

## Final Rule Clarifies Employers Obligations Under Pregnant Workers Fairness Act, by Keith J. Gutstein, Esq., Jennifer E. Sherven, Esq., and Alisha Talati (bar admission pending), 6-17-2024

On April 15, 2024, the U.S. Equal Employment Opportunity Commission (“EEOC”) released its long-awaited final rule to implement the federal Pregnant Workers Fairness Act (“PWFA”), a law that became effective on June 27, 2023. The final rule goes into effect on June 18, 2024.

Briefly stated, the PWFA requires covered employers to provide a “reasonable accommodation” to a qualified employee’s or applicant’s known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an “undue hardship.”

The PWFA expands existing protections prohibiting pregnancy discrimination under federal law including Title VII of the Civil Rights Act of 1964 (“Title VII”), the Americans with Disabilities Act (“ADA”), and the Family and Medical Leave Act (“FMLA”).

According to the EEOC, the final rule and interpretive guidance, was released to provide “important clarity that will allow pregnant workers the ability to work and maintain a healthy pregnancy and help employers understand their duties under the law.” While the EEOC began accepting charges of discrimination on June 27, 2023, the day the PWFA became effective, the final regulation provides insight into how the EEOC interprets the PWFA.

### Expanded Covered Conditions

The final rule is quite extensive and identifies a wide scope of covered conditions. Significantly, it provides that the physical or mental condition can be a PWFA limitation whether it meets the definition of “disability” under the ADA.

Under the regulation, pregnancy, childbirth, or related medical conditions include uncomplicated pregnancies, vaginal deliveries or cesarian sections, miscarriage, postpartum depression, edema, placenta previa, and lactation. Related medical conditions also cover termination of pregnancy including via miscarriage, stillbirth, or abortion.

The inclusion of abortion in the regulations has drawn strong criticism and on April 25, 2024, Republican Attorney Generals from 17 states filed a lawsuit seeking to block the EEOC’s implementation of the final regulation and challenging its inclusion of time off and accommodations for abortions.

It is not yet clear on how that will impact the future of the final regulations, but until then employers should familiarize themselves with the final regulations, including what constitutes a reasonable accommodation.

### Examples of Reasonable Accommodations

The EEOC’s specific examples of possible reasonable accommodations under the PWFA include the following:

- Additional, longer, or more flexible breaks to drink water, eat, rest, or use the restroom;
- Changing food or drink policies to allow for a water bottle or food;
- Changing equipment, devices, or workstations, such as providing a stool to sit on, or a way to do work while standing;
- Changing a uniform or dress code or providing safety equipment that fits;

- Changing a work schedule, such as having shorter hours, part-time work, or a later start time; and,
- Telework.

The EEOC specifically indicated that the examples are illustrative and are not intended to cover every limitation or possible accommodation under the PWFA.

The final rule also outlines factors to be considered when determining whether “undue hardship” exists. The EEOC specifically indicated in the final regulation that there are four job modifications often sought by pregnant employees that, in virtually all cases, will be found to be reasonable accommodations that do not impose undue hardship. These are: (1) carrying or keeping water near and drinking, as needed; (2) allowing additional restroom breaks, as needed; (3) allowing sitting for those whose work requires standing and standing for those whose work requires sitting, as needed; and (4) allowing breaks to eat and drink, as needed. In the final regulation, the EEOC encourages employers and the employee to engage in discussions (known as the interactive process) in reaching a reasonable accommodation and specifically prohibits employers from requiring an employee or applicant to accept an accommodation other than one arrived at through the interactive active process.

### Different Requirements than ADA

While there’s some overlap between the ADA and PWFA, there are some distinct differences that employers should be aware of including the expanded definition of a qualified employee. Unlike the ADA, PWFA has two definitions of “qualified.” The first is similar to the ADA’s definition (“an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the position”). The second definition provides that an employee or applicant may still be qualified even if they cannot perform one or more essential functions of the job if:

1. The inability to perform the essential function(s) is “temporary;”
2. The employee could perform the essential function(s) “in the near future;” and
3. The inability to perform the essential function(s) can be reasonably accommodated.

The final regulation defines the term “temporary” as lasting for a limited time, not permanent, and may extend beyond “in the near future.”

### Documentation

According to the EEOC, seeking documentation must be reasonable under the circumstances for the employer and it is not considered reasonable to seek documentation if, for example, the limitation and need for an adjustment or change at work due to the limitation is “obvious.”

If the employer is allowed to get documentation from a health care provider, the employer is limited to documentation that:

- Confirms the physical or mental condition;
- Confirms that the physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and,
- Describes the adjustment or change at work that is needed due to the limitation.

## Conclusion

According to the EEOC's fact sheet, the following are key points for employers to keep in mind about the PWFA and reasonable accommodations:

- Train supervisors about the PWFA. First level supervisors may be particularly likely to receive accommodation requests and should be trained in how to respond, including how to avoid retaliating against those who request or use a reasonable accommodation.
- Workers do not need to use specific words to request an accommodation to begin the interactive process. Once an employee requests an accommodation, employers should use the interactive process.
- Limitations may be minor and may be associated with an uncomplicated pregnancy and may require accommodations that are easy to make.
- A worker may need different accommodations as the pregnancy progresses, they recover from childbirth, or the related medical condition improves or worsens.

It is important to note 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.

The final rule imposes many more obligations on employers. As such, employers should review the EEOC's summary of key provisions to familiarize themselves with their obligations.

If your company needs assistance navigating the PWFA's final regulations or defending claims related to pregnancy discrimination or reasonable accommodations, Kaufman Dolowich's team of skilled labor and employment attorneys can help.