

# Providing Accommodations to Pregnant Employees

By Brett M. Anders & Jenifer M. Bologna

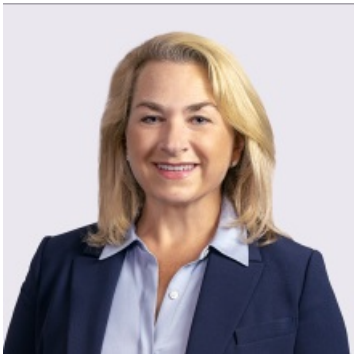
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## Details

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A landmark piece of legislation, the Pregnant Workers Fairness Act provides expansive protections for workers impacted by pregnancy, childbirth and related medical conditions. The EEOC's final regulations provide important clarifications and insights into how the agency plans to enforce the law.



## Transcript

### Brett M. Anders

*Principal and Office Litigation Manager, Berkeley Heights*

Today we're diving into the Pregnant Workers Fairness Act, or the PWFA, a landmark piece of legislation aimed at providing greater protections for pregnant workers.

Joining me is Jenifer Bologna, a principal in our White Plains office. We are going to explore what the PWFA means for employers, how it compares to existing laws, and what steps businesses need to take to ensure compliance. Jenifer, can you give us a brief overview of the Pregnant Workers Fairness Act?

### Jenifer M. Bologna

*Principal, White Plains*

Sure. Thank you for having me today. The Pregnant Workers Fairness Act requires a covered employer to provide reasonable accommodations to an employee or applicant's known limitations related to, affected by or arising out of pregnancy, childbirth or related medical conditions, unless such accommodation would cause an undue hardship. I know that's a lot and we'll break it down.

### Anders

That sounds similar to what employers need to do anyway. How does the PWFA differ from other federal existing laws like the Pregnancy Discrimination Act or the ADA?

### Bologna

There are significant differences between those laws and the Pregnant Workers

Fairness Act.

The Pregnancy Discrimination Act prohibits discrimination against individuals who are pregnant, but it doesn't affirmatively require employers to accommodate pregnancy or a pregnancy-related condition.

And while the ADA requires employers to provide accommodations, pregnancy itself is not considered a disability. Thus, prior to the Pregnant Workers Fairness Act, pregnant workers could only obtain an accommodation under federal law if they had a pregnancy-related or some other kind of disability.

The Pregnant Workers Fairness Act kind of closes the gap between the federal laws that required employers to reasonably accommodate those with disabilities and not discriminate against pregnant employees.

### **Anders**

What are some of the key provisions of the PWFA that employers need to be aware of?

### **Bologna**

At a high level, the Pregnant Workers Fairness Act prohibits employers from failing to make reasonable accommodations, from forcing employees to accept accommodations without engaging in an interactive process, from discriminating against employees based on their need for reasonable accommodations, and from mandating leave for an employee.

This is an important one: One of the purposes behind the Pregnant Workers Fairness Act is to make sure that pregnant employees can continue to work. So, you can't mandate leave when there's a reasonable accommodation, and you can't retaliate against an employee who requests or utilizes a reasonable accommodation.

### **Anders**

What if one of those accommodations would require the employer to take away an essential job function? I know under the ADA you do not have to accommodate somebody by removing an essential job function. Is that different under the PWFA?

### **Bologna**

Yes, that's probably one of the most significant differences between the Pregnant Workers Fairness Act and the ADA.

One of the Pregnant Workers Fairness Act requirements is to provide accommodations to qualified employees. To be qualified under the ADA, you need to be able to perform all your essential job functions with or without reasonable accommodation.

While that's one definition of a qualified employee under the PWFA. An employee can still be considered qualified under the PWFA even if they cannot perform all their essential job functions for a temporary period of time as long as they can do so

in the near future.

So, the short answer is yes. Even if an employee can't perform all their essential job functions, you may still have to provide a reasonable accommodation to that employee as long as such accommodation does not create an undue hardship.

**Anders**

You just mentioned that you may have to do it for a temporary condition or for a temporary period. The question that always then gets asked is: "Well, how long do we have to do this for?" Is there any guidance yet on how long you may have to accommodate somebody by removing an essential job function?

**Bologna**

In the final regulations, there were some guidelines about what would constitute a temporary condition — and it's not really all that temporary.

For a current pregnancy, "temporary" may be nine months or 40 weeks. But for individuals who need accommodation for other childbirth or related medical conditions, that period of time is not defined. And the EEOC in its final regulations said employers should look to other accommodation cases for guidance. So, the only thing we know is that indefinite leave is not going to be deemed a reasonable accommodation, just like it's not a reasonable accommodation under the ADA. But beyond that, six months, one year may potentially be a "temporary" period of time.

**Anders**

Am I correct that under those situations where you're looking at a temporary period of time, where you're removing an essential job function, the employer is still able to consider whether or not doing so would be an undue hardship?

**Bologna**

Yes, you can still consider undue hardship, just like you can under the ADA. And the factors are more or less the same. You can look at whether you can get the work done and the costs associated with it. But importantly, the Pregnant Workers Fairness Act anticipates that there may be some additional cost or there may be some period of time where essential job functions are being done by another employee or by a temporary employee, and/or they're being put on hold for some period of time.

**Anders**

Are there other types of accommodations that the PWFA expects that employers will provide or that you're seeing are being requested more often now under the PWFA?

**Bologna**

Well, in terms of "expects to provide," the final regulations talk about four predictable assessments that almost always have to be provided — the ability to:

1. Carry or keep water nearby.

2. Take additional restroom breaks.
3. Take breaks to eat or drink.
4. Change your workstation from sitting to standing or vice versa. If you're normally sitting in your job and you need to stand, or you're normally standing in your job but need to sit.

But while the EEOC would say these must be provided, it is not always so easy, depending on the industry, to just provide those. For example, in life sciences, you wouldn't necessarily want people bringing food into a secure laboratory, right? It could potentially contaminate the work that's being done. So, you still may need to engage in some interactive process there.

Other accommodations that we see a whole lot of are requests for remote work. For example, we are seeing the need for remote work towards the end of pregnancy for reasons because of increased tiredness. I need to be home.”

### **Anders**

I've seen that come up as well. And the question that I had was, you know, sometimes the remote work is because the mother is recovering, they can't travel, or it's for lactation reasons. What if the request for remote work is because of a health condition with the child? Does that come under the PWFA or is that something separate?

### **Bologna**

That's something separate. In the final regulations, the EEOC made clear that the individual that's covered under the Pregnant Workers Fairness Act *is* the person who has limitations due to pregnancy, childbirth or related medical conditions. It's not an affected family member.

So, in your example, it wouldn't be the child. If a child were having difficulty with lactation or difficulty using a bottle, the employee wouldn't be entitled to work remotely so that that employee could nurse the child. That would be a condition related to the child. Similarly, if the spouse were very nervous about a high-risk pregnancy, the spouse's nervousness would not be a condition covered under the Pregnant Workers Fairness Act.

### **Anders**

One question that also comes up relates to documentation. If a person is seeking an accommodation under the PWFA, are there any limitations or is it different what you can ask them under the PWFA as compared to the ADA?

### **Bologna**

Yes, that's a very good question and it's very important for employers to be aware of this. There's very limited medical information you can require under the Pregnant Workers Fairness Act. In fact, a primary purpose behind the PWFA is to streamline providing accommodations to pregnant workers or to those impacted by pregnancy and related conditions.

You can only get documentation if it's reasonable under the circumstances. And for

those predictable assessments I was talking about before, in virtually all cases, you can't get any documentation at all. So, you're not going to want to use the same ADA forms that you use when someone is seeking an accommodation for a disability.

**Anders**

In terms of comparing it to the ADA, I know under the ADA, with the disability, there has to be a major implication to a life activity. What about under the PWFA? Is there the same level of severity of condition in order to obtain an accommodation or is it something less?

**Bologna**

It's much less. And this is another very important factor because the ADA was always out there. If someone had a pregnancy-related condition that rose to a level of disability, an employee would have been entitled to an accommodation under the ADA. But under the Pregnant Workers Fairness Act, an employee is entitled to an accommodation for something that's very modest or minor or even episodic. So, if "I'm tired and my doctor thinks that it would be better for the health of myself or my child to rest more frequently or work with my feet up, and therefore, they're advising that I stay home," that would be sufficient to warrant a need for accommodation.

**Anders**

Are there any specific obligations other than what we've discussed that the PWFA imposes on employers?

**Bologna**

The same posting requirement that you would have under Title VII, exists with the PWFA. You'd also need to make sure you're engaging in that interactive process because showing a good faith effort may reduce liability associated with a violation.

The other thing that you need to make sure you're doing is training your frontline supervisors because, to request an accommodation, all someone needs to do is just communicate the need for an adjustment or a change at work. The preamble to the regulations talks about the need to train supervisors so they're not missing these requests.

**Anders**

Do you have any thoughts on how this new law is going to impact the workplace of the future and the culture of workplaces?

**Bologna**

In general, most employers are fairly supportive of pregnant employees. I'm not seeing a lot of pushback in providing accommodations to those when they're currently pregnant. In fact, one of the biggest policy requests that I have, for even the smallest of employers, is a parental leave policy because a workplace that shows it is supportive of parental issues is well sought after.

However, I have seen a lot of issues arise in terms of removing essential job functions. While employers want to be supportive of pregnant employees, there is still the need for work to get done. If essential job functions are just being taken off the table for what could be nine months or longer, that's really hard for employers to handle.

I've also seen a lot of changes that relate to lactation. There were laws in the books about lactation and a birthing parent's ability to pump at work, but the Pregnant Workers Fairness Act goes beyond the ability to pump or time off to pump. It actually provides the ability for a parent to nurse their child. It doesn't grant the right to proximity, so you can't just say, "I want to be home so I can nurse." But potentially workplaces might change by children coming into the workplace to nurse. The law would allow someone to bring the child to you and nurse during work hours and your break time.

### **Anders**

Is there any final advice that you would give to employers regarding the PWFA? Anything else that you want to share?

### **Bologna**

While many of the legal concepts associated with the PWFA are similar to the ADA, there are important distinctions for employers to remember.

- While there is still an emphasis on the interactive process, some accommodations should just be granted without much if any interactive process.
- It is important for employers to implement accommodation with minimal delay. For example, simple accommodation, such as increased food or water breaks, should be granted potentially the same day they're asked for.
- Employers are going to have to remember that the rules on medical documentation are different from the ADA.
- And employers are going to have to remember that temporary suspension of essential functions may be a reasonable accommodation.

This is also a new law as we're discussing it. And there's currently legal challenges, including the scope of what constitutes pregnancy, childbirth and related medical conditions. As it reads right now, it's incredibly broad. Employers are going to want to keep up with current updates and work closely with their legal counsel if there's any questions about whether a condition qualifies as something that needs an accommodation under the Pregnant Workers Fairness Act.

### **Anders**

Thank you for sharing your insights on the Pregnant Workers Fairness Act. This conversation has provided a lot of valuable information for employers navigating these new requirements.

If you have any questions or need any further guidance, you can always feel free to reach out to us. Our information is on our website, [JacksonLewis.com](http://JacksonLewis.com).

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