

# Navigating the Pregnant Workers Fairness Act

Ensuring Equity and Accommodation in the Workplace

Presented by:

Liz Johnston

[ejohnston@verrill-law.com](mailto:ejohnston@verrill-law.com)

Erik Peters

[epeters@verrill-law.com](mailto:epeters@verrill-law.com)

## Agenda

- Overview of Pregnant Workers Fairness Act
- Employer obligations

# What is the Pregnant Workers Fairness Act?

- Federal law effective June 27, 2023.
- EEOC regulations interpreting law effective June 18, 2024.
- Applies to employers with 15 or more employees
- Provides job-related protections for pregnant workers

## What does the Pregnant Worker Fairness Act Require?

- Employers with at least 15 employees and other covered entities must:
  - Provide reasonable accommodations to:
    - A qualified employee's or applicant's known limitations that are
    - 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.

## Who is a Qualified Employee or Applicant Entitled to a Reasonable Accommodation?

- Two ways to establish:
- Like under the Americans With Disabilities Act (“ADA”), “an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position”

...or

## Who is a Qualified Employee or Applicant?

- Unlike the ADA, even if the individual cannot perform all essential job functions with reasonable accommodation, they can still be entitled to it if:
  - Their inability to perform an essential job function(s) is for a *temporary* period;
  - They could perform the essential job function(s) *in the near future*; and
  - The employer can reasonably accommodate the employee's inability to perform the job's essential function(s).

## One More Time . . .

- An employee can be entitled to an accommodation, even if they cannot perform an essential function of their job after receiving it.



## “Defining” the Timeframes Relevant to Employee’s Performance of Job’s Essential Function

- Employees are entitled to the PWFA’s protections if
  - Their inability to perform an essential job function is for a *temporary* period; and
  - They can perform the essential job function(s) *in the near future*
  - PWFA does not define either “temporary” or “in the near future.”



## **When is the inability to perform a job's essential function “temporary”?**

- Per the EEOC, “temporary” means “lasting for a limited time, not permanent and may extend beyond ‘in the near future.’”

## When can essential job functions be performed “in the near future”?

- Per the EEOC, assessing whether all essential job functions can be performed “in the near future” depends on the circumstances:
  - For a current pregnancy, “in the near future” is generally defined as 40 weeks from the start of the temporary suspension of an essential function.
  - For conditions other than a current pregnancy, “in the near future” is not defined as any particular length of time.

## When can essential job functions be performed “in the near future”?

- Preamble to EEOC’s regulations: an employee needing indefinite leave cannot perform essential job functions “in the near future.”
- EEOC: Employers should consider whether an employee will be able to perform the essential functions “in the near future” each time an employee asks for an accommodation requiring suspension of an essential job function.

## Scope of the PFWA's Duty to Accommodate – employee's “known limitation”

- Employers are only obligated under the PWFA to accommodate an employee's “known limitation.”
- A “limitation” is defined as a “physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, of the specific employee in question.”
- The condition may be “modest, minor, and/or episodic,” and does not need to meet the definition of “disability” under the ADA.

## Scope of the PFWA's Duty to Accommodate – employee's “known limitation”

- A limitation becomes “known” to the employer when the employee or their representative has communicated the limitation to the employer.
  - An employee's representative may include a family member, friend, healthcare provider, union representative, or other representative.
- The limitation may be communicated to a supervisor, a manager, someone who has supervisory authority for the employee or who regularly directs the employee's tasks (or the equivalent in the case of an applicant), human resources personnel, or other appropriate official or by following the steps in the employer's policy to request an accommodation.
- This communication need not be in any specific format and may also be oral.

## Reasonable Accommodations under the PWFA

- Again, the PFWA requires employers to provide reasonable accommodations, which the final regulations define to be generally consistent with the ADA except for temporarily excusing or eliminating the performance of an essential job function.
  - Otherwise, the EEOC's position is that a reasonable accommodation is a modification or adjustment that is "reasonable on its face, i.e., ordinarily or in the run of cases" if it appears to be "feasible" or "plausible."
- An accommodation also must be effective in meeting the qualified employee's needs to remove a work-related barrier and provide an employee with equal employment opportunity to benefit from all privileges of employment.

## Potential Reasonable Accommodations under the PWFA

Per the EEOC, they can generally include:

- **Removing job's essential functions;**
- Temporarily transferring the employee to another job; and/or
- Assigning the employee to light or modified duty.

## Potential Reasonable Accommodations under the PWFA

Specific reasonable accommodations can generally include:

- Schedule changes due to morning sickness or to treat medical issues following delivery;
- Adjustments to accommodate restrictions for lifting or requests for light duty;
- Time and/or space to pump or nurse during work hours;
- Time off to recover from childbirth.



## Potential Reasonable Accommodations under the PWFA

- Providing closer parking spaces;
- Providing appropriately sized uniforms and safety apparel;
- Allowing workers additional break time to use the bathroom, eat, and rest; and/or
- Excusing workers from strenuous activities or activities that involve exposure to compounds not safe for pregnancy.

## Leave as a Reasonable Accommodation under the PWFA

- It is unlawful to require an employee to take leave, including paid leave, as an accommodation if another onsite accommodation is available, **unless the employee requests or selects leave as their preferred accommodation.**
- Employers **must** document when an employee has specifically requested or selected leave as an accommodation instead of other alternatives.
- A qualified employee with a known limitation who is granted leave as a reasonable accommodation under the PWFA is entitled to return to their same position unless the employer demonstrates that holding open the position would impose an undue hardship.

## Reasonable Accommodations and “Predictable Assessments”

- The EEOC regulations contain four “predictable assessments” that will not impose an undue hardship on the employer to provide in “virtually all cases”:
  - Allowing an employee to carry or keep water near to enable them to drink;
  - Permitting an employee to take additional restroom breaks as needed;
  - Allowing an employee whose work requires standing to sit and whose work requires sitting to stand as needed; and
  - Allowing an employee to take breaks to eat and drink as needed.

## Reasonable Accommodations and “Predictable Assessments”

- In their regs, the EEOC clarified that despite stating that “in virtually all cases,” predictive assessments will not impose an undue hardship, they are **not** reasonable per se, i.e., reasonable as a matter of law.
- The EEOC recognized that in certain industries, they may cause an undue hardship.
- Employers may still conduct an individualized assessment of a predictable assessment accommodation request and employers in certain industries may assert an accommodation request otherwise deemed to be a predictable assessment causes them undue hardship and may deny the request.

## **Scope of the PFWA's Duty to Accommodate – Condition “related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions”**

The EEOC defines “related medical conditions” as conditions “related to, are affected by, or arise out of pregnancy or childbirth,” including:

- Current pregnancy;
- Past pregnancy;
- Potential or intended pregnancy (which can include infertility, fertility treatments and the use of contraception);
- Labor;
- Childbirth;

## **Scope of the PFWA's Duty to Accommodate – Condition “related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions”**

- Termination of pregnancy, including by miscarriage, stillbirth, or abortion;
- Lactation and conditions related to lactation;
- Menstruation;
- Postpartum depression, anxiety or psychosis;
- Vaginal bleeding;
- Preeclampsia;
- Pelvic prolapse;
- Preterm labor;

## **Scope of the PFWA's Duty to Accommodate – Condition “related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions”**

- Ectopic pregnancy;
- Gestational diabetes;
- Cesarean or perineal wound infection;
- Maternal cardiometabolic disease;
- Endometriosis; and
- Changes in hormone levels.

## **Scope of the PFWA's Duty to Accommodate – Condition “related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions”**

The final regulations also reference related medical conditions that are not unique to pregnancy or childbirth, such as:

- Chronic migraine headaches;
- Nausea or vomiting;
- High blood pressure;
- Incontinence; and
- Carpal tunnel syndrome

Note: These conditions are covered by the PWFA only if the condition relates to pregnancy or childbirth or are exacerbated by pregnancy or childbirth.



## Lactation Accommodations

- The EEOC's regulations require reasonable accommodation for lactation beyond what may be required under the Providing Urgent Maternal Protection for Nursing Mothers Act (the "PUMP Act").
- The PUMP Act generally requires reasonable break time and space shielded from view and free from intrusion for a nursing mother to express breast milk.
- The final PWFA regulations provide a non-exhaustive list of examples of accommodations relating to lactation, including space for pumping that is in reasonable proximity to a sink, running water, and refrigeration for storing milk.
- The final regulations add nursing during working hours (as distinct from pumping) to the list of potentially reasonable accommodations.

# Delay in Providing an Accommodation

- According to the EEOC, unnecessary delay in providing an accommodation may constitute a violation of the PWFA, even if the employer ultimately provides a reasonable accommodation.
- Providing an interim accommodation should decrease the likelihood that unnecessary delay will be found.
- EEOC regulations state that leave does not count as an interim reasonable accommodation or a factor that will excuse delay, unless the employee specifically requests it, so employers should consider other interim accommodations before offering an employee time off while an accommodation request is pending.

## Standards for Evaluating whether an Accommodation Causes “undue hardship”

- Per the EEOC’s regulations, if the employee can perform all their essential job functions, “undue hardship” has the same meaning as under the ADA and generally means significant difficulty or expense for the employer’s operation.

## Standards for Evaluating whether an Accommodation Causes “undue hardship”

- If an employee cannot perform all essential functions and the accommodation is temporary suspension of an essential job function, the employer needs to consider the ADA definition of undue hardship and the following relevant factors:
  - Length of time the employee or applicant will be unable to perform the essential function(s);
  - Whether there is work for the employee to accomplish by allowing the employee to perform all the other functions of the job, transferring the employee to a different position, or otherwise;
  - The nature of the essential function, including its frequency;
  - Whether the covered entity has temporarily suspended the performance of essential job functions for other employees in similar positions;
  - Whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function(s); and
  - Whether the essential function(s) can be postponed or remain unperformed for any length of time and for how long.

## Requesting Documentation from the Employee

- The final PWFA regulations continue to provide for a “reasonableness” standard in evaluating the circumstances under which an employer may request documentation from an employee.
- “[R]easonable documentation” is defined by stating that an employer may only request the “minimum documentation” necessary to confirm the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and describe the adjustment or change at work due to the limitation.
- Additionally, an employer must accept as sufficient an employee’s self-confirmation of their pregnancy status when: the pregnancy is obvious; or an employee seeks one of the “predictable assessment” accommodation requests within the regulations.

## Requesting Documentation from the Employee

- The final PWFA regulations also discuss where it is not reasonable to seek supporting documentation:
  - The limitation and adjustment or change needed is obvious, and the employee provides self-confirmation;
  - The employer has sufficient information to determine whether the employee has a qualifying limitation and needs an adjustment or change due to the limitation;
  - When the employee is pregnant and requests a “predictable assessment”;
  - The reasonable accommodation relates to a time and/or place to pump or to nurse during work hours, and the employee provides self-confirmation; or
  - The requested accommodation is available to employees without known limitations under the PWFA pursuant to a policy or practice that does not require them to submit supporting documentation.

# Requesting Documentation from the Employee

- The same prohibitions on disability-related inquiries and medical examinations as well as the protection of medical information enforced under the ADA apply with equal force to documentation collected under the PWFA.
- Employers should ensure they continue to limit inquiries to only those that are job-related and consistent with business necessity.
- Employers should also treat all documentation relating to a PWFA accommodation request like they treat ADA documentation — maintain it confidentially and separate from an employee's personnel file.

## Other Laws Related to Pregnancy and Employment

- The Pregnancy Discrimination Act (“PDA”) prohibits discrimination against individuals because they are pregnant but does not affirmatively require employers to accommodate pregnancy or pregnancy-related conditions.
- It requires only that employers accommodate pregnant employees in the same manner they accommodate other employees who are similar in their inability to work.



## Other Laws Related to Pregnancy and Employment

- Both Title VII of the Civil Rights Act of 1964, as amended by the PDA and the Maine Human Rights Act (“MHRA”) prohibit employment discrimination on the basis of sex, which includes pregnancy and related conditions.

## Other Laws Related to Pregnancy and Employment

- Under the Americans with Disabilities Act, pregnancy is generally not considered a disability.
- Workers are entitled to reasonable accommodations under that law if they have a pregnancy-related disability, subject to the employer's undue hardship defense.

## Other Laws Related to Pregnancy and Employment

- Subject to the undue hardship defense, the MHRA requires employers to provide reasonable accommodations to an employee with a “pregnancy-related condition.”
- "Pregnancy-related condition" means a known limitation of an employee's ability to perform the functions of a job due to pregnancy, childbirth or related medical conditions, including but not limited to lactation.

## Other Laws Related to Pregnancy and Employment

The Family and Medical Leave Act, Maine's Family and Medical Leave Requirements Law and Maine's Paid Family Medical Leave Act all ensure that (some) employees receive protected unpaid leave related to pregnancy and childbirth but have no accommodation requirements.

## Other Laws Related to Pregnancy and Employment

- The PUMP Act requires employers to provide time and space for breastfeeding parents.
- While the Affordable Care Act already required employers to provide reasonable time to express breast milk and a place for pumping, other than the bathroom, that is shielded from view and private, the PUMP Act extends these rights to all breastfeeding employees for the first year of the baby's life – no longer excluding most salaried employees.

## Final Thoughts

- Ensure policies at your organization comply with requirements of the PWFA if it applies to you.
- Update managers/supervisors and HR personnel on PWFA obligations and reasonable accommodation obligations and request process.



# QUESTIONS?



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