

EEOC Issues Final Rule and Interpretive Guidance on Pregnant Workers Fairness Act

As noted in our [May 3, 2023](#) and [August 14, 2023](#) client alerts, Congress enacted the Pregnant Workers Fairness Act (PWFA) in late 2022, expanding protections for pregnant workers. Pursuant to the Act, the Equal Employment Opportunity Commission (EEOC) was directed to make rules to implement the statute. On April 15, 2024, the EEOC issued its [final rule and interpretive guidance](#), which will go into effect on June 18, 2024.

When the EEOC published its proposed regulations, it received approximately 100,000 public comments, including several criticisms of its broad interpretation of the PWFA. Despite these criticisms, the EEOC maintained its far-reaching position, the highlights of which will be discussed in this alert.

To whom does the PWFA apply?

As a reminder, the PWFA requires a covered entity to provide reasonable accommodations to qualified employees' known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The PWFA defines "covered entity" using the definition of "employer" from Title VII of the Civil Rights Act 1964, such that "covered entity" includes public and private employers with 15 or more employees.

Under the PWFA, a "qualified employee" is, as under the Americans with Disabilities Act of 1980 ("ADA"), an employee or applicant (hereafter, "employee") who, with or without reasonable accommodation, can perform the essential functions of the job. The PWFA definition also allows an employee to be qualified even if they cannot perform one or more essential functions (using the same definition as in the ADA, that is, the fundamental duties) of the job if the inability to perform the essential function is (1) temporary, (2) the essential function could be performed in the near future, and (3) the inability to perform the essential function can be reasonably accommodated.

A "known limitation" is defined in the PWFA as a "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions," and it was with reference to this latter phrase that the EEOC garnered the most criticism. The EEOC retained its expansive reading of this phrase to include in its non-exhaustive list: current pregnancy, past pregnancy, potential pregnancy, lactation (and conditions related to lactation such as mastitis), use of contraception, menstruation, fertility and infertility treatments, ante- and post- partum anxiety or depression, miscarriage, stillbirth, or abortion, amongst other conditions.

The EEOC confirmed that under the PWFA, the physical or mental condition on which the employee bases their reasonable accommodation request can be modest, minor, and/or episodic, and need not rise to the level of severity applied under the ADA.

What is required under the PWFA?

As mentioned above, under the PWFA, covered employers are required to provide reasonable accommodations for qualified employees, unless it would impose an undue hardship – that is, a significant difficulty or expense – on the employer. The EEOC provides multiple examples of reasonable accommodations including:

- frequent breaks;
- sitting/standing;
- schedule changes, part-time work, and paid and unpaid leave;

- telework (remote work, or “work from home”);
- reserved parking;
- assignment to light duty;
- job restructuring (e.g., removing any nonessential job function that requires heavy physical labor);
- temporarily suspending one or more essential functions;
- making existing facilities accessible or modifying the work environment (e.g., providing access to an elevator not normally used by employees, providing a fan to regulate temperature, moving an employee’s workspace closer to a bathroom or away from exposure to fumes, providing lactation facilities, etc.);
- acquiring or modifying equipment, uniforms, or devices; and
- adjusting or modifying examinations or policies (e.g., postponing examinations that require physical exertion or increasing the time or frequency of breaks, etc.).

To increase efficiency and decrease the time it takes for employees to receive these accommodations, the EEOC also identified “predictable assessments,” which are “common-sense, low-cost” reasonable accommodations that will, in virtually all cases, be found to be reasonable accommodations that do not impose undue hardship. Furthermore, the EEOC considers that delay in providing the following predictable assessments will “virtually always” result in a finding of unnecessary delay and a violation of the PWFA:

- i. carrying or keeping water near and drinking, as needed;
- ii. allowing additional restroom breaks, as needed;
- iii. allowing sitting for those whose work requires standing and standing for those whose work requires sitting, as needed; and
- iv. allowing breaks to eat and drink, as needed.

How are reasonable accommodations requested and implemented?

The EEOC rules encourage an informal system for providing reasonable accommodations: employees need not make their request for accommodation in writing, in a specific format, use specific words, or be on a specific form for their condition to be “communicated to the employer”. Employees may verbally communicate their physical or mental condition and the reasonable accommodation required, and the EEOC continues to encourage employers and employees to engage in an informal “interactive process,” in which the employer can ascertain the limitation under the PWFA, and the required accommodation, stating that no rigid steps must be followed. The interactive process, as informal as it may be, is nevertheless critical, as the PWFA prohibits a covered entity from requiring an employee to accept a reasonable accommodation other than one arrived at through the interactive process.

The EEOC rules also remind employers that the PWFA does not require employers to seek supporting documentation regarding an employee’s requested reasonable accommodations, and even limits the circumstances in which employers may request such documentation. Seeking documentation must be reasonable for the employer. It is not reasonable if:

- i. the limitation and need for a reasonable accommodation is obvious;
- ii. the employer already knows about the limitation and requested accommodation (e.g., the employee has already provided documentation previously);
- iii. the employee is currently pregnant and seeking a “predictable assessment” (see above);
- iv. the reasonable accommodation regards pumping or nursing at work;
- v. the accommodation is ordinarily available to employees without documentation under the employer’s own policy or practice (e.g., if an employer’s policy is that employees only require documentation for use of leave for 3 or more consecutive days, it would not be reasonable to require an employee seeking a leave for less than 3 days due to pregnancy, childbirth or a related medical information, to provide documentation).

Furthermore, “reasonable documentation” is limited to that which: (1) confirms the physical or mental condition; (2) confirms that the physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth or related medical conditions (the “limitation”); and (3) states that the reasonable accommodation is needed due to the limitation.

Finally, the EEOC also provides further guidance on five prohibited practices under the PWFA, some of which have already been mentioned above:

- i. failing to provide any reasonable accommodations;
- ii. requiring an employee to accept a reasonable accommodation (other than one arrived at through the interactive process);
- iii. denying equal employment opportunities;
- iv. requiring the employee to take leave when other accommodations are available; and
- v. adverse action on account of requesting or using a reasonable accommodation.

Key Takeaways

As mentioned previously, as New York State and New York City laws already require employers to provide reasonable accommodations to pregnant employees, the final EEOC rules are unlikely to have great practical impact on New York employers who already comply with New York law. Nevertheless, particularly given the very informal nature in which accommodations may be requested, it is worth ensuring that policies are up-to-date, and supervisors are informed of the need for an interactive process and of the “predictable assessments” to be implemented without delay.

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