Finalized Pregnancy Rule Requires Employers to Accommodate Abortion and More: 8 Things Employers Need to Know

Insights
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A finalized rule released by the EEOC yesterday will require employers to accommodate applicants and workers who need time off or other workplace modifications for an abortion procedure or recovery. That is the most significant of several key developments contained in the final regulations that will soon govern the federal pregnancy accommodation law that took effect last year. What are the eight most important aspects of the final regulations to the Pregnant Workers Fairness Act (PWFA) that employers need to know?

Quick Overview of the Federal Pregnancy Accommodation Law

Before we dive into the eight things you need to know, let's make sure you understand the PWFA basics. The law – which took effect June 2023 – requires employers with at least 15 employees to consider employee and applicant accommodation requests related to pregnancy, childbirth, or related medical conditions the same way you consider requests for accommodation related to disabilities under the Americans with Disabilities Act (ADA). If you want a comprehensive recap, you can read our detailed FAQs about the PWFA here.

The key development that just took place: the Equal Employment Opportunity Commission (EEOC), the federal agency charged with regulating the PWFA, released its finalized rules on Monday providing clarity to the law. We've reviewed the 408 pages of the EEOC's release so you don't have to and have summarized the eight biggest developments here.

1. Broad Coverage Includes Abortion-Related Accommodations

The finalized rule contains a very broad definition of "pregnancy, childbirth or related medical conditions." A non-exhaustive list of possible circumstances that fall within the broad definition includes:

- current, past, and potential pregnancy;
- infertility and fertility treatment;
- the use of contraception;
- termination of pregnancy – including via miscarriage, stillbirth, or abortion;

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- pregnancy-related sicknesses, ranging from nausea or vomiting to edema, from preeclampsia to carpal tunnel syndrome, and many other pregnancy-related conditions;
- lactation and issues associated with lactation; and
- menstruation.

The finalized rule is bound to be controversial given that it expressly requires employers to consider abortion accommodations. According to Bloomberg Law, over 95% of the 100,000+ comments offered by the general public after reviewing the draft rules released in October related to abortion.

In response to employer concerns about the abortion accommodation requirement, the EEOC noted that "nothing in the PWFA requires, or forbids, an employer to pay for health insurance benefits for an abortion." The Commission expects the most common requests to be for time off to attend an abortion-related appointment or for recovery. But given the debate over including abortion-related accommodations, we expect this aspect of the regulations to soon be tested in court.

While the PWFA contains no express exemption for religious-based employers, the EEOC encourages any religious employer facing a charge of discrimination under this law to raise a defense as soon as possible. The agency says it will consider such matters on a case-by-case basis.

2. Many Employees Will Be Deemed "Qualified" For Protection

Only "qualified" applicants and employees will be covered under the PWFA – but the final rule provides a sweeping definition that may encompass many workers as covered under the PWFA. As illustrated below, the PWFA is much broader than the ADA, since it includes terms like "temporary" and "in the near future," which may be more challenging for employers to determine when handling requests.

- Someone is qualified if they can perform the **essential functions of the position**, with or without reasonable accommodation.
- Someone is also qualified if their inability to perform the essential functions is just **temporary** and the essential functions can be performed "in the near future." "Temporary" means a limited time, not permanent, and may extend beyond "in the near future." "In the near future" generally – but not automatically – means about 40 weeks.

3. "Limitations" Don't Have to Be Very Limiting to Be Covered

The law says that qualified employees and applicants are covered by the law if they have "known limitations" that relate to pregnancy, childbirth, or related medical conditions. This phrase is defined as follows:

- "**Known**" means that the worker or a representative of the worker has communicated to the employer about the limitation. There are no magic words and no required format when it comes

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to the communication, which can be oral or written.

- "**Limitation**" means any physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions – including impediments or problems that are modest, minor, or episodic. It could also include actions that need to be taken to maintain the worker's health or the health of their pregnancy, or even if the worker is simply seeking health care for their pregnancy, childbirth, or related medical condition.

In other words, workers with healthy and normal pregnancies could seek and receive accommodations under the PWFA. Unlike the ADA, there's no threshold for the severity of the physical or mental conditions for accommodation requests.

4. Rule Includes List of Possible Accommodations

Accommodations are simply modifications or adjustments that would enable an applicant or employee to perform the essential functions of the job. They could apply to the job application process or the job itself. The rule provides a long list of potential accommodations employers will need to consider, including:

- Job restructuring;
- Schedule changes, part-time work, and paid and unpaid leave;
- Frequent breaks;
- Acquiring or modifying equipment, uniforms, or devices;
- Making existing facilities accessible or modifying the work environment;
- Allowing sitting or standing (and providing means to do so);
- Light duty;
- Telework or remote work;
- Providing a reserved parking space;
- Temporarily suspending one or more essential function; and
- Adjusting or modifying workplace policies.

This list is not exhaustive. The EEOC and courts may consider other accommodations to be "reasonable," so employers will want to work with the employee during the interactive process to review these options but to also identify other possible accommodations.

5. You Can Check Documentation in Certain Cases

If you have reasonable concerns about whether a physical or mental condition or limitation is "related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions," you may request information from the employee regarding the connection.

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When requesting documentation, the EEOC expects you to follow best "interactive process" practices. This is a method borrowed from the ADA, generally calling for "a discussion or two-way communication between an employer and an employee or applicant to identify a reasonable accommodation." The rule also requires you to be reasonable in your requests for documentation and not seek more information than is required in order to make a proper determination.

6. Rule Clarifies When You Can Deny Accommodation Requests

Employers can only deny accommodation requests if they would impose an "undue hardship" on business operations. In general, an accommodation would create an undue hardship if it would cause significant difficulty or expense for operations.

Under the final rule, the following factors may be considered when determining whether temporarily suspending an essential function of the job will cause an undue hardship:

- The length of time the employee or applicant will be unable to perform the essential function;
- Whether there is work for the employee or applicant to accomplish;
- The nature of the essential function, including its frequency;
- Whether you have provided other employees or applicants in similar positions who are unable to perform essential functions with temporary suspension of those functions and other duties;
- Whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function in question, if needed; and
- Whether the essential function can be postponed or remain unperformed for any length of time and, if so, for how long.

7. Rule Slated to Take Effect in June

The finalized rule is slated to be published in the Federal Register this coming Friday (April 19) and take effect 60 days later – on June 18, 2024. There is a chance that the effective date could be delayed or set aside completely by court action, so stay tuned for more information.

8. Don't Forget Other Laws

The rule confirms that the PWFA does not replace federal, state, or local laws that are more protective of workers affected by pregnancy, childbirth, or related medical conditions. At least 30 states and five cities require certain employers to provide some form of accommodations to pregnant employees. If you operate in one of these locations, your practices may not need to change much, or at all.

What Should You Do?

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You have a few months to prepare for these rules to take effect. To position your organization most effectively, you should consider the following steps:

- Make sure you are already in compliance with the PWFA. If you haven't reviewed and adjusted your accommodations review process since June 2023, now is the time to do so.
- Train your HR department on the ins and outs of the regulations so they are familiar with the new details provided in these regulations.
- Make sure your HR department has access to list of suggested accommodations provided in the regulations as a good starting point for use during the interactive process.
- Adjust your mandatory HR trainings to include a discussion of this law and the new regulations as necessary.
- Contact your legal counsel before denying any pregnancy or childbirth-related accommodation request under the undue hardship theory given the high stakes involved.

Conclusion

We will monitor developments related to this final rule, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Employee Leaves and Accommodations Practice Group.

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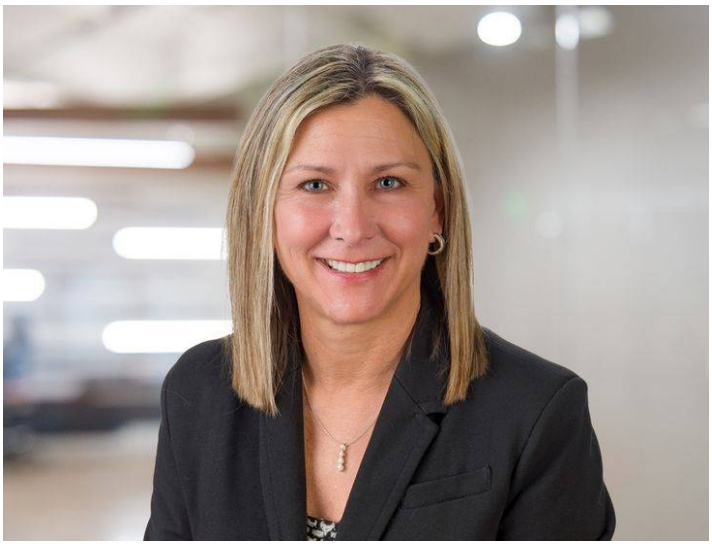

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