NATIONAL EDUCATION ASSOCIATION

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THE PROTECTIONS PROVIDED BY THE PREGNANT WORKERS FAIRNESS ACT

In 2023, the Biden administration secured the passage of the Pregnant Workers Fairness Act of 2023 (PWFA), which provides important employment protections for individuals who are pregnant or managing related conditions. Most significantly, the PWFA requires that employers accommodate individuals for such conditions even if the conditions do not amount to a disability for which an accommodation would be required under the Americans with Disabilities Act (ADA). The Equal Employment Opportunity Commission (EEOC) has issued a final rule and interpretative guidance[1] which will go into effect as of June 18, 2024. Below are the key points advocates should understand about the PWFA protections.

CENTRAL MANDATE

The PWFA requires employers to provide employees (including job applicants) with reasonable accommodations for known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical condition, absent undue hardship to the employer.

The required accommodations can be minor or significant adjustments to working conditions, must be offered by an employer after interacting with the employee, and must be provided promptly.

Employers may not insist on unreasonable or burdensome medical or other documentation requirements, and must offer accommodations in response to an employee's expressed need. For example, if a pregnant educator tells their principal they need someone to cover their class when they need to use the restroom, the principal must offer that or another effective and reasonable accommodation.

[1] This link to the Federal Register includes the rule, the interpretative guidance and the EEOC's explanations and responses to comments.

What Employers are Covered?

The PWFA covers employers (including unions, employment agencies, and public employers) who have 15 or more employees.

What Individuals are Covered?

Any employee or applicant of a covered employer is protected by PWFA if they are qualified for the position and have a "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions," including abortion, miscarriage or stillbirth; preeclampsia, gestational diabetes, migraines; and lactation. *See also* listing of related conditions at 89 Fed. Reg. 29096, Section 1636.3(b).

The list of conditions PWFA covers is broad and includes, among others, all of the following:

a. An impediment or problem that may be modest, minor and/or episodic, such as morning sickness;

b. A need or problem related to maintaining the employee's health or the health of the pregnancy, such as bed rest or limiting certain activities such as heavy lifting or exposure to hazardous working conditions; OR

c. Seeking health care related to pregnancy, childbirth, or a related medical condition.(Fed. Reg. 29132)

The "physical or mental condition" need not be the sole, original or substantial cause of the need for accommodation. For example, if a pregnancy aggravates a preexisting medical condition (such as diabetes or hypertension) necessitating some accommodation, the employee is entitled to a reasonable accommodation even though the condition existed prior to the pregnancy. (Fed. Reg. 29190-29192, 1636.3(a)(2)).

An individual is qualified for a position if they can perform the essential functions of the job with a reasonable accommodation.

What must an employee do to make their condition "known" to the employer and to request an accommodation?

The employee, applicant, or their union or other representative must "communicate[] the limitation to the employer" in some way (orally or in writing), although no magic words or formulation are required. *See* 1636.3 (c-d). Where a condition is obvious, such as a pregnancy, an individual can simply state they are pregnant. For other conditions, they may need to explain how the condition is related to pregnancy.

The request can be made to any supervisor or to human resources (HR); employees should not be denied accommodations "because they talked to the wrong supervisor." (Fed. Reg. 29,192). Similarly, a request for an accommodation can simply be a statement that an adjustment in working conditions is needed. The request need not be written, but if the employer requires a written form, the form should be simple (Fed. Reg. 29,121). The process of communicating the limitation and requested

accommodation to the employer "should be simple processes that do not require any specific language." (Fed. Reg. 29,114). The EEOC's interpretative guidance recognizes that informing an employer of a limitation and requesting an accommodation will often "take place at the same time" and "should not be complicated or difficult." (Fed. Reg. 29192).

Must the employer provide the employee with the requested accommodation or may the employer offer another?

The employer must provide an effective, reasonable accommodation after engaging in the interactive process with the employee. The employer need not provide the employee with the accommodation the employee requests or the most effective accommodation, but the offered accommodation must be effective at meeting the employee's needs. (Fed. Reg. 29138, 29140). An employer cannot require that an employee or applicant accept an accommodation that hasn't been arrived at through the interactive process. (Fed. Reg. 29207). An employee need not accept a reasonable accommodation offered by their employer as the result of the interactive process, but can be deemed "unqualified" for their position if they refuse it. (Fed. Reg. 29139).

An employer can choose between reasonable accommodations that provide the employee with "equal employment opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges as are available to the average employee without a known limitation who is similarly situated." (Fed. Reg. 29186, 1636.4) For example, an employer can require that a teacher accept assignment to a particular classroom if that assignment is comparable to the assignments of similarly situated non-pregnant teachers. An employer cannot require that a qualified employee take leave, either paid or unpaid, if another effective reasonable accommodation can be provided.

What does the interactive process require?

The employer and employee must interact regarding the condition and the needed accommodation. This interaction is intended to be an informal, interactive process in which both the employee and employer are involved. As the Interpretative Guidance states, "in many instances the appropriate accommodation may be obvious …. so that the interactive process can be a brief discussion." (Fed. Reg. 29207).

As part of the interactive process, an employer may request medical documentation only if it is reasonable to do so to determine whether the employee (or applicant) has a covered condition. An employer's documentation request is unreasonable where

i) the employee's physical or mental condition is obvious;
ii) the employer already has sufficient information to determine the issue;
iii) the employee seeks a pregnancy accommodation and confirms their pregnancy;
iv) the employer seeks an accommodation to pump; or
(v) the employer provides the accommodation to other employees without requiring documentation. An employer may not require that an individual be examined by a healthcare provider selected by the employer.

(Fed. Reg. 29138).

An employer's refusal to participate or their delay in providing a reasonable accommodation after the conclusion of the interactive process can violate the PWFA. Where it will take some time to provide an accommodation (e.g., because new equipment must be ordered or for some other reason), it is best practice for the employer to provide an interim reasonable accommodation. (Fed. Reg. 29123).

What is a reasonable accommodation?

A reasonable accommodation typically requires a change in the work environment or how things are usually done. The obligation to provide such accommodations is intended to provide protections that were previously denied by employers who told pregnant employees "you do the job that you're hired for or you don't work." Chino v. Lifespace Communities, Inc.

There are many possible reasonable accommodations. The EEOC's final rule at 1636.3(i) lists several, including:

1) Frequent breaks
2) Sitting/Standing
3) Schedule changes, part-time work, and paid and unpaid leave
4) Light duty
5) Making existing facilities accessible or modifying the work environment
6) Job restructuring
7) Acquiring or modifying equipment, uniforms, or devices
8) Adjusting or modifying policies
9) Changing work location including telework
10) Reserved parking space
11) As a last resort, paid or unpaid leave.

(Fed. Reg. 29201)

Unlike the ADA, the PWFA provides that a reasonable accommodation can include the temporary suspension of the employee's duty to perform some essential functions of their job so long as they will be able to resume those functions "in the near future." The EEOC rule specifies that the determination is case by case but that for an individual who is pregnant, "in the near future" means within 40 week's time. (Fed. Reg. 29179).

What are essential job duties?

The essential duties of a job are the fundamental job duties for a position, not marginal functions. 1636.3(g). Essential functions are identified based on the time spent performing them during the time period for which the accommodation is sought, the consequences of nonperformance, the actual duties of people in the position now and in the past, terms of a collective bargaining agreement, and job descriptions. (Fed. Reg. 29184)

Unlike the ADA, under which individuals are unqualified for their position if they cannot perform the essential job duties, the PWFA provides that individuals remain qualified even if they cannot perform one or more essential functions of the job on a temporary basis. For an employee or applicant who is currently pregnant, "temporary"

generally means 40 weeks. (Fed. Reg. 29226). For other pregnancy-related conditions, the employee or applicant can still be qualified if all of the following is true:

1) the inability to perform the essential function(s) is "temporary," meaning "lasting for a limited time, not permanent"
2) the employee could perform the essential function(s) "in the near future," as determined on a case-by-case basis; and
3) the inability to perform the essential function(s) can be reasonably accommodated.

(Fed. Reg. 29193-29195, 1636.3(f)(2)).

An employer may reasonably accommodate the temporary suspension of essential job duties by temporarily removing those duties or assigning them to someone else, as in the following scenarios:

1) the employee continues to perform the remaining functions of the job;
2) the employee may be assigned other tasks to replace the suspended duties; OR
3) the employee may be assigned to perform the functions of a different job to which the employer temporarily transfers or assigns them, such as light duty.

(Fed. Reg. 29202)

When can an employer refuse to provide an accommodation?

An employer is not required to provide a reasonable accommodation if it can show that the accommodation would impose an "undue hardship" on that employer. As under the ADA, undue hardship means "significant difficulty or expense for the operation of the employer," and the burden is on the employer to show such a hardship. In assessing whether an accommodation imposes an undue hardship on the employer, a court will take into account the cost, the employer's resources and size, and the impact of the accommodation on the employer's operations, both where the employee works and the overall organization. (Fed. Reg. 29204-5, 1636.3(j)(2)). For example, a school district would need to establish that hiring a substitute for a teacher who needs leave as an accommodation would impose significantly more of a burden than hiring a replacement if that teacher were discharged.

The employer should conduct an individualized assessment, rather than making assumptions, as to whether the accommodation will impose an undue hardship. If the accommodation involves the temporary suspension of an employee's essential function(s), the employer can attempt to prove that such a suspension would cause an undue hardship, based on the following factors:

1. the length of time that the employee will be unable to perform the essential function(s);
2. whether there is other work for the employee to accomplish;
3. the nature of the essential function, including its frequency;
4. whether the employer has provided other [non-pregnant] employees in similar positions who are unable to perform the essential function(s) of their positions with temporary suspensions of those functions and other duties;
5. whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function(s) in question; e.g., a substitute teacher; and

6. whether the essential function(s) can be postponed or remain unperformed for any length of time and, if so, for how long.

(Fed. Reg. 29205)

The EEOC's final rule also provides examples of workplace modifications that will "in virtually all cases, be found to be reasonable accommodations that do not impose an undue hardship," including allowing an employee to

1. carry or keep water near and drink, as needed
2. take additional restroom breaks, as needed
3. sit or stand, as needed, even if work requires the opposite
4. take breaks to eat and drink, as needed.

(Fed. Reg. 29206)

If an accommodation is reasonable and does not impose an undue hardship on the employer, then it should be provided.

What accommodations are available for pumping at work?

Both PWFA and the PUMP Act protect employees who need to pump at work. The PUMP Act requires an employer to provide reasonable breaks for nursing mothers to express milk during the work day for a year and this right was extended to exempt workers (like teachers) in 2023. Salaried workers should receive their full pay without deductions taken for time to pump. The PUMP Act also requires employers to provide a place to pump that is shielded from view, free from intrusion and is not a bathroom.

PWFA adds to the PUMP Act's requirements the right to obtain a reasonable accommodation to pump at work. The PWFA regulations specify that such reasonable accommodations include access to a secluded location with an electrical outlet that is clean and near to the employee's work and to a sink and a refrigerator. (Fed. Reg. 29185, 1636.3(i)(4)).

What if an employer takes an adverse action against an individual for seeking an accommodation or requesting an accommodation for another employee?

PWFA prohibits an employer from denying employment opportunities to a qualified employee or applicant based on that individual's request for, or need of, an accommodation. For example, an employer could not deny reappointment of a teacher who has informed the district that she will need leave as an accommodation for her pregnancy in the coming school year.

Like other non-discrimination statutes, the PWFA also prohibits an employer from taking any other adverse action against a qualified employee or applicant because they have requested or used a reasonable accommodation for a known limitation. (Fed. Reg. 29140). An adverse action includes changes in terms, conditions, or privileges of employment, such as the denial of a sabbatical earned by a pregnant faculty member.

Similarly, an employer cannot retaliate against any employee, applicant, or former employee because they have "opposed acts or practices made unlawful by the PWFA," or

"participated in any manner in an investigation, proceeding, or hearing under the PWFA." (Fed. Reg. 29188) The PWFA also prohibits "coercion, intimidation, threats, or interference with any individual in the exercise or enjoyment of rights under the PWFA." (Fed. Reg. 29213, 29216) This protection extends to anyone who aids or encourages anyone in the exercise or enjoyment of their PWFA rights.

What if a state or local law or collective bargaining agreement provides greater protections than the PWFA?

PWFA provides a floor of protections. State and local laws and collective bargaining agreements may provide greater protections, in which case employers must provide the greater protections. (Fed. Reg. 29142, 29179). For example, a CBA could require pay for leave provided as an accommodation for pregnancy.

How is the PWFA Enforced?

Employees and applicants can pursue their rights under the PWFA using the EEOC's free procedures for filing a charge under Title VII and other non-discrimination statutes within 180 days of the refusal to accommodate, an adverse action for requesting an accommodation, or retaliation or coercion. A charge can also be filed with a state agency with a cooperating agreement with the EEOC, within 300 days of the discriminatory event. (Fed. Reg. 29215, 1636.5)

Damages can include back wages and benefits, reinstatement or front pay, compensatory and punitive damages, and attorney's fees. (Fed. Reg. 29141, 1636.5) Like the ADA, damages may be limited if the claim involves the provision of a reasonable accommodation, and the employer makes a good faith effort to meet the need for a reasonable accommodation. (Fed. Reg. 29218, 1636.5(g)).

What other Resources are Available?

More information about the PWFA and the EEOC's final rule, including resources for employers and workers, is available on the EEOC's "What You Should Know about the Pregnant Workers Fairness Act" webpage.

Other EEOC resources:

EEOC on Pregnancy Discrimination: Pregnancy Discrimination and Pregnancy-Related Disability Discrimination | U.S. Equal Employment Opportunity Commission (eeoc.gov)

EEOC's Summary of Key Provisions

EEOC's Pregnancy Accommodations Tips For Small Businesses

Learn more about State & local protections: which may go beyond the PWFA requirements

Sample Letters to Give to Your Employer About the Pregnant Workers Fairness Act - A Better Balance

A Better Balance's free, confidential legal helpline at 1-833-NEED-ABB (1-833-633-3222) or fill out their online form.

For guidance on what is a reasonable accommodation, see JAN - Job Accommodation Network (askjan.org)

For more general information on pregnancy discrimination, see https://www.eeoc.gov/pregnancy-discrimination.