VOLUME 78 ◆ NUMBER 6

Employee Benefit Plan Review

New Equal Employment Opportunity Commission Pregnant Workers Rule Adds Requirements

By Brian D. Pedrow and Mia Kim

The U.S. Equal Employment Opportunity Commission (EEOC) has issued its final regulations[1] for the Pregnant Workers Fairness Act (PWFA), providing explanation and guidance for employers in implementing the PWFA in their workplaces and understanding how the law will be enforced. The new rules took effect on June 18, 2024, although the PWFA itself has been in effect since June 27, 2023.

The Upshot

- The PWFA provides expanded workplace protections for employees with conditions related to pregnancy or childbirth. While many of its concepts are similar to the requirements of the Americans with Disabilities Act (ADA), the PWFA mandates broader protections in several important respects.
- Covered conditions under the PWFA are broad, do not necessarily need to meet the definition of disability under the ADA, and may be considered modest, minor, or episodic. Controversially, and now subject to legal challenge, the PWFA may require employers to provide reasonable accommodations related to pregnancy terminations, including abortion.
- In some instances – and unlike the ADA – employers may be required to temporarily remove essential job functions as an accommodation, provided an employee is able to perform the essential functions in the near future.
- Employers are subject to strict limitations on their ability to seek supporting documentation related to PWFA accommodations, which can only be requested under "reasonable" circumstances.

The Regulations

The EEOC's regulations, and accompanying interpretive guidance, are meant to provide employers clarity on how the EEOC will enforce the PWFA. The PWFA applies to employers with 15 or more employees and implements expanded protections for pregnancy, childbirth, and related conditions. The final regulations further provide additional direction on the extensive protections of the PWFA, which imposes obligations on employers beyond the requirements of the ADA. Most notably, these include:

- Coverage of conditions is significantly broader and more inclusive under the PWFA;

- Employers may be required to temporarily remove an employee's essential functions under the PWFA; and
- The PWFA sets new limitations on an employer's ability to seek supporting documentation.

Covered Conditions

The PWFA requires covered employers to reasonably accommodate a qualified employee's "known limitations," unless such an accommodation would pose an undue hardship on the employer. Known limitations are physical or mental conditions related to pregnancy, childbirth, or related medical conditions that have been communicated to the employer by the employee or their representative. The PWFA adopts a broad definition of covered conditions, which do not necessarily need to meet the definition of a disability under the ADA.

The PWFA applies to employers with 15 or more employees and implements expanded protections for pregnancy, childbirth, and related conditions.

Conditions related to "pregnancy" and "childbirth" include current pregnancy, past pregnancy, potential and intended pregnancy (which can include infertility, fertility treatments, and the use of contraception), and labor and childbirth (including vaginal delivery and cesarean section).

"Related medical conditions" do not necessarily need to be caused solely, originally, or substantially by pregnancy or childbirth. Such covered conditions may develop, become exacerbated, or pose a new risk during pregnancy, childbirth, or during an employee's postpartum period. The regulations include an expansive and non-exhaustive list of related medical conditions that may be covered, including several that employers may not have initially expected to fall under the scope of the act:

- Termination of pregnancy (including via miscarriage, stillbirth, and abortion);
- Gestational diabetes, endometriosis, and HELLP (hemolysis, elevated liver enzymes and low platelets) syndrome;
- Nausea, vomiting, hyperemesis gravidarum (intractable vomiting during pregnancy), and dehydration;
- Chronic migraines, high blood pressure, and preeclampsia;
- Depression, anxiety, or psychosis during pregnancy and postpartum;
- Lactation and conditions related to lactation;
- Menstruation or vaginal bleeding (particularly where there is a nexus to a current or prior pregnancy or childbirth);
- Frequent urination and incontinence; and
- Sciatica, lumbar lordosis, carpal tunnel syndrome, and edema.

Covered conditions may be modest, minor, or episodic, and do not necessarily need to rise to the level of severity required to meet the definition of a "disability" under the ADA. The EEOC intentionally created a broad standard, noting that "the PWFA was intended to cover all types of limitations, including those that are minor and those that are needed to maintain the employee's health of the health of the pregnancy."

With respect to the controversial inclusion of abortion as a covered condition, the EEOC took the stance that its approach is consistent with the EEOC's and courts' longstanding interpretation of the phrase, "pregnancy, childbirth, or related medical conditions" in Title VII of the Civil Rights Act of 1964.

Temporary Suspension of Essential Functions

Employees, including job applicants, can qualify for the protections of the PWFA in two different ways.

First, consistent with the ADA, the PWFA covers individuals who are able to perform the essential functions of their role, with or without a reasonable accommodation.

The second definition is broader – departing from the ADA approach – by covering individuals who are:

- Unable to perform an essential function of their role for a "temporary" period of time;
- Able to perform that essential function "in the near future"; and
- Able to be reasonably accommodated by the employer for their inability to perform essential functions.

Thus, an employee seeking a temporary suspension of an essential job function may be qualified if they can perform the function in the near future and the employer can reasonably accommodate a temporary inability to perform the function without incurring an undue hardship.

The regulations describe "temporary" as "lasting for a limited time, not permanent, and may extend beyond 'in the near future.'" When suspending an essential function due to a current pregnancy, the EEOC presumes that "in the near future" means generally 40 weeks from the start of the temporary suspension of an essential function, tying the timeframe to the typical length of a full-term pregnancy. Importantly, this presumption does not require an automatic suspension of essential functions for 40 weeks, but merely establishes that pregnant employees will be considered qualified employees for that timeframe.

For circumstances other than current pregnancy, such as childbirth or a related medical condition, the

standard of "in the near future" must be made on a case-by-case basis, but it will not be satisfied where an employee requires suspended essential functions for an indefinite period of time.

An employee may require the temporary suspension of an essential function multiple times, such as during pregnancy, recovering from childbirth, and returning to work. The determination of "in the near future" should be made separately each time the employee asks for an accommodation requiring a suspended essential function.

Identifying Reasonable Accommodations

Under the PWFA, reasonable accommodation includes modifications or adjustments to the job application process or work environment that allow qualified employees with known limitations to be considered for positions, perform essential functions, and enjoy equal benefits and privileges of employment as similarly situated employees.

As discussed above, such reasonable accommodation can include the temporary suspension of an essential function. The regulations provide additional examples of potential reasonable accommodations, including:

- Frequent breaks (such as, due to fatigue or nursing);
- Seating for jobs that require standing;
- Schedule changes (such as, part-time hours or changes to accommodate medical appointments);
- Paid or unpaid leave;
- Telework arrangements;
- Reserved parking spots;
- Light duty placement;
- Access to existing facilities (such as, bathrooms, lactation spaces, or elevators);
- Modifications to the work environment (such as, moving an employee or providing personal protective equipment to reduce exposure to hazards);
- Job restructuring;
- Modifying equipment or uniforms; and
- Modifying examinations or policies.

The final regulations specify that employers may not mandate that an employee take a leave of absence where an alternative reasonable accommodation exists.

The regulations also provide that accommodations specifically related to abortion will most likely include time off to attend medical appointments or for recovery, and that the PWFA does not require employer coverage of abortion costs.

Lactation Accommodations

The regulations incorporate the lactation accommodations required by the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act), which include reasonable break time to express breast milk in a place other than a bathroom, and the room must be shielded from view and free from intrusion. In a further step, the regulations also note that reasonable lactation accommodations may include that the lactation space is regularly cleaned; in reasonable proximity to the employee's usual work area, a sink, running water, and a refrigerator for storing milk; and has electricity, appropriate seating, and a surface sufficient to place a breast pump. Reasonable accommodations may also be related to nursing during work hours, "where the regular location of the employee's workplace . . . makes nursing during work hours a possibility because the child is in close proximity."

Undue Hardship

Employers do not have to provide accommodations that would cause undue hardship, meaning significant difficulty or expense incurred by the employer. Undue hardship is not limited to financial difficulty, and refers to "any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business." This determination is made on a case-by-case through individualized assessment of the current circumstances. And, as under the ADA, an employer claiming undue hardship must offer other reasonable accommodations if they exist, or provide part of the reasonable accommodation up to the point of undue hardship.

Undue hardship is not limited to financial difficulty, and refers to "any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business."

Predictable Assessments

The EEOC identified four categories of "predictable assessments," which are accommodations for pregnant employees that will, in virtually all cases, be deemed reasonable accommodations that do not impose an undue hardship on the employer:

- 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 and whose work requires sitting to stand, as needed.
- Allowing an employee to take breaks to eat and drink, as needed.

While an employer should still conduct an individualized assessment in these scenarios, the EEOC considers

these modifications as common sense, low-cost accommodations that most pregnant employees will need.

Accommodation Processes

The process for an employee to obtain a reasonable accommodation should be straightforward, uncomplicated, and expeditious, given the temporary nature of conditions related to pregnancy or childbirth. Employees, or their representatives, may communicate their limitation and need for an adjustment or change at work in plain language, either verbally or in writing. There is no need for a specific format, use of specific words or phrases, or use of a specific form for an employer to be considered on notice. Employees may share information about their request for an accommodation with persons they would "normally consult with if they had questions or concerns about work matters," including those who supervise or regularly direct the employee's work or human resources personnel. Employers must then initiate an informal, interactive process to identify an appropriate reasonable accommodation.

Limits on Requesting Supporting Documentation

Employers may only request supporting documentation "when reasonable under the circumstances" to determine whether the employee has a covered limitation and requires an adjustment or change at work due to the limitation. Employers should also remain in compliance with the ADA's restrictions on disability-related inquiries and medical exam requirements.

The regulations provide five examples of circumstances under which it would be unreasonable for an employer to seek supporting documentation:

- The limitation and related accommodation are obvious (such as, a pregnancy is showing and easily noticeable);
- The employer already has sufficient information to determine that the employee has a limitation and requires an accommodation (i.e., an employer cannot seek new supporting documentation each time an episodic condition such as pregnancy-related migraines arises);
- The employee is seeking an accommodation covered under a predictable assessment;
- The employee is seeking an accommodation related to pumping at work and the employee has provided a simple statement of self-confirmation; and
- The requested accommodation is already available to employees without known limitations under the employer's policy (such as, an employer that has a practice of only requiring supporting documentation for three or more consecutive days of leave must apply this same practice to an employee using the same leave for a PWFA limitation).

When the circumstances are reasonable, an employer may seek "reasonable documentation." Such documentation is limited to the minimum that is sufficient to:

- Confirm the physical or mental condition;
- Confirm the condition is related to, affected by, or arising out of pregnancy, childbirth, or a related medical condition; and
- Describe the change or adjustment at work needed due to the limitation.

An employer may require that the documentation comes from a health care provider, which can include doulas, industrial hygienists, or lactation consultants, but may not require documentation on a specific form.

Remedies and Enforcement

Remedies under the PWFA are the same as those under Title VII, which include injunctive and other equitable relief, compensatory and punitive damages, and attorneys' fees. Individuals can file charges with the EEOC and/or state and local agencies for investigation.

Employers may not retaliate against an individual in the exercise or enjoyment of rights (or in the aiding and abetting of another individual's exercise of rights) under the PWFA, or discriminate against an employee for opposing any act rendered illegal by the PWFA.

The PWFA's anti-retaliation provisions should be interpreted under the same standard as Title VII. Employers may not retaliate against an individual in the exercise or enjoyment of rights (or in the aiding and abetting of another individual's exercise of rights) under the PWFA, or discriminate against an employee for opposing any act rendered illegal by the PWFA. The PWFA also includes an anti-coercion provision, which is analogous to the ADA's interference provision and reaches instances "when conduct does not meet the 'materially adverse' standard required for retaliation."

Legal Challenges

The PWFA has faced numerous legal challenges over the last several months regarding its coverage of abortion-related conditions.

On February 27, 2024, a Texas federal judge enjoined enforcement of the PWFA as applied to the Texas state government and its agencies in their capacity as employers. The decision rested on the court's finding that the House of Representatives lacked a constitutionally compliant quorum at the time it passed the PWFA. The federal government has appealed the decision

to the U.S. Court of Appeals for the Fifth Circuit.[2]

On April 25, 2024, a group of 17 states filed a lawsuit against the EEOC in the U.S. District Court for the Eastern District of Arkansas, challenging the coverage of abortion in the EEOC's final regulations. The challengers were led by the state attorneys general for Tennessee and Arkansas, in addition to Alabama, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Missouri, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, and West Virginia. The complaint sought injunctive and declaratory relief to invalidate the inclusion of abortion as a "related medical condition," asserting various bases, including that the EEOC's interpretation exceeded its statutory authority and violated the U.S. Constitution. On June 14, 2024, the court dismissed the suit, finding that the states lacked standing as their assertion of imminent enforcement action was too speculative, in addition to the challenged costs being neither concrete nor particularized. Pending an appeal, the state attorneys general sought an administrative stay and injunction from the U.S. Court of Appeals for the Eighth Circuit, which denied their request on June 25, 2024.[3]

However, a similar challenge saw a different outcome in the U.S. District Court for the Western District of Louisiana. On May 13, 2024, the state attorneys general of Louisiana and Mississippi filed a complaint alleging that the "EEOC is forcing States like Louisiana and Mississippi to go against State law and effectively facilitate an abortion." The lawsuit was consolidated with another challenge to the PWFA's abortion accommodation language, brought by several religious groups led by the U.S. Conference of Catholic Bishops. On June 17, 2024, the court preliminarily enjoined the portions of the PWFA that mandate accommodations for purely elective abortions, as applied only to the religious organizations named as plaintiffs and the states of Louisiana and Mississippi, and their agencies, in their capacity as employers.[4]

Next Steps for Employers

In conjunction with counsel, employers should review their existing policies that govern providing accommodations to employees, including lactation policies. These policies should be amended, or new policies adopted, that comply with the expanded scope of coverage and accommodation issues under the PWFA. Managers and supervisors should be trained on recognizing and responding to accommodation requests. Employers should also remember that state and local jurisdictions may still require greater protections for pregnant and/or lactating employees than those provided under federal law. The PWFA sets forth minimum standards for compliance and does not preempt applicable state or local law. Employers are also still obligated to comply with other potentially applicable federal laws such as the ADA, Title VII, the PUMP Act, and the Family and Medical Leave Act (FMLA).

In Summary

The PWFA imposes heightened obligations on employers with respect to providing accommodations related to pregnancy and childbirth. Employers need to take steps to ensure compliance with the final regulations and interpretive guidance. Most critically, existing ADA accommodation policies and procedures cannot simply be expanded to cover PWFA conditions, and a separate PWFA policy should be adopted to address these issues. In addition, managers, supervisors, and human resources personnel will need to be trained to ensure they understand the employer's obligations under the PWFA, including recognizing and responding to requests for accommodations.

Notes

1. https://www.federalregister.gov/documents/2024/04/19/2024-07527/implementation-of-the-pregnant-workers-fairness-act.
2. State of Texas v. Garland, No. 24-10386 (5th Cir. May 1, 2024).
3. State of Tennessee, et. al v. EEOC, No. 24-02249 (8th Cir. June 25, 2024).
4. State of Louisiana, et. al v. EEOC, No. 24-00629 (W.D. La. June 17, 2024).

The authors, attorneys with Ballard Spahr LLP, may be contacted at pedrow@ballardspahr.com and kimmi@ballardspahr.com, respectively.