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Pregnant Workers Fairness Act: Long Anticipated Final Rule Published by the EEOC

Update

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The Equal Employment Opportunity Commission (EEOC) issued its final rule and interpretive guidance implementing the Pregnant Workers Fairness Act (PWFA), which became law on June 27, 2023. Employers previously relied on the EEOC's proposed rule for guidance in implementing the PWFA, which was issued in August 2023 and previously discussed in a prior alert. The EEOC received over 100,000 comments in response to the proposed rule — 94,000 of those comments specifically related to abortion being included in the definition of "related medical conditions." The final rule, which substantially reflects the proposed rule, will be published in the Federal Register on April 19, 2024, and take effect 60 days after its publication.

The PWFA requires employers with 15 or more employees to provide reasonable accommodations to "qualified" employees and applicants with "known limitations" related to pregnancy, childbirth, or related medical conditions. A "known limitation" is a physical or mental condition that has been communicated to the employer by either the employee or the employee's representative. It does not need to rise to the level of a "disability" under the Americans with Disabilities Act (ADA).

In complying with the final rule, employers will want to note the following:

- The definition of "employee" includes both an employee and applicant for employment.
- A "known limitation" means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, and may be "modest, minor, and/or episodic."
- "Pregnancy" can refer to not only an employee's current pregnancy, but also a past, potential, or intended pregnancy (which can include infertility, fertility treatment, and the use of contraception).

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- The final rule provides a broad and detailed list of potential "related medical conditions," while also noting the list is non-exhaustive. The final rule continues to include abortion as a related medical condition. The final rule, however, notes that accommodations related to abortion — like all accommodations — remain subject to applicable exceptions and defenses, including both those based on religion and undue hardship.
- Limitations can be communicated by an employee's *representative* to an employer and do not necessarily need to be communicated by the employee. An "employee's representative" means a family member, friend, union representative, health care provider, or other representative of the employee.
- Negative side effects of medications, or burdens associated with a particular treatment regimen, can be considered when determining whether an employee has a limitation.
- Diverging from the ADA, an employee is still considered "qualified" even if the employee cannot perform one or more of the essential functions of the job if (1) the inability to perform is for a temporary period, (2) the function can be performed in the near future, and (3) the inability to perform can be reasonably accommodated. Under the final rule, if the employee is pregnant, it is presumed the employee will be able to perform the essential function generally within 40 weeks of its suspension (i.e., the typical length of a pregnancy). Therefore, a reasonable accommodation may be the temporary suspension of an essential function or functions (unless it would pose an undue hardship on the employer).
- The final rule provides a long, though non-exhaustive, list of generally reasonable accommodations under the PWFA, including job restructuring, modified work schedules, modified equipment, telework, and light or modified duty programs.
- The following requested accommodations are reasonable and will not cause undue hardship in "virtually all cases": allowing an employee to carry or keep water near and drink; allowing an employee to take additional restroom breaks; allowing an employee whose work requires standing to sit and whose work requires sitting to stand; and allowing an employee to take breaks to eat and drink.
- Supporting documentation may only be required when reasonable under the circumstances. For example, it is not reasonable to require documentation for a requested accommodation involving lactation or pumping.
- Employers may be found liable under the PWFA for "unnecessary delay" in providing a reasonable accommodation, which is determined by a variety of factors provided for in the final rule.

- A qualified employee cannot be required to take leave, whether paid or unpaid, if another reasonable accommodation can be provided for the known limitation. The employee, however, can request leave as an accommodation.

While the PWFA has been law for some time, employers should ensure that their policies and procedures are compliant with the PWFA and the PWFA's final rule. Further, managers and supervisors should be trained to refer pregnancy-related accommodations and other related requests to their organization's human resources department.