



Walk, Crawl, Run: The PWFA Turns One

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The Act Says Employers Cannot:

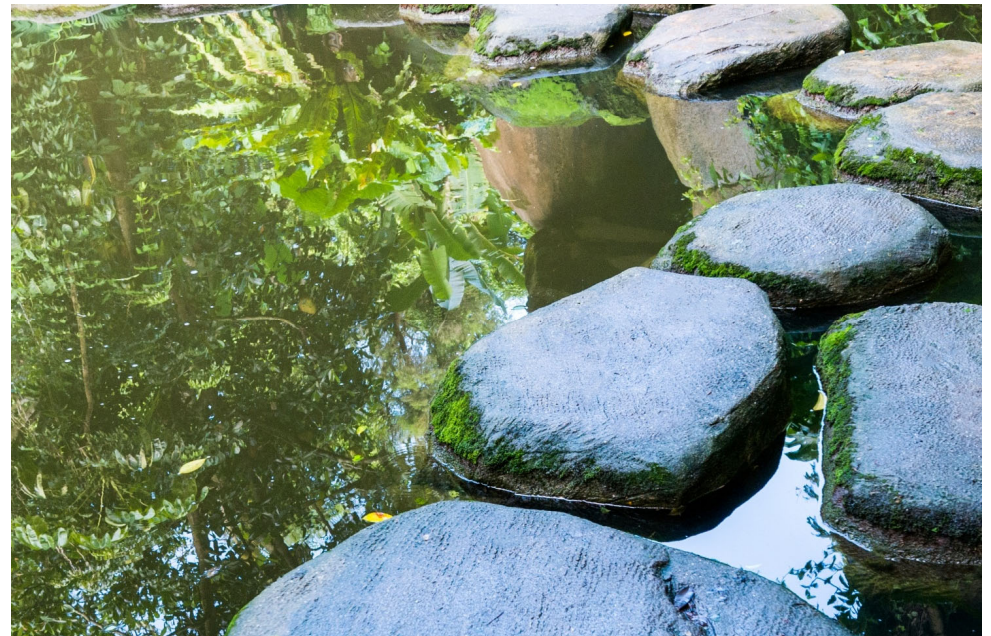
1. Fail to “make **reasonable accommodations** to the **known limitations** related to **pregnancy, childbirth, or related medical conditions** of a **qualified employee**, unless such covered entity can demonstrate that the accommodation would impose an **undue hardship** on the operation of the business”
2. Require an employee to accept accommodations without engaging in the interactive process
3. Deny employment opportunities based on the employer needing to provide reasonable accommodations
4. Mandate leave for an employee when a reasonable alternative accommodation can be provided
5. Retaliate/discriminate against an employee for requesting or utilizing a reasonable accommodation, opposing unlawful conduct or participating in a proceeding
6. Coerce individuals who exercise their rights or help others

** Employers with at least 15 employees



The Path to Final Regulations

- June 27, 2023: PWFA in effect and the EEOC accepting charges
- August 11, 2023: EEOC published proposed regulations
- Over 100,000 comments were submitted including those from Jackson Lewis
- April 19, 2024: EEOC published final regulations including extensive summary introduction, interpretive guidance (Appendix A to Part 1636) and numerous examples
- April 25, 2024: 17 states filed suit to enjoin the EEOC's abortion-accommodation obligation in the final regulations
- June 18, 2024: Final regulations become effective



Who is Eligible for Reasonable Accommodations?

Step 1: Known Limitation

Employee has a known limitation related to pregnancy, childbirth, or related medical conditions

Known Limitation:

- Physical or mental condition related to, affected by, or arising out of P, CB or RMC
 - Impediment or problem. Can be modest, minor and/or episodic. Includes healthcare.
 - Does not have to meet ADA disability!
- Communicated to the employer by employee or representative
 - Final regs added **union rep** to the list of potential representatives

Step 2: Pregnancy, Childbirth, or Related Medical Conditions

Employee has a known limitation related to pregnancy, childbirth, or related medical conditions

Pregnancy, Childbirth, Related Medical Condition:

- Current, past, potential, intended pregnancy (under final regulations, infertility, fertility treatments, use of contraception are considered P or CB instead of RMC)
- RMC includes termination of pregnancy, ectopic pregnancy, preterm labor, gestational diabetes and MANY more conditions such as carpal tunnel, chronic migraines, etc.

Step 3: Employee Must be Qualified

The Act explains there are 2 paths:

1. **ADA-Like employees.** These employees can perform the essential functions of their job with or without a reasonable accommodation
2. **ADA-Plus employees.** These employees cannot perform the essential functions of their position for a **temporary period** but can **in the near future** and can **be reasonably accommodated. E.g., suspending an EJF, transferring to another job, assigned to light/modified duty or to light duty program**

** In the final regs, the EEOC changed the definition of “**in the near future**”

- Whether the employee could perform the essential function(s) “**in the near future**” for limitations related to childbirth or RMC, employers must determine on a case-by-case basis
- If employee is pregnant, the final rules presume the employee could perform essential function “**in near future**” because they could perform essential functions within 40 weeks

Qualified Employee?

Lydia is a delivery driver and routinely moves packages over 30 pounds. Two months into her pregnancy her doctor tells her that she should not lift more than 30 pounds. She tells her supervisor. The employer is unable to provide Lydia with assistance in lifting packages, and Lydia requests placement in the employer's light duty program, which is used for drivers who have on-the-job injuries.



Qualified Employee?



One of the essential functions of Elena's position as a park ranger involves patrolling the park. Park rangers also answer questions for guests, sell merchandise, and explain artifacts and maps. Due to her postpartum depression, Elena is experiencing an inability to sleep, severe anxiety, and fatigue. Her anti-depressant medication also is causing dizziness and blurred vision, which make it difficult to drive. Elena seeks the temporary suspension of the essential function of patrolling the park for 12 weeks.

Who is NOT entitled to an accommodation?

- Family members and others are **not** entitled to accommodations. Only the individual who is pregnant, experiences childbirth or has a RMC is entitled to accommodation
- The definition of “**limitation**” is revised in final regulations to state that limitation means a physical or mental condition related to, affected by, or arising out of P, CB, RMC “**of the specific employee in question**”

Reasonable Accommodations

What Triggers a Reasonable Accommodation?

- To request an accommodation, an employee/representative must communicate the need for adjustment/change at work due to limitation
- New language is added to the final regulations clarifying that the employee/representative does not have to identify a medical condition or use medical terms

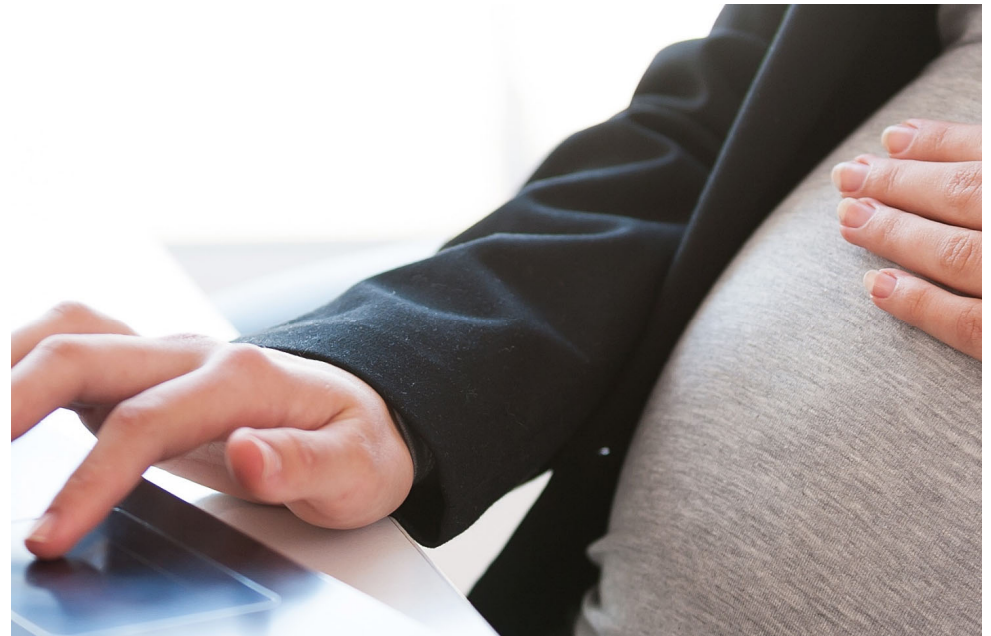
Potential Accommodations

- The EEOC identifies a LONG LIST of potential accommodations
- Final regulations **added**:
 - **Remote work** or a change in work location
 - **Nursing** “during work hours (where the regular location of the employee’s workplace makes nursing during work hours a possibility because the child is in close proximity)”

**Covered employers should always consider the PUMP Act, the PWFA & state law

Reasonable Accommodation?

Avery works as an administrative assistant and is pregnant. Avery normally works in the office and commutes by driving and public transportation. Due to pregnancy, Avery is experiencing sciatica; commuting is painful because it requires Avery to sit and stand in one position for an extended period of time. Avery seeks the accommodation of teleworking or changing the start and end time of the workday in order to commute during less crowded times and reduce the commute time and thereby reduce the pain.



Harassment



Kristina, a graphic designer at a marketing firm, is experiencing pregnancy-related morning sickness. Kristina's employer accommodates her limitations due to morning sickness by permitting Kristina to telework up to three days per week and utilize flexible scheduling on the days she comes into the office. Kristina's colleagues complain that pregnant women always get special perks and privileges and accuse Kristina of getting pregnant "just so she can kick back, relax at home on the couch, and collect a paycheck." During a team meeting to discuss staffing a new, high-priority portfolio, when Kristina requests to be considered, her coworkers scoff that "if Kristina is so sick that she cannot come into the office, how can she be well enough to work on such an important account?"

Predictable Assessment Reasonable Accommodations

The EEOC says there are 4 accommodations that are reasonable and do not impose an undue hardship “in virtually all cases” for a pregnant employee

1. Allowing an employee to carry **or keep** water **near** and drink, **as needed**;
2. Allowing an employee additional restroom breaks **as needed**;
3. Allowing an employee whose work requires standing to sit and whose work requires sitting to stand **as needed**; and
4. Allowing an employee breaks to eat and drink **as needed**

Individualized assessment in these situations should be “simple and straightforward.” In unique circumstances an employer may be able to demonstrate undue hardship.

Accommodating Employees Who Cannot Perform Essential Job Functions

Accommodating Employee Who Can't Perform Essential Job Functions

Congress included this in the PWFA

Legislative policy goal: Keep pregnant workers at work and healthy

EEOC tells us:

- When determining if an employee is qualified (can perform functions in near future), consider employee's current capabilities
- Consider whether employee can perform "in the near" future each time an accommodation is requested
- "In the near future" could be applied during pregnancy and then "in the near future" could restart once the pregnancy is over and the employee has returned to work
- Leave for recovery from childbirth does not count as time when an essential function is suspended and is not counted in determining whether qualified
- Employer does not have to suspend essential job function(s) if doing so would create an **undue hardship**

When Does Eliminating an Essential Job Function(s) Impose an Undue Hardship?

General Rule: Undue hardship is significant difficulty or expense incurred by the employer

EEOC's General Factors

- Nature and net cost of the accommodation
- Financial resources of the facility
- Financial resources of the entity
- Operations of the entity
- Impact of accommodation on operation of facility including ability of other employees to perform and facility's ability to conduct business

Additional Factors When Faced with Eliminating Essential Job Function(s)

- Length of time unable to perform essential function(s)
- Is there work for the employee?
- Nature and frequency of essential functions
- Has employer temporarily suspended job function(s) for other employees?
- Can other employees or temps be hired to perform the function(s)?
- Can the function(s) be postponed?

Can an Employer Request Medical Documentation When an Employee Requests Accommodation?

When Can an Employer Ask for Documentation?

Key word: **REASONABLE**

Final regulations modified definition of reasonable documentation

Employers may only request documentation **when it is reasonable** and only **reasonable (minimum) documentation** sufficient to:

1. Confirm the condition (impediment/problem/healthcare)
2. Confirm the condition is “related to, affected by, or arising out of P, CB or RMC”
3. Describe the adjustment or change needed due to the limitation

5 Times Requesting Documentation is Not Reasonable

The EEOC says there are 5 times when seeking documentation is **NOT** reasonable under the circumstances

1. The limitation and accommodation are “obvious”
2. Pumping at work or nursing during work hours (with self confirmation)
3. The limitation and accommodation are already “known”
4. Predictable assessments
5. Employer’s own policies or practices would not seek supporting documentation from non-pregnant employees

Remember Before Asking for Documentation . . .

- EEOC emphasizes that confirmation can be accomplished through simple statement and does not need medical diagnosis
- Asking for medical information/documentation beyond what is appropriate under PWFA could also violate the ADA's limitations on disability-related inquiries/medical exams
- Final regulations add that it is not reasonable to require documentation regarding nursing at work as accommodation
- Final regulations add that employers may NOT require supporting documentation on a specific form (i.e., if the HCP's form or note provides what is necessary no additional form can be required)
- Employer may require documentation from HCP but the final regs say the employer cannot require that the HCP submitting the documentation be treating the condition
- EEOC encourages employers who are asking for supporting documentation when permitted "to consider best practice of granting interim reasonable accommodation" when employee says it will be provided at later

Responding to an Accommodation Request

Tips for Handling Requests

- Leave is accommodation of last resort.
- Employer must choose the accommodation that provides equal employment opportunity as similarly situated employees. Under language in final regulations, an employer should consider equal employment as compared to other employees **AND the employee making the request** before the employee had a limitation.
- Be prepared to respond promptly to requests for accommodation. The final regulations say that an unnecessary delay in providing a reasonable accommodation may be a violation.

What Should Employers Do Now?

Steps to Consider Taking Now

- Review the final regulations and examples.
- Keep in mind that if another federal, state, or local law provides greater protection or different requirements, those laws will also apply.
- The PWFA incorporates Title VII's poster requirement: [Know Your Rights: Workplace discrimination is illegal \(eeoc.gov\)](https://www.eeoc.gov/what-we-do/posters).
- Review your policies and procedures.
- Carefully evaluate your forms. The EEOC is clear in the final regulations that employers should not automatically be requiring medical information to support every request.
- Keep in mind that some state and local laws limit when medical information can be requested to support a pregnancy related request.
- Consider training your HR team, managers, first-line supervisors and others.
- Document! Employers who demonstrate good faith efforts to work with employees to identify and make reasonable accommodations have an affirmative defense to money damages.

More Information

Subscribe to our [Disability, Leave and Health Management Blog](#) for updates on the latest guidance.

Thank you.