

2023 Mid-Year Report: The Pregnant Workers Fairness Act

By Joseph J. Lynett & Catherine A. Cano

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Pregnant Workers Fairness Act
and PUMP for Nursing Mothers
Act

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Jackson Lewis P.C. · 2023 Mid-Year Report: The Pregnancy Workers Fairness Act



Transcript

Alitia Faccone:

No matter the month or year, employers can count on one thing, changes in workplace law. Having reached the midway point of the year, 2023 does not look to be an exception. What follows is one of a collection of concise programs, as We Get Work™ the podcast provides the accompanying voice of the Jackson Lewis 2023 Mid-Year Report. Bringing you up-to-date legislative, regulatory, and litigation insights that have shaped the year thus far and will continue to do so. We invite you and others at your organization to experience the report in full on JacksonLewis.com, or listen to the podcast series on whichever streaming platform you turn to for compelling content. Thank you for joining us.

Joe Lynett:

Hello, my name is Joe Lynett. I'm a principal in the New York City office of Jackson Lewis, and I co-lead the firm's Disability, Leave and Health Management practice group. With me today is my fellow principal, Catherine Cano, in our Omaha office. She's a principal and a critical part of the Disability, Leave and Health Management group. We're here to speak with you today, and doing a podcast on, the Pregnant Workers Fairness Act, the PWFA, which was recently enacted and effective on June 27th of this year, 2023. So, Catherine, we have this new law here, PWFA, and so, what does it require employers to do? What should employers be thinking about?

Catherine Cano:

Yeah, the PWFA essentially has five rules for employers. It makes it unlawful for an employer to fail to make reasonable accommodations to the known limitations related to pregnancy, childbirth, or related medical conditions of a qualified employee, unless doing so would create an undue hardship. Sounds a little bit like the ADA, right? You cannot require an employee to accept an accommodation, other than a reasonable accommodation arrived at through the interactive process. Employers cannot deny employment opportunities based on the need to make reasonable accommodations. They cannot require an employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the employee, and they cannot take an adverse action against an employee because the employee requested or is using a reasonable accommodation.

Joe Lynett:

So, Catherine, it's interesting. It requires employers to reasonably accommodate pregnancy, childbirth, or related medical conditions. So, it's not limited only to accommodating pregnancy, right? The accommodations could occur after pregnancy as well, it sounds like.

Catherine Cano:

Yeah, definitely. Because we're talking about related medical conditions, it could be something like needing time off to recover from childbirth. Or, if somebody has a complicated delivery, it could be potentially time off due to postpartum depression. Or lactation breaks, which... that's also covered by the PUMP Act, but there could be things either that it would be covered by both of those laws, or maybe there's some different accommodations an employee would need under the PWFA that aren't covered by the PUMP Act. So there's, I think, quite a few things that could be related to childbirth, and then the related medical conditions piece. We aren't quite sure where exactly the EEOC will draw the line, but potentially things like fertility treatments, or miscarriage, or an early termination of a pregnancy could be covered.

Joe Lynett:

Yeah, I noticed in this law, the EEOC is charged with developing and implementing regulations by the end of the year, but to date, I haven't seen any notice from the EEOC of its intent to issue rules. What's going on with that? Do you know when the EEOC might be issuing that, or what can we expect the EEOC to do here?

Catherine Cano:

Well, we're hoping that we'll have regulations soon. The EEOC has until the end of year, December 29th, to issue those regulations by law. However, there's a whole process to it. They have to do a notice of proposed rule and get public comment. There's usually a comment period that's 60 or 90 days, and right now we haven't seen even the proposed regulations. The law has already gone into effect. The EEOC has given some informal guidance to employers on its website, and employers should certainly look at that guidance and follow it, but until we have the regulations, we will all do the best we can, but it may not be for a couple of more months before we get those proposed regulations. And hopefully the EEOC will

meet their deadline of December 29th.

Joe Lynett:

Yeah, so I mean, the EEOC, in some of their public announcements, have indicated that they will be accepting charges under the PWFA after June 27th, which is the date the statute goes into effect. So, employers are in a kind of strange situation, where they have this obligation to comply with the law, but there's no particular regulations to fill in the gaps, right? There's some gaps in this law that I think aren't necessarily intuitive, either, to fill yourself. I thought I saw in the Politico, the publication, last week, that the EEOC commissioners had voted to move forward with the regulatory process under the PWFA, but as of the date of this podcast, we still don't have them. It's interesting you mentioned it. It's sort of like the ADA, and it is kind of, in the obligation to accommodate. In some critical ways, it isn't.

I was reading in the statute that employees don't necessarily have to be able to perform the essential functions of the job in order to be entitled to an accommodation under the PWFA, which is really different than the ADA, right? Under the ADA, employees have to be able to perform all essential job functions with or without reasonable accommodations. So, the PWFA almost contemplates that employees will be entitled to accommodation due to pregnancy, childbirth, and related medical conditions, even though those conditions may not enable them to perform all essential functions of the job. But yet, if I'm reading the statute right, there's still an obligation to accommodate those conditions, if they can be reasonably accommodated. Am I reading the statute right, or is that... Because I think that's going to confuse a lot of employers that are used to dealing with the ADA.

Catherine Cano:

Yeah, so we still have the undue hardship piece in the background throughout. So, we'll always have that, and that is going to have the same definition as the ADA, but you are right that there's a provision in there that says they can still be considered a qualified employee even if they're temporarily unable to perform the essential functions of their position. And, right now, we don't know what temporary means. There's no definition of temporary under the statute. That is one area where, you mentioned earlier, there's gaps in the statute of how the EEOC is going to interpret these things, and I think that's one area. The definition of temporary.

Hopefully the EEOC regulations will give us some guidance into what that means, because pregnancy itself is finite. We know that the employee's going to give birth or the pregnancy will end at one point or another, but it can be a long road, right? We're talking, potentially, up to a year from the time that the person is pregnant till the time they recover from childbirth. So, it'll be interesting to see how the EEOC goes there. How they decide to address that issue.

Joe, I've been getting a lot of clients that are asking questions about what they should be doing for their policies and forms and things like that. What are your thoughts on just... Can we just use things from the ADA, or do we need something different?

Joe Lynett:

I think that's a lot of employer's natural inclination, to use the forms they're already using for the ADA, but in many ways, those forms don't apply so neatly. For example, there are at least 30 states and municipalities that pretty significantly restrict the ability to request medical information in connection with pregnancy. I mean, where I practice, where I'm located, New York City has a very restrictive city law involving the circumstances in which employers can request medical information in connection with a pregnancy accommodation. So, you have to consider state and local restrictions, but also, many of the forms that employers use in connection with the ADA, talk about the ability to perform all essential job functions, which is not a requirement under the PWFA. So, the forms that I think many employers have won't fit so neatly into the PWFA.

Plus, as a practical matter, you don't need confirmation that somebody's pregnant in most cases. Unlike with a disability, unless the disability is obvious, employers are... The EEOC has helped for many years. Employers have a right to request medical information to confirm the existence of a disability. That doesn't apply so neatly with pregnancy, though. I mean, if someone's pregnant, at some point they're going to show. So, you don't really need confirmation that they're pregnant. And some accommodations may be quite simple, actually. More flexible work time, additional breaks, sitting closer to the bathroom, having uniforms that fit properly. Things like that, where employers really have to make their own business judgment of how far they want to go to request information, but I think that the short answer to your question, Catherine, is I don't think employers can use those forms effectively to evaluate accommodations due to pregnancy, childbirth, and related medical conditions.

As I mentioned, in some jurisdictions, they may be prohibited from requesting that information. What else, Catherine, do you think employers should do in response to this law? Should they be looking at their handbooks, their policies? What else? I mean, we talked about their forms, and forms are pretty common, but there's a whole bunch of issues we could be talking about here. We only have a limited time. I mean, how does paid sick leave, and FMLA interact with the PWFA? There seems to be an avoidance in this law, or the law wanting to avoid employers just simply putting employees on leave, putting pregnant employees on leave, because, historically, that's what the [inaudible 00:10:37] was trying to address. That tendency to either terminate employees who are pregnant, or just place them on leave, forced leave. Which obviously has a detrimental impact on income. What are your thoughts on that? I mean, should leave be the accommodation of last resort? Is this what this law is telling us?

Catherine Cano:

Yeah, I mean, the law specifically says employers can't require an employee to take leave unless there's no other accommodation, and they still need to arrive at that accommodation through the interactive process. If the employee is the one requesting leave, then I think you certainly want to entertain it right off the bat. If they're the one saying, "Leave is what I want," then you're not forcing it on them, but if they're saying, "I think that I could be accommodated with some additional

breaks or with taking away some of my lifting requirements," et cetera, small adjustments, the response should not be, "Well, we don't want to do that. We're going to put you out on leave." It's really important here for employers to engage in the interactive process, because that's built into the statute.

Some other quick last minute pointers, I think, for employers, as Joe mentioned, there's a lot of different laws that could be coming into play, so make sure that, as an employer, you're familiar with what your obligations are under state or local law. Don't forget about the FMLA, because you need to give the employee... Whatever law is going to give them the most protection is what's going to apply, so keep that in mind. I think training supervisors to make sure that they're understanding that there's been a change in the law here, because they're often the ones that get requests for accommodation, and if they're not able to flag the issue or know what to do with that, you may end up with some situations where you have a failure to accommodate claim, and that is certainly problematic.

And other than that, watch for the EEOC guidance, hopefully, again, should be coming out sometime soon, and even though they have to go through that process of proposed regulations before they do the final regulations, we'll at least get an idea of where they're going once we get those proposed regulations. And a final note on my end, the EEOC has updated its posters on this to incorporate pregnancy, so if you haven't already gotten your [inaudible 00:12:36] posters, make sure that you're getting the new version of that that does address discrimination and pregnancy accommodation. Any other tips you would give, Joe?

Joe Lynett:

Oh gee, plenty, but I think unfortunately we're out of time, but I guess the takeaway here is, there's a lot to think about. Employees have a lot to think about. There's a lot that's still ahead of us with the EEOC regulation, so we'll wait and see. This is certainly going to be a topic that we're going to be talking about, I think, for quite a while. Well, thank you for listening. It's been a pleasure having this discussion, and if you have any questions, feel free to speak with the Jackson Lewis attorney with whom you regularly work, or with us. Thank you.

Alitia Faccone:

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