May 30, 2024

EEOC Final Rule and Interpretive Guidance on the Pregnant Workers Fairness Act and Legal Challenge to the Final Rule

The Equal Employment Opportunity Commission (EEOC) published its Final Rule and Interpretive Guidance regarding implementation of the Pregnant Workers Fairness Act (PWFA) in the Federal Register on April 19, 2024. As we discussed last year, the PWFA took effect on June 27, 2023, and requires employers with 15 or more employees to provide reasonable accommodations to employees and applicants for known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation would impose an undue hardship. The final rule provides clarity for employers regarding how the EEOC will interpret and enforce the PWFA. Specifically, the final rule includes examples of limitations and medical conditions for which employees or applicants may seek reasonable accommodations, what constitutes a reasonable accommodation, and when a reasonable accommodation may impose an undue hardship for an employer.

Key Takeaways

Covered Limitations

The EEOC broadly interprets the PWFA's coverage of "known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions" and provides a non-exhaustive list of examples of conditions that may be "related medical conditions." A few of these examples include termination of pregnancy, including via miscarriage, stillbirth, or abortion; preterm labor; cesarean or perineal wound infection; gestational diabetes; preeclampsia; chronic migraines; nausea or vomiting; postpartum depression, anxiety, or psychosis; frequent urination; and lactation and conditions related to lactation.

Reasonable Accommodations

Under the PWFA, employers must reasonably accommodate known limitations of employees or applicants. Employees or applicants must communicate to the employer both a limitation and the need for an adjustment or change at work due to their limitation in order to trigger the employer's obligation to consider potential accommodations under the PWFA. The EEOC, again, provides a list of non-exhaustive examples of reasonable accommodations that employers should consider, including job restructuring; part-time or modified work schedules; reassignment to a vacant position; breaks for use of the restroom, drinking, eating, and/or resting; acquisition or modification of equipment, uniforms, or devices, including devices that assist with lifting or carrying for jobs that involve lifting or carrying; modifying the work environment; providing seating for jobs that require standing, or vice versa; permitting the use of paid leave or providing unpaid leave for reasons including recovery from childbirth, miscarriage, stillbirth, or medical conditions related to pregnancy or childbirth; telework, remote work, or change of work site; providing a reserved parking space; and other similar accommodations.

The Interactive Process

Similar to the Americans with Disabilities Act (ADA), employers have an obligation to engage in an "interactive process" with employees to arrive at a reasonable accommodation under the PWFA. The EEOC clarifies that the interactive process is informal and there are no rigid steps that must be followed. However, as part of the interactive process, the EEOC's final rule

places limits on employers seeking supporting documentation from employees or applicants that request an accommodation under the PWFA. Employers may only seek supporting documentation when it is reasonable under the circumstances for the employer to determine whether the employee or applicant has a covered limitation and needs an adjustment or change at work due to the limitation. The EEOC provides examples of situations when it is ***not*** reasonable for an employer to seek supporting documentation, which includes when the employee or applicant provides self-confirmation and one of the following: when the limitation and adjustment or changes at work needed due to the limitation are obvious; when the employer already has sufficient information to make the determination; when the employee is pregnant and seeks an accommodation to carry or keep water nearby, for additional restroom breaks, to stand or sit, or to take breaks to eat and drink; or when the reasonable accommodation is related to a time and/or place to pump or nurse at work.

Undue Hardship

An employer is not required to provide a reasonable accommodation if the accommodation will cause the employer an "undue hardship." The EEOC defines "undue hardship" to mean significant difficulty or expense incurred by an employer when considering (i) the nature and net cost of the accommodation; (ii) the overall financial resources of the facility, the number of employees at the facility, and the effect on expenses and resources; (iii) the overall financial resources of the employer, its overall size, and the number, type, and location of its facilities; (iv) the type of operation of the employer; and (v) the impact of the accommodation on the operation of the facility, including the impact on the ability of other employees to perform their duties and the facility's ability to conduct business.

The EEOC provides additional factors to consider when the requested accommodations involve one or more essential functions of the employee's position to be temporarily suspended: (i) the length of time that the employee will be unable to perform the essential function(s); (ii) whether there is work for the employee to accomplish; (iii) the nature of the essential function(s), including frequency; (iv) whether the employer has provided other employees in similar positions with temporary suspensions of the essential function(s); (v) whether there are other employees, temporary employees, or third parties who can perform or be hired to perform the essential function(s); and (vi) whether the essential function(s) can be postponed or remain unperformed for any length of time and, if so, for how long.

Legal Challenge to the Final Rule

A group of 17 states filed a lawsuit in federal court in Arkansas on April 25, 2024, challenging the EEOC's final rule for including abortion as a "related medical condition." The complaint seeks to enjoin the implementation of the final regulation and alleges that the EEOC exceeded its statutory authority by construing the PWFA to include abortion. The text of the final rule addresses the inclusion of abortion and clarifies the limitations of the PWFA, stating that the type of accommodation that most likely would be sought under the PWFA regarding an abortion is time off to attend a medical appointment or for recovery. The PWFA does not require that when an employer provides leave as an accommodation that such leave be paid.

Next Steps

The EEOC's final rule is set to take effect on June 18, 2024. However, and despite the legal challenge to the final rule, the PWFA is already in effect. Accordingly, employers should ensure that their workplace policies and procedures comply with the PWFA and update them where necessary in light of the EEOC's Final Rule and Interpretive Guidance.

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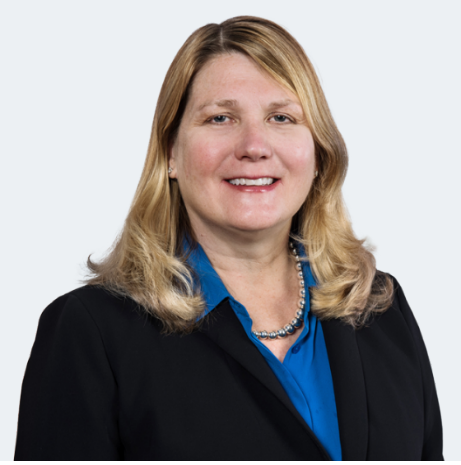

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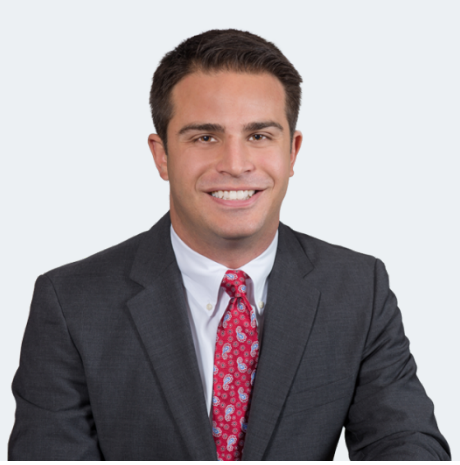

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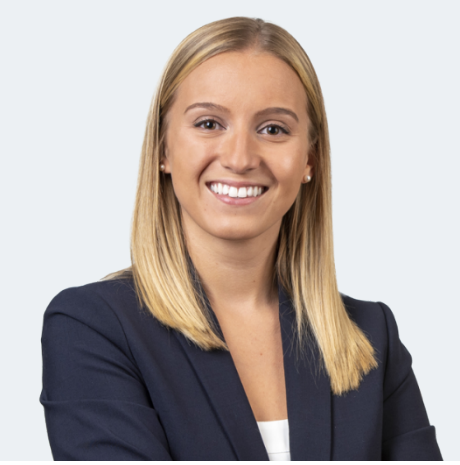

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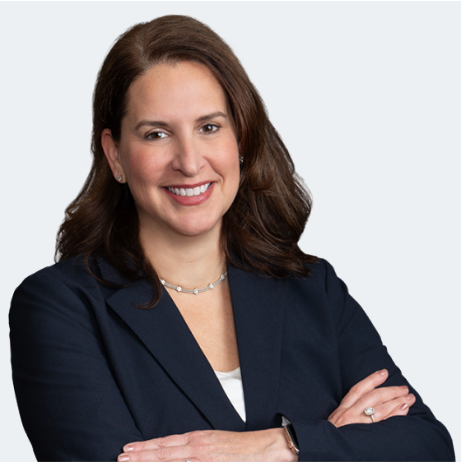

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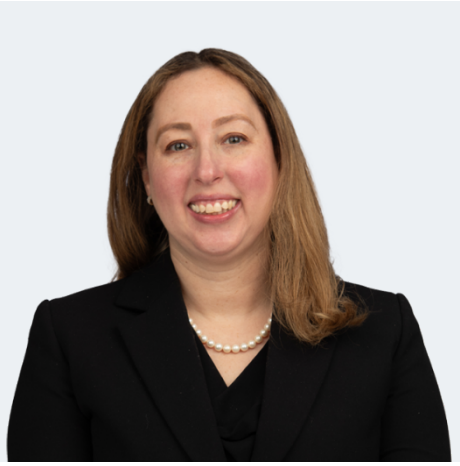

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