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Employee Benefit Plan Review

Key Takeaways So Far From the Equal Employment Opportunity Commission's Enforcement of the Pregnant Workers Fairness Act

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In the months following the June 18, 2024 effective date of the U.S. Equal Employment Opportunity Commission's (EEOC or the Commission) final rule (Final Rule)[1] and interpretive guidance[2] to implement the Pregnant Workers Fairness Act (PWFA),[3] the EEOC has taken an aggressive and proactive role in enforcing the Final Rule.

In September 2024, the EEOC filed a series of lawsuits alleging violations of the PWFA and has since announced conciliation agreements with several companies. These lawsuits and settlements signal the EEOC's intent to strictly enforce the PWFA, and provide important takeaways for employers as they navigate the new landscape of pregnancy-related accommodation requests under the PWFA. Of note, some cases particularly highlight differences between the PWFA and the Americans with Disabilities Act (ADA).

Employers Cannot Rely On Their Default Procedures For Assessing Accommodation Requests Under the ADA to Assess PWFA Accommodation Requests

The Final Rule emphasizes that employers should consider whether it is reasonable to require an employee to submit medical documentation in support of an accommodation request for a pregnancy-related medical condition. In fact, the Final Rule affirmatively prohibits employers from seeking documentation when the request is for one of four "predictable assessment" accommodations, including, for example, allowing an employee to carry and drink water all day. The EEOC's recent filings illuminate that even outside those "predictable assessment" accommodations, the Commission narrowly interprets when it would be reasonable to require medical documentation under the PWFA.

On September 10, 2024, the EEOC filed its first lawsuit, *EEOC v. Wabash National Corporation*,[4] alleging violations of the PWFA based on allegations that a national industrial manufacturing company "failed to accommodate an employee's known pregnancy-related limitation and subjected her to an unlawful medical inquiry."[5] As alleged in the EEOC's complaint, this case involved an employee whose job duties included bending over trailers and lying on her stomach to install wiring in semi-trailers and other commercial trucking equipment. In her seventh month of pregnancy, the employee requested that she be moved to a different position on the assembly line or be placed in a light-duty position due to pain she experienced as a result of the pressure she was required to put on her abdomen and concerns this aspect of her job may jeopardize her pregnancy. The complaint alleges that, upon receiving this request for an accommodation, the company immediately placed the employee on unpaid leave and required her to have her physician complete an ADA questionnaire designed to elicit information regarding ADA restrictions. Although the company offers light duty options to non-pregnant workers with disabilities, the company denied the pregnant employee's accommodation request because her physician reported that the employee did not have any ADA restrictions. Faced with the option of returning to her job without modification or taking unpaid leave for the duration of her pregnancy, the employee resigned and filed a Charge of Discrimination with the EEOC.

The *Wabash* lawsuit highlights several key distinctions between accommodation determinations made under the ADA versus the PWFA. Unlike the ADA, the PWFA prioritizes accommodations that enable an employee to remain on the job while preserving the employee's ability to take leave, when necessary, due to "known limitations" related to pregnancy, childbirth, or related medical conditions. *Wabash* and other cases discussed herein demonstrate that ultimately, employers cannot rely on their default procedures for assessing ADA accommodation requests to assess PWFA accommodation requests.

As an initial matter, employers should be cautious of requiring an employee to submit medical documentation in support of accommodation requests that are obviously necessitated by the employee's pregnant condition. In *Wabash*, for example, the employee's request for temporary reassignment to a job position that did not require her to lay on her stomach during the second and third trimesters of her pregnancy are plainly necessary due to her pregnant condition. In contrast, the Final Rule specifies that employers may require medical documentation to support a request for an accommodation that is not inherently derivative of a pregnancy-related limitation. For example, if an employee requests the suspension of an essential job function that involves climbing ladders due to dizziness and the danger of falling, an employer may seek reasonable documentation to confirm that the request arises from a pregnancy-related limitation and to determine the parameters of this limitation (e.g., how high the employee can climb, how long the modification will be needed, etc.). However, if an employer does request supporting medical documentation, the Final Rule requires employers to consider providing interim reasonable accommodations pending the submission of documentation in support of the accommodation request.

Wabash also demonstrates that, as discussed in more detail below and unlike the ADA, the PWFA requires employers to temporarily suspend an employee's essential job functions as an accommodation for a pregnancy-related limitation, absent undue hardship. Additionally, employers should be wary of denying a PWFA accommodation request when it previously provided the same temporary accommodation to an employee with no pregnancy-related medical condition, as this likely would violate not only the PWFA but also possibly other laws, such as Title VII of the Civil Rights Act of 1964 (Title VII) as amended by the Pregnancy Discrimination Act (PDA).

Employers Cannot Default To Placing An Employee On Unpaid Leave As An Accommodation And Must Evaluate Whether It Is Feasible To Temporarily Suspend An Essential Job Function

The PWFA prohibits default, unilateral placement of an employee on unpaid leave as an accommodation for a pregnancy-related limitation if another reasonable accommodation is available that would not cause the employer undue hardship. Instead, an employer must engage in the interactive process to determine whether a reasonable accommodation exists that would enable the employee to continue working and unlike under the ADA, it may mean temporarily eliminating an essential function in certain situations, and unlike under the ADA, it may mean temporarily eliminating an essential function in certain situations.

Given the temporary nature of pregnancy-related accommodation requests, simply asserting that a requested accommodation requires altering an employee's essential job functions is insufficient to support an undue hardship defense under the PWFA. Instead, employers must be prepared to show why temporarily suspending an essential job function is infeasible and creates an undue hardship.

Notably, as highlighted by *Wabash*, the Commission also views

default placement of an employee on unpaid leave during the pendency of the interactive process as a violation of the PWFA. Thus, as emphasized in the Final Rule, employers must be prepared to provide temporary, interim accommodations during the pendency of the interactive process, absent undue hardship or an employee's request that they be placed on unpaid leave.

The EEOC's recent filings suggest that the Commission has placed a high burden for employers asserting that undue hardship necessitates placing an employee on unpaid leave as an accommodation for a pregnancy-related limitation where the employee identifies a change to the duties of the role that would have allowed the employee to continue working. In *Equal Employment Opportunity Commission v. Urologic Specialists of Oklahoma, Inc.*,[6] the EEOC filed suit asserting violations of the PWFA and ADA against a medical practice that allegedly placed a pregnant employee on unpaid leave after denying the employee's repeated requests for an accommodation that would enable her to take short breaks from standing throughout her shifts. As a medical assistant, the employee's job required her to be on her feet for 80-95% of each shift, and she was not guaranteed a lunch break each day, which caused her significant swelling and pain in her feet, legs, and abdomen. The employee requested an accommodation of performing some tasks while sitting down or, alternatively, being permitted to take a 30-minute lunch break every shift to rest, and submitted documentation from her physician advising that these accommodations were necessary to protect the employee's health. The company allegedly advised the employee that neither of these accommodations were feasible and denied her request without offering any alternative options. Over the course of the next several months, the employee repeatedly proposed alternative accommodation options, including a request to work a reduced schedule, in an effort to continue working during the final trimester of her high-risk pregnancy. In response, the company allegedly advised the employee that she could only take a break if someone could cover her shift and the physician she was assigned to assist allowed the breaks. As the unpredictability of this arrangement failed to provide the employee with a workable accommodation, she was ultimately forced to take unpaid leave for the final two months of her pregnancy. After the birth of her child, the employee requested that, upon returning to work, she be allowed to work a reduced schedule and given lactation breaks throughout her shift, which the company allegedly refused to guarantee. The employee was therefore unable to return to work without knowing whether she would be permitted to take lactation breaks, and the company ultimately terminated her employment.

This case highlights the Commission's low tolerance for an employer's claim that it had to place an employee on unpaid leave rather than grant the employee's request for an accommodation for a pregnancy-related limitation that would have enabled the employee to continue working – even where granting the accommodation request means temporarily suspending an essential function of the role. The allegations in the *Urologic Specialists* complaint reflect that the employee's position as a medical assistant inherently required her to be on her feet all day and was not, on its face, conducive to allowing regular breaks or job tasks to be performed while sitting down. Arguably, such an arrangement would disrupt the medical practice's ability to schedule patient visits and fundamentally alter the essential job duties of the employee's position.

Despite this, the EEOC contends that there was no basis for the medical practice's failure to offer accommodations that would enable the employee to sit, take breaks, work light duty, or work on a part-time basis, which suggests that the Commission does not view temporary disruptions in an employer's workflow as an undue hardship. This case highlights the high bar employers must meet to defend an argument that temporarily suspending an essential job function poses an undue hardship warranting placement of an employee on unpaid leave against the employee's request.

Employers Cannot Terminate The Employment Of A Pregnant Employee Based On An Assumption That The Employee Will Be Unable To Perform Essential Job Functions

As amended by the PDA, Title VII designates discrimination on the basis of pregnancy, childbirth, or related medical conditions as unlawful sex discrimination. Title VII does not, however, afford an employee the right to an accommodation for limitations arising from pregnancy, childbirth, or a related medical condition absent evidence that a similarly situated employee received the same accommodations. And pregnancy, by itself, does not constitute a disability under the ADA. This is why the PWFA was enacted – in order to bridge the gap between these federal legal protections afforded to workers experiencing pregnancy-related limitations.

As illustrated by a recent EEOC conciliation announcement, the Commission utilizes the interplay between Title VII and the PWFA to protect pregnant workers from discrimination based on an assumption that they are unable to perform their job duties because of their pregnancy.[7] After investigating a Charge of Discrimination filed against a popular fast-food chain alleging violations of the PWFA and Title VII, the EEOC determined that reasonable cause existed to support allegations that the restaurant terminated an employee upon learning

that she was pregnant because the restaurant "believed that she would need accommodations to perform her job duties."[8] The charge resulted in a conciliation agreement between the parties in which the restaurant chain "agreed to pay compensation to the former employee, provide training to all employees on pregnancy discrimination, appoint an EEO coordinator to ensure revised policies and practices, and an annual report to the EEOC containing any complaints of discrimination."

This highlights the interplay of protections afforded under Title VII and the PWFA. First, the restaurant's decision to terminate the employment of this pregnant employee based on its assumption that the employee would require pregnancy-related accommodations violated the employee's protection from adverse actions based on her pregnant status under Title VII. Second, the restaurant violated the PWFA due to its unwillingness to evaluate and consider whether any pregnancy-related accommodation requests – should they arise – were reasonable and feasible. Put simply, employers cannot assume an employee is not qualified to perform their job duties because they are pregnant, nor can employers preemptively terminate an employee because the employer believes it will be unable to accommodate any potential pregnancy-related limitations.

The EEOC Treats Requests For Time Off To Attend Medical Appointments For Pregnancy-Related Medical Conditions As Presumptively Reasonable

Absent a demonstration of undue hardship, the Final Rule prohibits employers from terminating the employment of an employee who needs to miss work to attend medical appointments for their pregnancy-related medical condition. This includes, for example, absences to attend medical appointments related to a current pregnancy, postpartum care, or pregnancy loss. As specified under the Final Rule, the PWFA requires employers to permit an employee to take unpaid leave during their normal work hours to attend medical appointments, even if the employee is not eligible for leave under the employer's leave policy, the Family Medical Leave Act (FMLA), or other state laws.

The EEOC's recent settlements and litigation pursuits suggest that the Commission views an accommodation of leave to attend medical appointments for a pregnancy-related medical condition as presumptively reasonable. The EEOC has announced conciliation agreements entered with two companies that allegedly terminated employees who requested a reasonable accommodation of time off from work to attend monthly medical appointments related to each employee's pregnancy. As a result of these conciliation agreements, ABC Pest Control, Inc.,[9] agreed to pay $47,480.00 in damages to its former employee and Family Fresh Harvesting, LLC,[10] agreed to pay an undisclosed amount of monetary damages to its former employee.

Further, the PWFA's anti-coercion provision is broader than the ADA's interference provision, and requires employers to reevaluate whether their attendance policies may discourage employees from invoking their rights under the PWFA are prohibited. For example, the Final Rule specifies that "a fixed leave policy that states 'no exceptions will be made for any reason'"[11] is inappropriate as such a provision "is reasonably likely to interfere with the exercise or enjoyment of PWFA rights."

This also means that automatically penalizing an employee for an unexcused absence that the employee incurs to attend a pregnancy-related medical appointment is prohibited, and as the EEOC's recent lawsuit filed against Polaris Industries, Inc.,[12] shows, the Commission is strictly enforcing this regulation. According to the complaint filed in *EEOC v. Polaris Industries, Inc.*,[13] an employee informed the company that she was pregnant during her new-hire orientation and informed her supervisor that she required periodic time off to attend her prenatal appointments. In response, the company allegedly assessed attendance points against the employee for missing work to attend her prenatal appointments because she was not eligible to accrue paid time off under the company's attendance policy until her sixty-day probationary period ended, nor was she eligible for FMLA leave due to her new-hire status. When the employee expressed concerns regarding the attendance points assessed against her, the company advised that her that she would continue to accrue attendance demerits until she accrued paid time off to cover her absences to attend her pregnancy-related medical appointments. Ultimately, the company advised the employee that if she accrued one more absence she would be terminated, and the employee was forced to resign.

Accordingly, employers must avoid rigidly applying attendance policies that assess penalties against employees for unexcused absences when those absences are accrued because of an employee's attendance of medical appointments for a pregnancy-related medical condition.

Employers Must Be Prepared To Articulate Why An Employee's Requested Accommodation Creates An Undue Hardship

The *Polaris* lawsuit also reflects the importance of evaluating on a case-by-case basis whether a requested accommodation is an undue hardship and being prepared to articulate that undue hardship determination to an employee. In addition to requesting leave to

attend her medical appointments, a few months after she began her employment, the Polaris employee requested a temporary accommodation to not work overtime. In support of her accommodation request, the employee submitted medical documentation from her physician reflecting that she was restricted to working 40 hours per week. The company allegedly denied the employee's accommodation request on the basis that overtime is an essential function of the position. In response, the employee requested that the company explain why temporarily exempting her from working overtime would present the company with an undue hardship, given that her position on the assembly line was currently overstaffed to the point where multiple employees were assigned to work her station per shift, even though her station was designed to be staffed by a single employee. In the EEOC's complaint, it alleged that the company did not respond to the employee's additional inquiries regarding its undue hardship determination.

This case highlights that the interactive process does not end with an employer's determination that a requested accommodation would create an undue hardship. Rather, the interactive process also entails communicating and responding to employee inquiries regarding accommodation requests. Employers must be prepared to articulate specific reasons an employee's requested accommodation for a pregnancy-related limitation creates an undue hardship and to respond to employee inquiries regarding accommodation determinations.

The PWFA's Protections Include Reasonable Accommodations Sought Due To Pregnancy Loss

If an employee requests leave due to a pregnancy-related limitation, the employer must first determine whether the employee has a right to leave under the employer's policy, the FMLA, and/or another state or local laws, as the employee is entitled to use of that leave regardless of whether the employee requests leave as a reasonable accommodation under the PWFA. If an employee requires leave beyond what they are entitled to under those laws or policies, the request for additional leave constitutes a request for a reasonable accommodation, necessitating an undue hardship analysis.

The Final Rule specifies that these leave practices also apply for employees experiencing pregnancy loss. The Final Rule presents an example in which an employee experiences a miscarriage and requests leave to recover, having only earned two days of paid leave, being not covered under the FMLA, and working for a company that does not have a policy regarding unpaid leave. In such a scenario, the EEOC stipulates that the PWFA requires the employer to provide unpaid leave as an accommodation for this employee, absent undue hardship, the lack of leave available under the company's leave policy or the FMLA notwithstanding.

Similarly, in *EEOC v. Lago Mar Properties Inc.*,[14] the EEOC alleged that an employer's failure to provide unpaid leave as an accommodation for an employee who experienced a pregnancy loss violated the PWFA and ADA. According to the complaint, the employer allegedly terminated the employment of an employee one day after the employee requested a six-week leave of absence to recover mentally and physically from the stillbirth of her child during her fifth month of pregnancy. The employer allegedly failed to engage in the interactive process and provided no explanation for its denial of the employee's accommodation request and employment termination.

Ultimately, the parties reached a pre-litigation settlement through the EEOC's conciliation process. This settlement required the employer to enter into a three-year consent decree, which includes the employer's payment of $100,000 in damages to the former employee. The consent decree also requires the employer to appoint an EEO coordinator, revise the company's employment policies to ensure the company provides reasonable accommodations under the PWFA and ADA, provide trainings to all company employees, and report any complaints of discrimination to the EEOC.

What To Expect in 2025

The EEOC strategically prioritizes PWFA enforcement. Last year, the EEOC released the Strategic Enforcement Plan (SEP) Fiscal Years 2024-2028,[15] which guides the Commission's activities, such as enforcement. The FY2024-2028 SEP updated "the emerging and developing issues priority" to include protections for workers affected by pregnancy, childbirth, or related medical conditions, including under the PWFA. In turn, the EEOC's recently released Fiscal Year 2024 Agency Financial Report[16] highlights the agency's enforcement of the PWFA as an example of the what the agency sees as its strategic use of law enforcement to effectively combat employment discrimination.

We do not expect the EEOC enforcement priorities to change right away when the new administration takes over in January 2025. Each of the EEOC commissioners participate equally in the development and approval of Commission policies, issuing charges of discrimination, and authorizing the filing of suit, and currently the panel has a Democratic majority.

Key Takeaways

- *Employers Must Be Wary of Requiring an Employee to Submit Medical Documentation in Support of Accommodation Requests That Are Obviously Necessitated By the Employee's Pregnant Condition.* The Final Rule emphasizes that employers

should consider whether it is reasonable to require an employee to submit medical documentation in support of an accommodation request for a pregnancy-related medical condition. If an employer does request supporting medical documentation, the Final Rule requires employers to consider providing interim reasonable accommodations pending the submission of documentation in support of the accommodation request.

- *To Assess PWFA Accommodation Requests, Employers Cannot Rely on Their Default Procedures for Assessing Accommodation Requests Under the ADA*. Unlike the ADA, the PWFA requires employers to temporarily suspend an employee's essential job functions as an accommodation for a pregnancy-related limitation, absent undue hardship. Given the temporary nature of pregnancy-related accommodation requests, simply asserting that a requested accommodation requires altering an employee's essential job functions is insufficient to support an undue hardship defense under the PWFA. Instead, employers must be prepared to show why temporarily suspending an essential job function is infeasible and creates an undue hardship. Likewise, employers should be wary of denying PWFA accommodation requests where it previously provided the same temporary accommodation to an employee for a non-pregnancy-related limitation.
- *Employers Cannot Default to Placing an Employee on Unpaid Leave as an Accommodation*. The PWFA prohibits default, unilateral placement of an employee on unpaid leave as an accommodation for a pregnancy-related limitation if another reasonable accommodation is available that would not cause the employer undue hardship. The EEOC's recent filings highlight the Commission's low tolerance for an employer's claim of undue hardship where an employee requests a pregnancy-related accommodation that would have permitted the employee to continue working with a temporary adjustment to an essential function of the role.
- *Employers Cannot Terminate the Employment of a Pregnant Employee Based on an Assumption That the Employee Will Be Unable to Perform Their Essential Job Functions*. Employers cannot assume an employee is not qualified to perform their job duties because they are pregnant, nor can employers preemptively terminate an employee on the basis that the employer believes it will be unable to accommodate any pregnancy-related limitations that may arise.
- *The EEOC Treats Requests for Time Off to Attend Medical Appointments for Pregnancy-Related Medical Conditions as Presumptively Reasonable*. This means that automatically penalizing an employee for an unexcused absence that the employee incurs to attend a pregnancy-related medical appointment is prohibited. Accordingly, employers must avoid rigidly applying attendance policies that assess penalties against employees for unexcused absences when those absences are accrued because of an employee's attendance of medical appointments for a pregnancy-related medical condition.
- *Employers Must Be Prepared to Articulate Why an Employee's Requested Accommodation Creates an Undue Hardship*. The interactive process does not end with an employer's determination that a requested accommodation would create an undue hardship. Rather, the interactive process also entails communicating and responding to employee inquiries regarding accommodation requests. Employers must be prepared to articulate specific reasons an employee's requested accommodation for a pregnancy-related limitation creates an undue hardship and to respond to employee inquiries regarding accommodation determinations.
- *Employers Must Engage in the Interactive Process and Determine Whether It Poses an Undue Hardship to Grant an Employee's Request for Additional Leave Beyond Exhausted Leave Entitlements*. If an employee requests leave due to a pregnancy-related limitation, the employer must first determine whether the employee has a right to leave under the employer's policy, the FMLA, and/or another state or local laws, as the employee is entitled to use of that leave regardless of whether the employee requests leave as a reasonable accommodation under the PWFA. If an employee requires leave beyond what they are entitled to under those laws or policies, the request for additional leave constitutes a request for a reasonable accommodation, necessitating an undue hardship analysis.
- *The PWFA's Protections Include Reasonable Accommodations Sought Due to Pregnancy Loss*.

Notes

1. https://www.federalregister.gov/documents/2024/04/19/2024-07527/implementation-of-the-pregnant-workers-fairness-act.
2. https://www.eeoc.gov/summary-key-provisions-eeocs-final-rule-implement-pregnant-workers-fairness-act-pwfa.
3. https://uscode.house.gov/view.xhtml?path=/prelim@title42/chapter21G&edition=prelim.
4. EEOC v. Wabash National Corporation, No. 5:24-cv-148-BJB (W.D. Ky. Sept. 10, 2024).
5. https://www.eeoc.gov/newsroom/eeoc-sues-wabash-national-pregnancy-discrimination.
6. Equal Employment Opportunity Commission v. Urologic Specialists of Oklahoma, Inc., No. 24-cv-00452-JFJ (N.D. Okla. Sept. 25, 2024).
7. As a refresher, an employee instigates a claim of discrimination under the PWFA by filing a Charge of Discrimination against their employer, which prompts an EEOC investigation into the employee's allegations. If the EEOC determines there is reasonable cause to believe discrimination has occurred, the

Commission invites the parties to settle the charge through an informal and confidential process known as conciliation.

8. https://www.eeoc.gov/newsroom/sailormen-inc-popeyes-conciliates-eeoc-pregnant-workers-fairness-act-charge.
9. https://www.eeoc.gov/newsroom/abc-pest-control-inc-conciliates-pregnant-workers-fairness-act-charge.
10. https://www.eeoc.gov/newsroom/family-fresh-harvesting-conciliates-eeoc-pregnancy-discrimination-charge.
11. https://www.govinfo.gov/content/pkg/FR-2024-04-19/pdf/2024-07527.pdf#page=121.
12. https://www.eeoc.gov/newsroom/eeoc-sues-two-employers-under-pregnant-workers-fairness-act.
13. EEOC v. Polaris Industries, Inc., 5:24-cv-01305-CLS (N.D. Ala).
14. EEOC v. Lago Mar Properties Inc., No. 0:24-cv-61812 (S.D. Fla.).
15. https://www.eeoc.gov/strategic-enforcement-plan-fiscal-years-2024-2028.
16. https://www.eeoc.gov/fiscal-year-2024-agency-financial-report?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=#h_66896126954017315983711 00.

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