be performed in the *near future;* and (c) the inability to perform the essential function(s) can be *reasonably accommodated.* The Act, however, does not define "temporary" or "in the near future." Several commentors raised concerns about the EEOC's definition of these terms in the proposed regulations.

Like the proposed regulations, the final regulations state that "temporary" means "lasting for a limited time, not permanent, and may extend beyond 'in the near future.'" Unlike the proposed regulations, however, the final regulations state that assessing whether all essential job functions can be performed in the near future depends on the circumstances:

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- For a current pregnancy, "in the near future" is generally defined as 40 weeks from the start of the temporary suspension of an essential function.

- For conditions other than a current pregnancy, "in the near future" is not defined as any particular length of time. However, the preamble to the final regulations explains that an employee who needs indefinite leave cannot perform essential job functions "in the near future."

The final regulations explain that employers should consider whether an employee will be able to perform the essential functions "in the near future" each time an employee asks for an accommodation that requires suspension of an essential job function.

Ultimately, whether an employee is "qualified" involves a fact-sensitive evaluation whether the temporary suspension of essential job functions can be reasonably accommodated by the employer. This is significantly different from the ADA reasonable accommodation obligation and may involve, as the final regulations state, removing essential job functions and other arrangements including, but not limited to, requiring the employee perform the remaining job functions and other functions assigned by the employer, temporarily transferring the employee to another job or assigning the employee to light or modified duty, or allowing the employee to participate in an employer's light or modified duty program.

Accommodations Only Required for Individual With Limitation

The EEOC explains that the regulations do not require employers to provide accommodations to an employee when an employee's partner, spouse, or family member — not the employee themselves — has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. For clarity, the EEOC revised the final regulations' definition of "limited" to state the limitation must be the specific employee.

Known Limitations

Employers are only obligated under the PWFA to accommodate an individual's "known limitation."

A "limitation" is defined as a "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, of the specific employee in question." The condition may be "modest, minor, and/or episodic, and does not need to meet the definition of "disability" under the ADA.

It becomes "known" to the employer when the employee or the employee's representative has communicated the limitation to the employer. An employee's representative may include a family member, friend, healthcare provider, union representative, or other representative.

The limitation may be communicated to a supervisor, a manager, someone who has supervisory authority for the employee or who regularly directs the employee's tasks (or the equivalent in the case of an applicant), human resources personnel, or other appropriate official or by following the steps in the employer's policy to request an accommodation.

This communication need not be in any specific format and may also be oral.

Pregnancy, Childbirth, Related Medical Conditions

Although the EEOC acknowledged receiving many comments on the scope of the proposed definition of "pregnancy, childbirth or related medical conditions," it made no substantive changes to the definition in the final regulations.

"Pregnancy" and "childbirth" are still defined as including current pregnancy, past pregnancy, potential or intended pregnancy (which can include infertility, fertility treatments and the use of contraception), labor, and childbirth (including vaginal and cesarean delivery).

The term "related medical conditions" continues to be defined as conditions that are "related to, are affected by, or arise out of pregnancy or childbirth." The regulations provide the following non-exhaustive list of examples: termination of pregnancy, including by miscarriage, stillbirth, or abortion; lactation and conditions related to lactation; menstruation; postpartum depression, anxiety or psychosis; vaginal bleeding; preeclampsia; pelvic prolapse; preterm labor; ectopic pregnancy; gestational diabetes; cesarean or perineal wound infection; maternal cardiometabolic disease; endometriosis; changes in hormone levels; and many other conditions.

The final regulations also reference related medical conditions that are not unique to pregnancy or childbirth, such as chronic migraine headaches, nausea or vomiting, high blood pressure, incontinence, carpal tunnel syndrome, and many other medical conditions. These conditions are covered by the PWFA only if the condition relates to pregnancy or childbirth or are exacerbated by pregnancy or childbirth, although the ADA or other civil rights statutes may apply.

Documentation

The final PWFA regulations continue to provide for a "reasonableness" standard in evaluating the circumstances under which an employer may request documentation from an employee. The final regulations, however, modify the definition of "reasonable documentation." An employer may only request the "minimum documentation" necessary to confirm the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and describe the adjustment or change at work due to the limitation.

In addition to stating when an employer can ask for documentation, the PWFA regulations add a paragraph regarding an employee's self-confirmation of their pregnancy status. It provides that an employer must accept as sufficient an employee's self-confirmation when: (1) the pregnancy is obvious; or (2) an employee seeks one of the "predictable assessment" accommodation requests set forth in the regulations (discussed below).

The final PWFA regulations make clear the circumstances where it is not reasonable to seek supporting documentation. These circumstances include when: (1) the limitation and adjustment or change needed is obvious and the employee provides self-confirmation; (2) the employer has sufficient information to determine whether the employee has a qualifying limitation and needs an adjustment or change due to the limitation; (3) when the employee is pregnant a "predictable assessment"; (4) the reasonable accommodation relates to a time and/or place to pump or to nurse during work hours, and the employee provides self-confirmation; or (5) the requested accommodation is

available to employees without known limitations under the PWFA pursuant to a policy or practice without submitting supporting documentation.

Importantly, the same prohibitions on disability-related inquiries and medical examinations as well as the protection of medical information enforced under the ADA apply with equal force to documentation collected under the PWFA. Employers should ensure they continue to limit inquiries to only those that are job-related and consistent with business necessity. Employers should also treat all documentation relating to a PWFA accommodation request like they treat ADA documentation — maintain it confidentially and separate from an employee's personnel file.

Reasonable Accommodations

The PFWA requires employers to provide reasonable accommodations, which the final regulations define to be generally consistently with the ADA except for temporarily excusing or eliminating the performance of an essential job function. Otherwise, the rule provides that a reasonable accommodation is a modification or adjustment that is "reasonable on its face, *i.e.,* ordinarily or in the run of cases" if it appears to be "feasible" or "plausible." An accommodation also must be effective in meeting the qualified employee's needs to remove a work-related barrier and provide an employee with equal employment opportunity to benefit from all privileges of employment.

The final regulations include examples of requests that may be reasonable. These include schedule changes due to morning sickness or to treat medical issues following delivery, adjustments to accommodate restrictions for lifting or requests for light duty, time and/or space to pump or nurse during work hours, or time off to recover from childbirth.

Lactation Accommodations

The EEOC's final regulations require reasonable accommodation for lactation beyond what may be required under the Providing Urgent Maternal Protection for Nursing Mothers Act (PUMP Act). The PUMP Act generally requires reasonable break time and space shielded from view and free from intrusion for a nursing mother to express breast milk. The final PWFA regulations provide a non-exhaustive list of examples of accommodations relating to lactation, including space for pumping that is in reasonable proximity to a sink, running water, and refrigeration for storing milk.

The final regulations add nursing during working hours (as distinct from pumping) to the list of potentially reasonable accommodations. In the comments explaining this addition, the EEOC cautioned that accommodations for nursing mothers during work hours address situations where the employee and child are in close proximity in the normal course of business, such as where the employee works from home or where the employer offers on-site daycare. The EEOC stated this is not intended to create a right to proximity to nurse because of an employee's preference.

Predictable Assessments

Like the proposed regulations, the final regulations recognize four "predictable assessments" that will not impose an undue hardship in "virtually all cases":

1. Allowing an employee to carry or keep water near to enable them to drink;

2. Permitting an employee to take additional restroom breaks as needed;

3. Allowing an employee whose work requires standing to sit and whose work requires sitting to stand as needed; and

4. Allowing an employee to take breaks to eat and drink as needed.

Despite stating the predictable assessments above will not "in virtually all cases" impose an undue hardship, the EEOC clarified this does not mean such requests are reasonable per se. The EEOC recognized that in certain industries, these predictable assessments may cause an undue hardship. Accordingly, employers may still conduct an individualized assessment of a predictable assessment accommodation request. However, the final regulations make clear that any such individualized assessment should be particularly simple and straightforward.

Many individuals and organizations that submitted comments on the proposed regulations suggested the addition of other types of predictable assessment accommodations, including dress code modifications, minor workstation modifications, proximity to a restroom, permitting eating and drinking at a workstation, rest breaks, and personal protective equipment. Although noting agreement with the commenters and stating that employers should be able to provide such requests with "little difficulty," the EEOC declined to expand the list of predictable assessments beyond the four originally listed that in "virtually all cases" will be considered reasonable and will not pose an undue hardship. In response to comments objecting to predictable assessments based on different challenges by industry, the EEOC guidance recognizes that an employer in certain industries may assert an accommodation request otherwise deemed to be a predictable assessment causes the employer an undue hardship and may deny the request.

Undue Hardship

The EEOC adopted the same standard for undue hardship in the final regulations as was in the proposed regulations. When an employee can perform all their essential job functions, the EEOC stated that undue hardship has the same meaning as under the ADA and generally means significant difficulty or expense for the employer's operation. If an employee cannot perform all essential functions and the accommodation is temporary suspension of an essential job function, the employer needs to consider the ADA definition of undue hardship and the following relevant factors: (1) the length of time the employee or applicant will be unable to perform the essential function(s); (2) whether there is work for the employee to accomplish by allowing the employee to perform all the other functions of the job, transferring the employee to a different position, or otherwise; (3) the nature of the essential function, including its frequency; (4) whether the covered entity has temporarily suspended the performance of essential job functions for other employees in similar positions; (5) whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function(s); and (6) whether the essential function(s) can be postponed or remain unperformed for any length of time and for how long.

EEOC Interpretative Guidance

The EEOC's final regulations include an appendix entitled "Appendix A to Part 1636—Interpretative Guidance on the Pregnant Workers Fairness Act" (Interpretative Guidance). The Interpretative Guidance, which becomes part of the final regulations, has the same force and effect as the final regulations.

The Interpretative Guidance addresses the major provisions of the PWFA and its regulations and explains the main concepts pertaining to an employer's legal requirements under the PWFA to make reasonable accommodations for known limitations (physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions). It represents the EEOC's interpretation of the PWFA and, as stated in comments to the final regulations, the EEOC will be guided by the Interpretive Guidance when enforcing the PWFA. The Interpretative Guidance includes many examples and other practical guidance illustrating common workplace scenarios and how the PWFA applies.

Remedies, Enforcement

The final regulations' remedies and enforcement are the same as proposed. Remedies under the PWFA mirror those under Title VII of the Civil Rights Act and include injunctive 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.

PWFA's Relationship to Other Federal, State, Local Laws

The final regulations provide 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, or related medical conditions. About 40 states and cities have laws protecting employees and applicants from discrimination due to pregnancy, childbirth, and related medical conditions. Accordingly, employers should evaluate whether state and/or local law may provide greater rights and obligations than the PWFA. To the extent such laws provide greater obligations, the PWFA final regulations require employers to comply with both the PWFA and analogous state and local law.

Jackson Lewis invites you to a complimentary webinar on the PWFA final regulations on May 10 at 1:00 p.m. ET.

If you have any questions about the PWFA, the implications of the final regulations for your organization, or the many state and local laws, please contact a Jackson Lewis attorney.