*Barclay Damon Live*:*Labor & Employment Podcast*

Episode 66: “Breaking Down the New PWFA Regulations”

Speaker: Ari Kwiatkowski

Ari: Hi, everyone. This is a *Barclay Damon Live* broadcast where we discuss all things L&E, labor and employment. I'm Ari Kwiatkowski. Let's dig in.

Ari: Hi everyone. Welcome to episode 66, “Breaking Down the New PWFA Regulations.” We had an episode a couple of months ago on the PWFA or the Pregnant Workers Fairness Act, and we're going to really get into it today because the EEOC has issued some regulations to that legislation. And I'm going to break it down and tell you what you need to know. You know, our listeners always know that I request our guests to provide a fun or interesting fact about themselves. This is a solo episode. I don't want to exempt myself. I've been thinking about it for basically the whole day, what I was going to say today, and I'm not coming up with much, although I'll say that I am…this topic rings true to me because I am currently 38 weeks pregnant. So, now that I have a vested interest in what the Pregnant Workers Fairness Act regulations say, but I certainly, I think, given the timing of everything, won't forget them any time soon. So that's my fun or interesting fact for today. So let's dig in.

Ari: Today, as I mentioned, we want to break down the PWFA regulations. Just for a brief recap, the Pregnant Workers Fairness Act requires employers to provide accommodations to a worker’s known limitations related to pregnancy, childbirth, or related medical conditions absent undue hardship. So as we talked about a couple of months ago on the podcast, basically this is like the ADA, but as it relates to pregnancy and conditions related to pregnancy, and we'll talk about that in a few minutes because the EEOC’s regulations have certainly addressed and provided examples of what those conditions are. I also wanting to note that in addition to applying to employees, the regulations have said that the Pregnant Workers Fairness Act also applies to applicants. So that's something I wanted to point out. That was something new. I don't know that we went over that a few months ago, but in any event, the PWFA went into effect on June 27th. The EEOC is now accepting charges under that statute for discrimination under the law.

Ari: I haven't had any come across my desk yet, and I'm not sure that anybody else at Barclay Damon, has yet either. But obviously, it's a very new, new statute. And the EEOC, as I mentioned a few moments ago, has issued regulations to the law. There's a 60-day comment period. So the regulations were issued in the middle of August. So there's some more time left on the comment period or the public comment period. But the regulations do need to be finalized by the end of December. So that's kind of where we were. That's generally the Pregnant Workers Fairness Act. Let's talk about some of the high points of the regulations. If you are a lawyer or if you are an employer or if you're just curious and ever read regulations publisher in the Federal Register, you know that they tend to be quite dense. There's hundreds of pages devoted to the Pregnant Workers Fairness Act regulation. So I don't think we're going to get into necessarily everything today. But I did want to hit a few high points for you, so let's just dig right into it. I did want to… I mentioned a few moments ago that the Pregnant Workers Fairness Act or PWFA, relates to employers providing accommodations for workers *known* limitations so that that language “known limitations” is unique to this new law. The regulations define that as “a physical excuse me, or mental condition related to affected by or arising out of pregnancy, childbirth or related medical addition excuse me, related medical conditions that the employee has communicated to the employer whether or not the condition meets the definition of disability under the ADA.” So kind of a mouthful. I don't normally like to do this on the podcast.

Ari: I feel like you guys know this. I don't normally read off language, but in the context of reading definitions or providing definitions for a law, I think it's important that we do that. So basically what this is saying is that the employee has to make the limitation known to the employer. So communicate that to the employer. The limitation under the regulations may also be “modest, minor, or episodic.” So that's new as well. And it does talk a little bit the regulations about how the limitation should be communicated to the employer. Basically, the regs say that it should be orally communicated or in writing to a supervisor or a manager or someone the appropriate person in human resources. So if you're just kind of looking at the EEOC guidance on the statute and it kind of defines what the statute is, this provision of the regulations, the section kind of provides some insight into the known limitation piece. So definitely wanted to hit that.

Ari: Now, as I mentioned a few moments ago, this relates to pregnancy and, quote, related medical conditions is what the law says. And these regulations have provided a pretty long list of conditions that would qualify as a related medical condition under the law. It's not exhaustive, but there's… this includes, you know, carpal tunnel, anemia, preeclampsia, which is common in pregnancy. It includes mental health issues that are causally related to pregnancy, including depression, anxiety, postpartum depression. I think sciatica was on there. Gestational diabetes. It also includes abortion and fertility treatments. So if you need accommodation as a result of a fertility treatment, if an employee does, that would fall under the ambit of what related medical conditions or what may be related medical conditions under the law.

Ari: So I definitely wanted to point that out. Like, I said, the regulations provide quite a few examples of what may be related, So I thought that was important. So like the ADA, the PWFA, they require that the employee who's requesting the accommodation is qualified. That is also addressed in the regulations that it's the ADA definition, which as we all know, if we're in the space… employers in the space, the employee is qualified. If the employee can perform the essential functions of the job with or without a reasonable accommodation under the ADA, that's the definition of qualified. But under the PWFA, and this is new, an employee can be qualified if the inability to perform the essential functions of the job is temporary, and that's defined as “lasting for a limited time, not permanent, and may extend beyond in the near future or 40 weeks.” So I think if we think about this in the context of an employee who may be pregnant, this makes some sense. Basically, the EEOC is saying that an employee can be qualified if they can't perform the essential functions of the job on a temporary basis, which as defined in the current regulations, could be up to 40 weeks, which, as most of us know, is the gestational period or …the long period of time 40 for… the long period of time of pregnancy. But the EEOC is seeking public comment on this, that the piece of the in the near future, should that be 40 weeks, because that's the length of pregnancy, should it be a year? There is some discussion of that in the regulations and the EEOC is looking for the public to comment on that.

Ari: So I wanted to bring that up because that's new. Basically, this… the regulations in this law propose that an individual may still be qualified for the job if they can't perform the essential functions of the position, but that inability is temporary as defined under the law and the regulations. So I think that's definitely interesting. Definitely a high point to hit and I wanted to bring it up. So, you know, when we're discussing the ADA, we're normally talking about whether an employee is qualified and what may qualify for undue… what may qualify as undue hardship. Right. Because those are really the two guideposts of the ADA. The PWFA is similar because, as I mentioned a few minutes ago, an employer is required to grant the accommodations requested for a known limitation unless that accommodation would pose an undue hardship to the employer. So very similar to the ADA and the PWFA regulations similarly define undue hardship as undue hardship is defined under the ADA, which makes sense. However, under the new regulations, there are some factors that are provided by the EEOC for an employer to consider when assessing that temporary suspension of an essential function piece, which we talked about a couple minutes ago. So the EEOC says that generally undue hardship means the same thing under the ADA. But when there is an assessment or there has to be an assessment of the temporary suspension of an essential function the employer should consider. And again, I'll read a few of these off: the length of time that the employee or applicant will be unable to perform the essential function, whether there is work for the employee to accomplish by allowing the employee to perform all the other functions of the job, nature of the function, including its frequency. Whether the covered employer has temporarily suspended the performance of essential job functions for other employees in similar positions, whether there are other employees, temporary or third parties who can perform or be temporarily hired to perform the essential functions the employee can't do, and whether the essential function can be postponed or remain unperformed for any length of time. And if so, for how long? So basically, this goes hand in hand with that suspension of the ability to perform the essential function as being temporary under the PWFA. And basically the EEOC is providing some guideposts or factors that employers should consider in determining whether granting the accommodation request under the PWFA would, in fact cause an undue hardship. So it'll be interesting to see how this plays out.

Ari: I wish, you know, on the podcast, I think a lot of times we have war stories or practical applications, or at least we aim to have any for the PWFA yet. But I'm not saying I’m hoping that I acquire those war stories soon. But you know, I'm definitely interested to see how this will all shake out once we do respond to a charge filed under the PWFA. I also wanted to point out that in the regulations, the EEOC takes the position that there are four accommodations that essentially should be granted in all cases. And I think we talked about this a couple of months ago because the EEOC had issued some guidance on the PWFA before the law actually went into place, I believe, or maybe shortly thereafter. And this kind of falls hand in hand with that. But under the regulation, the EEOC has said that the following accommodations basically should be granted in most instances. So the first one is allowing an employee to carry water and drink at their convenience, allowing an employee additional restroom breaks, allowing an employee to sit or stand. If the position requires mostly sitting, allowing the employee to stand. If it's a standing position, allowing the employee to sit. And the last is allowing additional breaks to eat and drink. So these are four accommodations that have been specifically identified by the EEOC as I guess what we can call reasonable under the law. I don't… it's not exhaustive.

Ari: I wouldn't be surprised if this changed in the future. But these are identified right now as being accommodations that really, if you're an employer, you're probably going to have to grant in the event of a request from an employee. One other thing I really wanted to review with you guys is that the PWFA addresses lactation accommodations. So if you're in New York City, if you're in New York State, you know that there were some updates earlier this year to the labor law which provided for enhanced lactation accommodations for employees who have the need to express breast milk in the workplace. And I believe we did a podcast on that as well. But in any event, I think we've touched on it in our what was new for 2023. But in any event, the PWFA, it's interesting because I think a lot of us listening to the podcast will recall that there is a federal law called the Pump Act in place, and that one underwent some additional changes. I think it was at the end of last year, effective at the beginning of this year. And the Pump Act provides for lactation accommodation provisions in the workplace, and it provided many of the expansive protections that the New York state law provided. Right. So the New York state law is expansive. It requires a private room in most instances with lighting, seating, a table, refrigeration has to be provided, etc. The Pump Act, the federal law, didn't actually rise quite to the threshold of the New York State…The amendments to New York State labor law, Section 206C. So under the Pump Act, it's a federal law. Like I mentioned, it was expanded at the end of this year. But basically the Pump Act says that if you are in a state that has a more protective law for employees, that the New York… that the state law will apply.

Ari: So what's interesting about the Pregnant Workers Fairness Act is that it actually, although it's a separate federal statute from the Pump Act, actually creates some enhance…protections for employees who have the need to express breast milk in the workplace. So basically, the Pregnant Workers Fairness Act says that employees have to provide lactation accommodations under this law absent an undue hardship, because according to the law (I know we talked a few minutes ago about what medical conditions were related to pregnancy), but under the law, lactation, including breastfeeding, pumping, etc., and medical conditions related to lactation are among those conditions that the EEOC identifies as covered in the regulations. So as I mentioned, the Pump Act requires most employers or many employers to provide a private space for pumping. If you're in New York State, you definitely have to. But this actually expands those protections. And it expands those protections by requiring the employer to provide a lactation area that's close in proximity to the employee’s work area that has electricity and seating and is close to a sink with running water, and a refrigerator for storing milk. So I thought this was interesting because, especially if you're an employer in New York State, this has been a hot topic this year. And it's interesting to me that the EEOC is kind of using that PWFA to supplement the protections that are provided under the Pump Act. So definitely wanted to mention that.

Ari: So those are the high points that I wanted to hit for everyone on the regulations. Again, not completely inclusive of everything that's in the Federal Register. And some of these things might change, but I thought that this would be a good time to kind of give employers and business owners a primer on what those regulations say. I also wanted to note that the EEOC has published a new EEO poster that is specific to the Pregnant Workers Fairness Act. I believe they have a poster that basically tells you what you need to know about it. And then they've updated their…the EEO poster that is required to be hung in the workplace as well. So I just wanted to throw that out there.

Ari: And I think it's important, even though the public comment period is still ongoing, I think it's important for employers to really pay attention to this now. Take a hard look at some of these things. It's really important to start training your HR professionals, your supervisors, your managers now because the… as I mentioned a few minutes ago, the law does say that a known limitation is one that is communicated to a manager, a supervisor, or someone in HR. So I think this is super important. I think it's definitely worth noting and paying attention to and I think the biggest piece of advice we can give is to just start paying attention now because when these are finalized at the end of the year, you want to be in a good spot and know that everyone in the workforce knows of these protections, that your managers, your supervisors, again, your HR professionals are aware of the response that needs to be made to someone who requests an accommodation and are aware of what accommodations you may have to grant. So that's all for today. Thanks so much for listening, everyone. We’ll be back in a couple of weeks. Take care.

Ari: The *Labor & Employment* *Podcast* is available on barclaydamon.com, YouTube, and all your favorite podcast streaming platforms. Like, follow, share, and continue to listen. Thanks.

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