



Season 3, Episode 9: “Highlights From New PWFA Regulations: What You Need to Know”

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Ari Kwiatkowski: Hi everyone. The PWFA regulations are here, and I am here to tell you everything you need to know. Hi everyone. My name is Ari Kwiatkowski, host of the *Labor & Employment Podcast*. If you're a listener of the podcast, you've probably noticed that I've been absent for a few months, so this will tie into my fun fact that I normally make all of our guests share. But I actually was on maternity leave for about six months, and I've been back for a few weeks. So I am back in action, hosting the podcast. And given that my daughter is now eight months old, obviously, as I mentioned, I was on leave, I think this is a very timely topic for us, the podcast and me to talk about. So if you are a long listener of the podcast, you know that last year the Pregnant Workers Fairness Act went into effect. That's a federal anti-discrimination statute, a new federal anti-discrimination statute that was effective as of last June. So just a refresher or you're probably wondering, Ari, what's the Pregnant Workers Fairness Act or the PWFA, as I'll call it?

[Ari]: Just as a refresher, the PWFA is kind of like the ADA, but it is limited to conditions, related to pregnancy or childbirth, and accommodations needed for those conditions, and accommodations that are reasonable, that are needed as it relates to childbirth and labor. So if you think PWFA, you should think ADA, basically it is a similar statute. It requires that employers provide reasonable accommodations to qualified employees for, as a result of pregnancy or childbirth, including labor and, related conditions or conditions related to childbirth and labor. So the PWFA has been in effect for about a year, and we've been waiting for the EEOC to issue its regulations. As I mentioned, the law is a federal law, and it is enforced by the United States Equal Employment Opportunity Commission, or EEOC. And if an employee believes that they have been discriminated against under the PWFA, they are entitled or can file a charge with the EEOC. And the EEOC will investigate the allegations. So, you know, that's kind of just a refresher on what PWFA. I will note that the PWFA is limited to, requiring employers to provide accommodations. So that's really the purpose of the statute.

[Ari]: So the EEOC did finally issue its regulations or proposed rule, the final version of them back in April, and they are set to go into effect, in June. So very soon, this month, I believe June 18th. So I'm breaking it down. And I tell you what you need to know and what's new as it relates to the regulations, so as I noted, the PWFA requires that an employer provide reasonable accommodations for a known limitation as, as a result of, affected by or arising out of pregnancy, childbirth or related medical conditions. And the regulations explain a little bit better what that means. So you might be wondering what is a known limitation. And the regulations do tell us a little bit more or give us some more information about what the law means. “Known” in the context of the law means that the employee or employees representative communicated the limitation to the employer. So that gives us a little bit, more information because what is “known” to the employer was a bit amorphous or unclear before the regulations were issued. The regulations also define “limitation.” Limitation means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth or related medical conditions.

[Ari]: So, you know, I think that gives us a little bit more information in a, in a lot of ways, the PWFA does follow the ADA or the Americans with Disabilities Act. But, you know, there is some additional information and some differences between the two, which we'll go over. So the physical or mental condition that is a limitation under the regulations is one, an impediment or problem that may be modest, minor and or episodic, a need or problem, or relating to the employee's health or the health of the pregnancy, or seeking health care

related to pregnancy, childbirth or related medical condition itself. So if your employee needs a reasonable accommodation, and the in the request is to have some time off, or to have a schedule modification to go to a medical appointment related to child, to the pregnancy or childbirth, if they're still working or prior to the time they go on leave. That's something that you definitely will need to consider as an employer and grant accommodation. I did want to note that under the PWFA, the condition can be a limitation under that statute, whether or not it meets the definition of disability under the ADA.

[Ari]: Moving on to qualified employee. The guidance or excuse me, the regulations do provide us some guidance on what, who a qualified employee is under the PWFA. This is a little bit different than under the ADA. The reason it's different is because the PWFA does include, a temporary time frame that is not specifically explained or included in the ADA. So under the PWFA regulations, if an employee cannot perform all essential job functions, even with a reasonable accommodation, the employee can be qualified under the PWFA if the inability to perform an essential job function is for a temporary period. So I know we talked about this a little bit last year because this provision is in the original statute. But luckily for us, the EEOC has given us a little bit more information on what this "temporary period" means. So under the regulations, "temporary" is defined as lasting for a limited time, not permanent, and may extend beyond "in the near future." So 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. So what that means, what the regulations are really getting at is to say that if are if you have an employee or you are an employee and you request a reasonable accommodation, the length of that accommodation or the need for the accommodation can be temporary and that could be the length of the pregnancy if we're talking about a current pregnancy. So that that does give us a little bit more information.

[Ari]: But depending on the nature of the accommodation, obviously the length of the pregnancy or 40 weeks is a potentially very long period of time. I will say this. The PWFA regulations include a provision for conditions other than a current pregnancy, or providing accommodations for a temporary period for conditions other than a current pregnancy. But in that situation, the regulations do not define in the near future as any particular length. So we'll have to wait and see on that and how that actually plays out. So let's talk reasonable accommodations and let's talk about what the EEOC regulations say about what could be a reasonable accommodation under the PWFA. So the regulations do give examples of reasonable accommodations. The examples are not exhaustive. So that means, you know, these are we shouldn't be limiting or the accommodations that could be considered reasonable are not limited to this list. But for example, and I'm going to read off a list that the regulations say that frequent breaks, sitting or standing, schedule changes, part-time work, paid or unpaid leave, telework or working remotely, providing the employee with parking, providing the employee with light duty, temporarily suspending one or more essential functions which we just talked about, of the position; acquiring or modifying equipment, uniforms or devices, and adjusting or modifying its current examinations or policies could all qualify as reasonable accommodations under the PWFA. Now, if you're familiar with the ADA, the PWFA is similar in that whether or not an accommodation is reasonable under the circumstances is really a fact-specific case-by-case inquiry. And, of course, the PWFA does require that an employer engage in an interactive, process and a dialog with the employee when a request for an accommodation is made.

[Ari]: So the regulations also give us a little bit more information or expand on the definition of pregnancy and childbirth. According to the regulations, pregnancy and childbirth include a current pregnancy, past pregnancy, potential or intended pregnancy, and that also can include fertility treatments, labor and childbirth. And included in childbirth is a vaginal childbirth or a childbirth via cesarean delivery. The regulations also give us a little bit more information on what conditions could qualify as related medical conditions under the statute, and the regulation. So there is non-exhaustive list in the regulations as well, for what is a condition that is related to, a related medical condition related to pregnancy or childbirth, that includes miscarriage, termination of pregnancy, postpartum depression, anxiety or psychosis, migraines, hormonal fluctuations. And, you know, there's several conditions that are listed in the regulations. And again, that list is not meant to be exhaustive. so there are other possible conditions that could qualify. I also wanted to note that one of the,

related medical conditions included in the regulations is abortion shortly after these, the proposed rule was issued back in April, I think 17 states joined in a lawsuit against the EEOC to enjoin, the final implementation of the rule on the basis that abortion was included. So we'll have to, you know, keep an eye on it and see how things progress as that case moves through the courts.

[Ari]: And the last and final thing I wanted to mention is lactation accommodation. And again, this is just meant to be a general overview to give you some highlights of what you need to know from the regulations. But if you have any follow up questions, please feel free to reach out on LinkedIn. Shoot me an email, give me a call. Would love to chat about it. So the last thing I wanted to mention is lactation accommodation. If you're an employer in New York—and we did some episodes on this last year—you already know that in late 2022, the New York state legislator made some updates to the labor law, which requires some enhanced, accommodations or protections for employees who were expressing breast milk in the workplace. There's an accompanying federal law, which is called the PUMP Act. But the PUMP Act did not have quite as many, requirements as New York law. But, in the interest of, providing additional protections for employees expressing breast milk in the workplace, the PWFA regulations actually include some additional requirements as it relates to lactation accommodation. But the bottom line is that if you're an employer in New York State, chances are, and we hope, you are already complying with those new rules. Thanks, everyone, for listening today. I hope this was helpful. I wanted to give you the highlights, the high points of what the new regulations say. And I will be back in the studio in a couple weeks. I think our next episode, Lee Jacobs, will be back, and I think Rosemary may join him to talk about a few other issues. But, I'll definitely be back on the podcast. I'm glad to be back. It's good to see everyone, and talk soon.

[Ari]: The *Labor & Employment Podcast* is available on barclaydamon.com, YouTube, LinkedIn, Apple Podcasts, Spotify, and Google Podcasts. Like, follow, share, and continue to listen. Thanks.

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