EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1636

RIN 3046–AB30

Implementation of the Pregnant Workers Fairness Act

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final rule and interpretive guidance.

SUMMARY: The Equal Employment Opportunity Commission is issuing this final rule and interpretive guidance to implement the Pregnant Workers Fairness Act, which requires a covered entity to provide reasonable accommodations to a qualified employee's or applicant's known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause an undue hardship on the operation of the business of the covered entity.

DATES: This final rule and interpretive guidance is effective on June 18, 2024.

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SUPPLEMENTARY INFORMATION:

Introduction

The Pregnant Workers Fairness Act (PWFA) [1] requires a covered entity to provide reasonable accommodations to a qualified employee's or applicant's known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, absent undue hardship on the operation of the business of the covered entity. The PWFA at 42 U.S.C. 2000gg–3(a) directs the Equal Employment Opportunity Commission (EEOC or Commission) to promulgate regulations to implement the PWFA.

The Commission issued its notice of proposed rulemaking (NPRM) on August 11, 2023, and invited public comment on this proposal from August 11, 2023, through October 10, 2023.[2] Members of the public submitted approximately 98,600 comments to the EEOC during this 60-day period. Several of those comments were signed by multiple individuals; thus, the total number of comments was over 100,000.[3]

Pursuant to 42 U.S.C. 2000gg–3(a), the Commission is issuing this final regulation and an appendix entitled ''Appendix A to Part 1636—Interpretive Guidance on the Pregnant Workers Fairness Act'' (Interpretive Guidance). As explained in the NPRM, the Interpretive Guidance (a proposed version of which was included in the NPRM) will become part of 29 CFR part 1636.[4] The Interpretive Guidance represents the Commission's interpretation of the issues addressed within it, and the Commission will be guided by the regulation and the Interpretive Guidance when enforcing the PWFA.[5]

General Information on Terms Used in the Regulation and Interpretive Guidance

The PWFA at 42 U.S.C. 2000gg(3) uses the term ''employee (including an applicant)'' in its definition of ''employee.'' Thus, throughout the statute, this preamble, the final regulation, and the Interpretive Guidance, the term ''employee'' should be understood to include ''applicant'' where relevant. Because the PWFA relies on Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. 2000e *et seq.* for its definition of ''employee,'' that term also includes ''former employee,'' where relevant.[6]

The PWFA defines ''covered entity'' using the definition of ''employer'' from different statutes, including Title VII.[7] Thus ''covered entities'' under the PWFA include public and private employers with 15 or more employees, unions, employment agencies, and the Federal Government.[8] In this preamble, the final regulation, and the Interpretive Guidance, the Commission uses the terms ''covered entity'' and the term ''employer'' interchangeably.

To track the language of the statute more closely and improve readability, the Commission made three global changes from the proposed rule and proposed appendix to the final rule and Interpretive Guidance. First, the Commission removed most instances of the words ''applicant'' and ''former employee'' from the regulation and the Interpretive Guidance; based on the statute and Title VII, the term ''employee'' covers ''applicant'' and ''former employee'' when relevant. Second, the Commission replaced the word ''worker'' with the word ''employee'' throughout the regulation and the Interpretive Guidance. Third, the Commission removed sections of the proposed rule that pertained solely to employees covered by the Congressional Accountability Act of 1995 because the Commission does not have authority to regulate those employees (former §§ 1636.2(c)(2) and 1636.5(b)).

The Interpretive Guidance contains numerous examples to illustrate provisions in the regulation. The Commission received some comments identifying instances where these examples, in an effort to be simple and short, oversimplified situations related to pregnancy, childbirth, or related medical conditions. For example, the Commission used the term ''bed rest'' in some examples; that is a colloquialism for several actions that would be better described as ''rest and reduced activity.'' [9] The Commission agrees that in a real situation, there may or may not be more complexity and that describing a restriction may require different or more facts than are in an example. However, the purpose of these examples is to illustrate legal points, to suggest practical actions for covered entities and employees, and to encourage voluntary compliance with the law. Thus, while

[1] Consolidated Appropriations Act, 2023, Public Law 117–328, Div. II, 136 Stat. 4459, 6084 (2022) (codified at 42 U.S.C. 2000gg to 2000gg–6).

[2] 88 FR 54714–94 (proposed Aug. 11, 2023) (to be codified at 29 CFR part 1636).

[3] The vast majority of the comments were form comments that were identical or slightly altered versions of a few base form comments.

[4] 88 FR 54719.

[5] *Id.*

[6] *Robinson* v. *Shell Oil Co.,* 519 U.S. 337, 346 (1997).

[7] 42 U.S.C. 2000gg(2)(A), (B)(i), (B)(iii), (B)(iv). The other statutes are the Congressional Accountability Act of 1995 and 3 U.S.C. 411(c).

[8] The statute at 42 U.S.C. 2000gg(2) provides that the term ''covered entity'' ''has the meaning given the term 'respondent''' under 42 U.S.C. 2000e(n) and includes employers as defined in 42 U.S.C. 2000e(b), 2000e–16c(a), and 2000e–16(a). The statute at 42 U.S.C. 2000gg–5(b) provides as a rule of construction that ''[t]his chapter is subject to the applicability to religious employment set forth in section 2000e–1(a) of this title [section 702(a) of the Civil Rights Act of 1964].''

[9] Similarly, several examples discuss restrictions on how much an employee can lift. The examples in the Interpretive Guidance generally refer to these restrictions as ''lifting restrictions'' with a specific pound limit. In some situations, the determination of such restrictions can depend on the frequency of lifting, the height to which the object is lifted, the body position of the person, and the distance between the person and the object. *See, e.g.,* Leslie A. MacDonald et al., *Clinical Guidelines for Occupational Lifting in Pregnancy: Evidence Summary and Provisional Recommendations,* 209 a.m. J. Obstetrics & Gynecology 80–88 (2013), *https://pubmed.ncbi.nlm.nih.gov/23467051/;* U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention, Nat'l Inst. for Occupational Safety & Health, *Provisional Recommended Weight Limits for Lifting at Work During Pregnancy* (Infographic), *https://www.cdc.gov/niosh/topics/repro/images/Lifting_guidelines_during_pregnancy_-_NIOSH.jpg* (last visited Mar. 18, 2024).

the Commission has made some changes to the examples in response to these comments, it also has retained simple language in many examples to allow for ease of reading and to keep the focus of the examples on the PWFA's legal interpretation. The Commission notes that, depending on the facts in the examples, the same facts could lead to claims also being brought under other statutes that the Commission enforces, such as Title VII and the Americans with Disabilities Act of 1990 (ADA), as amended by the ADA Amendments Act of 2008 (ADAAA or Amendments Act), 42 U.S.C. 12101 *et seq.*[10] Moreover, the situations in specific examples could implicate other Federal laws, including, but not limited to, the Family and Medical Leave Act of 1993, as amended (FMLA), 29 U.S.C. 2601 *et seq.;* the Occupational Safety and Health Act of 1970, as amended (OSH Act), 29 U.S.C. 651 *et seq.;* and the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.,* as amended by the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act), Public Law 117–328, Div. KK, 136 Stat. 4459, 6093 (2022).[11] Additionally, although some examples state that the described actions ''would violate'' the PWFA, additional facts not described in the examples could change that determination.

Finally, the Commission notes that the examples are illustrative. They do not and are not intended to cover every limitation or possible accommodation under the PWFA.[12]

[10] References to the ADA throughout the preamble, the regulation, and the Interpretive Guidance are intended to apply equally to the Rehabilitation Act of 1973, as all nondiscrimination standards under Title I of the ADA also apply to Federal agencies under section 501 of the Rehabilitation Act. *See* 29 U.S.C. 791(f).

[11] To the extent that an accommodation in an example is required under another law, like the OSH Act, the example should not be read to suggest that such a requirement is not applicable.

[12] In the examples, the preamble, the regulation, and the Interpretive Guidance, the Commission uses the terms ''leave'' or ''time off'' and intends those terms to cover leave however it is identified by the specific employer. As stated in the proposed rule, the Commission recognizes that different types of employers use different terms for time away from work, including leave, paid time off (PTO), time off, sick time, vacation, and administrative leave, among others. 88 FR 54715 n.19. Similarly, in the examples, the preamble, the regulation and the Interpretive Guidance, the Commission uses the term ''light duty.'' The Commission recognizes that ''light duty'' programs, or other programs providing modified duties, can vary depending on the covered entity. As stated in the proposed rule, the Commission intends ''light duty'' to include the types of programs included in Questions 27 and 28 of the EEOC's *Enforcement Guidance: Workers' Compensation and the ADA* and any other policy, practice, or system that a covered entity has for accommodating employees, including when one or more essential functions of a position are temporarily excused. EEOC, *Enforcement Guidance: Workers' Compensation and the ADA* (1996), *https://www.eeoc.gov/laws/guidance/enforcement-guidance-workers-compensation-and-ada;* 88 FR 54715 n.20.

1636.1 Purpose

The Commission made several minor changes to the *Purpose* section of the regulation to follow the language in the statute more closely. Specifically, the phrase ''related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions'' was added after ''known limitations'' throughout this paragraph, and the descriptions of the retaliation and coercion provisions were slightly modified.[13]

1636.2 Definitions—General

The Commission received numerous comments regarding the proposed general definitions. For example, many comments encouraged the Commission to clarify that restaurant workers are covered by the PWFA. Several comments also suggested the Commission clarify that the requirements for protection under the FMLA (in terms of how long an employee must work for an employer and the number of hours) do not apply under the PWFA and suggested the Commission clarify that employees need not work for an employer for any specific period of time in order to be covered by the PWFA.

The PWFA relies on definitions from Title VII to describe when an employer is covered and who is protected by the law. Employers are covered by the PWFA if they have 15 or more employees, regardless of the industry. Thus, restaurant workers who work for restaurants with 15 or more employees are covered. Because the PWFA's approach to coverage and protection follows Title VII, rather than the FMLA, employees are covered even if they have not worked for a specific employer for a specific length of time.

In the general definitions section of the rule, the Commission added ''or the employee of a political subdivision of a State'' in § 1636.2(b)(3) and (c)(4) to better describe the employees covered by the Government Employee Rights Act of 1991 (GERA), 42 U.S.C. 2000e–16c(a).

[13] For example, the phrase ''Prohibits a covered entity from retaliating'' was replaced with ''Prohibits discrimination'' in the discussion of retaliation, and the phrase ''Prohibits a covered entity from interfering with any individual's rights'' was replaced with ''Prohibits coercion of individuals in the exercise of their rights'' in the discussion of coercion.

1636.3 Definitions—Specific to the PWFA

1636.3(a) Known Limitation

The rule reiterates the definition of ''known limitation'' from 42 U.S.C. 2000gg(4) and then provides definitions for the operative terms.

1636.3(a)(1) Known

The Commission did not change the definition of ''known'' from the proposed rule. Under that definition a limitation is ''known'' to a covered entity if the employee, or the employee's representative, has communicated the limitation to the covered entity.

1636.3(a)(2) Limitation

The proposed rule restated the definition of limitation from the statute and added that the physical or mental condition may be a modest or minor and/or episodic impediment or problem, that it included when an employee affected by pregnancy, childbirth, or related medical conditions had a need or a problem related to maintaining their health or the health of the pregnancy, and that it included when an employee affected by pregnancy, childbirth, or related medical conditions sought health care related to pregnancy, childbirth, or a related medical condition itself.

The Commission received several comments supporting the definition of ''limitation'' and suggesting that the word ''need'' be added to the second sentence (in addition to ''impediment'' or ''problem'') so that it would read: ''Physical or mental condition is an impediment, problem, or need that may be modest, minor, and/or episodic.'' The Commission declines to make this change because this sentence as it exists (which uses the term ''impediment'' or ''problem'') is sufficiently broad, and the third sentence of the definition of ''limitation'' covers when the employee has a ''need or a problem related to maintaining their health or the health of the pregnancy.''

The Commission received a few comments asserting that this definition was too broad and that it should be more restrictive. The Commission disagrees. As discussed in the NPRM, the PWFA was intended to cover all types of limitations, including those that are minor and those that are needed to maintain the employee's health or the health of the pregnancy.[14] Thus,

[14] 88 FR 54714–16 (discussing the purpose of the PWFA, including that it helps workers with uncomplicated pregnancies and minor limitations), 54719–20 (explaining that allowing employees to

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creating a higher threshold would not be in keeping with this rationale, would be contrary to congressional intent, and would impede a qualified employee's ability to stay on the job.

A handful of comments asked for clarification as to whether the language in the NPRM required employers to provide reasonable accommodations to an employee when an employee's partner, spouse, or family member—and not the employee themselves—has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. It does not. To respond to these comments, the Commission has included in the final rule's definition of ''limitation'' that the limitation must be of the specific employee in question. This is essentially the same language that was in the NPRM with regard to related medical conditions in § 1636.3(b).[15]

The Commission has made one minor change in the language of this provision in the regulation. To track the language of the statute in 42 U.S.C. 2000gg(4), the Commission has changed the last sentence of the definition of ''limitation'' regarding the ADA so that it now mirrors the language in the statute (''whether or not such condition meets the definition of disability'').

In the Interpretive Guidance, the Commission has added information in section *1636.3(a)(2) Limitation* calling attention to the possible overlap between the PWFA and the ADA and noting that in these situations the qualified employee may be entitled to an accommodation under either statute, as the protections of both may apply. The Commission has added information consistent with the changes in the regulation described above to state that the limitation must be of the specific employee in question and that the PWFA does not create a right to reasonable accommodation based on an individual's association with someone else with a PWFA-covered limitation or provide accommodations for bonding or childcare. To make the language in the Interpretive Guidance consistent with the regulation, the Commission has modified language in the Interpretive Guidance regarding accommodations for health care to clarify that accommodations may be needed to attend health care appointments for a variety of reasons.[16] Finally, the Commission has modified language from the proposed appendix regarding the PWFA and the lack of a ''severity'' requirement to avoid giving the mistaken impression that the ADA has such a requirement.

Comments and Response to Comments Regarding the Commission's Proposed Description of ''Related to, Affected by, or Arising Out of''

Some comments supported the Commission's reading of the language ''related to, affected by, or arising out of,'' stating that the Commission's reading was textually accurate in that nothing in the statutory language requires that the pregnancy, childbirth, or related medical conditions be the sole or original cause of the limitation. Other comments stated that the language in the NPRM explaining ''related to, affected by, or arising out of,'' especially when combined with the definition of ''related medical conditions,'' could require accommodations for known limitations caused by any physical or mental condition that has any real, perceived, or potential connection to—or impact on—an individual's pregnancy, fertility, or reproductive system. These comments asked the Commission to alter the NPRM language to counter this interpretation. Some comments asked for additional clarification regarding the language ''related to, affected by, or arising out of.''

The PWFA uses the language ''related to, affected by, or arising out of'' to explain the connection between the physical or mental condition and pregnancy, childbirth, or related medical conditions.[17] As such, the statute does not require that pregnancy, childbirth, or related medical conditions be the sole, the original, or a substantial reason for the physical or mental condition, and the Commission does not have the authority to change this term.

To help respond to these comments, in the Interpretive Guidance in section *1636.3(a)(2)* under *Related to, Affected by, or Arising Out of,* the Commission has added that ''related to, affected by, or arising out of'' are inclusive terms and that a pregnancy, childbirth, or related medical condition does not need to be the sole, the original, or a substantial cause of the physical or mental condition at issue for the physical or mental condition to be ''related to, affected by, or arising out of'' pregnancy, childbirth, or related medical conditions. This is in keeping with the dictionary definition of ''related to,'' which is generally defined as ''connected with'' or ''about'' something.[18] It also is consistent with the meaning of ''affected by,'' as the dictionary definition of the word ''affect'' is ''to cause,'' ''to produce,'' or ''to influence'' something.[19] Finally, it aligns with the meaning of ''arising out of,'' because the dictionary definition of ''arise'' includes ''to begin to occur or exist'' or ''to originate from a source.''[20]

The Interpretive Guidance in section *1636.3(a)(2)* under *Related to, Affected by, or Arising Out of* further explains that determining whether a physical or mental condition is ''related to, affected by, or arising out of'' pregnancy, childbirth, or related medical conditions should typically be straightforward, particularly in cases where an individual is currently pregnant, is experiencing childbirth, or has just experienced childbirth. Pregnancy and childbirth cause systemic changes that not only create new physical and mental conditions but also can exacerbate preexisting conditions and can cause additional pain or risk.[21] Thus, a connection between an employee's physical or mental condition and their pregnancy, childbirth, or related medical conditions will be readily ascertained when an employee is currently pregnant or is experiencing or has just experienced childbirth.

The Commission has maintained the list of situations in the Interpretive

seek health care related to pregnancy, childbirth, or a related medical condition itself is consistent with the ADA).

[15] 88 FR 54767 (providing that related medical conditions are ''as applied to the specific employee or applicant in question'').

[16] The proposed appendix stated: ''The definition also includes when the worker is seeking health care related to the pregnancy, childbirth, or a related medical condition itself . . . and recognizes that for pregnancy, childbirth, or related medical conditions the proper course of care can include regular appointments and monitoring by a health care professional.'' 88 FR 54773. The new language in the Interpretive Guidance in section *1636.3(a)(2) Limitation* states: ''Similarly, under the PWFA, an employee may require a reasonable accommodation of leave to attend health care appointments or receive treatment for or recover from their pregnancy, childbirth, or related medical conditions.'' The new language more accurately reflects that accommodations are not limited to ''regular appointments'' or ''monitoring,'' which is consistent with how leave for health care appointments is described in the regulation and elsewhere in the Interpretive Guidance.

[17] 42 U.S.C. 2000gg(4).

[18] *Relate To, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/related%20to* (last visited Mar. 9, 2024).

[19] *Affect, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/affect* (last visited Mar. 18, 2024).

[20] *Arise, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/arising* (last visited Mar. 14, 2024).

[21] *See, e.g.,* Danforth's Obstetrics & Gynecology 286 (Ronald S. Gibbs et al. eds., 10th ed. 2008) (''Normal pregnancy entails many physiologic changes . . . .''); Clinical Anesthesia 1138 (Paul G. Barash et al. eds., 6th ed. 2009) (''During pregnancy, there are major alterations in nearly every maternal organ system.'').

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