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**COMMENTARY**

*Navigating the Pregnant Workers Fairness Act*

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Last summer, new legislation establishing workers' rights to accommodation for pregnancy, childbirth, and other related medical conditions came into effect under the Pregnant Workers Fairness Act (PWFA).<sup>1</sup> This piece of federal legislation aims to ensure employers provide reasonable accommodations for employees facing known limitations due to their condition.<sup>2</sup> By ensuring the American Disabilities Act (ADA) covered employers are also beholden to the PWFA, Congress sought to close the gap in accommodations relating to pregnant workers who need some support during pregnancy but whose condition did not rise to the level of protection required under the ADA.<sup>3</sup> Protection from pregnancy discrimination has been in place federally since Congress passed the Pregnancy Discrimination Act (PDA) in 1978, which added this to other workplace discrimination protections contained in Title VII.<sup>4</sup>

Before the PWFA was in effect, thirty states and some municipalities had implemented their own laws to encourage access to reasonable accommodations for employees.<sup>5</sup> The PWFA works in conjunction with state and local laws that may be more protective of workers. It ultimately sets the base level of protections and accommodations

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<sup>1</sup> *What You Should Know About the Pregnant Workers Fairness Act*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act> (last visited Mar. 10, 2024).

<sup>2</sup> Pregnant Workers Fairness Act, H.R. 2617-1626, 117th Cong. (signed into law Dec. 29, 2022).

<sup>3</sup> Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213).

<sup>4</sup> Pub. L. No. 95-555, 92 Stat. 2076, 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)).

<sup>5</sup> *State Pregnant Workers Fairness Laws*, BETTER BALANCE (Sept. 29, 2023), <https://www.abetterbalance.org/resources/pregnant-worker-fairness-legislative-successes>.

that workers can utilize during pregnancy.<sup>6</sup> Some state laws increase protections by including employers smaller than the federal regulation or by adding other accommodations that are easily met.<sup>7</sup>

Unlike the ADA, it protects even non-severe pregnancy-related limitations without requiring specific documentation.<sup>8</sup> Requests for accommodations are broadly interpreted, requiring only communication about the need for adjustments.<sup>9</sup> Employers can deny accommodations only if they pose an undue hardship, following similar criteria as the ADA.<sup>10</sup> During the legislative process, other potential accommodations including modified duties, telework, or job restructuring, were discussed.<sup>11</sup> The PWFA prohibits forcing accommodations without discussion as a means of encouraging the interactive process used for ADA accommodations.<sup>12</sup>

In August, the EEOC issued a Notice of Proposed Rulemaking (NPRM) that outlined the initial evaluation process for charges under the PWFA and accepted public comments until October 2023.<sup>13</sup> The final version of the regulations, which was due by December 29, 2023, is still forthcoming.<sup>14</sup> Challenges the EEOC is struggling with include the varied nature of accommodations and defining "temporary inability" to perform duties.<sup>15</sup> Four accommodations of water availability, breaks for food and water, varied sitting or standing, and additional restroom breaks were accommodations that likely will not require extensive documentation and should be easily granted.<sup>16</sup> The EEOC confirmed that an employee going on leave may be a reasonable accommodation, but employers must exhaust other options before requiring an employee to take leave regardless of if it is paid or unpaid.<sup>17</sup> Like many workplace protections, "good faith efforts" to accommodate can shield employers from damages, so proper training of staff and the documentation of the interactive process is crucial to ensure compliance.<sup>18</sup> PWFA violations follow other federal employment laws and allow for recovery of lost income, compensatory damages, punitive damages, and attorney's fees.<sup>19</sup>

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<sup>6</sup> Pregnant Workers Fairness Act, H.R. 2617-1626, 117th Cong. § 107 (signed into law Dec. 29, 2022).

<sup>7</sup> Or. H.B. 2341 (2019) (codified at ORS §§ 659A.146-659A.148); Minn. Stat. §181.939.

<sup>8</sup> Pregnant Workers Fairness Act, H.R. 2617-1626, 117th Cong. § 105 (signed into law Dec. 29, 2022).

<sup>9</sup> Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714 (proposed Aug. 11, 2023) (to be codified at 29 C.F.R. pt. 1636).

<sup>10</sup> Pregnant Workers Fairness Act, *supra* note 2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714, 54742 (proposed Aug. 11, 2023) (to be codified at 29 C.F.R. pt. 1636).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

On February 27, 2024, a U.S. District Court in Texas blocked enforcement of the PWFA against state employees due to potential violations of constitutional proxy laws during its passage.<sup>20</sup> Just over a week later, on March 6, 2024, the EEOC and Department of Justice notified the court that they would comply with the order and not enforce the PWFA against the state of Texas; however, the EEOC reserved its right to appeal.<sup>21</sup> This puts qualified state of Texas employees back into a position where they may need to meet higher criteria for an accommodation or face outright discrimination to seek protections. This challenge by the state of Texas may inspire others to also pursue claims against the enforceability of the PWFA which complicates the forthcoming implementation of EEOC rules.<sup>22</sup> This legal battle undermines the PWFA's goal of setting a federal standard for employee protection and is likely to continue developing.

If the PWFA withstands the questions of enforceability that are now at issue, it will empower workers nationwide to prioritize their health during pregnancy without jeopardizing their careers. The PWFA supports workers during a life-altering period in their lives. Despite resistance, the PWFA is widely recognized as supportive of workers' rights, though challenges like the one in Texas remain.

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<sup>20</sup> Emily C. Lodge, *A Lullaby? Pregnant Workers Fairness Act May Be Unenforceable*, THE NAT'L L. REV. (Mar. 8, 2024), <https://www.natlawreview.com/article/lullaby-pregnant-workers-fairness-act-may-be-unenforceable>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*