

PWFA: Final Regulations

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Agenda

- Critical Legislative Updates
- PWFA Final Regulations
 - History
 - Limitations
 - Qualified Employees
 - Related Medical Conditions
 - Predictable Assessments
 - Reasonable Accommodations
 - Undue hardship
 - Documentation
 - Prohibitions

Critical Legislative Updates:

Federal Agencies have been busy this week!

- FLSA Salary Basis Increased:
 - \$844/week July 1, 2024
 - \$1,128/week January 1, 2025
 - Increase every 3 years
 - Still must meet duties test
- FTC bans noncompete agreements – future and current



Pregnant Workers Fairness Act (PWFA)

Historical context: The Americans with Disabilities Act (ADA) did NOT cover most pregnant workers because the health conditions associated with pregnancy were temporary and pregnancy was not deemed to be a disability. Accordingly, pregnant workers who needed even a very minor accommodation were not eligible for an accommodation under the ADA and risked losing their jobs – even though the same/similar accommodation might be given long-term to a disabled individual.



PWFA went into effect on June 27, 2023 and the EEOC has been investigating complaints since that date and operating under proposed regulations.

April 15, 2024, the EEOC finalized the regulations and they will be effective June 18, 2024. However, companies should NOT wait to comply.



PWFA

The [Pregnant Workers Fairness Act \(PWFA\)](#) is a new law that requires covered employers (with 15 or more employees) to provide “reasonable accommodations” to a [qualified](#) worker’s known [limitations](#) related to pregnancy, childbirth, or [related medical conditions](#), unless the accommodation will cause the employer an “undue hardship.”

Sounds like the ADA....

The [House Committee on Education and Labor Report on the PWFA](#) provides several examples of possible reasonable accommodations including the ability to sit or drink water; receive closer parking; have flexible hours; receive appropriately sized uniforms and safety apparel; receive additional break time to use the bathroom, eat, and rest; take leave or time off to recover from childbirth; and be excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy. Employers are required to provide reasonable accommodations unless they would cause an “undue hardship” on the employer’s operations. An “undue hardship” is significant difficulty or expense for the employer.



PWFA

Employees are ALSO protected by Title VII, the ADA and all other applicable Federal, state and local civil rights laws

- Some states/localities have more generous pregnancy protection laws.
- **Don't lose sight of this!**



PWFA Limitations:



Limitation means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The physical or mental condition that is the limitation is:

1. an impediment or problem that may be modest, minor and/or episodic;
2. a need or problem related to maintaining the employee's health or the health of the pregnancy; or
3. seeking health care related to pregnancy, childbirth, or a related medical condition itself.

PWFA Limitations:

KEY Concepts:

The limitation does NOT need to rise to the level of a disability. It can be MINOR.

Pregnancy, childbirth, or related medical conditions do NOT need to be the sole, the original, or a substantial cause of the physical or mental condition at issue in order for the physical or mental condition to be “related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.”

- Anxiety
- High blood pressure
- Back Problems

PWFA Known Limitation:

“Known” means “the employee or the employee’s representative has communicated the limitation to the employer.”

No magic words are needed.

Does not have to specifically use one of the medical terms listed in the regulation.

PWFA Qualified:

1. An employee or **applicant** who, with or without reasonable accommodation, can perform the essential functions of the employment position” is qualified. (Same as ADA)
2. PWFA **ALSO** allows an employee or **applicant** to be qualified even if they cannot perform one or more essential functions of the job if the inability to perform the essential function(s) is “temporary,” the employee could perform the essential function(s) “in the near future,” and the inability to perform the essential function(s) can be reasonably accommodated. The terms “temporary,” “in the near future,” and “can be reasonably accommodated” are **not** defined in the statute. The new regulations attempt to define these terms (with limited success).

PWFA Qualified:

1. The new regulations “define” the term “temporary” as meaning lasting for a limited time, not permanent, and may extend beyond “in the near future.”

2. The new regulations state that if the employee is pregnant, it is **assumed** that the employee could perform the essential function(s) “in the near future” because they could perform the essential functions within generally 40 weeks of the temporary suspension of the essential function.

- Takeaway: 40 week suspension of essential function is almost always required unless there is an undue hardship.

3. Whether the employee could perform the essential function(s) “in the near future” in situations other than when the employee is pregnant is determined on a case-by-case basis.

4. Reasonably accommodated for some positions, this may mean that one or more essential functions are temporarily suspended (with or without reassignment to someone else) and the employee continues to perform the remaining functions of the job. For other positions, some of the essential functions may be temporarily suspended (with or without reassignment to someone else) and the employee may be assigned other tasks to replace them. In yet other situations, one or more essential functions may be temporarily suspended (with or without reassignment to someone else) and the employee may perform the functions of a different job to which the employer temporarily transfers or assigns them, or the employee may participate in the employer’s light or modified duty program.

PWFA Related Medical Conditions:

Includes current pregnancy, past pregnancy, potential pregnancy, lactation (including breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, or having or choosing not to have an abortion, among other conditions.

The regulations also reference conditions that are not unique to pregnancy or childbirth, such as chronic migraines, nausea or vomiting, high blood pressure; incontinence, carpal tunnel syndrome, and many other medical conditions. These conditions are only covered under the PWFA if the condition relates to or is exacerbated by pregnancy, childbirth or other related medical conditions (although the ADA or other civil rights statutes may apply).

The EEOC emphasizes that the list in the regulation is non-exhaustive, and to receive an accommodation an employee or applicant does not have to specify a condition on this list or use medical terms to describe a condition.

PWFA Predictable Assessments:

- Regulations add new concept of “predictable assessments” based on the opinion that in virtually all cases a limited number of simple modifications are reasonable accommodations that do not impose undue hardship when requested by an employee due to pregnancy.
- These modifications are: (1) allowing an employee to carry water and drink, as needed, in the employee's work area; (2) allowing an employee additional restroom breaks; (3) allowing an employee whose work requires standing to sit and whose work requires sitting to stand, and (4) allowing an employee breaks, as needed, to eat and drink.
- Cannot request documentation. (Note requests for documentation can only be “reasonable” in other circumstances – generally not for uniforms/safety equipment other “obvious” needs and watch requests especially early in pregnancy.)

PWFA Reasonable Accommodations:

Reasonable accommodation” is a term from the ADA, and the PWFA uses a similar definition as in the ADA. Generally, it means a change in the work environment or how things are usually done. The final rule, provides specific examples of possible reasonable accommodations under the PWFA, including:

1. Frequent breaks (possible predictable assessment);
2. Schedule changes, part-time work, and paid and unpaid leave;
3. Telework;
4. Parking;
5. Light duty;
6. Making existing facilities accessible or modifying the work environment;
7. Job restructuring;
8. Temporarily suspending one or more essential functions;
9. Acquiring or modifying equipment, uniforms, or devices; and
10. Adjusting or modifying examinations or policies.

PWFA Reasonable Accommodation Examples:

- Schedule changes, part-time work, and paid and unpaid leave. Leave for medical treatment can be a reasonable accommodation. By way of example, an employee could need a schedule change to attend a round of IVF appointments to get pregnant; a part-time schedule to address fatigue during pregnancy; or additional unpaid leave for recovery from childbirth, medical treatment, post-partum treatment or recuperation related to a cesarean section, episiotomy, infection, depression, thyroiditis, or preeclampsia.
- Telework. Telework or “work from home” has been recognized by the EEOC as a potential reasonable accommodation. Telework could be used to accommodate, for example, a period of bed rest or a mobility impairment.
- Parking. Providing reserved parking spaces if the employee is otherwise entitled to use employer-provided parking may be reasonable accommodation to assist a worker who is experiencing fatigue or limited mobility because of pregnancy, childbirth, or related medical conditions.

PWFA Reasonable Accommodations:

- Light duty. Assignment to light duty or placement in a light duty program has been recognized by the EEOC as a potential reasonable accommodation under the ADA, even if the employer's light duty positions are normally reserved for those injured on-the-job and the person with a disability seeking a light duty position does not have a disability stemming from an on-the-job injury.
- Making existing facilities accessible or modifying the work environment. Examples of reasonable accommodations might include allowing access to an elevator not normally used by employees; moving the employee's workspace closer to a bathroom; providing a fan to regulate temperature; or moving a pregnant or lactating employee to a different workspace to avoid exposure to chemical fumes. This also may include modifications of the work environment to allow an employee to pump breast milk at work.
- Adjusting or modifying examinations or policies. Examples of reasonable accommodations include allowing workers with a known limitation to postpone an examination that requires physical exertion. Adjustments to policies also could include increasing the time or frequency of breaks to eat or drink or to use the restroom.

PWFA Undue Hardship:

“Undue hardship” is a term from the ADA, and the PWFA follows the definition in the ADA. Generally, it means significant difficulty or expense for the operation of the employer.

Extremely high/difficult bar to meet.

PWFA Documentation:

NONE with Requests for Predictable Assessments.

NONE with “obvious” conditions/limitations.

With other Conditions/Limitations/Requests for Accommodations, the documentation that the employer can request is very **LIMITED**.

1. An employer is not required to seek supporting documentation from an employee or applicant who requests an accommodation under the PWFA. 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.
2. When requiring documentation is reasonable, the employer is limited to requiring documentation that itself is reasonable – which 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 (together with (1) “a limitation”); and (3) describe the change or adjustment at work needed due to the limitation.
3. The provisions of the ADA that require an employer to keep medical information confidential apply to employees and information under the PWFA.




PWFA Documentation:

Key Concepts:

Documentation does **NOT** necessarily have to be from a health care provider.

Documentation is the “minimum that is sufficient.” Very low threshold/bar for the employee to meet.

Could be “self-attestation” by employee or other information provided by the employee.



PWFA Prohibitions:

Employers cannot:

- Require an employee to accept an accommodation without a discussion about the accommodation between the worker and the employer (**must** engage in “interactive process”);
- Deny a job or other employment opportunities to a qualified employee or applicant based on the person's need for a reasonable accommodation;
- Require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working;
- Retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
- Interfere with any individual’s rights under the PWFA.

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Thank You