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The EEOC Issues its Long-Awaited Final Rule on the Pregnant Workers Fairness Act

Key Notes:

- The EEOC's final rule implementing the PWFA is expected to go into effect on June 18, 2024.
- The final rule maintains a broad definition of "pregnancy, childbirth, or related medical condition," and despite great controversy, retained abortion in the definition.
- The final rule limits employers' ability to seek documentation to support accommodation requests under the PWFA.
- There is no severity threshold for medical conditions prompting an accommodation request under the PWFA.
- The EEOC provided examples of accommodations under the PWFA, but it maintained that a case-by-case analysis is required.

The Pregnant Workers Fairness Act (PWFA) has been in effect since June 27, 2023, and expands protections for qualified individuals by requiring employers with 15 or more employees to make reasonable accommodations for conditions "related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions," unless the accommodation would impose an undue hardship on the employer. When Congress passed the PWFA, it directed the EEOC to issue regulations implementing the law. The EEOC issued its notice of proposed rulemaking (NPRM) on August 11, 2023, and invited public comment until October 10, 2023. After more than six months since the close of the public comment period, on April 15, 2024, the EEOC released its 408-page final rule and interpretive guidance implementing the PWFA. The final rule is expected to go

into effect on June 18, 2024. This alert focuses on the key provisions of the final rule and interpretive guidance.

The Final Rule

The PWFA builds upon existing protections against pregnancy discrimination under Title VII and the Americans with Disabilities Act (ADA). According to the EEOC, the final rule and interpretive guidance "reflect the EEOC's deliberation and response to the approximately 100,000 public comments received on the Notice of Proposed Rulemaking." The EEOC has also asserted in its accompanying press release that the final rule "provides clarity to employers and workers about who is covered, the types of limitations and medical conditions covered, and how individuals can request reasonable accommodations, and numerous concrete examples."

Additionally, the final rule outlines the EEOC's interpretation of five prohibited practices under the PWFA:

1. failure to provide reasonable accommodations;
2. requiring an employee or applicant to accept an accommodation;
3. denying equal employment opportunities;
4. requiring the employee to take leave when other accommodations are available; and
5. taking adverse action against a worker for seeking or using a reasonable accommodation.

Definition of “Pregnancy, Childbirth, or Related Medical Conditions”

The final rule reinforces the EEOC’s expansive interpretation of “pregnancy, childbirth, or related medical conditions” to include, among other things, breastfeeding and pumping, miscarriage, stillbirth, having or choosing not to have an abortion, preeclampsia, gestational diabetes, migraines, morning sickness, infertility, fertility treatments, and endometriosis.

From the EEOC’s description of the comments received, one of the most controversial aspects of the final rule is the inclusion of abortion in the definition of “related medical conditions.” The EEOC addressed this concern but ultimately confirmed in the final rule that obtaining an abortion qualifies as a “medical condition” arising out of pregnancy and is covered under the PWFA. The EEOC explained its position by noting that pregnant workers are already entitled to reasonable accommodations after getting an abortion under existing Title VII regulations.

Recognizing that many religious employers may be upset by the inclusion of abortion in the definition of “related medical conditions,” the EEOC supported its inclusion by stating that nothing in the PWFA requires an employer to pay for an abortion or provide health care benefits for an abortion in violation of state law, and, like any other accommodation request, a request for leave arising from an abortion is subject to applicable exceptions and defenses, including those based on religion and undue hardship.

Documentation

The EEOC encourages employers and employees to keep an open dialogue about accommodation needs under the PWFA. The final rule clarifies that an employer is not required to seek supporting documentation when an employee asks for a reasonable accommodation under the PWFA and should only do so when it is reasonable under the circumstances to determine if the employee has a qualifying condition and needs an adjustment or change due to the limitation.

The final rule limits “reasonable documentation” to documentation that: (1) is the minimum that is sufficient to confirm the physical or mental condition underlying the employee’s limitation; (2) confirms that the limitation is related to, affected by, or arises out of pregnancy, childbirth or related medical conditions; and (3) states that the accommodation is needed due to the limitation. The EEOC also noted that employers may ask the employee for the expected duration of the requested modification.

In its interpretive guidance, the EEOC cautioned employers against requesting more information than permitted, as it may violate the PWFA’s prohibition on retaliation. In keeping with its view that employers take a case-by-case approach to each accommodation request under the PWFA, the EEOC also advised that employers may not require that supporting documentation be submitted on a specific form.

The final rule expressly prohibits employers from seeking supporting documentation in five instances: (1) when the limitation and need for a reasonable accommodation is obvious; (2) when the employer already has sufficient information to support a known limitation related to pregnancy; (3) when the request is for one of the four “predictable assessment” accommodations; (4) when the request is for a lactation accommodation; and (5) when employees without known limitations under the PWFA receive the requested modification under the employer’s policy or practice without submitting supporting documentation. In these instances, employers are limited to seeking an employee’s self-confirmation.

No Severity Threshold

The EEOC confirmed that under the PWFA, the physical or mental condition prompting an accommodation request under the PWFA may be modest, minor, or episodic in nature and confirmed that there is no requirement that conditions rise to a specific severity threshold. The EEOC also noted that the PWFA is intended to cover conditions that do not rise to the level of a disability under the ADA.

Reasonable Accommodations

The final rule provides a non-inclusive list of examples of reasonable accommodations the EEOC finds to be presumptively reasonable, including:

- Allowing an employee additional restroom breaks as needed;
- Allowing an employee to carry or keep water and drink, as needed, in or near the employee's work area;
- Allowing an employee whose work requires standing to sit, and vice versa, as needed;
- Allowing employees breaks to eat and drink as needed;
- Scheduling changes;
- Telework;
- Temporary reassignments;
- Time off to recover from childbirth or miscarriage;
- Modifying equipment, uniforms or devices;
- Leave for healthcare appointments; and
- Temporary suspension of one or more essential functions of a job.

The EEOC referred to the underlined accommodations as "predictable assessments." The final rule states that these accommodations will be deemed *de facto* reasonable, as they will be commonly requested and typically require "modest and minor" alterations in the workplace on a temporary basis. The EEOC will presume that these specific accommodations will not impose an undue hardship "in virtually all cases." An employer's delay in providing the accommodations identified as predictable assessments will also "virtually always result in a finding of unnecessary delay," which violates the PWFA.

Next Steps for Employers

Employers should familiarize themselves with the final rule and interpretive guidance to better understand their obligations under the PWFA and how the EEOC will interpret and enforce the law in the future. One way to do so is to review the examples of reasonable accommodations in the EEOC's interpretive guidance and identify all reasonable accommodations an employer could potentially make for a qualified employee. Employers should also review their pregnancy accommodation policies and related forms to ensure they comply with the final regulations.

FOR MORE INFORMATION

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