

# EEOC's Final Regulation on PWFA & New Guidance on Workplace Harassment

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# The Pregnant Workers Fairness Act

- Became effective on June 27, 2023.
- EEOC Regulations effective June 18, 2024
- Applies to employers with 15 or more employees
  - No industry exclusions (compare PUMP Act)
- Fills in the gaps left by Title VII and ADA.
- PWFA is an accommodation statute
  - Purpose is to ensure pregnant and postpartum employees can retain their jobs.

# The Pregnant Workers Fairness Act

- Requires reasonable accommodations provide 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 operations of the business.
- Companion legislation to PUMP Act
  - Must provide “reasonable break time” each time needed
  - Private space to express breast milk through child's first year.
    - Not a bathroom, shielded from view, free from intrusion

# What's Unlawful Under the PWFA?

- Refusing or failing to accommodate (absent undue hardship)
- Unnecessary delays in providing accommodation
- Denying accommodation based on lack of documentation, unless...
- Requiring employee to accept accommodation not arrived at through interactive process
- Denying equal employment opportunities based on need for accommodation
- Requiring employee to take leave if working accommodation would not be undue hardship
- Taking adverse action based on request for/use of reasonable accommodation (retaliation)

# Sounds like the ADA, but New/Different Concepts

## Sounds like the ADA

- Reasonable accommodations
- Essential job functions
- Interactive process
- Undue hardship

## New/Different Concepts

- Types of “related medical conditions”
- Alternative definition of “qualified” and temporary suspension of essential functions
- Explicitly requires access to light-duty programs
- “Predictable Assessment” accommodations
- Limits on documentation requests – including prohibiting requiring a specific form
- Leave - how/when leave is used

# Related Medical Conditions

- Broad list includes:
  - infertility and fertility treatments
  - past pregnancy
  - endometriosis
  - birth control use
  - miscarriage and stillbirth
  - postpartum depression
  - post-pregnancy limitations or complications that are a consequence of pregnancy
  - menstruation
  - having or choosing not to have an abortion
  - lactation (and conditions related to lactation, such as low milk supply, mastitis, etc.)

# Alternative Definition of “Qualified” Individual

## Like the ADA...

- Employees/applicants are qualified if they can perform the essential functions of their jobs, with or without reasonable accommodation.

## New Variant

- **Employees/applicants are qualified even if they cannot perform one or more essential functions of the job, provided:**
  - The inability to perform the essential function(s) is for a temporary period.
  - The essential function(s) could be performed *in the near future*.
  - The inability to perform the essential function(s) can be reasonably accommodated.

# The (not-so-near?) Future

- “In the near future”
  - Case-by-case analysis
  - Generally, for pregnancy, this will be 40 weeks
  - Does not count time where the employee is on leave for a covered condition



# Sample Reasonable Accommodations

- Making existing facilities readily accessible to and usable by employees and applicants;
- Job restructuring;
- Reassignment;
- Leave;
- Part-time schedules;

- Providing reserved parking spaces;
- Allowing employees to telework on a full-time or part-time basis;
- Removing an essential function;
- Assigning an employee to light duty;
  - In no uncertain terms, the regulations say covered employees are entitled to placement in light duty programs, even if offered only for on-the-job injuries
- Adjusting or modifying policies.

# “Predictable Assessment” Reasonable Accommodations

- Regulations state that employers should grant some accommodations in virtually all cases.
- Will rarely be an undue hardship.
- No supporting documentation or extensive individualized assessment.

# “Predictable Assessment” Reasonable Accommodations (cont’d)

- Allowing an employee to carry water and drink in the work area;
- Allowing additional restroom breaks;
- Allowing sitting in jobs that require standing, and standing in jobs that require sitting;
- Allowing breaks as needed to eat and drink.

# Additional Lactation Accommodations

- PWFA requires lactation accommodations **beyond** PUMP Act
- Lactation area must be
  - in reasonable proximity to the employee's usual work area;
  - regularly cleaned;
  - have electricity, appropriate seating, and a surface sufficient to place a breast pump; and
  - in reasonable proximity to a sink, running water, and a refrigerator for storing milk.
- Accommodations related to lactation may also include nursing “where the regular location of the employee’s workplace makes nursing during work hours a possibility because the child is in close proximity.”

# Limits on Documentation Requests

- Reasonable documentation defined as the minimum information:
  - To confirm a physical or mental condition;
  - Is affected by pregnancy, childbirth or related condition(s); and
  - That a change or adjustment at work is needed for that reason
- Regulations strongly encourage interim accommodations pending receipt of documentation
  - **Avoid placement on leave**
- You may not require a specific form
- Healthcare provider includes doula and lactation consultant



# Related Medical Conditions - Menstruation

- Specifically identified by EEOC as a “related medical condition,” meaning it is one that is *commonly but not necessarily* related to pregnancy or childbirth
- Okay to request documentation in accord with Regulations
- Be mindful of potential ADA/FMLA coverage (e.g., endometriosis)
- Potential accommodations:
  - Flexibility to work from home, reduced hours, additional breaks, temporary cessation of physically strenuous tasks

# Related Medical Conditions - Menopause

- Unlike menstruation, not specifically listed as a “related medical condition,” but see EEOC Commissioner’s statement
- Be mindful here of ADA/FMLA coverage
  - Menopause due to aging versus induced menopause due to surgery or medical treatments
- Potential accommodations:
  - Providing a fan at work station, office with separate temperature control, redirecting A/C & heat vents, modify dress code, flexible scheduling, work at home
- **Caution** – intersectional harassment (age/gender) under new EEOC Workplace Harassment Guidance

# Leave as an Accommodation

- When should it be considered?
- Unlike the ADA, temporary inability to perform one or more essential functions does not trigger leave as the next logical accommodation to consider
  - Employer must first consider whether suspending essential function(s), providing light duty or other accommodations will cause an undue hardship.
- Entitled to return to same position absent undue hardship
- Consider overlap with FMLA, if applicable/eligible



# Common Questions

- Q: If an employee is late to work, not visibly pregnant, and cites morning sickness as the reason, can we request a doctor's note?
- Q: A pregnant worker is requesting FMLA leave after birth. Does the PWFA impact our ability to get FMLA forms?
- Q: If employee does not qualify for FMLA, is she entitled to job-protected leave under the PWFA post-birth?
- Q: Can employers require document to return to work following PWFA leave?

# Penalties for Non-Compliance

- Incorporates damages provision applicable to Title VII claims
  - Back pay, reinstatement, compensatory and punitive damages (subject to caps), attorney's fees and costs
- For claims involving the provision of a reasonable accommodation, employer may assert **good faith defense** to award for compensatory and punitive damages
  - Means engaging in the interactive process and demonstrating good faith efforts in consult with employee to identify and make a reasonable accommodation
- Overlapping laws may provide additional/different damages, e.g., PUMP Act and FMLA

# New EEOC Enforcement Guidance on Harassment in the Workplace

- Issued 4/29/2024 – effective immediately
- Key Points
  - Express protection of LGBTQ workers
  - Addresses intersectional and intraclass harassment and online harassment
  - More than 70 modern workplace examples
    - Pregnancy, lactation, and related medical conditions
    - Focus on EEOC’s subject-matter priorities of discrimination toward vulnerable and underserved populations
      - Teen workers, migrant workers, victims of domestic violence

# EEOC Guidance on Harassment in the Workplace – Sexual Orientation/Gender Identity (SOGI)

***Bostock v. Clayton County*, 590 U.S. 644 (June 15, 2020)**

- Title VII of the Civil Rights Act’s prohibition against sex discrimination includes sexual orientation and gender identity
- “The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”

# EEOC Guidance on Harassment in the Workplace – Sexual Orientation/Gender Identity

- Use of epithets
- Intrusive questions
- “Outing” – disclosure without permission
- Harassment due to non-conformity with gender stereotyping
  - Requiring transgender female to wear pants instead of a dress
- Repeated/intentional use of pronouns or names that are inconsistent with an individual’s known gender identity
- Refusal to allow locker room/restroom use corresponding to the employee’s gender identity

# Other Areas of Note

- Race, color, and national origin are often, but not always, overlapping concepts
  - e.g., supervisor harassing Black workers with darker complexion but not Black workers with lighter complexion
- Intraclass harassment
  - e.g., 52-year-old manager harassing 65-year-old subordinate
- Intersectional harassment
  - e.g., older woman harassed as being “menopausal” and “hormonal”

# Examples of Harassment (if Severe **or** Pervasive)

- Severe – one instance may be enough
  - Groping, touching, or otherwise physically assaulting a person;
  - Displaying offensive material (such as a noose, swastika, or other hate symbols, or offensive cartoons, photographs, or graffiti);
  - Use of N-word by supervisor toward/in presence of Black worker
- Pervasive – cumulative effect of acts
  - Saying or writing an ethnic, racial, or sex-based slur;
  - Forwarding an offensive or derogatory “joke” email;
  - Threatening or intimidating a person because of the person’s religious beliefs or lack of religious beliefs;

# Examples of Pervasive Harassment

- Sharing pornography or sexually demeaning depictions of people, including AI-generated and deepfake images and videos;
- Making comments based on stereotypes about older workers;
- Mimicking a person's disability;
- Mocking a person's accent;
- Making fun of a person's religious garments, jewelry, or displays;
- Asking intrusive questions about a person's sexual orientation, gender identity, gender transition, or intimate body parts;
- Making sexualized gestures or comments, even when this behavior is not motivated by a desire to have sex with the victim; and
- Threatening a person's job or offering preferential treatment in exchange for sexual favors.



# Examples of When a Company May Be Liable

- If supervisor coerces another employee to harass a co-worker, company could be liable both for the co-worker's harassment and for the coercion
- Employer can be liable for harassment that occurs entirely outside the workplace
- If harasser is in a high enough position (proxy or alter ego), the employer is automatically liable for the harassment
- Defines a tangible employment action that can result in liability to include doing a favor for an employee after the employee submits to sexual demands
- Employer can be liable for third-party harassment
- Employer knows about harassment if supervisor knows

# EEOC Guidance on Harassment in the Workplace

- Provides examples of when employee is justified in not reporting harassment
  - The people designated to receive complaints are not accessible
  - Following the process would require the victim to complain to someone who is buddies with the harasser
  - Previous complaining employees got no action, or were retaliated against for complaining
  - The employer knew or should have known about the harassment already
- Provides examples of appropriate corrective action
  - Case by case
  - Termination may not be required

# EEOC Guidance on Harassment in the Workplace

- States that conduct must be evaluated in the context in which it arises
  - In certain instances, conduct that is not discriminatory on its face may in fact be discriminatory based on the specific context in which it occurs or within a larger social context
- Statutes are not limited to discriminatory conduct that has tangible or economic effects and instead are intended to address “the entire spectrum of disparate treatment” but are still not civility codes
- Harassment need not be directed at complainant
- Finds that conduct that is subjectively and objectively hostile is necessarily unwelcome

# Effective Anti-Harassment Policy

- To be effective:
  - Defines what is prohibited (guidance provides good examples)
  - Policy is widely disseminated
  - Policy is comprehensible to workers, including those who might have barriers to comprehension – limited literacy skills or limited proficiency in English
  - Requires supervisors to report harassment when aware of it
  - Offers multiple avenues for reporting
  - Clearly identifies accessible points of contact to whom reports should be made and includes contact information
  - Explains employer's complaint process, including anti-retaliation and confidentiality protections.

# Effective Complaint Process

- To be effective, should include:
  - Process for prompt and effective investigations and corrective action
  - Process provides adequate confidentiality provisions
  - Process provides adequate anti-retaliation protections

# Effective Training

- Explains employer's anti-harassment policy and complaint process, including any ADR process and confidentiality and anti-retaliation protections
- Describes and provides examples of prohibited conduct
- Provides information about employees' rights if they experience, observe, become aware of, or report conduct that they believe may be prohibited
- Provides information to supervisors about how to prevent, identify, stop, report, and correct harassment –
  - actions to be taken to minimize risk, clear instruction for addressing/reporting harassment that they observe, is reported to them, or that they become aware of
- Tailored to workplace and workforce
- Provided on regular basis to ALL employees
- Clear, easy-to-understand style and format

# Effective Investigations

- Small Employer FAQ: “...take appropriate action to promote a safe, fair, and productive work environment.”
- “Prompt” investigation
  - Reasonably soon after complaint is made (or employer has notice)
  - 1 day later v. 2 months later
  - Fact-sensitive and depends on nature and severity of alleged harassment
  - Document reasons for delay
- “Adequate” investigation – “sufficiently thorough to arrive at a reasonably fair estimate of the truth”
  - Seek information about the conduct from all parties involved
  - May need to make credibility determination

# Effective Investigations (cont.)

- Investigator should be:
  - Impartial party
  - Well-trained in skills required for interviewing witnesses and evaluating credibility
  - Familiar with EEO law
  - Experience conducting investigations
- At conclusion, employer should inform complaining party and alleged harasser of its determination and of any corrective action that will be taken
- Examples of intermediate measures
  - Make every reasonable effort to minimize burden/negative consequence on complainant



# Possible Next Steps

- Watch for challenges and possible enjoinder
- Evaluate scope of protected classes in relevant policies
- Update and modernize harassment training
- Incorporate examples into investigation guidelines
- Evaluate remote work agreements and policies to reflect incorporation of and adherence to policies
- Save a copy on your desktop and search as needed for relevant information/benchmarking

# Thank you!

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