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A View from the Top: Pregnant Workers Fairness Act (PWFA)

Carol Miaskoff, Legal Counsel EEOC
Marjory Robertson, AVP & Senior Counsel, Sun Life
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Agenda

- Introduce Carol Miaskoff and her role with PWFA
- Overview of PWFA and Proposed Regulations
- Texas Case discussion
- Questions & Answers



Introduction of Carol Miaskoff

PWFA – Why is it a big deal?

- Became effective 6/27/2023
- Fills gaps in federal laws that did not adequately protect pregnant EEs or those recovering from childbirth.
- Has bells and whistles that close gaps between existing laws about pregnancy, childbirth, and related medical conditions (Title VII, ADA, FMLA).

The PWFA Fills Gaps in Prior Federal Law

- **Americans with Disabilities Act (ADA):** “Routine pregnancy” is not a disability though a pregnancy with complications may be a disability.
 - 2022 11th Circuit Court of Appeal case: pregnancy with complications including two blood transfusions was not a disability under the ADA, and the claim for failure to permit telework was dismissed (EE worked in Georgia – no pregnancy accommodation law)
- **Pregnancy Discrimination Act (PDA):** PDA does not require ERs to accommodate pregnant women.
 - SCOTUS ruled that PDA only prohibits negative action against pregnant women and, therefore, if accommodations are made for others and there is not a nondiscriminatory reason for excluding pregnant women, not unlawful.
 - 2022 7th Circuit Case concluding that Walmart did not violate PDA when it provided light duty to those injured at work but not pregnant women. (EE worked in Texas – no pregnancy accommodation law)

More on Why the PWFA was Needed

Family and Medical Leave Act (FMLA) considers pregnancy a “serious health condition”. Therefore, FMLA leave is available for pregnancy-related conditions, including recovery from childbirth.

- However, FMLA has high eligibility requirements:
 - Only 12 weeks allotment per year
 - Must have worked for ER for at least 12 months at time of leave
 - Must have worked at least 1,250 hours in the 12 months before the leave
 - Must work at a worksite that has 50 or more EEs w/in 75 miles.
- FMLA provides leave only
 - FMLA does not require on-the-job accommodations to enable a pregnant EE to keep working



Review of PWFA Law and PWFA Proposed Rule

The PWFA requires a **covered entity** to provide **reasonable** accommodations to **a qualified EE or applicant** with **a known limitation** related to, affected by, or arising out of pregnancy, childbirth, **or related medical conditions**, absent **undue hardship**.

PWFA Law and Proposed Regulations – Qualified EE or Applicant (Part 1)

- ▶ The statute and the proposed rule use same language as the ADA.
- ▶ An EE or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position.





PWFA Law– Qualified EE or Applicant (Part 2)

- Under the PWFA, an EE who cannot do one or more essential functions of a job will also be considered qualified if:
 - Any inability to perform an essential function is for a **temporary** period;
 - The essential function could be performed **in the near future**; and
 - The inability to perform the essential function can be reasonably accommodated.

PWFA Proposed Regulations – Qualified EE or Applicant (Part 2 -- Continued)

- ▶ In the proposed rule, the EEOC proposed the following definitions for the terms in the second definition of qualified:
 - **Temporary:** lasting for a limited time, not permanent, and may extend beyond “in the near future.”
 - **In the near future:** generally 40 weeks per accommodation.



PWFA Proposed Regulations – Qualified EE or Applicant (Part 2 Continued)

- ▶ Can be reasonably accommodated: can mean different things depending on the position. There are examples in the proposed rule:
 - May mean that one or more essential functions are temporarily suspended, with or without reassignment to someone else, and **the EE continues to perform the remaining functions of the job.**
 - May mean that one or more essential functions are temporarily suspended, with or without reassignment to someone else, and **the EE performs the functions of a different job to which the ER temporarily transfers or assigns them.**



PWFA Proposed Regulations – “Related to, Affected by, or Arising out of”

- ▶ Under the proposed rule, this is usually a straightforward determination.
 - For example, leave to recover from childbirth is clearly related to childbirth.
- ▶ Under the proposed rule, if an ER has reasonable concerns about whether a limitation is “related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions,” the ER may request information from the EE regarding the connection using the interactive process.



PWFA Law and Proposed Regulations – Pregnancy, Childbirth or Related Medical Conditions

- ▶ Although the PWFA does not define the term “pregnancy, childbirth, or related medical conditions,” it is a term used in Title VII (42 U.S.C. § 2000e(k)).
- ▶ In the proposed rule, this phrase has been given the same meaning under the PWFA as it has under Title VII.
- ▶ Under the proposed regulations, the PWFA also covers existing conditions that are exacerbated by, and therefore related to, pregnancy or childbirth, such as high blood pressure, anxiety, or carpal tunnel syndrome



Non-Exhaustive list of Related Medical Conditions in Proposed Regulations

| | | | | | | |
|--------------------------------------|---|--|---------------------------|---|-------------------------------------|------------------------|
| Miscarriage | Stillbirth | Abortion | Infertility | Fertility treatment | Ectopic pregnancy | Pre-term labor |
| Maternal cardiometabolic disease | Gestational diabetes | Preeclampsia | Vaginal bleeding | Use of birth control | Anemia | Endometriosis |
| Chronic migraines | Dehydration | Hemorrhoids | Nausea or vomiting | Menstrual cycles | High Blood pressure | Infection |
| Cesarean or perineal wound infection | Postpartum depression, anxiety or psychosis | Antenatal (<u>i.e.</u> during pregnancy) anxiety, depression or psychosis | Changes in hormone levels | HELLP (hemolysis, elevated liver enzymes & low platelets) | Edema (legs, ankles, feet, fingers) | Hyperemesis gravidarum |
| Sciatica | Pelvic Prolapse | Nerve injuries | Loss of balance | Lumbar lordosis | Vision Changes | Varicose veins |
| Frequent urination of incontinence | | Carpal tunnel syndrome | | Lactation conditions (low milk supply, engorgement, plugged ducts, mastitis or fungal infections) | | |



PWFA Law and Proposed Regulations – “Known”

PWFA Law: A physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions **that the EE or EE’s representative has communicated to the ER** whether or not such condition meets the definition of a disability from the ADA.

- ▶ **Proposed Rule:** In the proposed rule, “known” means “the EE or applicant, or a representative of the EE or applicant, has communicated the limitation to the covered entity.”
- ▶ **Proposed Rule:** Not a “high” bar – no formal method of communication required



PWFA Proposed Regulations – Examples of Reasonable Accommodations in the Proposed Rule

- ▶ Additional, longer, or more flexible breaks to drink water, eat, rest, or use the restroom
- ▶ Changing food or drink policies to allow a worker to have a water bottle or food
- ▶ Changing equipment, devices, or workstations such as providing a stool to sit on, or a way to do work while standing
- ▶ Changing a uniform or dress code or providing safety equipment that fits
- ▶ Changing a work schedule, such as having shorter hours, part-time work, or a later start time
- ▶ Telework
- ▶ Temporary reassignment
- ▶ Leave for appointments with health care professionals
- ▶ Light duty or help with lifting or other manual labor
- ▶ Leave to recover from childbirth



PWFA Proposed Regulations

Leave as a Reasonable Accommodation

- ▶ May be needed for
 - Appointments with health care professionals
 - Recovery from childbirth
 - Other reasons related to pregnancy, childbirth, or related medical conditions



PWFA Law and Proposed Regulations Undue Hardship

- ▶ **Law:** The PWFA says to use the same definition as the ADA. The proposed rule does so, with a few additions to account for the differences between the ADA and the PWFA.
- ▶ **Proposed Regulations:** The proposed rule explains that, as under the ADA, “undue hardship” means significant difficulty or expense.
 - Focuses on the resources and circumstances of the particular ER in relationship to the cost or difficulty of providing a specific accommodation.
- ▶ **Proposed Regulations:** The proposed rule also adopts the factors listed in the ADA for determining whether an undue hardship exists, with certain additions.



PWFA Law and Proposed Regulations Additions to Undue Hardship Factors

Proposed Regulations: ADA undue hardship + additional factors re: the length of time that the EE or applicant will be unable to perform the essential function(s);

- ▶ Whether there is work for the EE to accomplish; the nature of the essential function, including its frequency;
- ▶ Whether the ER gave other EEs in similar positions who are unable to perform essential function(s) of their positions temporary suspensions of those or other duties;
- ▶ Whether the essential function(s) can be postponed or remain unperformed for any length of time and, if so, for how long; and
- ▶ If necessary, whether there are other EEs, temporary EEs, or third parties who can perform or be temporarily hired to perform the essential function(s) in question.



PWFA Proposed Regulations

Additions to Undue Hardship: Predictable Assessments

- ▶ The proposed rule identifies four simple modifications that will, in virtually all cases, be found to be reasonable accommodations that do not impose an undue hardship when requested by an EE due to pregnancy.
- ▶ They include allowing an EE:
 - to carry water and drink, as needed, in the EE's work area.
 - additional restroom breaks.
 - to stand or sit in jobs that typically require the other.
 - breaks, as needed, to eat and drink.



PWFA Proposed Regulations

Requesting Accommodation

- ▶ Under the proposed rule, a request for an accommodation has two parts.
 - First, the EE or applicant (or their representative) must identify the limitation that is the physical or mental condition and that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.
 - Second, the EE or applicant (or their representative) must communicate that they need an adjustment or change at work.
- ▶ Under the proposed rule, a request for a reasonable accommodation does not need to be in writing or use any specific words or phrases. Instead, EEs or applicants may request accommodations in conversation or may use another mode of communication to inform the ER.



PWFA Proposed Regulations

Supporting Documentation

- ▶ Under the law and the proposed rule, the interactive process is strongly encouraged and an ER is not required to seek supporting documentation from a worker who seeks an accommodation.
- ▶ If an ER decides to require supporting documentation, it is only permitted to do so under the proposed rule if it is reasonable to require documentation under the circumstances for the ER to determine whether to grant the accommodation.
- ▶ When requiring documentation is reasonable, the ER is limited to requiring documentation that itself is reasonable.





PWFA Law

Prohibited Employment Practices

- An ER must not
 - Deny a reasonable accommodation to a qualified EE or applicant absent undue hardship.
 - Require a qualified EE or applicant affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process.
 - Deny an employment opportunity to a qualified EE or applicant because it will have to provide a reasonable accommodation.
 - Require a qualified EE to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations under the PWFA.
 - Take an adverse action in terms, conditions, or privileges of employment against a qualified EE or applicant on account of the EE requesting or using a reasonable accommodation.

PWFA Law and Proposed Regulations

Prohibited Practice #1: Denying Reasonable Accommodation

- ▶ **Law:** An ER must not deny a reasonable accommodation to a qualified EE or applicant absent undue hardship. The proposed rule sets out additional considerations for covered entities and EEs in complying with this provision.
 - **Regulations:** Under the proposed rule, an unnecessary delay in responding to a request for a reasonable accommodation may result in a violation of the PWFA if the delay results in a failure to provide a reasonable accommodation.
 - **Regulations:** Under the proposed rule, the ER cannot deny or delay a reasonable accommodation because of lack of supporting documentation, unless the request for documentation meets the requirement of the proposed rule.



PWFA Law and Proposed Regulations

Prohibited Practice #2: Forced Accommodation

- ▶ **Law:** The PWFA prohibits an ER from requiring a qualified EE or applicant to accept an accommodation other than one arrived at through the interactive process. The proposed rule explains that:
 - **Proposed Regulations:** A covered entity cannot force an EE or applicant to accept an accommodation such as light duty or a temporary transfer, or delay of an examination that is part of the application process, without engaging in the interactive process, even if the covered entity's motivation is concern for the applicant's or EE's health or pregnancy.



PWFA Law and Proposed Regulations

Prohibited Practice #3: Denial of Employment Opportunities

- ▶ **Law:** The PWFA prohibits an ER from denying employment opportunities to a qualified EE or applicant if the denial is based on the ER's need to make a reasonable accommodation for the known limitation of the EE or applicant. The proposed rule explains that:
 - **Proposed Regulations:** An EE's or applicant's known limitation and need for a reasonable accommodation cannot be part of the covered entity's decision regarding hiring, discharge, promotion, or other employment decisions, unless the reasonable accommodation would impose an undue hardship on the covered entity.
 - **Proposed Regulations:** A covered entity is prohibited from making a decision based on its belief that an individual may need a reasonable accommodation in the future even if the individual has not asked for one.



PWFA Law and Proposed Regulations

Prohibited Practice #4: Forced Leave

- ▶ **Law:** The PWFA prohibits an ER from requiring a qualified EE with a known limitation to take leave, either paid or unpaid, if another effective reasonable accommodation exists, absent undue hardship. The proposed rule explains:
 - **Proposed Regulations:** An EE cannot be forced to take leave if another reasonable accommodation can be provided that would not impose an undue hardship and would allow the EE to continue to work.
 - **Proposed Regulations:** This limitation does not prohibit giving leave as a reasonable accommodation if the EE selects or requests the use of leave, or if leave is the only reasonable accommodation that does not cause an undue hardship.



PWFA Law and Proposed Regulations

Prohibited Practice #5: Adverse Actions

- ▶ **Law:** The PWFA prohibits an ER from taking an adverse action in terms, conditions, or privileges of employment against a qualified EE on account of the EE requesting or using a reasonable accommodation for a known limitation. The proposed rule explains that:
 - **Proposed Regulations:** This provision is likely to have significant overlap with the anti-retaliation provision of the ADA.
 - **Proposed Regulations:** This provision may be violated if, for example, an ER grants a reasonable accommodation but then penalizes the EE for using it.





PWFA Law: Relief

- Relief under the PWFA is the same as under Title VII and the ADA and can include:
 - Injunctive relief – getting an accommodation
 - Back pay
 - Front pay
 - Compensatory or punitive damages
 - Damages are limited based on ER size.
 - Additionally, like the ADA, money damages can be limited if the claim involves a reasonable accommodation, and the ER shows good faith efforts, in consultation with the individual, to identify and provide a reasonable accommodation.



Fact Patterns to Consider

PWFA – Fact Pattern 1

- ▶ A pregnant cashier asks her supervisor if she can sit while working at the register because her pregnancy makes it hard for her to stand for long periods of time. Cashiers usually have to stand.
 - Known limitation
 - Qualified
 - Undue Hardship



PWFA – Fact Pattern 2

- ▶ A pregnant delivery driver asks for light duty work because they cannot lift heavy boxes because of their pregnancy. The ER has a light duty program for workers with on-the-job injuries that excuses them from lifting heavy packages.
 - Known Limitation
 - Qualified
 - Undue Hardship



PWFA – Fact Pattern 3

- ▶ A new call center EE needs time off to attend therapy appointments for postpartum depression. The EE has not earned enough sick leave yet to cover the time away for the appointments.
 - Known Limitation
 - Qualified
 - Undue Hardship



PWFA – Fact Pattern 4

- ▶ A retail worker needs eight weeks of leave to recover from childbirth. The EE does not qualify for FMLA leave, and the ER does not offer short term disability leave. The worker will be able to do the job after recovering from childbirth.
 - Known Limitation
 - Qualified
 - Undue Hardship





Concluding Thoughts

PWFA – Suggestions for ERs

- ▶ Train supervisors about the PWFA. First level supervisors may be particularly likely to receive accommodation requests and should be trained about how to respond.
- ▶ Use the interactive process.
- ▶ Remember that the worker does not have to have a disability or something severe.
- ▶ Remember that the accommodations can be simple.
- ▶ Understand that the worker may need different accommodations as the pregnancy progresses, they recover from childbirth, or the related medical condition improves or gets worse.
- ▶ Reach out for assistance.



State of Texas v. Merrick Garland, et al., No. 5:23-cv-00034-H(N.D. Texas 2/27/2024)

- Texas challenged the PWFA on the grounds that its enactment was unconstitutional because the House of Representatives did not have a quorum under the Quorum Clause of the Constitution when it approved the Consolidated Appropriations Act of 2023 (CAA of 2023), of which the PWFA and other laws and appropriations were parts.
- During COVID, the House started accepting proxies. When CAA of 2023 was passed by the House, there were only 205 representatives physically present but a “quorum” required 218 to be present.
- The court entered a final judgment permanently enjoining the EEOC and the DOJ from enforcing the PWFA against the State of Texas and its divisions and agencies, as an employer.
- The injunction does not cover any other employers in Texas or other laws.



Appendix

Resources

- ▶ PWFA What You Should Know: <https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act>.
- ▶ Summary of Key Provisions of the Proposed Rule: <https://www.eeoc.gov/summary-key-provisions-eeocs-proposed-rule-implement-pregnant-workers-fairness-act-pwfa>.
- ▶ Enforcement Guidance on Pregnancy Discrimination: <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues>.
- ▶ FMLA (enforced by the Department of Labor): <https://www.dol.gov/agencies/whd/fmla>.
- ▶ PUMP Act (enforced by the Department of Labor): <https://www.dol.gov/agencies/whd/pump-at-work>.
- ▶ Listing of relevant state or local laws: <https://www.dol.gov/agencies/wb/pregnant-nursing-employment-protections>.
- ▶ Job Accommodation Network: <https://askjan.org/>.

