Podcast: What Employers Should Know about the Pregnant Workers Fairness Act

October 05, 2023

The Pregnant Workers Fairness Act took effect on June 27th. What is this new federal law? What are employees' obligations? What steps can employees take to comply? How should employers deal with difficult situations under the Act?

Courtney Joiner: My name is Courtney Joiner and I'm a partner of out of McGlinchey's Baton Rouge office, and I work in the Labor and Employment Group. I'm joined today by my colleague Melissa Losch who also works in the Labor Employment Group, and she's Of Counsel out of the New Orleans office.

Melissa and I have been tracking the Pregnant Workers Fairness Act and proposed regulations. We're here today to offer guidance on basic questions that may arise as employers deal with and learn how to navigate this Act, and to explain the regulations that have been proposed. So to start, Melissa, can you explain what the Act requires, and who it applies to?

Melissa Losch: Sure. Yes, of course. It's applicable to employers that have 15 or more employees as well as to Congress, federal agencies, employment agencies, and labor organizations. The bottom line is it requires employers to provide reasonable accommodations for known limitations associated with pregnancy, unless that would cause an undue hardship. Now, some think that, well, doesn't the ADA already do that? And the answer to that is no. While the ADA does require some accommodations for people with disabilities, it does not specifically apply to pregnancy. Now, certainly some medical conditions could be considered a disability under the ADA or Americans with Disabilities Act, meaning that it could rise to the level of creating a substantial limitation to a major life Activity.

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But this Pregnant Workers Fairness Act applies to pregnancy-related conditions, or a condition that would be related to childbirth, and that will encompass a lot more than would otherwise be covered by the ADA. Now, we would point out that this is not a non-discrimination statute. Discrimination would still be covered by Title VII of

the Civil Rights Act of 1964, the Pregnancy Discrimination Act of 1978, as well as the ADA. So if someone were to file a lawsuit for discrimination, they would not be filing under this statute. But if they are looking for an accommodation that's been denied, that could be a lawsuit that would be filed under this statute.

Courtney Joiner: Alright, Melissa, what is the status of regulations for implementation of the Act?

Melissa Losch: Well, on August 11th of this year, the Equal Employment Opportunity Commission, the EEOC, published Regulations for the Act in the Federal Register. These regulations include the agency's interpretation of the new law, and they provide some examples to assist employers in understanding what is expected and how to comply with the provisions of the Act. Now stakeholders have 60 days from the date of publication of these proposed regs, or until October 10th, 2023, to submit comments. After the comment period is complete, then EEOC will look at all of the comments, some of which will come from employers, some of which will come from employees and other stakeholders, advocacy groups, that sort of thing. The EEOC will look at all of those comments collectively, make some edits, and then publish the finalized regulations. These regulations are only proposed, these could change. The things that we're talking about today could change. The Act has been in effect since the beginning of 2023. So we can really look to these proposed regs as they will serve as a useful guide to what the EEOC at least is looking at in terms of enforcement right now.

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Courtney Joiner: All right. So Melissa, thanks for answering the question. I have another question for you. You mentioned known limitations as it relates to reasonable accommodations required under the Act. Can you expound upon that for us?

Melissa Losch: Yes. Well, obviously the Act does not apply to pregnancy itself. Pregnancy in and of itself is not a limitation. But the language of the statute and the proposed regulations define a known limitation as any physical or mental condition that's related to pregnancy, childbirth, or related medical condition that is communicated to the employer by the employee or by her representative. It's important to note that the limitation does not need to rise to the level of disability. So we're looking at conditions that would actually be something less than a substantial limitation on a major life activity.

> *Some known limitations may be pretty obvious: morning sickness, increased fatigue. Some others may not: gestational diabetes, for example, or pregnancy related carpal tunnel syndrome. What's key is that it must be something that is related to pregnancy, childbirth, or related medical condition.*

Now, this would not apply to a medical condition that the baby may have upon the child's birth. But what an employer may need to look at in that regard would be how is that child's illness affecting the mother and how it affects her in her workplace. It may be that she needs to take a 15-minute break to go give medication to the baby if she's working at home or, you know, whatever the case may be. The point is that what we're looking at is how it is that the condition affects the mother, not a specific condition of the child.

Courtney Joiner: All right. Now you said some of the known limitations can be obvious and some are not obvious. What information can an an employer ask an employee to show that she has a known limitation as defined by the statute?

Melissa Losch: So employers cannot request supporting documentation anytime that the need for an accommodation is obvious. In those kinds of situations, a self-report is sufficient and no further information should be requested. Additionally, the proposed regulations do provide some specific instances where further information may never be requested, including situations where the employee has already provided the employer with some information that is sufficient to evidence the need. Anytime that the request involves lactation or pumping, we cannot request any additional information. Or if the request is for one or more of the accommodations that the EEOC has deemed per se reasonable. And they have listed a whole host of accommodations that are per se reasonable in their view. Anytime an employer believes that supporting documentation is needed, then that request should be tailored to seeking only that information that is absolutely necessary to describe or confirm the condition and the need for the accommodation. Notably, unlike the ADA, an employer is never authorized to require an employee to be examined by an independent healthcare provider. And of course, once the limitation is recognized, which is a very low bar that we have to recognize the limitation, then the employer becomes obligated to reasonably accommodate that condition.

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Courtney Joiner: I think that point leads to the next question. What is a reasonable accommodation under the Act?

Melissa Losch: Essentially whatever the employee needs to be able to do their job, that doesn't create an undue hardship. As I mentioned earlier, there's some accommodations that the EEOC deems per se reasonable, automatically reasonable, and should always be provided. Some of those include making existing facilities accessible, job restructuring, excusing a pregnant employee from strenuous activities or from activities that might expose the employee to dangerous chemicals or compounds, part-time or modified work schedules, increased breaks so that they can drink water or just take a rest, acquisition or modification of equipment such as equipment that might assist an employee in lifting, if lifting is a requirement of their job, allowing an employee to use paid leave or providing additional unpaid leave, any sort of light duty or modified work that might be available, telework, whenever that is possible, flexible work hours, appropriately sized uniforms and safety apparel, providing reserved parking so that the employee doesn't have to walk so far, and any reasonable accommodations related to lactations, such as extra breaks, space to be able to lactate or pump. If it's one of those things that are being requested, then I would say that that is a reasonable accommodation.

Now, one other accommodation that can be provided would be leave, if an employee needs to have some leave time due to their pregnancy or a medical condition related to that. But importantly, this Act specifies that you cannot require the employee to take time off if there's an alternative reasonable accommodation that can be provided. So leave, if that's what they're requesting, is certainly a reasonable accommodation, but it can't be something that an employer is going to require. One thing that I would note with respect to leave, if an

employee does request to have leave as a reasonable accommodation, the employer should keep in mind obligations under the Family Medical Leave Act, which also allows for up to 12 weeks of leave for pregnancy or any medical condition associated with pregnancy.

Melissa Losch: So I would urge employers that if they are going to provide leave as an accommodation under this Act, that they also consider that under the FMLA, so that they provide the notices and that way they can avoid doubling up. So you don't want the employer to provide say, six weeks of leave because of a medical condition, and then the employer comes in and makes a request for FMLA. If they didn't provide those FMLA notices, then they're going to have 12 more weeks of leave that they're legally obligated to provide, whereas this can run concurrently.

Courtney Joiner: So Melissa, let's say that there's a known limitation. The employer has gone through the, the process of trying to determine an accommodation. That accommodation is outlined by the employee and the employer determines that it's an undue hardship. Can you explain for our audience what is an undue hardship?

> *I would first caution any employer when they are considering something, an undue hardship, it's a pretty high bar. Those factors would include the nature and the cost of the accommodation as compared to the number of employees that the employer has, and the overall financial resources of the employer. But as I said, like the ADA, that's going to be a high bar. So an employer does not want to just automatically say, Nope, that's an undue hardship. I'm not going to provide that. And then close to the door to that request.*

Melissa Losch: Well, I would first caution any employer when they are considering something, an undue hardship, it's a pretty high bar. Those factors would include the nature and the cost of the accommodation as compared to the number of employees that the employer has, and the overall financial resources of the employer. But as I said, like the ADA, that's going to be a high bar. So an employer does not want to just automatically say, Nope, that's an undue hardship. I'm not going to provide that. And then close to the door to that request. What the Act requires, also like the ADA, is that employers engage in what's called an interactive process with the employee. Meaning that if the request that the employee is making, if the employer believes that that's too burdensome, that doesn't end the inquiry. That would prompt the employer to have to sit down, meet with the employee, talk about, okay, what is the limitation that you have? And this is what you're asking. This is why we don't feel that we can really provide this. But how about this? And maybe offer some alternatives and try to sit and work that out with the employee to where you come up with an accommodation that suits the need as well as suits the abilities of the business. So it's very important that you go through that interactive process.

The important takeaway to this is that employers should be very cautious when considering denial of an accommodation related to pregnancy, or if they're questioning the validity of an employee's request. I would strongly recommend that employers seek legal advice from their counsel before refusing an accommodation or asking an employee for proof of the need for an accommodation.

Courtney Joiner: Right. And I think, Melissa, it is particularly important to exercise caution and to seek legal advice because the EEOC are accepting claims for violations potentially of this Act. Is that correct?

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Melissa Losch: That is correct, yes. The EEOC began taking claims in June right after the Act was taken. So in the way that will work, it'll be just like any other civil rights statute that the EEOC enforces. A person can file a complaint. The EEOC will investigate, and once the investigation is complete, if they find that there is a potential violation, they'll try to work that out between the employer employee. If not, the employee will get a right to sue letter and they'll be able to file a lawsuit under this statute. So it's very important to get legal advice before it gets to that point.

Courtney Joiner: Alright. Melissa, what are key takeaways for employers from the proposed regulations?

Melissa Losch: Well, I would say that employers should be encouraged to really review and submit comments to the proposed regulations prior to that October 10th, 2023 deadline. The purpose of the comment period is to give stakeholders, including employers, the opportunity to address what they think could be problematic with the regulations as proposed. Maybe of that list of per se accommodations, they think, well, you know, one of these, this really is not feasible. Then it's those kinds of comments that the EEOC will look at and potentially make edits to prior to the proposed regs. So we think that that can sometimes have a real impact. And so we would definitely recommend that employers take that opportunity. We will be keeping an eye on when these regulations are finalized and we will be providing updates. So stay tuned.

Courtney Joiner: Melissa, this is a very fascinating topic and I think you'll agree with this, that it is in its infancy stages. Because it's so new, it's so fresh, we'll continue to monitor the regulation process and we'll provide updates as they become available. Until that time, I want to thank you, Melissa, for this fabulous work that you did presenting.

Melissa Losch: Well, thank you, Courtney. I appreciate it.

Courtney Joiner: And with that, we'll sign off.

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