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Updated—Key points of the EEOC's 2024 PWFA guidance: What employers need to know

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Explore crucial updates in the EEOC's PWFA guidance for 2024—simplify accommodations, engage in meaningful dialogues, and ensure compliance.

What's the impact?

- Simplified process: Employers can choose not to request medical documentation for pregnancy-related accommodations under PWFA, easing compliance.
- Expanded PWFA accommodations: Now includes options like flexible schedules, extended breaks, and remote work for pregnant employees.

April 26, 2024, Update: A coalition of state attorneys general has filed a lawsuit challenging the EEOC's interpretation of the Pregnant Workers Fairness Act (PWFA), particularly its inclusion of abortion-related accommodations. The suit argues that these regulations exceed the EEOC's authority, potentially impacting the enforcement and scope of the PWFA's guidelines. This legal challenge could delay the timeline for enforcing the new rules, affecting employer compliance

strategies. The authors will monitor developments in this legal challenge to the PWFA's guidelines and update this article with any significant changes.

The Equal Employment Opportunity Commission (EEOC) has finalized extensive guidance interpreting and implementing the Pregnant Workers Fairness Act (PWFA), which becomes effective on June 18, 2024.

What is the Pregnant Workers Fairness Act?

The Pregnant Workers Fairness Act (PWFA) requires that employers provide necessary changes to help employees who are pregnant, have recently given birth, or have related medical conditions. These changes, or accommodations, should not be too costly or disruptive to the business. Examples include allowing flexible work hours, providing a place to sit, or changing some job tasks.

The PWFA is different from other laws, such as the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act. The ADA helps employees with disabilities, which may include pregnancy if the condition is severe enough to be considered a disability. However, the PWFA covers all pregnancy-related conditions, not just those considered disabilities.

Title VII prohibits discrimination based on sex, which includes pregnancy. However, it does not require employers to make specific accommodations for pregnant workers. The PWFA does—it requires employers to engage in a dialogue with pregnant employees to determine effective adjustments to their work, if any would be needed.

What was the PWFA rule-making process?

The rule-making process for the PWFA guidance included collecting public comments from various stakeholders, such as employers, advocacy groups, and legal professionals. This step allowed these groups to provide their insights and concerns regarding the legislation. The feedback was used to shape the guidelines, ensuring that they address the needs and experiences prevalent in the workplace. This method of involving multiple perspectives is typical in the development of regulations, and in aiming to facilitate effective implementation of new laws.

Why is the PWFA guidance important?

The finalized guidance under the PWFA is significant for various reasons:

- Provides employers with directives about how to accommodate pregnant workers, reducing legal ambiguities and aiming to minimize discrimination claims.
- Offers employees protections and a formalized process for requesting accommodations,

promoting fair treatment.

- Supplies legal practitioners with a framework for advising clients, ensuring compliance with the law and advocating for employee rights.

Overview of changes and constants in the PWFA guidance

The 125 Federal Register pages (9.5 font) include hundreds of updates, clarifications, and public comment summaries, that explain not only the "what" of the changes, but also the "why," as well as reasons that certain requested changes were not included in the guidance. However, much of the guidance borrows from and applies existing definitions and principles from the ADA.

EMPLOYER SIZE CLARIFIED

- Employers are covered by the PWFA if they have fifteen (15) or more employees, regardless of the industry.

"KNOWN LIMITATION" DEFINED

- Known limitation" is defined in the PWFA as 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.
- The EEOC takes a broad reading of "pregnancy, childbirth, or related medical conditions" to include current pregnancy, past pregnancy, potential pregnancy, lactation (including breastfeeding and pumping), use of contraception, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, or having or choosing not to have an abortion, among other conditions.
- For the above definition, a limitation is "known" if the employee or an employee-representative has communicated the limitation to the employer.

EXPANDED DEFINITION OF "REASONABLE ACCOMMODATION"

- Similar to the ADA definition, a "Reasonable Accommodation" under the PWFA may include, but is not limited to, providing more frequent or longer break periods, making temporary modifications in work schedules; and modifying the work environment, equipment, uniforms, or devices, light duty, or telework.
- An employer may need to consider eliminating one or more essential functions of a job for up to 40 weeks during an employee's pregnancy and for an additional amount of time after

its conclusion upon request, unless doing so poses an undue hardship to the employer as defined below.

CLARIFICATION ON "UNDUE HARDSHIP"

- Also similar to the ADA, "Undue Hardship" refers to the employer-borne difficulty or expense that is severely disruptive to operations. There is no "bright line" rule for what will qualify as an Undue Hardship. Rather, the following (non-exhaustive) list of factors are to be considered: the length of time that the employee will be unable to perform the essential function(s); whether there is work for the employee to accomplish; nature of the essential function, including its frequency; whether the employer has provided other employees in similar positions who are unable to perform the 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; and whether the essential function(s) can be postponed or remain unperformed for any length of time and, if so, for how long.

  The guidance also identifies certain accommodations that it states "should be particularly simple and straightforward," including allowing an employee to carry or drink water, and providing a pregnant employee with additional eating, drinking, or restroom break, and seating where practicable. (See § 1636.3(j)(4)(i)-(iv).)

MANDATORY INTERACTIVE PROCESS

- Tracking the ADA's "interactive process," under the PWFA, the employer and employee shall engage in a timely, good faith, and interactive process to determine effective reasonable accommodations.
- However, given the temporary nature of pregnancy-related conditions, the EEOC encourages employers to respond quickly to employee requests for accommodations under the PWFA.
- Best practices include granting an accommodation on an interim basis if the employer requires additional information.

LIMITATIONS ON REQUESTING MEDICAL DOCUMENTATION

- As under the ADA, an employer may elect not to seek supporting documentation from an employee requesting an accommodation under the PWFA. The guidance is clear that employers who do seek documentation should be cautious in the circumstances in which they do so, since there are at least five prohibited situations in the final rule ("the adjustment or change at work needed due to the limitation are obvious and the employee provides self-

confirmation"; When the reasonable accommodation is related to a time and/or place to pump at work, other modifications related to pumping at work…" [See § 1634.3(l)(1)(i)-(v)].)

NON-DISCRIMINATION AND ANTI-RETALIATION ENHANCEMENTS

- Employers may not discriminate or retaliate against any employee for requesting or obtaining a pregnancy-related accommodation.

DISPUTE RESOLUTION

- Employers must establish mechanisms for resolving disputes regarding pregnancy-related accommodations.

PRACTICAL IMPLICATIONS FOR COMPLIANCE

To ensure compliance with the PWFA guidance, employers should undertake the following actions:

- Review and Revise Policies: Update workplace policies and accommodation procedures to align with the new guidelines.
- Educational Initiatives: Provide training for HR personnel and management to understand and implement the changes effectively.
- Monitor and Evaluate Compliance: Establish processes to monitor ongoing adherence to PWFA requirements and address any compliance issues promptly.

What's next?

The EEOC's guidance under the PWFA represents an important update in the legal landscape about workplace accommodations for pregnant employees. Employers must take informed steps to understand and implement these changes to maintain a compliant work environment. It is critical to recognize that the discussed elements form part of a comprehensive set of updates detailed in the guidance, requiring thorough review, and understanding.

Final notes

Nixon Peabody's attorneys possess deep experience in navigating compliance with pregnancy discrimination and accommodation rules. For detailed guidance about the PWFA, interpreting its provisions, or understanding California's complex labor laws, please consult with your Nixon Peabody attorney or the authors of this alert.

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