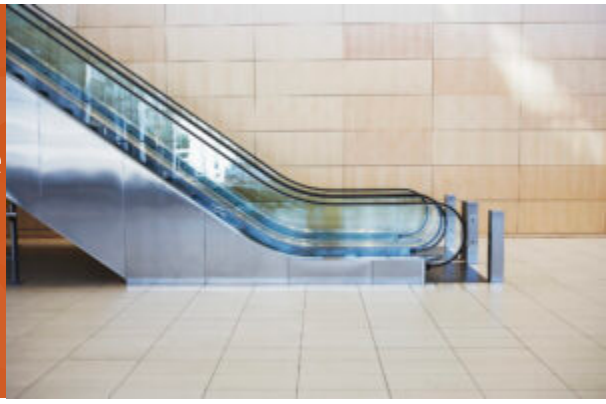
Employment Law Alert: EEOC Issues Final Regulation and Interpretive Guidance on the Pregnant Workers Fairness Act

April 17, 2024



On April 15, 2024 the U.S. Equal Employment Opportunity Commission ("EEOC") issued its final regulation and interpretive guidance related to carrying out the Pregnant Workers Fairness Act ("PWFA"), which went into effect last June 2023 (see Morse's previous post on the PWFA). The final regulation will be published on April 19, 2024, and will go into effect on June 18, 2024. The PWFA requires employers with at least 15 employees to provide reasonable accommodations for employees with limitations relating to "pregnancy, childbirth, or related medical conditions" unless the accommodation would result in an undue hardship for the employer.

The final regulation comes after the 60-day public comment period, wherein the EEOC was primarily focused on clarifying definitions and limitations of the PWFA. The EEOC invited employers to provide practical commentary and criticism of the final regulation. The EEOC received more than 100,000 comments from employers and individuals.

The EEOC published its Implementation of the Pregnant Workers Fairness Act, a comprehensive report of the changes it adopted (and what it declined to adopt), in response to the extensive comments it received. Below are a few key takeaways:

- Illustrative Examples: The final regulation provides more detail and illustrative examples for employers in identifying and providing reasonable accommodations. For example, the EEOC noted that in the final regulation it replaced some more simplistic terms like "bed rest" with the better description of "rest and reduced activity." The EEOC also noted that while the examples are illustrative, they are not intended to cover every potential limitation or accommodation under the PWFA.
- Applies Only to Covered Employees: The EEOC clarified that the protections of the PWFA apply only to job applicants or employees who have physical or mental limitations *arising out of* pregnancy, childbirth, or related medical conditions. Unlike the Family Medical Leave Act ("FMLA), which includes protections for caregivers, the PWFA does not provide rights or protections to job applicants or employees who may be a partner, spouse, or family member.
- Connection with Title VII: The EEOC relied heavily on Title VII of the Civil Rights Act of 1964 ("Title VII") precedent to ensure that carrying out the spirit of both statutes would be consistent. In that vein, the EEOC noted that whether an individual has a condition covered under the PWFA will be guided by current Title VII definitions and interpretations, as will many of the PWFA's other definitions and interpretations.
- Causality and Interaction with ADA: The EEOC declined to narrow the definition of "related to, affected by, or arising out of." Some public comments expressed concern that the broad definition could require accommodations for "known limitations caused by any physical or mental condition that has any real, perceived, or potential connection to—or impact on—an individual's pregnancy, fertility, or reproductive system." The EEOC declined to make the definition less inclusive but did add helpful commentary on how employers may engage in this

analysis with the help of the employee. The EEOC also noted that through this analysis it could become apparent that while the employee does not qualify for an accommodation under the PWFA, they may qualify for an accommodation under the Americans With Disabilities Act ("ADA").
  - Further, important protections from the ADA that apply to all covered employees continue to apply when employees are seeking accommodations under the PWFA, such as the protection of private medical information and limitations on disability-related inquiries.
  - The PWFA and ADA utilize many of the same terms and definitions, such as there may be circumstances where an employee is entitled to protections under both the PWFA and the ADA at the same time.

- Temporal Proximity to a Current or Recent Pregnancy: The EEOC declined to limit the definition of "pregnancy, childbirth, or related medical conditions" to a current or recent pregnancy. The EEOC noted that limiting the definition in that way would not be supported by the current definitions under Title VII, and would exclude many employees who may still require pregnancy-related accommodations postpartum.
- Commentary on Specific Conditions:
  - *Menstruation*: The EEOC declined to specifically include or remove menstruation from the list of "medical conditions." It noted that Title VII precedent is not consistent on this point, and as such, any decision related to such a condition should be made on a case-by-case basis with the employee's particular circumstances in mind.
  - *Fertility and Infertility*: The EEOC noted that fertility and infertility treatments may be a covered condition under the PWFA and Title VII, absent undue hardship for the employer.
  - *Contraception*: The EEOC provided analysis on when contraception may be a basis for protection under the PWFA, to the extent it affects an individual's potential pregnancy. The EEOC noted explicitly that such an analysis should be done on a case-by-case basis.
  - *Abortion*: The EEOC provided extensive explanation on why abortion is explicitly included under the definition of "pregnancy, childbirth, or related medical conditions." Recognizing that there are deeply held moral, religious beliefs, and convictions on both sides of the issue, the EEOC noted that including abortion acknowledges the longstanding inclusion of the interpretation of the phrase under Title VII. It further noted that the protections under the PWFA are limited and do not necessitate the employer to provide any paid leave or paid travel expenses for the condition, nor does it compel employer-sponsored health care providers to provide such care.

The EEOC's interpretive guidance is extensive; however, the significant reliance on current Title VII and ADA precedent will help employers as they navigate the PWFA's requirements. Employers should note that state laws that provide more stringent or additional protections for pregnant workers will continue to take precedence over the PWFA.

Please contact a member of the Employment Team should you have questions concerning this subject.