DEEP DIVE REPORT

Managing and Accommodating **Pregnant Employees**

HR Employment Law *Advisor*

Contents

Executive summary

The Pregnant Workers Fairness Act, enacted in 2023, is the newest federal law intended to uphold the employment rights of pregnant women, a group that has long faced discrimination as they juggle the unique but temporary restrictions and physical limitations that can accompany pregnancy. **www.federalregister.gov/documents/2024/04/19/2024-07527/implementation-of-the-pregnant-workers-fairness-act**

The PWFA joins other laws designed at least in part to enable pregnant women to continue working during and after pregnancy. It attempts to fill gaps not covered by Title VII of the Civil Rights Act, the Pregnancy Discrimination Act, the Americans with Disabilities Act and the Family and Medical Leave Act.

The focus of the PWFA is on reasonable accommodations. It requires covered employers to adjust work rules and schedules in ways they haven't been required to do before. For example, it requires employers to empower front-line supervisors to make quick decisions when faced with reasonable accommodation requests from workers affected by pregnancy-related limitations. Many of these conditions go well beyond actual pregnancy itself.

The EEOC administers and enforces the PWFA, which requires employers with 15 or more employees to comply, including private- and public-sector employers.

Major PWFA provisions include:

- **Reasonable accommodations.** Covered employers must provide reasonable accommodations to qualified employees' or applicants' known limitations related to, affected by or arising out of pregnancy, childbirth or related medical conditions, unless doing so creates undue hardship.

- **Pregnancy-related limitations.** The law focuses on pregnancy-related limitations rather than the more familiar concept of disabilities employers have been making reasonable accommodations for since enactment of the ADA. The PWFA defines a pregnancy-related limitation as "a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions."
- **Right to work.** Another specific PWFA provision mandates that if a pregnant worker can be offered a reasonable accommodation that allows her to continue earning a paycheck, she can choose that accommodation over her employer's preference to provide unpaid leave as an accommodation. In that respect, it differs from the ADA, which lets the employer choose its preferred accommodation.
- **Inability to perform an essential function.** The law also says that the inability to perform an essential function temporarily may require removing that essential function as a reasonable accommodation.
- **Immediate coverage.** There is no service requirement before the PWFA kicks in. Applicants and employees are immediately covered and entitled to reasonable accommodations from Day One. Full-time and part-time employees are covered, with no requirement to have worked a minimum number of hours.
- **Anti-discrimination and retaliation.** The law forbids employers from taking adverse action against workers who ask for, receive or may be eligible in the future for benefits under the PWFA.

The EEOC's final regulations implementing the PWFA went into effect June 18, 2024. **www.eeoc.gov/summary-key-provisions-eeocs-final-rule-implement-pregnant-workers-fairness-act-pwfa**

Laws protecting pregnant employees

To understand the new rules employers must follow under the PWFA, it's important to look first at these older laws that partially protect pregnant employees' employment rights:

- Title VII of the Civil Rights Act
- Pregnancy Discrimination Act
- Americans with Disabilities Act
- Family and Medical Leave Act
- Pregnant Workers Fairness Act.

Title VII of the Civil Rights Act

Title VII of the Civil Rights Act of 1964 bars employment discrimination and harassment based on race, color, religion, sex and national origin. Under the law, discrimination based on pregnancy is considered a form of sex discrimination. The EEOC, which enforces the law, can sue employers on behalf of workers who allege that their employers refused to hire them or treated them differently because of pregnancy.

The EEOC defines sex discrimination to include discrimination and harassment based on:

- Current, past or potential pregnancy
- Medical conditions related to pregnancy or childbirth
- Breastfeeding and lactation
- Birth control usage and abortion.

The EEOC also defines harassment based on sex to include harassment because of pregnancy, childbirth or medical conditions related to pregnancy or childbirth, including physical or mental disabilities arising from pregnancy. Thus, Title VII sex discrimination would occur if an employer refused to hire a pregnant

applicant or told a pregnant worker she should have an abortion if she wanted a promotion.

The EEOC also recently released final guidance on harassment, which includes updated examples of what may constitute pregnancy-related sex discrimination. It includes these hypothetical examples:

Pregnancy-based harassment

Kendall, a veterinary assistant at a nationwide veterinary clinic chain, tells co-workers she is pregnant. Soon after, one of her supervisors, Veronica, begins berating Kendall's work as slow, shoddy and scatterbrained. She accuses Kendall of focusing more on getting ready for her new baby than doing her job.

Veronica also begins to scrutinize Kendall's trips to the bathroom and, on at least one occasion, yells at Kendall for "always" being in the bathroom. As Kendall's pregnancy progresses, Veronica refers to Kendall as a "heifer" and makes comments like, "We don't treat livestock at this office."

Based on these facts, Veronica's harassing conduct toward Kendall is based on sex, and is therefore prohibited by Title VII.

Harassment based on pregnancy-related medical conditions

Kristina, a graphic designer at a marketing firm, is experiencing pregnancy-related morning sickness. The firm accommodates Kristina's morning-sickness limitations by allowing her to telework up to three days per week and use flexible scheduling on the days she comes into the office.

Kristina's colleagues complain that pregnant women always get special perks and privileges, and accuse Kristina of getting pregnant "just so she can kick back, relax at home on the couch and collect a paycheck." During a team meeting to discuss staffing a new, high-priority portfolio, Kristina asks to be considered. Her

co-workers scoff that "if Kristina is so sick that she cannot come into the office, how can she be well enough to work on such an important account?"

Based on these facts, the co-workers' harassing conduct toward Kristina is unlawful under Title VII because it is based on a pregnancy-related medical condition—her morning sickness.

Pregnancy Discrimination Act

Because Title VII of the Civil Rights Act did not specifically define pregnancy discrimination as a form of sex discrimination, Congress determined that clearer language was needed to remove any uncertainty. It passed the Pregnancy Discrimination Act in 1978, amending Title VII to state that it prohibits "sex discrimination on the basis of pregnancy."

The PDA requires that a covered employer treat women affected by pregnancy, childbirth or related medical conditions in the same manner as other applicants or employees who are similar in their ability or inability to work.

The PDA covers all aspects of employment, including firing, hiring, promotions and benefits such as leave and health insurance. It states that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work…"

PDA limitations

The problem with the PDA was that, though it says employers must treat pregnant employees the same as any other employee, it does not address problems unique to pregnancy. For example, a pregnant worker with a physician-ordered lifting restriction has the same right to a light-duty position as her colleague whose job-related injury left him with the same lifting restriction. In other words, if a workers' comp claimant has the right to a light-duty

job when facing a lifting restriction, then the pregnant employee with the same lifting restriction would also be entitled to a light-duty assignment.

But many employers don't have a light-duty program for workers hurt on the job—they simply send them home and allow them to collect their full workers' comp benefits until they are ready to return to their job. In that case, a pregnant worker with a temporary restriction due to pregnancy would not be entitled to a light-duty position either. The PDA calls for equal rights for pregnant workers, not additional accommodations or exceptions from the rules that apply to other workers.

Americans with Disabilities Act

The Americans with Disabilities Act protects people with disabilities from workplace discrimination. Disabled employees are covered as long as their employer has a minimum of 15 workers. The EEOC is responsible for enforcing the ADA.

The ADA requires that applicants and employees with a disability—defined as a physical or mental condition that substantially impairs one or more major life functions—be accorded reasonable accommodations to allow them to perform their job's essential functions. For example, someone who uses a wheelchair is entitled to an accessible workplace so they can come to work, eat lunch with co-workers in the cafeteria and attend a catered company holiday party at an off-site facility.

To arrive at reasonable accommodations, the employer and the disabled employee must use an interactive accommodations process. That is, the two are required to discuss the nature of the employee's disability and possible accommodations that will allow the employee to perform his or her essential job functions.

Armed with a list of reasonable accommodations, the employer can pick the one it prefers. For example, if faced with a choice between purchasing an expensive custom-designed computer program or a less expensive off-the-shelf version, the employer is

free to pick the less costly option, even if the employee prefers a customized, easier-to-use program.

Many pregnancy-related conditions could be easily accommodated, but not under the ADA. That's because the law only covers disabilities that are permanent or long-term—not temporary impairments that don't substantially limit major life functions in the long term. Almost all pregnancy-related conditions are term-limited by the nature of pregnancy itself. That makes the ADA a poor vehicle for helping pregnant workers remain on the job.

Family and Medical Leave Act

The FMLA was the first federal law to provide unpaid, job-protected time off for serious health conditions. It includes a requirement that employers continue health insurance coverage during that time off if the employee was covered by a health insurance plan before taking FMLA leave.

The U.S. Department of Labor enforces the FMLA. The law covers employers with 50 or more employees. It does not cover smaller employers, the majority of employers in the United States. Employees must have worked for the employer for at least one year before becoming eligible for time off and must have worked at least 1,250 hours (about 24 hours per week on average) in the year before starting leave.

Basic FMLA leave provides up to 12 weeks of unpaid leave for three specific situations:

- **Birth or adoption:** Employees can take FMLA leave following the birth, adoption or foster care placement of a child.
- **Self-care:** Employees who suffer from a serious health condition may take up to 12 weeks of unpaid FMLA leave.
- **Care for a spouse or immediate family member:** Employees may take FMLA leave to care for a spouse, parent, child

or other immediate family member with a serious health condition.

Pregnant workers who otherwise qualify for leave under the FMLA because they work for a large enough employer and meet the service requirement can use unpaid FMLA leave to take time off for prenatal visits, giving birth and recovering.

Under the FMLA, pregnancy is considered a serious health condition. Thus, up to 12 weeks of unpaid leave are available in total during an average pregnancy and recovery period, with the possibility of some additional time off if the pregnancy spans more than one FMLA year. For example, if the employer provides FMLA leave that renews each calendar year, an employee who gives birth in March may have used FMLA leave both in the last three months of the preceding year and the first three months of the current year.

FMLA leave may also be available for other pregnancy-related serious health conditions. Examples:

- Morning sickness severe enough to require an absence, since the employee can't perform the essential functions of her job
- For an employee who had a miscarriage and needs treatment.

It may also be available for infertility treatments like *in vitro* fertilization.

Pregnant Workers Fairness Act

The Pregnant Workers Fairness Act is the most recent law protecting the rights of pregnant employees. It took effect in June 2023. Generally, the PWFA requires a covered employer 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 applies only to accommodations. Other laws such as Title VII, the PDA and the ADA make it illegal to fire or otherwise discriminate against employees or applicants on the basis of pregnancy, childbirth or related medical conditions.

Find detailed information on the PWFA in the following sections.

The PWFA and reasonable accommodations

The Pregnant Workers Fairness Act requires employers to reasonably accommodate workers who have known limitations related to, affected by or arising out of pregnancy, childbirth or related medical conditions. The only exception to the reasonable accommodation requirement is if the accommodation would cause an undue hardship for the employer.

EEOC regulations say an undue hardship involves significant expense or difficulty. Employers who decide to turn down an accommodation request because approving it would cause an undue hardship should be prepared with data demonstrating the expense or difficulty.

A reasonable accommodation is a change to the work environment or the way things are usually done at work. Unlike the ADA, a PWFA reasonable accommodation doesn't have to enable the employee to perform the essential functions of the job. In fact, a reasonable accommodation can be the temporary suspension of an essential function until the employee can resume performing the function.

Pregnancy-related limitations

Before you can determine if an employee is entitled to a reasonable accommodation under the PWFA, you must determine whether she is experiencing a pregnancy-related limitation. If there's none—or if the limitation isn't pregnancy-related—there is no obligation to accommodate.

The law focuses on pregnancy-related limitations rather than the more familiar concept of disabilities employers have grown used to accommodating since enactment of the ADA in 1990. The PWFA defines a pregnancy-related limitation as "a physical or mental condition related to, affected by or arising out of pregnancy, childbirth or related medical conditions." A limitation is a far lesser condition than a disability that substantially impairs a major life function.

In the PWFA regulations, the EEOC explained that a limitation can be a modest, minor or episodic impediment or problem; a need that's related to maintaining the employee's health or the health of the pregnancy; or simply a need to seek health care related to pregnancy, childbirth or a related medical condition itself.

Some examples of limitations include:

- Having to attend prenatal appointments that are routine in nature, such as getting a pregnancy test, blood work and ultrasounds
- Having to attend medical appointments that are for other pre-existing or new conditions that could affect the pregnancy but aren't directly related to pregnancy
- Experiencing nausea and vomiting
- Physician-ordered restrictions on lifting, bending, standing, running and so forth
- Needing to avoid toxic chemicals
- Being required to stay out of extreme heat or cold.

Reasonable accommodations

The PWFA regulations state that most accommodations will be simple and readily apparent. For example, if an employee tells her supervisor she is pregnant and is experiencing morning sickness, she should expect that her employer will, without a long delay, adopt one of these accommodations:

- Allowing her to arrive past her scheduled start time when morning sickness strikes, without penalizing her for breaking tardiness rules
- Moving the employee closer to the bathroom during her shift in case she becomes nauseous
- Letting her work from home if the job is suited to telecommuting, so she can take breaks as needed for morning sickness
- Allowing additional breaks if the job involves a production line or a checkout counter.

Other reasonable and common accommodations for pregnancy in general include permitting:

- Frequent breaks to use the bathroom or eat, or granting permission to drink and snack at her workstation if that's ordinarily against the rules
- Sitting or using a stool instead of standing
- Time off without penalty, even if the employee has no earned leave
- Remote work if that's appropriate for the job
- Priority parking close to entrances
- Light-duty work if available
- Temporary restructuring of the job
- Temporary suspension of one of more essential job functions
- Modification of uniforms or personal safety gear
- Time off to recover from childbirth, recuperate from miscarriage or stillbirth or undergo fertility treatments
- Time off to obtain and recover from abortion.

Note: Attorneys general in several states in early 2024 filed suit in federal court to challenge reasonable accommodations related

to abortion. Employers should check the status of that litigation before turning down a request for abortion-related time off.

Temporary removal of essential functions as reasonable accommodations

The PWFA says that the temporary inability to perform an essential job function may require accommodating the pregnant employee by removing that essential function.

This is a significant difference from the ADA, which focuses on accommodations that allow the worker to perform the essential functions of their job. Under the ADA, if there is no reasonable accommodation that accomplishes that goal, then no accommodation is due.

But under the PWFA, a reasonable accommodation can be the temporary elimination of the essential function itself. The temporary removal of an essential function is called for in the statute itself and reinforced in the final regulations. As long as the ability to perform the essential function will return "in the near future," it can be suspended until that time.

For example, a pregnant employee's job requires lifting 50-pound packages as an essential function. A doctor forbids lifting more than five pounds. The employer may be required to eliminate the lifting requirement for the duration of the pregnancy as a reasonable accommodation. The employee could begin lifting again when her medical provider has cleared her to do so. This may seem like creating a light-duty position, eliminating the need to transfer the worker to an open light-duty position. It is a recognition that, in the past, one of the biggest obstacles for pregnant workers who wanted to continue working throughout their pregnancies was the lack of opportunities to transfer to light-duty work.

The final regulations also define "in the near future" to mean 40 weeks, the typical duration of pregnancy. If the pregnant worker is expected to resume an essential function after giving birth

following a normal gestation of 40 weeks, then dropping the essential function is a reasonable accommodation.

The rule is different for the removal of essential functions when the employee requesting the accommodation is not presently pregnant but has a pregnancy-related limitation. For example, an employee requests the removal of an essential function of her job such as regular attendance on an assembly line because she is suffering from postpartum depression. There is no assumption that 40 weeks applies. Instead, the EEOC says the employer must assess each situation individually.

Here's an example from the final regulations:

> *Fatima's position as a farmworker usually involves working outdoors in the field, although there also is indoor work such as sorting produce. After she returns from giving birth, Fatima develops postpartum thyroiditis, which has made her extremely sensitive to heat, and has contributed to muscle weakness and fatigue. She seeks the accommodation of a seven-month temporary suspension of the essential function of working outdoors in hot weather.*
>
> *Fatima's sensitivity to heat, muscle weakness and fatigue are physical or mental conditions related to, affected by or arising out of pregnancy, childbirth or related medical conditions. Fatima needs an adjustment or change at work due to the limitation. Fatima has communicated this information to the employer.*
>
> *Fatima is asking for the temporary suspension of an essential function. The suspension is temporary, and Fatima could perform the essential functions of the job in the near future (seven months). It appears that the inability to perform the essential function can be reasonably accommodated by temporarily assigning Fatima indoor work, such as sorting produce.*

Note that assessing how long the removal of the essential function will last is based on the pregnant worker's unique circumstances rather than the presumed 40-week period. Employers must consider whether the predicted period the essential

function can't be performed is "in the near future." However, if the estimate is that the limitation is indefinite, that's clearly not "in the near future."

The PWFA's interactive process

The PWFA requires employers to engage in an interactive accommodations process to arrive at reasonable accommodations. This process is modeled after the ADA's interactive process. It begins with a request for a pregnancy-related accommodation and anticipates that the employer and the employee will come up with potential accommodations by talking it out.

Many employers may have rules that require employees to request ADA accommodations in writing. The EEOC final regulations say this should not be required to start the interactive process under the PWFA. The reason is simple: Most pregnancy-related requests will have a certain urgency; the limitations may appear suddenly. Placing roadblocks on the way to a reasonable accommodation therefore shouldn't happen. Instead, develop an interactive process designed to grant (or deny) the accommodation as quickly and easily as possible.

It is crucial for employers to train supervisors and give them authority to accept and grant requests quickly in most cases. Of course, they should also inform HR of the request and the approved accommodation and provide a written summary documenting the interactive process.

The final rules also say that many pregnancy-related accommodations are so obvious and simple that they should not require much in the way of discussion. These are referred to as "predictable assessments" that are presumed not to impose an undue hardship when an employee requests them. In other words, your supervisors should be trained to automatically approve these. Essentially, the request and the response are all the interactive process that's expected.

Sometimes, an employer might want to have supporting documents for the requested accommodation. The PWFA regulations

say this should not be a routine request since so many accommodations and their need are obvious. Document requests must be "reasonable" and ask for the minimum documentation that is sufficient to:

- Confirm that a physical or mental condition is related to, affected by or arising out of pregnancy, childbirth or related medical conditions
- Describe the change or adjustment at work needed because of the limitation.

Right to work

Another specific provision in the PWFA is a mandate that if the pregnant worker can be offered a reasonable accommodation that allows her to continue earning a paycheck, she can choose that accommodation over her employer's preference to provide unpaid leave as a reasonable accommodation. This differs from the ADA, which lets employers choose the reasonable accommodation they prefer.

The idea is that pregnant workers may very well prefer to continue working instead of being sent home on leave, knowing they may have to take time off after birth to recover. That's especially true if the employee already knows she will have a cesarean delivery and will have a longer recovery time.

Lactation and nursing

The final regulations make clear that lactation and nursing are pregnancy-related limitations requiring reasonable accommodations. Another federal law, the Providing Urgent Maternal Protections for Nursing Mothers Act or PUMP Act, mandates unlimited milk-expression breaks for new mothers who are nursing their infants. Those breaks—a form of reasonable accommodation—are available for the first year of the infant's life.

But what about an employee who has returned to work after giving birth and has placed her infant at an onsite or nearby day care center? The PUMP Act has no provision for breaks to nurse an infant.

The final PWFA rules address this issue and provide two examples:

- First, the rules say it may be a reasonable accommodation to nurse the infant if the infant is located nearby.
- Second, while there is no blanket rule that a new nursing mother is entitled to a reasonable accommodation of having the infant brought to the workplace to nurse because of a personal preference, the regulations do not rule out the possibility that if the mother has a medical condition that prevents successful pumping, she may be entitled to a reasonable accommodation that involves bringing the baby to the workplace.

No right to bonding leave or coverage for partners

The PWFA does not grant the right for a new mother to take leave to bond with her baby. Thus, post-birth, employees are entitled to time off as a reasonable accommodation to physically recover from pregnancy and childbirth, stillbirth or miscarriage, but leave to bond or care for the child is not covered. Such leave is available under the FMLA for qualified employees who work for a covered employer.

The final regulations also make it clear that the PWFA only covers employees who are capable of experiencing pregnancy. It does not cover fathers. And while it covers fertility treatments as a pregnancy-related condition, it does so only for employees who can become pregnant if fertility treatments are successful. To put it simply, male partners are excluded.

EEOC PWFA examples

Guidance from the EEOC offers these examples of pregnancy-related conditions and the reasonable accommodations that might apply.

Modifications to the workplace

Arya is pregnant and works in a warehouse. When it is hot outside, the temperature in the warehouse increases to a level that creates a risk to Arya and her pregnancy. Arya seeks an accommodation of a portable cooling device to reduce the risk to her health and the health of her pregnancy.

Under the PWFA, the employer is required to provide the requested accommodation (or another reasonable accommodation) absent undue hardship.

Safety equipment

Talia, a nurse, is pregnant. The community where she lives is experiencing a surge in cases of a contagious respiratory viral disease that has been shown to increase the risk of negative outcomes for pregnancy. To reduce her risk and the risk to her pregnancy, Talia requests additional protective gear and to not be assigned to patients exhibiting symptoms of this virus.

Under the PWFA, the employer is required to provide the requested accommodation (or another reasonable accommodation) absent undue hardship.

Interim reasonable accommodation

Nour is pregnant and drives a delivery van that is not air-conditioned. It is summer and the temperature is over 100 degrees Fahrenheit. Nour tells her supervisor she needs a change at work because of the risk to her health and the health of her pregnancy. Her supervisor orders equipment that will help Nour, such as a

personal cooling vest or neck fan. While waiting for the equipment to be delivered, the employer does not have other possible work that Nour can do.

In this situation, the employer could tell Nour she may take leave while waiting for the equipment to arrive.

Telework

Gabriela, a billing specialist in a doctor's office, experiences nausea and vomiting beginning in the first trimester of her pregnancy. Because the nausea makes commuting extremely difficult, Gabriela makes a verbal request to her manager to be permitted to work from home for the next two months so she can avoid the difficulty of commuting. The billing work can be done from her home or in the office.

Gabriela's nausea and vomiting are physical or mental conditions related to, affected by or arising out of pregnancy, childbirth or related medical conditions. She needs an adjustment or change at work due to the limitation and has communicated the information to the employer. Gabriela can perform the essential functions of the job with the reasonable accommodation of telework.

The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Commute

Jayde, a retail clerk, gave birth two months ago. Because of childbirth, Jayde is experiencing urinary incontinence, constipation and hemorrhoids. Jayde normally commutes by driving 45 minutes; because of the limitations due to childbirth, it is painful for her to sit in one position for an extended period, and she may need a bathroom during the commute.

Jayde requests the reasonable accommodation to work at a different, nearby store for two months. The commute to this other store is only 10 minutes.

Jayde's urinary incontinence, constipation and hemorrhoids are physical conditions related to, affected by or arising out of pregnancy, childbirth or related medical conditions. She needs an adjustment or change at work due to the limitation and has communicated this information to the employer. Jayde can perform the essential functions of the job with the reasonable accommodation of a temporary assignment to a different location.

The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

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