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EEOC Publishes Final Rule for Pregnant Workers Fairness Act

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On April 19, 2024, the U.S. Equal Employment Opportunity Commission ("EEOC") published its final rule and interpretive guidance ("Final Rule") implementing the Pregnant Workers Fairness Act ("PWFA"). The Final Rule clocks in at 125 pages and is set to take effect on June 18, 2024.

The PWFA generally requires employers with 15 or more employees (along with employment agencies, labor organizations and certain state and federal agencies) to make reasonable accommodations (absent undue hardship) for qualified employees and applicants with known limitations due to pregnancy, childbirth or related medical conditions which limit them (or prevent them) from performing the essential functions of their position. The PWFA further prohibits employers from taking adverse action against or retaliating against employees or applicants because they have requested an accommodation, opposed PWFA-related discrimination or participated in an investigation or proceeding relating to the PWFA. More information about the PWFA can be found here.

The PWFA took effect on June 27, 2023, and relies on several existing standards established by the Americans with Disabilities Act ("ADA"), Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act, as applicable. The Final Rule clarifies differences between the PWFA and existing laws that will have important implications for employers. Certain key takeaways from the Final Rule are summarized below.

What is a "known limitation" under the PWFA which may entitle an employee or applicant to an accommodation?

A "known limitation" is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that has been communicated to the employer. The Final Rule clarifies that the terms "pregnancy" and "childbirth" refer to current pregnancies as well as past pregnancies and potential or intended pregnancies, meaning that PWFA coverage extends to infertility, fertility treatment and the use of contraception, in addition to labor and delivery. Unlike the ADA, the employee's physical or mental condition does not need to be substantially limiting for the employee to qualify for an accommodation under the PWFA.

What qualifies as a "related medical condition"?

The Final Rule takes an expansive view of the term "related medical conditions," which includes physical and mental conditions related to (i) termination of pregnancy, including via miscarriage, stillbirth and abortion; (ii) the health of the mother during the pregnancy, including conditions such as gestational diabetes, preeclampsia and nausea or vomiting; and (iii) the health of the mother postpartum, including conditions such as depression, anxiety, incontinence, lactation and menstruation, among others. Importantly, given that the medical condition need not be caused solely, originally or substantially by the pregnancy or childbirth to be considered "related," preexisting conditions that are exacerbated by pregnancy or childbirth may be covered.

Must the employee be able to perform the essential functions of the job to be eligible for a reasonable accommodation?

No. The Final Rule clarifies that an employee can still be considered "qualified" even if the employee cannot perform one or more essential functions of the job, provided that (i) the inability to perform the essential function(s) is for a temporary period; (ii) the essential function(s) could be performed in the near future; and (iii) the inability to perform the essential function(s) can be reasonably accommodated through temporary suspension of the function(s) or otherwise.

Must an employee be disabled to be eligible for a reasonable accommodation under the PWFA?

No, although some PWFA-covered conditions may also qualify as disabilities under the ADA.

What qualifies as a reasonable accommodation under the Final Rule?

The Final Rule confirms that the PWFA's definition of reasonable accommodation is intended to mirror that of the ADA and may include, for example, job restructuring; part-time, modified or remote work; reserved parking in an employer-provided parking space; the use of paid or unpaid leave to attend medical appointments or recover from childbirth; more frequent restroom breaks or additional breaks for eating, drinking or resting; providing seating for jobs that require standing, or allowing standing for jobs that require sitting; modification of equipment, uniforms, and devices, including devices that assist with lifting or carrying; light duty; and temporarily suspending one or more essential functions of the position.

Must an employer engage in an interactive process under the PWFA?

Yes. The interactive process under the PWFA is similar to that under the ADA, and it is meant to be a flexible, individualized means for identifying the employee's limitation(s) and the adjustment(s) or change(s) that are needed. The Final Rule emphasizes the need to move swiftly, as unnecessary delay may constitute a violation of the PWFA, and suggests that to avoid unnecessary delay, an employer may choose to provide an interim accommodation while the interactive process remains ongoing.

What documentation can an employer require as part of the interactive process?

An employer may require "reasonable documentation" to support an accommodation request as part of the interactive process only if doing so is "reasonable under the circumstances." "Reasonable documentation" is the minimum documentation sufficient to (i) confirm the physical or mental condition; (ii) confirm that the physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and (iii) describe the adjustment or change at work that is needed due to the limitation. The Final Rule provides examples of when it will not be considered "reasonable under the circumstances" to seek supporting documentation, including, for example, when the employee's limitation(s) and the needed accommodation are obvious; when the employer already has sufficient information to make a determination; or when the employee is pregnant and seeks a "predictable assessment," as discussed below.

When does a requested accommodation cause an undue hardship?

The PWFA incorporates the ADA's definition of "undue hardship" and requires an employer to show that the requested accommodation would cause significant difficulty or expense.

Are some accommodations considered more reasonable than others under the PWFA?

Yes. The Final Rule explains that there are some accommodations (described as "predictable assessments" of accommodation) that will virtually never rise to the level of an undue hardship including, for example, allowing a pregnant employee to (i) carry or keep water near and drink, as needed; (ii) take additional restroom breaks, as needed; (iii) sit and stand, as needed; and (iv) take breaks to eat and drink, as needed.

The Final Rule is currently being challenged; however, employers should take steps now to comply with the Final Rule by June 18, 2024, and ensure that their employee handbooks, leave policies and accommodation policies are in compliance. Employers should also ensure that human resources personnel, managers and supervisors understand their obligations

under the new law and the obligations that may differ between the PWFA and state laws requiring employers to accommodate pregnancy, childbirth and related and common conditions.

If you have any questions regarding the topics discussed in this article, please contact **Michelle T. Olson** at molson@vedderprice.com, **Ellen M. Hemminger** at ehemminger@vedderprice.com or any Vedder Price attorney with whom you have worked.