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Briefly

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EEOC ISSUES FINAL RULE ON PREGNANT WORKERS FAIRNESS ACT (PWFA) AND IT'S NOT JUST THE ADA ALL OVER AGAIN

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On April 19, 2024, the Equal Employment Opportunity Commission (EEOC) published its Final Rule and interpretative guidance implementing the Pregnant Workers Fairness Act, 42 USC §2000gg (PWFA). This article will address some of the more significant provisions of the Final Rule.

1. Background

On December 29, 2022, President Biden signed the PWFA into law, which requires employers with 15 or more employees to provide reasonable accommodations to a qualified employee or applicant's known limitation related to, affected by or arising out of pregnancy, childbirth, or related medical conditions, subject to undue hardship.

Of course, there are already federal laws that provide protections for pregnancy, and related medical conditions. For example, the Pregnancy Discrimination Act of 1978, which amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., prohibits discrimination on the basis of pregnancy, childbirth, or related medical conditions; however, that law only prohibits discrimination and thus, requires employers to provide accommodations to the extent they do so for other, similarly situated employees. Likewise, the Family and Medical Leave Act (FMLA) in application is limited by employee eligibility requirements and is only applicable to covered employers (those with 50 or more employees in a 75-mile radius). Thus, the PWFA was enacted to address these gaps, and the protections the PWFA provides for employees, and the burdens it creates for employers, go much further than existing laws.

2. "Related Medical Conditions" – broader than the ADA

A significant aspect of the PWFA is that, in addition to pregnancy and childbirth, the law covers "related medical conditions." The Final Rule provides examples of conditions that may be "related medical conditions" and includes termination of a pregnancy, such as miscarriage, stillbirth or abortion; nerve injuries; carpal tunnel syndrome; chronic migraines; dehydration; hemorrhoids; nausea or vomiting; high blood pressure; anxiety, depression or psychosis; postpartum depression, anxiety or psychosis; loss of balance; vision changes; menstruation; lactation and conditions related to lactation. The Final Rule notes that the list is not exhaustive.

The EEOC goes to some length to address the decision to include abortion in its definition of "related medical conditions." The Commission notes that including abortion in the list does not require an employer-sponsored health plan to pay for or cover any particular item, procedure, or treatment including an abortion, and does not require an employer to pay any travel related expenses for an abortion, but that the type of accommodation most likely to be sought under the PWFA regarding an abortion will be time off to attend a medical appointment or for recovery.

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3. Documentation – more restrictive than the ADA

Under the PWFA, an employee may verbally request an accommodation and provide information regarding the condition verbally, rather than in writing.

Employers may ask the employee to put the request in writing, but the Final Rule specifically notes that it is a prohibited practice for an employer to delay or deny a reasonable accommodation based on an employee or applicant failing to provide supporting documentation, unless requiring the supporting documentation is reasonable under the circumstances for the employer to determine whether to provide the accommodation. From a practical standpoint, this particular provision is not all that much of a departure from the Tennessee "Pregnant Workers' Fairness Act," codified at TCA §50-10-101, et seq., which became effective July 1, 2020. Section 103(c) of the Tennessee law provides that during the time period in which an employee is making good faith efforts to obtain medical certifications to support a reasonable accommodation request, the employer must begin engaging in a good faith interactive process to determine whether a reasonable accommodation can be provided absent undue hardship" and is prohibited from taking adverse action against the employee during that time period.

When an employer seeks supporting documentation to support an accommodation request under the PWFA, it is limited to documentation "that is reasonable under the circumstances... to determine whether to grant the accommodation." The Final Rule contains five (5) examples of when it will not be considered reasonable for an employer to seek supporting documentation from an employee to support an accommodation request:

(1) where the known limitation and need for the reasonable accommodation is obvious and the employee confirms that through self-attestation;

(2) when the employer already has sufficient information to determine whether the employee has a condition related to, affected by or arising out of pregnancy, childbirth or related medical conditions and the employee needs an adjustment or change at work due to the limitation;

(3) when the employee is pregnant and seeks one of the following four (4) modifications (dubbed "predictable assessments") along with self-confirmation of the need:

(a) to carry water and drink water as needed during the work day;

(b) additional restroom breaks;

(c) modifications in sitting/standing; or

(d) to take breaks as needed to eat and drink.

(4) when the reasonable accommodation is related to a time and/or place to pump at work, or other modifications related to pumping, and the employee provides self-confirmation; or

(5) when the requested accommodation is available to employees (without known limitations under the PWFA) pursuant to a covered entity's policies or practices without submitting supporting documentation.

Under the Final Rule, the phrase "health care providers" is defined to include doctors, doulas1, midwives, psychologists, nurses, nurse practitioners, physical therapists, lactation consultants, occupational consultants, vocational rehabilitation specialists, therapists, and licensed mental health providers. With respect to the documentation, employers may not require the employee to provide a medical diagnosis, or to use a specific form. The Final Rule further notes that employers may not require the employer applicant seeking the accommodation to be examined by the employer's health care provider and that the medical information provided by an employee under the PWFA is considered confidential, as under the Americans with Disabilities Act (ADA).

4. "Qualified Employee" Defined - broader than the ADA

In a departure from the ADA, the PWFA defines a "qualified employee" as one "who, with or without reasonable accommodation, can perform the essential functions of the employment position, except that an employee or applicant shall be considered qualified if—

(1) any inability to perform an essential function is for a temporary period;

(2) the essential function could be performed in the near future; and

(3) the inability to perform the essential function can be reasonably accommodated."

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In the Final Rule, the EEOC interprets these provisions to require suspension of one or more essential functions of a position on a temporary basis. The EEOC, in defending its position on this issue, notes that "it is important to emphasize that the definition of "qualified" that includes the temporary suspension of an essential function is taken directly from the text of the statute." However, as noted above, the PWFA statute itself does not include the word "suspension," nor any variation of the word.

The Final Rule provides that suspension of essential functions could be accomplished either by the employee performing the remaining functions of their position or other arrangements being made such as performing other functions assigned by the covered entity, or the employee being assigned or transferred temporarily to a different job, or light or modified duty, all of which must be considered through the interactive process.

5. Reasonable Accommodations and Undue Hardship

Like the ADA, the PWFA provides it is unlawful for a covered entity to not make reasonable accommodations for covered limitations unless the entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business. Unlike the ADA, as noted above, the PWFA Final Rule provides that the temporary suspension of one or more essential functions is considered a potential reasonable accommodation.

In the Final Rule, the EEOC provides examples of reasonable accommodations, which goes further than the ADA, including steps such as job restructuring, change of work site, or "adjustments to allow an employee to work without increased pain or increased risk to the employee's health or the health of the pregnancy"; and temporarily suspending one or more essential job functions. With respect to accommodations related to pumping, the Final Rule provides that a reasonable accommodation would include ensuring an area that is in reasonable proximity to the employee's usual work area, not a bathroom, shielded from view, free from intrusion, that is regularly cleaned, that has electricity, appropriate seating and a surface sufficient to place a breast pump, is reasonably close to a sink with running water and a refrigerator for storing milk.

The Final Rule lists factors to be considered in the undue hardship analysis, most of which are very similar to the same analysis under the ADA. However, whether the "temporary suspension of an essential function(s)" would cause undue hardship has its own list of considerations, which includes "whether there are other employees, temporary employees, or third parties who can perform or be hired to perform the essential functions…. (and) whether the essential functions can be postponed or remain unperformed for any length of time and, if so, for how long." While the EEOC notes that an employer "is not required to invent work for an employee," this provision will require employers to analyze closely the essential functions of the position that the employee is unable to perform, and whether "other, temporary or third parties" can perform that essential function on a temporary basis.

6. "In the Near Future"

As noted above, one element of the PWFA's defines of a

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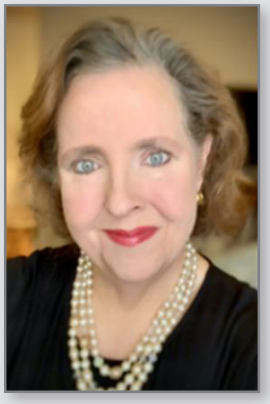

KNOW YOUR ATTORNEY

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DONNA BROWN WILKERSON is a Senior Associate in the Cookeville, Tennessee, office of Wimberly Lawson Wright Daves & Jones, PLLC, which she joined in 2023. Donna has been a licensed attorney since 1993, handling a wide range of civil litigation matters in state courts, federal courts, and administrative tribunals. She obtained a Bachelor of Science in Public Administration from the University of Tennessee in 1989 with honors and a Doctor of Jurisprudence from the University of Tennessee in 1993 cum laude.

"qualified employee or applicant" is whether the essential function at issue "could be performed in the near future." In the Final Rule, the EEOC has noted that determination of what is "in the near future" must be made on a case-by-case basis. However, the Commission notes that generally "in the near future" means 40 weeks because that is generally the length of a normal pregnancy; but that is not a hard and fast measure for determining the length of a reasonable accommodation. For conditions other than pregnancy, the Commission notes that there is not a consistent measure of how long an accommodation would be needed because the length of other conditions would vary.

The Commission notes that the temporary suspension of an essential function must be able to be reasonably accommodated and the employer retains the ability to establish that the reasonable accommodation causes an undue hardship. The Commission notes that an employee's request to indefinitely suspend an essential function cannot reasonably be considered to meet the standard for "in the near future," however, the temporary suspension of an essential function is not necessarily "indefinite" simply because the employee cannot pinpoint an exact date when they would be able to perform the essential functions.

The Commission further notes that employees may need temporary suspension of essential functions on more than one occasion. For example, an employee may need an essential function temporarily suspended during her pregnancy. After the pregnancy, the employee may be able to perform that essential function, but might need a different essential function temporarily suspended for a pregnancy-related condition, such as postpartum depression. The Commission notes that the employer will need to determine whether the employee is qualified as of the request for the accommodation, with a new calculation of "in the near future" each time. The new calculation would be made regardless of whether the employee seeks to temporarily suspend the same essential function that was suspended during pregnancy or a different one.

7. Examples

In the appendix to the Final Rule, the Commission provides several examples of how the regulations apply. In one example, an employee who works in a paint manufacturing plant is told by her provider to avoid certain chemicals for the remainder of her pregnancy. However, an essential function of her job involves regular exposure to these chemicals. In the example, the Commission concludes that the employee is nevertheless "qualified" for her position because "the employer can suspend the essential functions that require her to work with chemicals, while allowing her to do the remainder of her job."

In another example, a pregnant employee is employed as a park ranger, an essential function of which involves patrolling the park and driving. The employee seeks the temporary suspension of the essential function of patrolling the park for 12 weeks. In the example, the Commission concludes "the employee's need to temporarily suspend an essential function of her job may be reasonably accommodated by temporarily suspending the essential function and temporarily assigning (her) to duties such as answering questions and selling merchandise at the (park) visitor center."

Of course, the examples do not address exactly how the essential job functions will be accomplished during the suspension – that would be up to the employer. If the employer considers it undue hardship, note the discussion above regarding the list of factors to be considered in evaluating whether it would constitute undue hardship.

CONCLUSION

Employers should not consider the PWFA simply a reiteration of existing laws; the Final Rule and the law itself go much further in terms of employers' obligations. The PWFA will clearly present challenges for employers. Assuming nothing takes place that would delay the enforcement of the PWFA Final Rule, the effective date of the Rule and interpretative guidance is June 18, 2024. Employers should act promptly to ensure policies are updated to address compliance with the PWFA. Supervisory and managerial training is essential for compliance and employers should seek input from employment counsel for guidance as issues arise. The attorneys at Wimberly Lawson are available to assist in providing guidance to employers and in providing supervisory/managerial training.