EEOC Issues Long-Awaited New Rules and Guidance on the Pregnant Workers' Fairness Act of 2023

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The final rule and Guidance issued by the Equal Employment Opportunity Commission (EEOC) this week on the Pregnant Workers' Fairness Act of 2023 (PWFA) answers the question of "what took so long?"

The PWFA itself is fairly straightforward. As described in our previous alerts regarding this law when it was passed then went into effect last year, the PWFA is basically the "pregnancy equivalent of the federal Americans with Disabilities Act (ADA)," as it requires employers to engage in the interactive process and offer reasonable accommodations when such accommodations will not create an undue burden for employers, similar to the federal ADA.

This week, the EEOC issued a 23-page final rule along with an over 100-page new Guidance and over 200 pages of comments explaining its rationale for both the highly anticipated new rule and the Guidance. If you do not have time to peruse all 400+ pages, there is also a "cheat sheet" on the eeoc.gov website called "What You Should Know about the Pregnant Workers' Fairness Act."

What concerned many employers about the proposed version of the EEOC's PWFA final rule was how broad it was. The proposed version included in the PWFA's definition of "pregnancy, childbirth, and related medical conditions" everything from post-partum depression to migraines caused by pregnancy, varicose veins, menstruation, and abortion.

So, **the first thing to know about the new final rule** is that this broad definition did make it into the final rule. Specifically,

> The following are examples of conditions that are, or may be, "related medical conditions": termination of pregnancy, including via miscarriage, stillbirth, or abortion; ectopic pregnancy; preterm labor; pelvic prolapse; nerve injuries; cesarean or perineal wound infection; maternal cardiometabolic disease; gestational diabetes; preeclampsia; HELLP (hemolysis, elevated liver enzymes and low platelets) syndrome; hyperemesis gravidarum; anemia; endometriosis; sciatica; lumbar lordosis; carpal tunnel syndrome; chronic migraines; dehydration; hemorrhoids; nausea or vomiting; edema of the legs, ankles, feet, or fingers; high blood pressure; infection; antenatal (during pregnancy) anxiety, depression, or psychosis; postpartum depression, anxiety, or psychosis; frequent urination; incontinence; loss of balance; vision changes; varicose veins; changes in hormone levels; vaginal bleeding; menstruation; and lactation and conditions related to lactation, such as low milk supply, engorgement, plugged ducts, mastitis, or fungal infections. This list is non-exhaustive.

"Pregnancy" and "childbirth" also include current pregnancy; past pregnancy; potential or intended pregnancy (which can include infertility, fertility treatment, and the use of contraception); labor; and childbirth (including vaginal and cesarean delivery).

The second thing to know about the new rule is it is far more stringent regarding the amount and form of information employers may request in connection with a request for leave or another form of accommodation which is related to "pregnancy, childbirth, or a related medical condition" than the federal ADA. The new rule actually has a section called "Limits on supporting documentation," which prohibits employers from requesting any documentation relating to the following requests for accommodation, which the EEOC has deemed to be "predictable assessments," which should not require any such support:

(i) Allowing an employee to carry or keep water near and drink, as needed;

(ii) Allowing an employee to take additional restroom breaks, as needed;

(iii) Allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and

(iv) Allowing an employee to take breaks to eat and drink, as needed.

An employee shall be entitled to any of these requested accommodations through "self-confirmation," which is a "simple statement made in any form the employee wishes where the employee confirms a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions and the adjustment or change at work needed due to the limitation."

The (albeit non-binding) comments regarding these "predictable assessments" also state that these requested accommodations "will, in virtually all cases, result in a determination that these four modifications are reasonable accommodations that will not impose an undue

hardship under the PWFA when they are requested by an employee who is pregnant."

The new rule also provides that employers may not request supporting documentation "when the requested accommodation is available to employees without known limitations under the PWFA without submitting supporting documentation;" when the condition and the need for adjustment at work are "obvious;" and "when the request is related to a time and/or place to pump at work, other modifications related to pumping at work, or a time to nurse 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)." "Self-confirmation" (as defined above) is all that may be requested in connection with the "obvious" and the pumping/nursing time requests.

The new rule also states that only "reasonable documentation" may be requested, and defines such documentation as "the minimum that is sufficient to:

> (A) Confirm the physical or mental condition (i.e., an impediment or problem that may be modest, minor, and/or episodic; a need or a problem related to maintaining the employee's health or the health of the pregnancy; or an employee seeking health care related to pregnancy, childbirth, or a related medical condition itself) whether or not such condition meets the definition of disability specified in [the ADA];
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> (B) Confirm that the physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and
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> (C) Describe the adjustment or change at work that is needed due to the limitation."

Employers also "may not require that the supporting documentation be submitted on a specific form."

An employer "may choose to confirm an accommodation request in writing or may ask the employee to fill out a form or otherwise confirm the request in writing. However, the [employer] cannot ignore or close an initial request in which the employee communicates that she needs an adjustment or change at work due to a limitation (a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions) if the employee does not complete such confirmation procedures, because that initial request is sufficient to place the employer on notice. If a form is used, the form should be a simple one that does not deter the employee from pursuing the request and does not delay the provision of an accommodation."

Another difference employers who are used to engaging in the interactive process under the federal ADA may have difficulty getting used to under this new rule is the more stringent time requirements the rule sets on this process – in light of the fact that pregnancy is a temporary condition (even if some of the medical conditions related to it may not be).

Specifically, the new rule notes that "An unnecessary delay in providing a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee may result in a violation of the PWFA." In determining whether there has been an unnecessary delay, factors to be considered, with no one factor to be dispositive, include:

> (i) The reason for the delay;
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> (ii) The length of the delay;
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> (iii) The length of time that the accommodation is needed. If the accommodation is needed for a short time, unnecessary delay in providing it may effectively mean failure to provide the accommodation;
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> (iv) How much the employee and the [employer] each contributed to the delay;
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> (v) Whether the [employer] was engaged in actions related to the reasonable accommodation request during the delay;
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> (vi) Whether the accommodation was or would be simple or complex to provide. There are certain accommodations, [see the "predictable assessments" listed above], that are common and easy to provide. Delay in providing these accommodations will virtually always result in a finding of unnecessary delay; and
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> (vii) Whether the [employer] offered the employee an interim reasonable accommodation during the interactive process or while waiting for the [employer's] response. For the purposes of this factor, the interim reasonable accommodation should be one that allows the employee to continue working. Leave will not be considered an interim reasonable accommodation supporting this factor, unless the employee selects or requests leave as an interim reasonable accommodation.

The comments to the rule make it clear that “interim reasonable accommodations are not required.” “However, providing an interim reasonable accommodation is a best practice under the PWFA and may help limit an [employer’s] exposure to liability.” The comments also state that “[furthermore], depending on the circumstances, requiring an employee to take leave as an interim reasonable accommodation [also] may violate [the PWFA].”

Failing to provide an at-work interim reasonable accommodation while awaiting supporting documentation for the employee’s requested accommodation also may be deemed a violation of the PWFA.

As stated in the PWFA directly and addressed in our prior PWFA alerts, **the final thing employers need to continue to bear in mind** is that the PWFA not only contains a “non-retaliation” provision, like the ADA, but also a “non-coercion” provision, which like its other baseline provisions have now been further illuminated/fleshed out by the new EEOC rule and accompanying Guidance. In response to concerns raised through the comment phase regarding the final rule that religious or other “mission statements” of an employer could possibly be deemed to violate the non-coercion provision, the EEOC stated that “while whether a statement may be deemed to violate this provision will depend on the language of the statement. . .the making of general statements regarding an employer’s mission or religious beliefs is not the type of conduct that the Commission previously has determined would be prohibited by this provision.”

“Importantly the coercion provision does not apply to any and all conduct or statements that an individual finds intimidating; it only prohibits conduct that is reasonably likely to interfere with the exercise or enjoyment of PWFA rights.” The examples in this area include:

- coercing an individual to relinquish or forgo an accommodation to which they are otherwise entitled;
- intimidating an applicant from requesting an accommodation for the application process by indicating that such a request will result in the applicant not being hired;
- issuing a policy or requirement that purports to limit an employee’s rights to invoke PWFA protections (e.g., a fixed leave policy that states “no exceptions will be made for any reason”).

On a final note, the new rule also provides that while, as under the federal ADA, employers do not have to choose the requested accommodation of the employee’s choice, “when choosing among effective accommodations, the [employer] must choose an accommodation that provides the qualified employee with known limitations related to pregnancy, childbirth, or related medical conditions equal employment opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges as are available to the average employee without a known limitation who is similarly situated. The similarly situated average employee without a known limitation may include the employee requesting an accommodation at a time prior to communicating the limitation.”

“It also is an unlawful employment practice for an [employer] to require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process.”

> An employee with known limitations related to pregnancy, childbirth, or related medical conditions is not required to accept an accommodation. However, if such employee rejects a reasonable accommodation that is necessary to enable the employee to perform an essential function(s) of the position held or desired or to apply for the position, or rejects the temporary suspension of an essential function(s) if the employee is qualified under § 1636.3(f)(2), and, as a result of that rejection, cannot perform an essential function(s) of the position, or cannot apply, the employee will not be considered ‘qualified.’

The new final rule goes into effect on June 18, and the EEOC will start accepting charges under it starting June 23.

We Can Help

As always, if you have questions regarding this new rule or accommodation requests involving pregnant workers in general, please contact Stacie Caraway or any other member of our Labor & Employment Practice Group.