EEOC Issues Final Rule Implementing Pregnant Workers Fairness Act

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On Monday, April 15, 2024, the Equal Employment Opportunity Commission ("EEOC") released its final rule (the "Final Rule") interpreting the Pregnant Workers Fairness Act ("PWFA"). The Final Rule, published on April 19, 2024, is expected to take effect sixty (60) days later on June 18, 2024. Many of the provisions within the Final Rule mirror the proposed rule announced by the EEOC in August 2023; however, the Final Rule does contain important differences and additional interpretive guidance for employers.

As outlined in our previous client alert, the PWFA requires a covered entity to make reasonable accommodations 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 would impose an undue hardship.

What is a "Covered Entity"?

The Final Rule clarifies that the PWFA applies to both private employers and public sector employers (state and local governments) that have fifteen (15) or more employees.

What is a "Qualified Employee or Applicant"?

An employee or applicant is qualified if they can perform the essential functions of the job with or without a reasonable accommodation. Examples include a cashier who needs a stool, a production worker who needs bathroom breaks, or a retail worker who needs to carry a bottle of water.

Even if the employee or applicant cannot perform the essential functions of the job with a reasonable accommodation, they may still be qualified if (1) their inability to perform is temporary, (2) they could perform the functions in the near future (this can potentially be up to forty (40) weeks and is determined on a case-by-case basis), and (3) the inability to perform could be reasonably accommodated (e.g., temporarily suspending the essential function, temporarily reassigning the employee, or assigning the employee to light duty) without imposing undue hardship on the employer.

What is a "Known Limitation"?

The Final Rule defines "limitation" as a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, including:

- Minor or modest impediments regardless of whether they are persistent or episodic (e.g., migraines, morning sickness, etc.);
- Actions necessary to protect the employee's or applicant's health or the health of their pregnancy (e.g., not working in heat, limiting certain physical tasks, or not being around certain chemicals); and
- Healthcare appointments for pregnancy, childbirth, or related medical conditions.

A limitation becomes "known" when the employee or applicant (or a representative of either)

communicates the limitation to the employer.

Limits on Requesting Documentation

An employer may seek supporting documentation only if it is reasonable under the circumstances for the employer to determine whether the employee has a limitation, whether the physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, and what adjustment or change at work is needed due to the limitation. Employers can't require use of a particular form but can utilize optional forms as long as they do not request more information than is allowed by the PWFA.

Moreover, the Final Rule prohibits an employer from requesting documentation when:

- The known limitation and need for accommodation is obvious;
- The employer already has sufficient information to determine whether the employee has a limitation;
- The employee is pregnant and requests a work adjustment listed as a "predictable assessment" (see below);
- The reasonable accommodation is related to a time and/or place to pump at work, other modifications related to pumping at work, or a time to nurse during work hours; and
- The requested accommodation is available to employees without known limitations under the PWFA pursuant to a covered entity's policies or practices without submitting supporting documentation.

"Related to, affected by, or arising out of…"

The EEOC interpreted "related to, affected by, or arising out of" as an inclusive term, meaning that an employer may have an obligation to provide a reasonable accommodation even if pregnancy, childbirth, or a related medical condition is not the only cause, the original cause, or even a substantial cause of the limitation for which an accommodation is requested. Instead, the limitation need only be related to, affected by, or arising out of pregnancy, childbirth, or a related condition.

What is included in "pregnancy, childbirth, or related medical conditions"?

"Pregnancy" and "childbirth" refer to the pregnancy or childbirth of the specific employee or applicant in question and include, but are not limited to, current pregnancy; past pregnancy; potential or intended pregnancy (which can include infertility, fertility treatment, and the use of contraception); labor; and childbirth (including vaginal and cesarean delivery).

"Related medical conditions" are medical conditions relating to the pregnancy or childbirth of the specific employee or applicant in question. The Final Rule provides a non-exhaustive list of examples, including termination of pregnancy, including via miscarriage, stillbirth, or abortion; ectopic pregnancy; preterm labor; pelvic prolapse; nerve injuries; cesarean or perineal wound infection; maternal cardiometabolic disease; gestational diabetes; preeclampsia; HELLP (hemolysis, elevated liver enzymes and low platelets) syndrome; hyperemesis gravidarum; anemia; endometriosis; sciatica; lumbar lordosis; carpal tunnel syndrome; chronic migraines; dehydration; hemorrhoids; nausea or vomiting; edema of the legs, ankles, feet, or fingers; high blood pressure; infection; antenatal (during pregnancy) anxiety, depression, or psychosis; postpartum depression, anxiety, or psychosis; frequent urination; incontinence; loss of balance; vision changes; varicose veins; changes in hormone levels; vaginal bleeding; menstruation; and lactation and conditions related to lactation, such as low milk supply, engorgement, plugged ducts, mastitis, or fungal infections.

What is a "Reasonable Accommodation"?

"Reasonable accommodations" are changes in the work environment or the way things are usually performed in the work environment. Importantly, a qualified employee or applicant may need different accommodations at different stages of pregnancy, childbirth, or related medical conditions. The Final Rule lists a multitude of examples of accommodations, including four (4) "predictable assessments" that will almost always be considered reasonable:

- Allowing an employee to carry or keep water and drink, as needed, in or near the employee's work area;
- Allowing an employee to take additional restroom breaks, as needed;
- Allowing an employee whose work requires standing to sit, and vice versa, as needed; and
- Allowing an employee to take breaks, as needed, to eat and drink.

Just because the Final Rule lists an accommodation as an example or as a predictable assessment does not prohibit an employer from arguing that the accommodation imposes an undue hardship. Instead, whether the accommodation imposes an undue hardship will always depend on the specific circumstances of the case.

What is an "Undue Hardship"?

"Undue hardship" means significant difficulty or expense to the employer. Whether a reasonable accommodation imposes an undue hardship on the employer depends on a multitude of factors to be determined on a case-by-case basis, including but not limited to the following:

- The nature and cost of the accommodation;
- The overall financial resources of the facility;
- The number of employees at the facility;
- The effect on expenses and resources of the facility;
- The overall financial resources, size, number of employees, and, if applicable, the type and location of the employer's overall facilities;
- The type of operation of the employer; and
- The impact of the accommodation on the operation of the facility.

Takeaways and Next Steps for Employers

Given the length and complexity of the PWFA and Final Rule, not everything could be fully summarized in this alert. Employers should review the EEOC's resources by clicking here and here, and consult legal counsel when evaluating known limitations, requests for reasonable accommodations, and when assessing what is an "undue hardship" following an accommodation request. The most suitable approach to complying with the PWFA will depend on the specific circumstances of the employer and the employee or applicant.

The Seigfreid Bingham team will continue to monitor the latest developments and legal requirements in this area of law. If you have any questions concerning the PWFA or Final Rule and how they may affect your business operations or employees, please do not hesitate to contact the firm's employment law attorneys for further information concerning compliance for your specific situation.

This article is general in nature and does not constitute legal advice. If you have legal questions, please consult the authors, Cody Weyhofen (cweyhofen@sb-kc.com) – 816.265.4163 and John Vering (jvering@sb-kc.com) – 816.265.4109, *or other attorneys in Seigfreid Bingham's Employment Law Group, including Shannon Cohorst Johnson (sjohnson@sb-kc.com), Mark Opara (mopara@sb-kc.com), John Neyens (jneyens@sb-kc.com), Brenda Hamilton (bhamilton@sb-kc.com), Julie*

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