

What to Expect When Your Employee Is, Has Recently Been, Or Might Be Expecting

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Today's Topics

- The Basics
- Understanding the Differences
- Steps for Compliance
- Questions

The Basics

A Brief History

- Signed by President Biden in December 2022, the PWFA took effect in June 2023
- The EEOC proposed regulations in August 2023, issued the Final Regulations in April 2024, Final Regulations took effect in June 2024
- The PWFA requires employers with at least 15 employees to consider employee and applicant accommodation requests related to pregnancy, childbirth, or related medical conditions
- Like the ADA, an employee's request for accommodation under the PWFA remains subject to an employer's evaluation of whether the accommodation would pose an undue hardship.

Primary Purposes

Requires	Prohibits	Provides
<ul style="list-style-type: none"> ▪ reasonable accommodations for limitations due to pregnancy, childbirth, and related medical conditions 	<ul style="list-style-type: none"> ▪ requiring employees to accept accommodations arrived at without interactive process ▪ denying employment opportunities to those who need accommodations ▪ requiring employees to take leave if another reasonable accommodation can be provided ▪ adverse actions and discrimination against employees who request or use accommodations 	<ul style="list-style-type: none"> ▪ remedies for violations

Understanding the Differences

Know the Differences

- Between PWFA, ADA, and FMLA
- And how they all apply to your employee's specific needs related to pregnancy, childbirth, or related medical conditions
- And educate your managers on them, too
- This is Compliance Step 1a

Who Provides It? Who Gets It?

Eligibility Requirement	PWFA	ADA	FMLA
Covered Employer	Employers with 15 or more employees	Employers with 15 or more employees	Private sector employers with 50 or more employees (all public sector employers)
Required time worked for employer for employee eligibility	None	None	12 months (plus must have worked 1,250 hours in the 12 months immediately preceding the leave)
Geographic requirement	None	None	Employee must work in/from location with 50+ employees within 75 miles

What's The Obligation?

Provides For	PWFA	ADA	FMLA
	Reasonable <u>accommodation</u> to the <u>known limitations</u> of a <u>qualified</u> employee related to pregnancy, childbirth, or related medical conditions, unless the accommodation would cause the employer an undue hardship.	Reasonable <u>accommodation</u> for a <u>qualified</u> individual's <u>disability</u> , where the accommodation is necessary for the employee to perform the essential functions for his/her job.	<ul style="list-style-type: none"> Up to 12 weeks of <u>leave</u> to eligible employees for qualifying reasons; <u>reinstatement</u>; <u>continuation</u> of health care benefits
	Reasonable accommodation <u>may</u> include a leave of absence.	Reasonable accommodation <u>may</u> include a leave of absence.	

PWFA = Accommodation Obligation

- Requires a covered entity to make a reasonable accommodation for the known limitations of a qualified employee which are related to pregnancy, childbirth, or related medical conditions, absent undue hardship.

Known Limitation v. Disability

PWFA: Known limitation	ADA: Disability
Does the employee have a physical or mental condition that is a condition of the employee themselves and is:	An individual with a disability is a person who has:
1. An impediment or problem that may be modest, minor, or episodic? OR	1. A physical or mental impairment that significantly limits one or more major life activities OR
2. A need or problem related to maintaining the employee's health or the health of the pregnancy? OR	2. A history or record of such impairment, OR
3. Seeking healthcare related to pregnancy, childbirth, or a related medical condition?	3. Is perceived by others has having such an impairment

“Limitation” ≠ “Disability”

- **Limitation:** “impediment or problem,” can be modest, minor, episodic
- Pregnancy, childbirth, or related medical condition: Very broad
- “Related to, affected by, or arising out of”:
 - Pregnancy/childbirth/related medical conditions do not have to be the sole cause of limitation
 - Does not have to be a substantial cause of the limitation

“Qualified”

PWFA	ADA
Is the employee:	Does the individual:
1. Currently able to perform the essential functions of the job with or without reasonable accommodation, OR	1. Meet the necessary skills, experience, education, and other job-related requirements of the position they hold or seek, AND
2. Currently unable to perform the essential functions of the job for a <u>temporary period</u> , but will be able to perform the essential functions in the <u>near future</u> ?	2. Can the individual perform the essential functions of the position with or without a reasonable accommodation?

“Qualified” Even If The Employee Cannot Perform One or More Essential Job Functions

Under the PWFA, an employee is “qualified” if:

1. They can perform all essential job functions with or without reasonable accommodations; or
2. They are unable to perform an essential job function(s), but:
 - The inability to perform the essential function(s) is **temporary**; and
 - the essential functions could be performed **in the near future**; and
 - the inability to perform the essential functions can be reasonably accommodated **without an undue hardship**



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Essential Functions

- Same as ADA
- They are core tasks or responsibilities that an employee must perform to fulfill their job requirements.
- These functions are not peripheral or optional; they are integral to the job itself.
- Evidence of whether a function is essential
 - Job descriptions
 - Time spent performing the function
 - CBA
 - Work experience
 - Importance of function to the job and consequences of not performing it

When Can An Employee Use It?

Qualifying Purposes	PWFA	ADA	FMLA
Birth, adoption, or foster placement	Yes, for birth	No	Yes
Employee's own health condition	Yes, <i>if</i> for pregnancy, childbirth, or a pregnancy-related medical condition	Yes, <i>if</i> health condition is a "disability" as defined by ADA	Yes, <i>if</i> health condition is "serious" as FMLA
Family member's health condition	No	No	Yes, <i>if</i> the health condition is "serious" as defined by FMLA

What's A "Reasonable Accommodation"?

Reasonable Accommodation	PWFA	ADA
	A change to the work environment or routine to remove barriers for a qualified employee with known limitations related to pregnancy, childbirth, or related medical condition.	A change to the job or work environment that allows a qualified person with a disability to perform their job duties and have equal employment opportunities.

“Predictable Assessments”

- Simple modifications
- Will be considered presumptively reasonable without imposing undue hardship (minimal interactive process is appropriate)
- Specific examples:
 - Carrying water
 - Eating/drinking breaks
 - Restroom breaks
 - Sitting for standing positions, and standing for sitting positions

Other Reasonable Accommodations

- Additional restroom or eating breaks*
- Food or water by workstation*
- Adjustments to work schedule
- Modification of job duties
- Modification of workplace
- Reserved parking space
- Use of stools or chairs*
- Modification of dress code policy
- Lactation breaks (also covered by PUMP Act)
- Lactation space with refrigerator, electricity, running water
- Nursing child during work hours if employee works in close proximity to child
- Remote work
- May consider negative and positive effects of mitigating measures

Temporary Suspension of Essential Functions

- Examples of potential accommodations:
 - Complete suspension of the function (temporarily)
 - Providing assistance from others
 - Requiring employee to perform the remaining functions of their position and other functions
 - Temporary reassignment to a different job (light duty or otherwise)
 - Unpaid leave of absence (permitting paid leave if available)

What About Leave?

Leave Length	PWFA	ADA	FMLA
	<p>Cannot require employees to take leave if other reasonable accommodation available. No specific amount of leave time allowed; leave must be determined on a case-by-case basis up to point where it becomes an undue hardship</p> <p>Indefinite leave is not required.</p>	<p>No specific amount of leave time allowed; leave must be determined on a case-by-case basis up to point where it becomes an undue hardship</p> <p>Indefinite leave is not required.</p>	<p>12 workweeks in designated one-year period</p>

Leave As An Accommodation

- Cannot be forced if other reasonable accommodations exist
- What is considered a reasonable duration of leave?
 - No fixed durations allowed
 - Must be based on medical need
 - Cannot be indefinite



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What Documentation Can We Require?

Documentation	PWFA	ADA	FMLA
What type of documentation can the employer require?	Reasonable documentation means that the employer may require documentation only when necessary to: confirm the condition; confirm the condition is related to pregnancy, childbirth, or a related medical condition; confirm the change at work is needed due to the limitation.	Reasonable documentation means that the employer may require only the documentation that is needed to establish that a person has a disability, and that the disability necessitates a reasonable accommodation.	The employer may require a certification that includes certain information (such as the date the serious health condition began and how long it will last; appropriate medical facts about the condition such as symptoms, hospitalization, or doctor's visits; for leave for the employee's own serious health condition, information showing that the employee cannot perform essential functions of the job; etc.)

Limits on Supporting Documentation

- It is reasonable to request documentation only when necessary to:
 - Confirm the physical or medical condition
 - Confirm that the condition is related to, affected by or arising out of pregnancy, childbirth or related medical conditions
 - Confirm the adjustment or change at work that is needed due to the limitation



Limits on Supporting Documentation

- Employers may NOT require the documentation be submitted on a specific form
- Healthcare provider includes several provider types
- May NOT require that the healthcare provider be the provider treating the condition at issue
- May NOT require that the be examined by a health care provider selected by the employer

Compliance Checklist

Steps for Compliance

Step 1a

- Understand the differences

Step 1b

- Understand what your employee is asking for and apply PWFA, ADA, FMLA accordingly

Step 2

- Become familiar with the accommodations that the EEOC believes are “reasonable” under the PWFA and prepare to engage in the interactive process.

Interactive Process

- Triggered by employee or employee's representative communicating need to employer
- Good Faith Conversation
 - Consult
 - Discuss potential accommodations
 - Can happen through any medium: phone, email, in person etc.
- Requires flexibility (should be less rigid than under ADA)
- Practical Tip: document meetings/discussions



Steps for Compliance (Cont.)

Step 3

- Train your HR department and front-line supervisors on the new requirements.

Step 4

- Update your accommodation policies and processes.

Step 5

- Consider state-specific requirements that may be more broad than PWFA.

State Laws: Reasonable Accommodations for Pregnant Workers

- Alaska
- California
- Colorado
- Connecticut
- Delaware
- District of Columbia
- Hawaii
- Illinois
- Kentucky
- Louisiana
- Maine
- Maryland
- Massachusetts
- Minnesota
- Nebraska
- Nevada
- New Jersey
- New Mexico
- New York
- North Carolina
- North Dakota
- Oregon
- Rhode Island
- South Carolina
- Tennessee
- Texas
- Utah
- Vermont
- Virginia
- Washington
- West Virginia
- + Local laws!

Steps for Compliance (Cont.)

Step 6

- Consult legal before denying an accommodation request

Undue Hardship

- “Significant difficulty or expense”
- Case-by-case basis, factors include:
 - Cost of accommodation
 - Overall financial resources
 - Number of employees
 - Effect on expenses and resources
 - Type of operation
 - Negative impact on employee efficiency
 - Workplace safety



Undue Hardship

- Additional Factors to Consider If Employee Needs Temporary Suspension of Essential Functions
 - Length of time employee will be unable to perform essential functions
 - Whether there is otherwise work for the employee to do as the result of a reasonable accommodation
 - The nature and frequency of the essential functions
 - Whether the employer has temporarily suspended essential functions for other employees in similar positions
 - Whether there are other employees, including temps, or third parties who can perform the essential functions temporarily
 - Whether the essential functions can be postponed or remain unperformed for any length of time and, if so, for how long

Steps for Compliance (Cont.)

Step 7

- Track new developments
- Understand what might change
- Avoid the traps

Legal Challenges and Open Questions

- The law is likely here to stay
- Abortion-related accommodations:
 - Federal Court in Louisiana (6/17): Limited injunction granted
 - Arguments that the EEOC exceeded its authority/interpretation is too broad have new life, post-Chevron
- Constitutionality concerns might also arise:
- There are many open questions about how courts will interpret and apply the regulations

Enforcement Action

- Recent enforcement actions: Amtrak and Chik-Fil-A
 - **Amtrak:** A NY employee alleged that when she asked for accommodations to express breast milk during her shift, Amtrak denied her request, which resulted in the employee stopping breastfeeding sooner than she intended.
 - **Chik-Fil-A:** An Indiana employee alleges that she was punished under the Company's attendance policy when she took time off work to recover from a bleeding uterus and threatened miscarriage in March 2024. Chik-Fil-A told her that she needed medical clearance before returning to work, but assigned disciplinary points under the attendance policy for her absences.

Conciliation Agreement

- *ABC Pest Control, Inc. (FL)*
- Allegations:
 - Company fired employee after she requested a reasonable accommodation to attend monthly medical appointments for her pregnancy.
- Conciliation terms:
 - Damages to former employee: \$47,480
 - Appoint an EEO Coordinator
 - Revise employment policies to including making reasonable accommodations under PWFA
 - Provide training to both management and non-management employees
 - Provide quarterly reports to EEOC on requests for accommodations and complaints of discrimination

Consent Decree

- *Lago Mar Beach Resort & Club* (FL)
- Allegations:
 - Company fired an employee after she requested six weeks off to physically recuperate from, and grieve, a stillbirth.
- Consent Decree Terms:
 - Damages to former employee: \$100,000
 - Appoint an EEO Coordinator
 - Revise employment policies to including making reasonable accommodations under PWFA
 - Provide training to both management and non-management employees; EEOC has the right to participate in employer training

Consent Decree (Cont.)

- Consent Decree Terms (cont.)
 - Provide semi-annual reports to EEOC on requests for accommodations and complaints of discrimination
 - Post a “Notice Regarding Employment and Hiring” until October 2027

NOTICE REGARDING EMPLOYMENT AND HIRING

Title VII of the Civil Rights Act of 1964 ("Title VII") protects individuals from employment discrimination. Lago Mar will not condone employment discrimination of any kind as set forth in federal anti-discrimination laws and Lago Mar's Employee Handbook. It is Lago Mar's policy to treat all employees equally, regardless of sex, race, color, religion, national origin, age, disability, or pregnancy status. Lago Mar will adhere to its policy of prohibiting intentional discrimination in violation of the provisions of Title VII of the Civil Rights Act of 1964, as amended; the Age Discrimination in Employment Act ("ADEA"), the Genetic Information Non-Discrimination Act ("GINA"), the Equal Pay Act ("EPA") of 1963, the Americans with Disabilities Act ("ADA"), and the Pregnant Workers Fairness Act ("PWFA").

Lago Mar also assure its employees that its commitment to following these federal laws includes not taking any action against an individual because he/she has exercised his/her rights under the law to oppose discriminatory acts or to file charges with EEOC. Lago Mar will take appropriate corrective action against any employee (including management personnel) or independent contractor found to have violated its policy prohibiting discrimination and retaliation in any form.

The EEOC enforces the federal laws against discrimination in employment on the basis of sex, pregnancy, disability, race, color, religion, national origin, and age. If you believe you have been discriminated against, you may contact the EEOC at (800) 669-4000. The EEOC charges no fees and has employees who speak languages other than English.

This Notice is intended to foster a positive and productive workplace, while reducing the risk of violating any federal employment laws and, accordingly, it must not be altered, defaced or covered by any other material before October 2027. Any questions about this Notice may be directed to Lago Mar's EEO Coordinator or: Lago Mar Consent Decree, c/o Kristen Foslid, U.S. Equal Employment Opportunity Commission, 100 S.E. 2nd Street, Suite 1500, Miami, Florida 33131 or kristen.foslid@eeoc.gov.

If you wish to make or request an accommodation, contact the General Manager, Assistant General Manager or EEO Coordinator [name, email, phone number].

Date: _____, 2024.

The First PWFA Complaints

EEOC v. Wabash National Corporation: W.D. Kentucky (September 2024)

- Allegations:
 - Employee was a "front plate" assembler who installed wiring in trailers. This required her to bend over the tops of trailers.
 - When the employee was 7 mos. pregnant, she told HR that bending over trailers was painful and raised concerns that constant pressure on her stomach would jeopardize her otherwise health pregnancy.
 - She asked to be moved from the front-place position to another assembly-line position, to move to a light-duty position for the rest of her pregnancy, or to have her limitation accommodated in some other way.

EEOC v. Wabash National Corporation – Allegations (Cont.)

- Employer denied her claim under the ADA, even though she told them the request was being made under the recently enacted PWFA.
- Employer denied her request to transfer to a role that did not require lying on her stomach.
- Option employer presented: Unpaid leave or return to front-place without modification
- Employee resigned at 8 months of pregnancy

EEOC v. Polaris Industries (N.D. Alabama)

- Allegations:
 - Manufacturing company
 - Refused to excuse an employee's absences for pregnancy-related conditions and medical appointments
 - Company required employee to work mandatory overtime, despite knowing that employee's physician had restricted her from working over 40 hours/wk during her pregnancy.
 - Company accessed attendance points against employee, warned employee that she would be terminated if she acquired another point.
 - Employee resigned to avoid termination of employment and to protect her pregnancy

EEOC v. Urologic Specialists of Oklahoma, Inc (N.D. Oklahoma)

- Allegations:
 - Specialty medical practice in Tulsa, OK
 - Employer did not allow medical assistant to sit, take breaks, or work part-time as her physician said she needed to protect her health and safety during the final trimester of her high-risk pregnancy.
 - Instead, employer forced employee to take unpaid leave and refused to guarantee she would have breaks to express breastmilk.
 - When employee would not return to work without those guaranteed breaks, the employer terminated her employment.

Q & A



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