View on our website.

GIBSON DUNN

Labor & Employment Update April 18, 2024

EEOC's Final Rule Implementing the Pregnant Workers Fairness Act: 10 Takeaways

On April 15, 2024, the U.S. Equal Employment Opportunity Commission ("EEOC") issued regulations implementing the Pregnant Workers Fairness Act ("PWFA"). The final rule comes after considering extensive comments on the August 2023 draft rulemaking, and will go into effect on June 18, 2024.

The PWFA was signed into law on December 29, 2022. It was intended to fill gaps in the federal and state legal landscape regarding protections for employees affected by pregnancy, childbirth, or related medical conditions. Specifically, the PWFA requires most employers with 15 or more employees to provide reasonable accommodations for a qualified employee's or applicant's known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause an undue hardship on the operation of the employer's business. The requirements apply even when the medical limitations giving rise to the need for an accommodation would not constitute a disability under the Americans with Disabilities Act ("ADA"). (For a detailed analysis of the PWFA's requirements and differences between the PWFA and existing federal and state law with respect to the accommodation of pregnancy-related medical restrictions, please see our prior alert.)

The PWFA has been in effect since June 27, 2023, but the final rule and accompanying guidance clarify (and in some ways expand) the obligations that were explicit in the statute itself. Below are 10 key takeaways for employers.

10 Key Takeaways for Employers

1. **Certain Identified Accommodations Are Assumed To Be Reasonable:** The final rule specifies that the following four pregnancy accommodations are reasonable and should be granted in almost every circumstance without documentation: (1) additional restroom breaks, (2) food and drink breaks, (3) allowing water and other drinks to be kept nearby, and (4) allowing sitting or standing, as necessary. Other possible reasonable accommodations specified by the final rule, although not presumptively required, include job restructuring, modifying work schedules, use of paid leave, and reassignment to a vacant position.

2. **Broad Scope of Covered Conditions:** The EEOC's "non-exhaustive list" of conditions that can give rise to a request for accommodation under the PWFA include: current pregnancy, past pregnancy, lactation (including breastfeeding and pumping), use of birth control, menstruation, postpartum depression, gestational diabetes, preeclampsia, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, and having or choosing not to have an abortion, among other conditions. The breadth of this list has drawn criticism for exceeding the EEOC's authority—including a public dissent from EEOC Commissioner Andrea Lucas—and the abortion-related aspect in particular has attracted strong attention (and is likely to be litigated).

3. **Applicants/Employees May Need To Be Excused From Essential Functions For Extended Periods:** Under the ADA, only a "qualified individual" is entitled to a reasonable accommodation, and a qualified individual is one who can perform the essential functions of the job with or without a reasonable accommodation. By contrast, under the PWFA, an individual is still qualified—and therefore entitled to a reasonable accommodation—even if they cannot perform an essential function of the job *now*, so long as the limitation is for "a temporary period" and the essential function can be performed in the "near future."

4. **Employers Cannot Seek Documentation For Certain Requests:** The final rule generally prohibits employers from seeking documentation in many circumstances, including: (1) when the limitation and need for a reasonable accommodation is obvious; (2) when the employer already has sufficient information to support a known limitation related to pregnancy; (3) when the request is for one of the four identified reasonable accommodations listed above (i.e., additional restroom breaks; food/drink breaks; beverages near the work station; and sitting or standing as needed); (4) when the request is for a lactation accommodation; and (5) when the accommodation is available without documentation for other employees seeking the same accommodation for non-PWFA reasons.

5. **Informal Requests Can Trigger Statutory Obligations:** The guidance accompanying the final rule indicates that verbal conversations with direct supervisors can trigger accommodation obligations, and an employee's failure to fill out paperwork or speak to the "right" supervisor or designated department is not grounds for either delaying or not providing the accommodation. In other words, the initial request (or statement of need for an accommodation) alone may be sufficient to place the employer on notice and trigger the interactive accommodation process.

6. **Account For Accommodations In Reporting And Metrics:** Where a reasonable accommodation is granted (e.g., extra bathroom or water breaks), employers should ensure that technologies are appropriately adjusted to integrate the accommodation. Given that employers are increasingly using technology in the workplace for purposes such as monitoring attendance or tracking productivity and

performance, it is important that employers develop policies that contemplate how a reasonable accommodation might impact the accuracy of these tools. For example, the EEOC suggests that calculations on productivity for a given shift may need to be adjusted to account for the additional excused break periods.

7. **Act With Expediency And Consider Interim Accommodations:** Although the PWFA's interactive process largely tracks that of the ADA, the final rule provides that employers must respond to requests under the PWFA with "expediency" and notes that granting an interim accommodation will decrease the likelihood that an unnecessary delay will be found.

8. **Unpaid Leave As A Last Resort:** As the PWFA itself makes clear, employers may only *require* an employee to take leave as a last resort if there are no other reasonable accommodations that can be provided absent undue hardship. The final rule and guidance continue this theme, underscoring that requiring an employee to take unpaid leave or to use their leave after they ask for an accommodation and are awaiting a response could also violate the PWFA if, for example, there is paid work that the employee could have been provided during the interactive process.

9. **Overlap With The ADA: Overlap With The ADA:** The final rule acknowledges that there may be circumstances in which a qualified individual may be entitled to an accommodation under either the PWFA or the ADA for a pregnancy-related limitation. The interpretive guidance emphasizes that employees are not required to identify the statute under which they are requesting a reasonable accommodation, so employers should train human resources and management professionals to identify and apply the applicable framework.

10. **Don't Forget About Applicants:** The PWFA prohibits employers from refusing to hire a pregnant applicant because they *assume* that the applicant will soon need to leave to recover for childbirth. In addition, the interpretive guidance flags that the accommodation process is often more difficult to navigate for applicants than for existing employees. As such, employers should consider training recruiting and onboarding professionals on how to best ensure that an applicant understands the process for requesting a reasonable accommodation during the hiring process. The guidance notes that an applicant may not know enough about, for example, the equipment used by the employer or the application process itself to request an accommodation and the employer may likewise not have enough information to suggest an appropriate accommodation. Accordingly, employers might consider trying to anticipate potential hurdles to accessibility during the hiring process and either remedy the obstacles, if feasible, or provide advanced notice during the early stages of the process so that the applicant can identify any potential issues and request a reasonable accommodation.

The following Gibson Dunn lawyers prepared this update: Jason C. Schwartz, Katherine V.A. Smith, Molly Senger, David Schnitzer, and Emily M. Lamm.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment practice group, or the following authors and practice leaders:

Molly T. Senger – Partner, Labor & Employment
Washington, D.C. (+1 202.955.8571, msenger@gibsondunn.com)

Jason C. Schwartz – Partner & Co-Chair, Labor & Employment
Washington, D.C. (+1 202.955.8242, jschwartz@gibsondunn.com)

Katherine V.A. Smith – Partner & Co-Chair, Labor & Employment
Los Angeles (+1 213.229.7107, ksmith@gibsondunn.com)