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EEOC ISSUES FINAL RULE ON PREGNANT WORKERS FAIRNESS ACT

On April 15, 2024, the Equal Employment Opportunity Commission (EEOC) issued a final rule implementing regulations for the Pregnant Workers Fairness Act (PWFA) (the Final Rule). The Final Rule, which is expected to go into effect on June 18, 2024, also contains interpretive guidance of the PWFA that the EEOC will use in its enforcement of the Act. While the interpretive guidance tracks with the explicit language of the Act, the guidance denotes the Act will have a more expansive reach for employers.

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OVERVIEW OF THE FINAL RULE AND ITS REACH

The PWFA went into effect in June 2023 with a primary aim of ensuring employees affected by pregnancy or childbirth receive reasonable accommodations where needed and feasible. Legislators sought to fill the gap in benefits offered by the Americans with Disabilities Act (ADA), Title VII, and the Family and Medical Leave Act related to pregnancy. However, there remained some interpretive gaps within the PWFA, and the absence of any formal guidance by the EEOC has left employers to speculate about compliance requirements for nearly a year. After reviewing over 100,000 comments from the public, the Final Rule is largely consistent with the expansive interpretation of the PWFA in the proposed rule. The Final Rule and associated regulations have now clarified several questions with respect to the Act, including:

The Definition of "Pregnancy, Childbirth, or Related Medical Conditions"

The PWFA gave this phrase its broadest meaning making many concerned that such an expansive definition would give employees rights beyond those intended by the Act. Therefore, it was no surprise that during the comment phase of the Final Rule, the majority of comments related to the definition of "pregnancy, childbirth, or related medical conditions." Some commenters expressed that the definition could be interpreted to grant rights to workers seeking to obtain an abortion, which are not otherwise guaranteed to employees.

The EEOC addresses this concern, but ultimately confirmed in the Final Rule that obtaining an abortion qualifies as a "medical condition" arising out of pregnancy and would be covered under the PWFA. The EEOC rationalized its

position by noting that pregnant workers are already entitled to reasonable accommodations after getting an abortion under existing Title VII regulations. The Final Rule also clarifies that several other potentially controversial conditions, such as lactation issues, endometriosis, infertility, fertility treatments and miscarriages are conditions that properly fall under the definition of "pregnancy, childbirth, or related medical conditions," and therefore, are within the purview of the PWFA.

Recognizing that many religious employers will be dissatisfied with this definition, the EEOC included guidance in the Final Rule on how to assert that a requested reasonable accommodation is an undue hardship. It also stressed that nothing in the Final Rule requires employers to pay for or otherwise assist an employee in obtaining an abortion, but notes that the context of the protection is likely strictly limited to when an employee seeks physical leave or time off to secure an abortion through their own means.

Mental Health Concerns

The Final Rule identifies, through a nonexhaustive list, a number of mental health conditions that are to be incorporated within the term "related medical conditions" including: antenatal (during pregnancy) anxiety, depression or psychosis; and postpartum depression, anxiety or psychosis. The Final Rule makes clear that absent a showing of undue hardship, an employer is obligated under the PWFA to find a reasonable accommodation to these conditions, assuming the employee remains a qualified employee. This incorporation will require employers to develop more creative solutions when addressing employee medical conditions to ensure compliance with the law. Furthermore, because some of these conditions persist beyond pregnancy, employers may be required to provide reasonable accommodations for longer durations.

Qualified Employee

Many terms throughout the PWFA are defined consistently with those used in the ADA. However, the Final Rule addresses the divergence in what it means to be a "qualified" employee. The PWFA states that an employee within the meaning of the Act shall be considered qualified if, among other things, the essential function of the employee's job for which an accommodation is requested "could be performed in the near future." The Final Rule clarifies that "in the near future" generally means 40 weeks after the suspension of ability to perform the essential function and leaves open the ability of the EEOC to make case-by case determinations on duration.

Supporting Documentation

The Final Rule clarifies that if an employer decides to seek supporting documentation, it is only permitted to do so if it is reasonable to require documentation under the circumstances for the employer to determine

whether the employee (or applicant) has a physical or mental condition related to, affected by or arising out of pregnancy, childbirth or related medical conditions (a limitation) and needs a change or adjustment at work due the limitation.

When requiring documentation is reasonable under the circumstances, the Final Rule further clarifies that an employer is limited to requiring documentation that itself is reasonable. The Final Rule's definition of "reasonable documentation" now means the minimum documentation that is sufficient to: (1) confirm the physical or mental condition; (2) confirm the physical or mental condition is related to, affected by or arising out of pregnancy, childbirth or related medical conditions; and (3) describe the change or adjustment at work needed due to the limitation.

Undue Hardship Analysis

Similarly, the EEOC emphasized that whether or not a requested accommodation is reasonable or an undue hardship on the employe will require a fact-specific analysis, as is already required by ADA. Because the undue hardship analysis in the PWFA is consistent with the ADA, the EEOC declined to provide any hardline rules regarding accommodations that represent an undue burden in the Final Rule. However, it noted some items that are unlikely to constitute an undue burden, including: the discomfort of other employees caused by an employee pumping in the workplace, the unpredictability of intermittent leave to make fertility treatment appointments, as well as the fact that an employee already received other accommodations from the employer.

The Final Rule also discusses a noninclusive list of accommodations for workers that the EEOC finds to be presumptively reasonable, including allowing water, food or restroom breaks, remote work, temporary reassignments and intermittent leave in order to attend health care appointments, recover from childbirth or a miscarriage, or other medical appointments. This is of critical note as an inadvertent denial or even delay of any of the listed accommodations could subject an employer to significant damages.

LOOKING AHEAD

This area of the law is expected to undergo significant shifts depending upon the outcome of the 2024 election, as is true for many employment-related issues. Our lawyers will continue to monitor for any developments on this topic and others. For questions, please contact your regular Armstrong Teasdale lawyer or one of the listed authors.