Podcast

Pregnancy Accommodations and the PWFA's Final Regulations—Your Questions Answered

By Joseph J. Lynett & Katharine C. Weber

July 2, 2024

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Related Services

Disability, Leave and Health Management
Pregnant Workers Fairness Act and PUMP for Nursing Mothers Act

Details

July 2, 2024

The EEOC's final regulations and interpretative guidance implementing the Pregnant Workers Fairness Act provide important clarifications and insights into how the EEOC will enforce the law. The PWFA went into effect on June 27, 2023.

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Transcript

Welcome to Jackson Lewis' podcast, We get work™. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable, and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution and helps answer the question on every employer's mind. How will my business be impacted?

The EEOC's final regulations and interpretive guidance implementing the Pregnant Workers Fairness Act provide important clarifications and insights into how the EEOC will enforce the law. Effective June 27, 2023, the PWFA requires employers with at least 15 employees and other covered entities to provide reasonable accommodations to a qualified employees or applicants known limitations related to, affected by, or arising out of pregnancy, childbirth or related medical conditions unless the accommodation will cause undue hardship on the operation of the employer's business. On this episode of We get work™, we discuss the EEOC's highly anticipated final regulations, offer guidance on compliance strategies, and clarify changes while specifically addressing questions raised during our May 10, 2024, webinar.

Today's hosts are Joe Lynett and Katharine Weber, principals and co-leaders of Jackson Lewis' Disability, Leave and Health Management Practice Group.

Joseph J. Lynett
Principal and Disability, Leave and Health Management Practice Group Co-Leader
Today we're doing a podcast addressing some really interesting questions we received during a webinar that Katharine and I gave discussing the final regulations for the Pregnant Workers Fairness Act (PWFA).

There were 2,000 people attending this webinar. And we realized pretty quickly that there was no way that we could ever possibly do justice and answer even a fraction of those questions. So, we decided that that we'd have a whole separate podcast talking about the kind of questions that we received and how to resolve them because the PWFA is a new law and employers are really trying to understand how to comply with it.

There are some roadmaps that employers have typically used to try to comply using their ADA accommodation process but, as you'll find out, the PWFA is different — a different objective than the ADA, some more restrictions on the types of information you can request. So, the ADA accommodation process doesn't so easily translate into an accommodation process for the PWFA.

Katharine C. Weber
Principal and Disability, Leave and Health Management Practice Group Co-Leader
I completely agree. In fact, I think that when you take a look at the final regulations that were issued by the EEOC, the one big knockout punch we found is that the EEOC really has no use for our trying to use our ADA medical questionnaires and our typical ADA forms and processes to comply with the PWFA. They really do envision that we're going to handle these PWFA requests in a different manner.

Now that doesn't mean that we can never ask for medical information at all. It doesn't mean that we can't have a process in place. In fact, we should. It doesn't mean that we can't have template forms. Those are all great ideas, too. But the process that we're going to use under the PWFA looks very, very different. In some ways it is almost the opposite approach of how we handle accommodation requests under the ADA.

We'll talk about the PWFA process and how it differs from the ADA process and we will use a very practical lens, if you will. We'll talk about how you would actually walk out and administer the PWFA as compared to the ADA. But first, Joe, I've got a couple of questions for you.

I am going to start with just a few to level set for our folks. We had a few people asking us about the length of time that an employer has to accommodate an employee for either pregnancy, childbirth or a pregnancy-related medical condition. I think a lot of people expected that there was going to be some maximum time limit that employees would have to be accommodated, maybe three months before they delivered to three months after they returned from work. But that really didn't turn out to be how the EEOC addressed the issue in their final regulations.

So, Joe, is there a length of time after delivery of a child that the employer has to continue to consider requests for accommodation under the PWFA?

LYNETT

We received a lot of questions about this particular area because, commonly, many people regard accommodation of pregnancy as the period during pregnancy and for perhaps even the six- to eight-week period of post-childbirth recovery.

But the PWFA makes clear that there really is no uniform, defined maximum length of time that employers have to provide for accommodations related to pregnancy, childbirth and related medical conditions. For a current pregnancy, its 40 weeks per accommodation, but beyond that it's a case by case determination. And that in large part is due to the vast amount of conditions that can arise out of pregnancy well after childbirth that are related to pregnancy or childbirth.

So, the short answer is that there's no per se end date. And employers may be in a situation where they will have to consider accommodating pregnancy-related conditions long after the employee has given birth and even has recovered physically from the childbirth.

WEBER

Sure, and the same can be said of conditions that are related to but arise before the pregnancy too, right? All of that really relates to the way the EEOC defines pregnancy, childbirth and related medical conditions. That phrase is far broader than what I think most people would expect.

Certainly for accommodations related to a current pregnancy, we're talking about 40 weeks. But any sort of an accommodation request that is related to but necessary before an employee gets pregnant or after they return to work following childbirth – there's no time limit on those accommodation requests, right?

LYNETT

It's a question of causation: Is it caused by pregnancy? Is it related? Did it arise out of the pregnancy, or childbirth or one of those related conditions? Because certainly, there are conditions that can be exacerbated by pregnancy and childbirth that occur commonly throughout the population. Take carpal tunnel, for example. That may be related to pregnancy, but it also may not be related to pregnancy.

WEBER

Absolutely. There are some conditions that we commonly see in an individual who is pregnant, right? We would expect them to potentially have some morning sickness. Maybe they might have some back pain or some swelling, or maybe they could — using your example, develop a pregnancy-related case of carpal tunnel.

When we look at how broadly the EEOC addresses what constitutes pregnancy, childbirth and related medical conditions, I think some of some of the conditions the EEOC identifies are potentially up for grabs or open to debate, when we get into the PWFA litigation. For instance, will courts agree that menopause is covered by the PWFA?

LYNETT

The EEOC says you need to look at changes in hormonal levels, right? Whether the pregnancy or childbirth has altered the hormone levels such that it could impact the severity of menopause — that might be an argument we see in the courts.

WEBER

What about menstruation? I think we just saw the EEOC issue some public piece in late June about menstruators, right? Clearly, the EEOC is taking the position that menstruation is connected enough to be a pregnancy-related medical condition.

LYNETT

It's going to depend on the medical opinion of the employee's healthcare provider, connecting the pregnancy and childbirth to a medical condition which occurs naturally, right? Menopause is a natural part of human life as well as menstruation. Is that enough to potentially be covered? Menopause by its very nature happens regardless of whether the individual has children and may happen long after the employee's childbearing years, right?

WEBER

The EEOC also suggests that things like fertility treatments and abortion, postpartum depression and anxiety, all of those conditions are included in the various EEOC examples of conditions that might cause limitations that may have to be accommodated under the law. It will be interesting to see how all of this plays out in the courts.

LYNETT

The big takeaway is that there are a vast array of conditions that the EEOC specifically identifies as possibly covered under the PWFA. So, it's really going to come down to can the employee's healthcare provider make a reasonable connection between the current medical condition, which could be a psychological condition too, and the employee's pregnancy, childbirth or a related medical condition.

WEBER

And or just the limitation, right? Because we know we don't have to have a specific medical condition necessarily. Under the PWFA all that is necessary is a limitation arising out of pregnancy, childbirth or related medical condition.

Well, here's a fun one for you, Joe. What kind of protection do men have under the PWFA?

LYNETT

I think very little in terms of accommodation. One question we got is: Would men undergoing fertility treatment be covered?

I suppose that is their own fertility treatment, but probably not. How about if a man were undergoing fertility treatments and having side effects? Can they request an accommodation under the PWFA?

My view on this, and I think it's consistent with the EEOC regulations, is that the PWFA only protects the individual who is, was or could become pregnant, experience childbirth or a related medical condition. In this way, it is gender specific. Men, while not protected under the PWFA, may be protected if their condition rises to the level of a disability under the ADA or they may be entitled to

time off if their condition is a serious health condition under the FMLA. However, they will not have the protection of the PWFA.

WEBER

I agree and in addition, depending on their condition, men could also be protected under state or local paid sick leave laws. I see the PWFA as very similar to the ADA in that regard. Under the ADA, the law does not require an employer to accommodate a family member who has a disability. And under the PWFA, the law does not require an employer to accommodate a family member who has some condition that's related to the employee's pregnancy, childbirth or related medical condition. So, I think that's an easy way to remember it.

LYNETT

So, Katharine, let me ask you. We've discussed questions around what medical conditions are covered, possibly could be covered, and we got a bunch of practical questions from attendees on reasonable process best practices.

What are your thoughts on how employers should go about addressing accommodation requests under the PWFA? A lot of employers are of the view that they can either tweak or just use their ADA process to evaluate accommodations under the PWFA, just like they evaluate accommodation requests under the ADA.

WEBER

We've done a great job as an employer community, trying to be consistent in the process we use to handle accommodation requests covered by the ADA. But we have to stop using the ADA process as our default setting. In the EEOC's view, the ADA process should not be your default setting when it comes to the PWFA.

What the EEOC makes clear is, you may have developed fantastic ADA forms and medical questionnaires, but they are of limited utility under the PWFA.

This is because under the ADA, the initial focus of your forms and questionnaires is to determine whether an employee has a physical or mental impairment that substantially limits a major life activity. But that is not the test under the PWFA. Under the PWFA, the focus should be on whether the employee has a limitation due to pregnancy, childbirth or related medical conditions. So, if we're asking our employees to have their healthcare providers fill out an ADA questionnaire, we are arguably asking for information that is not even on target and maybe more information than we need to determine whether there is a need for a PWFA accommodation and whether we can provide the accommodation without undue hardship.

We've done a great job of being consistent in our ADA process. If an employee asks for an accommodation and its not obviously needed, we give them a healthcare provider form and ask them to have their healthcare provider complete the form. We then evaluate whether we can provide the accommodation or some alternative accommodation.

But under the PWFA, the EEOC envisions that the employee will let you know that

they're limited due to pregnancy, childbirth or related medical condition. If the employee's limitation is due to one of the four predictable assessments or lactation, then the employer will quickly provide the accommodation The employer won't need any additional medical information in order to grant the accommodation request.

To be clear on the four predictable assessments: we mean the employee is asking for the opportunity to carry or keep water nearby and drink. Or if they're asking for additional restroom breaks. Or if they're asking for the ability to sit when their job principally requires standing or vice versa. Or they're asking for breaks to eat or drink while they're pregnant. All of those things fall under predictable assessments and we don't need medical information in order to grant those. And the same thing would be said of lactation as well.

According to the EEOC, as a general rule, the only time an employer can ask for supporting medical information is when the limitation is not obvious, and the extent of the accommodation is not known.

LYNETT

And that's really different than the ADA process, where it's just a matter of course [for employers to] request medical information. Because oftentimes, a disability is not so obvious whereas pregnancy is often very obvious.

Reading the final regulations, it seems like the message the EEOC is sending is that you shouldn't be spending a lot of time requesting medical input. Especially due to the kind of, in some ways, urgency of some of the accommodation requests that we're talking about.

These four predictable assessments that you mentioned before, these are more urgent needs, right? Additional bathroom breaks are needed, keeping water nearby, sitting instead of standing, breaks to eat and drink. Your typical ADA accommodation process, even under the best circumstances, usually takes place over the course of 30 days, and that's when there are no glitches. But for something like these predictable assessments, you really don't want to wait 30 days while the accommodation process works out.

So, it sounds to me, Katharine, like employers need to rethink their accommodation process under the PWFA. Certainly, employers have gotten accustomed to the ADA process and the interactive process under the ADA. But it doesn't seem to translate so well or too perfectly into the accommodation process under the PWFA, and in fact, as you point out, may arguably cause an employer to run afoul of the law.

WEBER

Right. Because you're asking for more information than you're entitled to receive.

LYNETT

And that's not even considering state and local law. Because there are a host of state and local laws that place even more explicit restrictions on an employer's

ability to request medical information to evaluate accommodations related to pregnancy and childbirth.

WEBER

I think my last count was 13 state and local jurisdictions that limit when an employer can ask for medical support when it comes to a pregnancy or childbirth related accommodation request. And I'm sure that number will continue to grow.

The state and local legislatures are very active in this space. Not only are we seeing it in the accommodation space, but we're seeing a lot of action in terms of paid lactation breaks. We've got a few jurisdictions now that specifically require those breaks be paid.

One thing that I saw from a recent scenario I thought was really interesting. I had an employer who had really done a wonderful job in terms of instead of starting with forms, they started with a conversation, right? And they had this wonderful conversation with the employee about what is it that you need and how will it help you? How long do you think that you'll need it? Are there any other alternatives? They had this great conversation. Essentially, they were just having a dialogue with the employee about the information that you really wouldn't otherwise be able to ask of the doctor in the way of getting a form completed, but they were just gathering that sort of information from the employee directly. The employer was then able to make a good decision with the employee about what kind of accommodation they needed, how long the accommodation was needed, and whether there were any alternatives that might work.

That's a wonderful practice to adopt. It's going to take some trial and error to get it right. But all of that really is going to come down to great training for your HR professionals and also letting your managers know when they should let HR know that there is a PWFA request that's been made. We should make sure that our managers know that HR is there to provide assistance in terms of properly handling PWFA requests.

LYNETT

The last bucket of questions we have time to talk about relates to lactation breaks and pumping in the workplace and how that interacts with the PUMP Act, which has been on the books for several years. The PWFA requires accommodations related to lactation because lactation is a condition related to pregnancy and childbirth.

One significant substantive change that the EEOC made from its proposed regulations to the final regulations, is that the final regulations include nursing as an example of a reasonable accommodation. And nursing is different than pumping. So, there were questions around the scope of that accommodation because the PUMP Act creates a right to reasonable breaks and private space for breaks to pump, but it doesn't necessarily cover nursing. But the EEOC explicitly added nursing as something employers may need to reasonablyaccommodate. What do you have to say about that? What should employers be thinking about?

WEBER

The EEOC really did cross lanes, if you will, with the Department of Labor when they added lactation as something that would have to be potentially accommodated under the PWFA. It's certainly not out of step with how we're looking at the definition of pregnancy, childbirth and related medical conditions.

You know, we have seen in the case law for years that some courts view lactation as related to pregnancy and childbirth under the Pregnancy Discrimination Act. So, this is not a great shocker, right? But I think when the EEOC goes in and adds or layers additional accommodation obligations on the PUMP Act, it becomes more complicated for employers. And I think the big accommodation the EEOC layered on top of the PWFA was this: If the employee has proximity with their child and they want to nurse in the workplace, then the EEOC says that could potentially be a reasonable accommodation under the PWFA.

Think about perhaps you're an employer and in your building there's a daycare provider or you are an employer who has a dedicated space already set up where employees can pump, right? In those situations, if the child is in close proximity to the nursing employee, I can see the EEOC taking the position that the employer has to allow the employee to bring the child into the workplace and nurse at work in the same area where other employee pump.

I don't think that the EEOC meant to suggest that there's this right, to automatically stop your work whenever you need to do so, drive 20 minutes to your home, bring your child to work, nurse, and then take the child back home. I don't think that that's what the EEOC is saying at all. In fact, the final regulations say the employer is not obligated to create the proximity between the employee and child. But if the proximity already is available that's where the EEOC views that nursing at work may be a potential reasonable accommodation.

LYNETT

I think that's right that there's no right to proximity. Proximity is a sort of a condition, if you will, to evaluating a request to nurse at work, right? That the infant already needs to be in close proximity. The accommodation isn't meant to create the proximity. But you're right. It's going to occur in situations where the employer may be providing daycare on site. Certainly, it's going to occur at home if the employee is a remote worker, where presumably the child is already in close proximity.

Another takeaway here is that it just adds another layer of compliance and potential claims. In other words, we may see employees claim that the employer violated both the PUMP Act and the PWFA based on how the employer handle pumping or nursing requests.

WEBER

All of this is still so new for employers. Granted, the law has been in effect since June of 2023. It was enacted late December of 2022, went into effect in June of 2023, but we just recently received the final regulations in April of 2024.

So, it's going to take a while for employers really to get up to speed and to get really good at accommodating people who make requests for changes in how they work

or policies or other types of accommodation requests under the PWFA.

But eventually we'll get there just the same way as we got there under the ADA. When the ADA was enacted, everybody went, my gosh, how are we ever going to come into compliance with this law that's going to require so many things different than what we're normally used to doing. But, you know, this [PWFA implementation] will come to us naturally as well.

LYNETT

We're going to see how this all plays out over the course of the upcoming years. And particularly, the first few years a new law is in effect: The courts and the agencies really do create a scope of interpretation around how the law applies, where it applies, where it doesn't apply, the limits of employers' obligations, and so forth. It will certainly be a story in progress.

WEBER

That's right.

For folks who want to keep abreast on the new developments under the PWFA as cases are decided, make sure you're following our blog. and This will help you keep up to date on this space so that you can make great decisions when it comes to accommodating your employees under the PWFA.

Thanks so much for joining us. We've enjoyed our time together.

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