PRACTICAL NEWS
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The Final Regulations Interpreting The Pregnant Workers Fairness Act Take Effect on June 18, 2024

The Pregnant Workers Fairness Act ("PWFA") went into effect on June 27, 2023 and applies to employers with at least 15 employees. The PWFA was intended to fill gaps in the federal and state legal landscape regarding protections for employees affected by pregnancy, childbirth, and related medical conditions. In many respects, the PWFA expands employers' obligations to accommodate pregnancy-related conditions beyond the Americans with Disabilities Act ("ADA").

On April 15, 2024, the Equal Employment Opportunity Commission ("EEOC") issued its final regulations (the "Final Regs.") which interpret the PWFA and provide insight into how the EEOC will enforce the law. The Final Regs. will take effect on June 18, 2024. Below are the key takeaways from the Final Regs. and implications for employers' compliance with the law.

Expansive Scope of Covered Conditions

The PWFA requires employers to offer reasonable accommodations for employees' "known limitations" regarding "physical or mental condition(s) related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions." The Final Regs. explain that "related to, affected by, or arising out of" is an inclusive term. "Pregnancy" and "childbirth" are also interpreted broadly to include current pregnancy, past pregnancy, potential or intended pregnancy (which can include infertility, fertility treatments, and the use of contraception), labor and childbirth.

The Final Regs. define "related medical conditions" as conditions that are "related to, are affected by, or arise out of pregnancy or childbirth" and provide a *non-exhaustive* list of examples: termination of pregnancy, including by miscarriage, stillbirth, or abortion; lactation and conditions related to lactation; menstruation; postpartum depression, anxiety or psychosis; vaginal bleeding; preeclampsia; pelvic prolapse; preterm labor;

ectopic pregnancy; gestational diabetes; cesarean or perineal wound infection; maternal cardiometabolic disease; endometriosis; and changes in hormone levels.

"Undue Hardship" and "Predictable Assessments"

The PWFA provides that an employer is excused from making a reasonable accommodation to a qualified employee if doing so constitutes an "undue hardship." The PWFA and the ADA both define "undue hardship" as significant difficulty or expense incurred by the covered entity. The Final Regs list the following factors to be considered in determining if an accommodation would be an "undue hardship": (1) The nature and net cost of the accommodation; (2) The financial resources of the facility, the number of people employed at the facility, and the effect on expenses and resources; (3) The financial resources of the covered entity, the overall size of the business, and the number, type, and location of its facilities; (4) The type of operations of the covered entity; and (5) The impact of the accommodation on the operation of the facility, including on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

While the Final Regs. set forth factors to determine whether an accommodation constitutes an undue hardship, they also suggest that there are at least four types of accommodations that will in "virtually all cases," not impose an undue hardship. These four accommodations are considered "predictable assessments":

1. Allowing an employee to carry or keep water near and drink, as needed;
2. Allowing an employee to take additional restroom breaks, as needed;
3. Allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and
4. Allowing an employee to take breaks to eat and drink, as needed.

Limited Requests for Documentation

Employers should be aware that the EEOC's stance on supporting documentation for requests under the PWFA differs significantly from its stance under the ADA. The Final Regs. prohibit employers from seeking documentation in many circumstances, including: (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 aforementioned "predictable assessments" (i.e., additional restroom breaks; food/drink breaks; beverages near the work station; and sitting or standing as needed); (4) when the accommodation is related to lactation; and (5) when the accommodation is available to other employees without supporting documents.

Suspension of Essential Functions

Unlike the ADA, the Final Regs. of the PWFA contemplate temporarily relieving an employee of her essential job functions as a form of accommodation. The Finals Regs. provide that an employee may still be "qualified" if (1) she cannot perform one or more essential functions of the job on a "temporary" basis, (2) she could perform the essential function(s) "in the near future" (generally 40 weeks from the start of the temporary suspension of an essential function for a current pregnancy), and (3) the inability to perform the essential functions can be reasonably accommodated.

Determining whether an employee will be able to perform the essential functions "in the near future" is a fact-intensive inquiry and employers should perform an evaluation each time an employee asks for an accommodation that requires suspension of an essential job function.

IMPLICATIONS FOR EMPLOYERS

The Final Regs. acknowledge that there may be circumstances in which a qualified individual may be entitled to an accommodation under either the PWFA or the ADA for a pregnancy-related limitation. The interpretive guidance emphasizes that employees are not required to identify the statute under which they are requesting a reasonable accommodation, so employers should train human resources and management professionals to identify and apply the applicable framework.

In consultation with counsel, employers should develop revised policies and protocols to handle requests for pregnancy-related accommodations. Employers should also provide training to their human resources teams and anyone else who might receive a request for a pregnancy-related accommodation on the basic requirements of the law and how requests for accommodations should be handled.

For more information about the PWFA, please feel free to contact the attorneys within our Employment & Labor Law Practice.

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