The Pregnant Workers Fairness Act and the PUMP Act

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Overview of the PWFA

Changes in the accommodation landscape

An Outgrowth of the Americans with Disabilities Act

- Passed December 29, 2022, and became effective June 27, 2023.
- The PWFA builds upon the federal Americans with Disabilities Act (ADA), but has a distinct take on accommodation obligations for a class of workers: those experiencing pregnancy or pregnancy-related conditions.
- Codifies the principle that accommodations cannot be forced upon pregnant workers. Leave as an accommodations is only to be used where other workplace accommodations cannot be provided.
- Expands accommodation coverage to workers who are actually physically unable to perform essential functions of their jobs, if that inability is temporary and there is an expectation of ability to perform essential functions in the near future.
- Does NOT mandate maternity leave or treat men differently because the PWFA does not provide leave for bonding with a new child; the accommodations and leave entitlements are limited to medically necessary accommodations.
- Requires an interactive process.
- Applies to all employers with 15 or more employees, with same test for coverage as Title VII.
- PWFA is enforced by the EEOC.
- Includes an anti-retaliation provision.
- Has a “good faith” defense for employers.

Pre-History of the PWFA

- The PWFA can be seen as a direct (though quite belated) response to the U.S. Supreme Court's decision in Young v. United Parcel Service, 575 U.S. 206 (2015).
- In Young, the Supreme Court held that pregnant females deserved job-related accommodations only to the extent that similarly-situated males with medical limitations received job-related accommodations.
    - In other words, the Court held that the Pregnancy Discrimination Act (an amendment to Title VII from 1978) and the ADA did not grant women an independent right to accommodations due to pregnancy.
    - Instead, women would have to show sex discrimination – i.e., that men with "similar" disabling conditions were treated differently. The criticism of the Court's decisions is that there really are not "similar" male conditions; pregnancy is unique.
- The PWFA also builds upon the holding of the U.S. Supreme Court in Automobile Workers v. Johnson Controls, 499 U.S. 187 (1991), in which the Court held that consistent with Title VII, even well-meaning "fetal protection policies" cannot be imposed by employers upon pregnant workers, who **themselves** are the sole judges on what is safe for their pregnancies.

What's Unlawful under the PWFA?

It shall be an unlawful employment practice for a covered entity to--

(1) not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;

(2) require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process referred to in section 2000gg(7) of this title;

(3) deny employment opportunities to a qualified employee if such denial is based on the need of the covered entity to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee;

(4) **require a qualified employee to take leave**, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee; or

(5) take adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee.

42 U.S.C. 2000gg-1.

Anti-Retaliation Provision of PWFA

(f) Prohibition against retaliation

(1) In general

No person shall discriminate against any employee because such employee has opposed any act or practice made unlawful by this chapter or because such employee made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(2) Prohibition against coercion

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of such individual having exercised or enjoyed, or on account of such individual having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

42 U.S.C. 2000gg-2(f)

Good faith defense

Notwithstanding subsections (a)(3), (b)(3), (c)(3), (d)(3), and (e)(3), if an unlawful employment practice involves the provision of a reasonable accommodation pursuant to this chapter or regulations implementing this chapter, damages may not be awarded under section 1981a of this title if the covered entity demonstrates good faith efforts, in consultation with the employee with known limitations related to pregnancy, childbirth, or related medical conditions who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such employee with an equally effective opportunity and would not cause an undue hardship on the operation of the covered entity.

42 U.S.C. 2000gg-4(g)

The PWFA in Plain English

- The statute speaks in terms of what's illegal…so what does the PWFA really intend to accomplish?
  - Employers should provide reasonable accommodations for known limitations caused by pregnancy, childbirth, or related medical conditions, except where doing so would impose an undue hardship on the employer.
  - Employers and employees should work interactively to arrive at accommodations.
  - Employers must not deny opportunities just because they assume a pregnant worker can't handle them.
  - Employers should never force accommodations on pregnant workers.
  - Employees should not be mistreated for requesting or receiving accommodations.

Proposed EEOC PWFA Regulations

- The big news coming out of the PWFA enactment is not so much the law, but the expansive regulations proposed by the EEOC, which would dramatically expand what otherwise appears to be a fairly modest law.
- The PWFA directed the EEOC to issue regulations, and it did so in August 2023.
- Following issuance of proposed regulations, the Agency is required to accept public comments.
- There were over 100,000 comments from the public.
- Regulations have still not been finally issued and MAY CHANGE.
- Revisions by the EEOC to correct technical issues on February 14.
- On Monday, April 15, the EEOC announced it will publish its final rule **tomorrow**, on **Friday, April 19, 2024**.

Proposed EEOC PWFA Accommodations (cont.)

- Regulations tackle key topics such as:
  - *Where* accommodations are required
  - *What* is "pregnancy-related,"
  - *Who* remains "*qualified*" to perform the job for purposes of workplace accommodations
  - *When* is "leave" to be provided (or not)
  - *How much* information are employers entitled to during the accommodation process

Regulatory Trigger for Accommodations

- The EEOC's proposed PWFA regulations define the term "known limitation" as the trigger for providing accommodations.
  - Remember that under the PWFA, an employer should not force accommodations on an employee until they make an affirmative request (and even then, never force leave unless there is no other reasonable accommodation).
  - But when should the conversation start?
- The EEOC's proposed regs start with the definition of "known limitation" because an employer is only required to accommodate "known limitations."
  - "Known limitation" is defined in the PWFA is a "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or the employee's representative has communicated to the covered entity **whether or not such condition meets the definition of disability**" under the ADA.
  - In the proposed rule, "known" means "the employee or applicant, or a representative of the employee or applicant, has communicated the limitation to the covered entity."
  - Under the proposed rule, an employer with 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," the employer may request information.
  - However, the EEOC takes the view that this will "for the most part" be "a straightforward determination that can be accomplished through a conversation between the employer and the employee as part of the interactive process and without the need for the employee to obtain documentation or verification."

EEOC Permits Employee to Ask Supervisors for Accommodations

- Employers are accustomed to having employees go to Human Resources to request accommodations under the ADA.
- Under the proposed PWFA regulations, an accommodation is considered to have been "communicated" to the employer where the employee or their representative has "made the request for an accommodation by communicating with a supervisor, manager, or someone who has supervisory authority for the employee . . . or human resources personnel."
- The regulations render it confusing as to whether an employer may mandate the employee report the need to accommodations to a specific employee.
- Commentors pointed this out. Until we get clarification, supervisors need to be trained to communicate these conversations to HR.

EEOC Proposes Employers Receive Less Information

- The EEOC's statement about simply having a "conversation" with employees about their needs is a dramatic departure from the normal ADA process.
- The EEOC says that where the need and pregnancy connection are obvious, it is unreasonable for an employer to obtain medical documentation.
- It outlines four accommodations (discussed below) that are ALWAYS reasonable even without any supporting information.
- Lactation-related requests should never require documentation per the EEOC.
- EEOC views it as reasonable to request additional information only when it is not clear that the condition exists or that the need exists. Delaying an accommodation pending an "unreasonable request" for medical information is said to be a violation of the PWFA.

When is Accommodation Necessary under PWFA Regulations?

- Under the ADA, an accommodation is only required where it would be (a) reasonable, (b) would enable the employee to perform the "essential functions" of their job; and (c) would not impose an undue hardship on the employer.
- The proposed PWFA regulations propose to use this same test, but the results are likely to be different. Under the proposed regs:
  - There is NO severity threshold to trigger the obligation to accommodate. So it may be enough that the employee "needs" more water, gets tired a little more quickly, etc. An employee need not suffer pain to justify an accommodation.
  - The employee need not have a separate diagnosis beyond pregnancy, such as gestational diabetes. Pregnancy ALONE is the qualifier, and the EEOC anticipates the employer's familiarity with the common side effects of pregnancy.

EEOC's Proposed "Pregnancy-Related Conditions" List is Expansive

- The EEOC's view is that a wide variety of conditions are "pregnancy-related" and require accommodation even if they do not meet the ADA's test for "disability":
    - Breastfeeding and lactation (sets up potential inconsistencies with PUMP Act and has other implications regarding whether a mother can bring a child to work)
    - Use of birth control
    - Menstruation
    - Infertility
    - Endometriosis
    - Having or choosing not to have an abortion
    - Urinary tract infections
    - Obesity / weight gain
    - Sleep deprivation
    - Low back pain
    - Post-partum depression/anxiety
    - Carpal tunnel syndrome

EEOC Examples of Reasonable PWFA Accommodations

- Ability to sit when needed
- Closer parking spaces
- Appropriately sized uniforms and safety equipment
- Additional break time for restrooms and rest
- Excused from strenuous activities or dangerous substances (**if** requested by employee)
- Leave (including leave for appointments when the employee has no other available leave!!!!!!)
- Part-time work / schedule changes / flexible work hours
- Task reassignment
- Temporary suspension of essential job functions
- Telework

Four "Presumptively Reasonable" Accommodations

The EEOC has proposed that there are "a limited number of simple modifications that will, **in virtually all** cases, be found to be reasonable accommodations that do not impose an undue hardship when requested by an employee during pregnancy."

These seem to remove from the employee the presumptive obligation to prove that the accommodations requested are "reasonable" and have been somewhat controversial.

- Toting water / drinks
- Additional restroom breaks
- Ability to perform work while sitting and to alternate standing with sitting
- Additional eating / drinking breaks

PWFA Regs Modify "Essential Job Functions"

- We all understand the importance of "essential job functions" from the ADA. And we know that, except for very brief periods where leave might be required under the ADA, eliminating an essential job function is never reasonable.
- The PWFA regulations challenge that notion.
- EEOC says a pregnant worker remains "qualified" so long as "any inability to perform an essential function is for a temporary period" and the employee is likely to be able to perform that function "in the near future."
- But then the EEOC goes further, and says that "the near future" means "within forty weeks."
  - **(That's 9 months for the math-challenged)**
- But then it goes further *still*, and say "temporary" means "lasting for a limited time, not permanent, and **may extend beyond 'in the near future.'"**
- According the EEOC, it is up to the employer to prove that a given accommodation constitutes an undue hardship.

No Essential Functions for 40 weeks (or more)?

- The EEOC's suggested 40-week period during which essential functions may not have to be performed would RE-START each time an employee requests an accommodation related to the temporary suspension of a job function.
- In theory, if a pregnant employee temporarily cannot perform an essential function before giving birth, she could receive up to 40 weeks off.
- But then, upon returning from maternity leave, she might seek another accommodation. This would mean the employer ***could*** be without someone in that position performing the essential job function for longer than 40 weeks in total, if we take the EEOC regulations at face value.
- And, the EEOC seems to say that this could occur ***even if*** the employee is not FMLA eligible and has no leave.

PWFA Regulations Focus on Leave

- We are now accustomed to the fact that the ADA may require unpaid leave in certain circumstances where no other leave is available.
- The EEOC doubles down on leave for the PWFA regulations.
- The PWFA **itself** only uses the word "leave" once, and it is to say that employers **may not force leave** upon employees.
- The PWFA regulations use the word "leave" 22 times, and another 165 times in the Appendix to the regulations.
- The EEOC wants to turn the PWFA into a full-blown leave statute on par with the FMLA.

EEOC's PWFA Undue Hardship Test

The EEOC seems to believe that the burden should be on the employer to prove that a given accommodation poses an undue hardship on the employer, rather than focusing on the employee's burden to prove that the accommodation is reasonable. This seems especially true when it comes to leave.

Since the EEOC proposes that an employer may have to accommodate an employee's temporary inability to perform an essential function, the proposed rule adds additional factors that may be considered when determining if the temporary suspension of an essential function causes an undue hardship:

- The length of time that the employee or applicant will be unable to perform the essential function(s)
- Whether there is work for the employee or applicant to accomplish
- The nature of the essential function, including its frequency
- Whether the employer has provided other employees or applicants in similar positions who are unable to perform essential function(s) of their positions with temporary suspensions of those functions and other duties
- If necessary, whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function(s) in question
- Whether the essential function(s) can be postponed or remain unperformed for any length of time and, if so, for how long.

How about some examples?

- Available here: https://www.federalregister.gov/documents/2023/08/11/2023-17041/regulations-to-implement-the-pregnant-workers-fairness-act#sectno-reference-1636.8

Example 1636.3 #23/Unpaid Leave for Recovery from Childbirth:

- Sofia, a custodian, is pregnant and will need six to eight weeks of leave to recover from childbirth. Sofia is nervous about asking for leave so Sofia asks her mother, who knows the owner, to do it for her. The employer has a sick leave policy but no policy for longer periods of leave. Sofia does not qualify for FMLA leave.
  - Known limitation: Sofia's need to recover from childbirth is a physical condition; Sofia needs an adjustment or change at work; Sofia's representative has communicated this information to the employer.
  - Qualified: After the reasonable accommodation of leave, Sofia will be able to do the essential functions of the position.
  - The employer must grant the accommodation of unpaid leave (or another reasonable accommodation) absent undue hardship.

More EEOC Examples (from Appendix)

Example 1636.3 #24/Unpaid Leave for Medical Appointments

- Taylor, a newly hired member of the waitstaff, requests time off to attend therapy appointments for postpartum depression. As a new employee, Taylor has not yet accrued sick or personal leave and is not covered by the FMLA. Taylor asks her manager if there is some way that she can take time off.
  - Known limitation: Taylor's postpartum depression is a medical condition related to pregnancy, and she is seeking health care; Taylor needs an adjustment or change at work; Taylor has communicated this information to the employer.
  - Qualified: Taylor can do the essential functions of the job with a reasonable accommodation of time off to attend the therapy appointments.
  - The employer must grant the accommodation of unpaid leave (or another reasonable accommodation) absent an undue hardship.

Light Duty Example (Channeling *Young v. UPS*)

Example 1636.3 #9

- Two months into a pregnancy, Lydia, a delivery driver, is told by her health care provider that she should not lift more than 20 pounds. Lydia routinely has to lift 30–40 pounds as part of the job. She discusses the limitation with her employer. The employer is unable to provide Lydia with assistance in lifting packages, and Lydia requests placement in the employer's light duty program, which is used for drivers who have on-the-job injuries.
- Known limitation: Lydia's lifting restriction is a physical condition related to pregnancy; she needs a change in work conditions; and she has communicated this information to the employer.
- Qualified: Lydia needs the temporary suspension of an essential function.
  - Lydia's inability to perform the essential function is temporary.
  - Lydia could perform the essential functions of her job in the near future because Lydia needs an essential function suspended for less than forty weeks.
  - Lydia's need to temporarily suspend an essential function of her job may be reasonably accommodated through the existing light duty program. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Relief from Essential Function Example

Example 1636.3 #12:

- Jackie's position at a fabrication plant involves working with certain chemicals, which Jackie thinks is the reason she has a nagging cough and chapped skin on her hands. Once she becomes pregnant, Jackie seeks the accommodation of a temporary suspension of an essential function of working with the chemicals because the chemicals create an increased risk to her pregnancy. The employer provides the accommodation.
- After Jackie gives birth and returns to work, she no longer has any known limitations. Thus, she can be assigned to work with the chemicals again even if she would rather not do that work, because the PWFA only requires an employer to provide an accommodation that is needed due to the known limitation related to pregnancy, childbirth, or related medical conditions. Jackie's employer may also have accommodation responsibilities under the ADA.

PWFA Regs Undue Hardship Example

Example 1636.3 #31/Undue Hardship

- Patricia, a convenience store clerk, requests that she be allowed to go from working full-time to part-time for the last 3 months of her pregnancy due to extreme fatigue. The store assigns two clerks per shift, and if Patricia's hours are reduced, the other clerk's workload will increase significantly beyond his ability to handle his responsibilities. The store determines that such an arrangement will result in inadequate coverage to serve customers in a timely manner, keep the shelves stocked, and maintain store security.
- Based on these facts, the employer likely can show undue hardship based on the significant disruption to its operations and, therefore, can refuse to reduce Patricia's hours. The employer, however, should explore whether any other reasonable accommodation will assist Patricia without causing undue hardship, such as providing a stool and allowing rest breaks throughout the shift.

Pumping Example from PWFA Regs

- Later, we will talk about the PUMP Act, which applies for the first year following the birth of a child. Here, however, is an interesting example of how the EEOC thinks the PWFA might supplement the PUMP Act.

Example 1636.3 #29/Pumping Breast Milk

Salma gave birth **thirteen months** ago and wants to be able to pump breast milk at work. Salma works at an employment agency that sends her to different jobs for a day or week at a time. Salma asks the person at the agency who makes her assignments to only assign her to employers who will allow her to take a break to pump breast milk at work.

- Known limitation: Salma's need to express breast milk is a physical condition related to lactation which is a related medical condition; Salma needs a change or adjustment at work; Salma has communicated this information to the covered entity.
- Qualified: Salma is able to perform the functions of the jobs to which she is assigned with the reasonable accommodation of being assigned to workplaces that will allow her to pump at work.
- The agency must grant the accommodation (or another reasonable accommodation) absent undue hardship.

A Reminder: it's early, y'all

- The EEOC just began accepting charges of discrimination under the PWFA in June 2023.
- The regulations we've discussed aren't final, and could change.
- We have no real court decisions on the PWFA –
  - One case that questioned whether breastfeeding was a "pregnancy-related condition," but the question may have been directed more to whether the employee sufficiently invoked that theory in their lawsuit. Beddingfield v. UPS, No. 23-CV-05896-EMC, 2024 WL 1521238, at *9 (N.D. Cal. Apr. 8, 2024)
  - The other case held that the PWFA was unconstitutional because of the unusual procedure Congress used to pass the appropriations act to which the PWFA was attached. But that case only applies to the State of Texas and it may well be appealed. Texas v. Garland, No. 5:23-CV-034-H, 2024 WL 814498, at *1 (N.D. Tex. Feb. 27, 2024), superseded, No. 5:23-CV-034-H, 2024 WL 967838 (N.D. Tex. Feb. 27, 2024).

The PUMP Act

An old idea, re-invented

The PUMP Act

- For some time now (since the enactment of the Affordable Care Act), non-exempt (hourly) workers have been entitled to lactation breaks at work under an amendment to the Fair Labor Standards Act.
- However, exempt workers were, well, exempt from those rules.
- The PUMP Act expanded protections to include ALL workers covered by the federal Fair Labor Standards Act.
- The PUMP Act is **in effect now** and employers must comply.
- The FLSA does not have an employee threshold – it's test for employer coverage is much broader, and generally, if you are engaged in interstate commerce, you are covered.
- However, with respect to lactation breaks, the FLSA and the PUMP Act provide exemptions for so-called small employers (less than 50 employees). But the exemption is very narrow, and it's dangerous to rely upon because the employer must show an "undue hardship" on a case-by-case basis.

PUMP Act Overview

- Applies for the first year next-following the birth of a child.
- Requires reasonable break time "each time such employee has a need to express milk."
- No hard and fast limit on the number of breaks.
- Breaks are unpaid unless the employee is working during the breaks or unless the employer provides paid rest breaks.
- Employer must supply a space to express milk, other than a bathroom, that is (1) shielded from view and (2) free from intrusion." A bathroom **never** qualifies.
- Employers must post notices.
- Anti-retaliation provision and damages remedies.

PUMP Act Examples from Department of Labor

- Julia cleans guest rooms at hotels on weekends. Julia is entitled to break time and space under the FLSA for one year after the birth of a child.
- Sam is a registered nurse who is exempt from receiving overtime pay under the FLSA. Beginning on December 29, 2022, Sam is entitled to break time and space for one year after the birth of a child.
- Irina is the shift manager at a fast-food restaurant with several locations and meets all requirements to be exempt from overtime pay requirements under the FLSA. When Irina returns to work after the birth of her child in March of 2023, in order to comply with the law, her employer provides an office to take four breaks a day of 25 minutes each to pump breast milk for the nursing child.

Additional Examples from DOL

- Madison works on a farm. Madison's employer provides all employees with two paid 15-minute rest breaks each day. Madison chooses to use both of the paid 15-minute breaks to pump breast milk for her 6-month-old infant. If Madison needs additional breaks to pump, the additional break time does not have to be compensated as long as Madison does not perform any work during the breaks.
- Peyton is a third-grade teacher. Under the FLSA, Peyton is entitled to time to pump breast milk in a private space. Peyton chooses to grade papers and complete student records while pumping breast milk. Peyton must be compensated for the time spent pumping and doing this work at the same time.
- Lauren's employer requires all employees to attend a team-building meeting at 3pm on Thursdays. Lauren requests break time to pump during the Thursday meeting. Lauren's employer denies her request in violation of the FLSA. Lauren must be paid for the time attending the meeting and must be permitted time and space to pump.

Interaction Between PUMP Act and PWFA

Example 1636.3 #29/Pumping Breast Milk

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- Known limitation: Salma's need to express breast milk is a physical condition related to lactation which is a related medical condition; Salma needs a change or adjustment at work; Salma has communicated this information to the covered entity.
- Qualified: Salma is able to perform the functions of the jobs to which she is assigned with the reasonable accommodation of being assigned to workplaces that will allow her to pump at work.
- The agency must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Conclusion & Questions

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