

EEOC Suit Gives Employers 'Road Map' For Navigating PWFA

By **Amanda Ottaway**

Law360 (September 20, 2024, 7:18 PM EDT) -- The U.S. Equal Employment Opportunity Commission has officially begun flexing its enforcement muscles on one of the nation's newest civil rights laws, and experts say employers need to get up to speed on the unique accommodation analysis required under the Pregnant Workers Fairness Act.



In the lawsuit, the EEOC accused trucking equipment manufacturer **Wabash National** of putting a worker on unpaid leave instead of trying to accommodate her pregnancy as the PWFA requires, even though she had coworkers who were willing to switch duties with her. (iStock.com)

The agency filed its first lawsuit under the PWFA earlier in September, highlighting some compliance issues caught in its cross-hairs. Those violations include putting pregnant employees on unpaid leave without considering other options, and improperly using Americans with Disabilities Act processes or paperwork to process PWFA requests.

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"I think the EEOC's lawsuit is a message to employers in the country that this law is being taken seriously," said Margo Wolf O'Donnell, a partner at management-side firm **Benesch Friedlander Coplan &**

Aronoff LLP. "I think this complaint gives a roadmap to employers as to what to consider or not to consider, and how it might be different under the ADA."

The PWFA has been in effect since June 2023 and requires employers to make efforts to provide reasonable accommodations to workers with pregnancy-related conditions. Though there is some overlap with other federal protections, like the ADA, employers need to be sure they're clear on the PWFA's nuances as a law specific to pregnancy — a temporary condition that's not a disability, experts said.

Here are three takeaways from the EEOC's first PWFA lawsuit.

Don't Mix Up Your Accommodation Laws

The EEOC's PWFA lawsuit against Wabash on behalf of assembler Hayley Knight included an Americans with Disabilities Act claim that said the company improperly made her fill out disability paperwork — even though pregnancy is not a disability on its own.

According to the suit, despite notice that Knight's accommodation request was based on stomach distension from pregnancy, Wabash required her to submit ADA paperwork.

Knight was about seven months along in her healthy pregnancy at the time, and had asked to temporarily move to a different position because her condition made it physically difficult to bend over trucks to install wiring, the EEOC said.

Though the PWFA borrows some language from the ADA, like the requirement to engage in an interactive process with an employee requesting an accommodation, the laws are distinct from each other in critical ways, experts said.

"There are a lot of ways in which it's similar," said Liz Morris, co-director of the Center for WorkLife Law at the University of California College of the Law, San Francisco. "Employers understand what a reasonable accommodation is. Employers understand what an undue hardship is — or at least they're familiar with those concepts. They're familiar with the concept of an interactive process. But when it comes to the fact that somebody does not have to have a disability, that's a major departure point."

She said that the Center for WorkLife Law has received a lot of calls on its helpline from workers who say they've been forced to fill out ADA paperwork for what is actually a PWFA request. WorkLife Law, anticipating this, put out a sample PWFA medical certification form that employers can use.

"I feel like now employers are starting to say, 'Wait a second, this isn't just the ADA repackaged. This actually has some differences,'" said Charlotte Garry Carne, senior counsel at management-side Dykema Gossett PLLC.

Carne also noted that she's leading a webinar next week on the ADA and PWFA. Before the EEOC's lawsuit against Wabash, she had about 75 client attendees signed up, she said — on the high end of her average number of webinar attendees. But after news broke of the lawsuit, that number shot to 174, indicating employers are eager for information.

It would behoove employers to ensure they now have separate paperwork and policies for the ADA and the PWFA to help limit confusion, experts said.

"And it might be something that is prudent on us to actually do, because the ADA forms are not going to be ... they're not going to take into account the subtle differences between the ADA and the PWFA," Carne said.

Morris pointed out that the PWFA is a "major piece of civil rights legislation" and was signed into law nearly two years ago.

"In one sense, it makes sense that employers would be using their ADA paperwork, perhaps last year, in that it's a new law and there may be some confusion," she said. "I think we're beyond the point where employers, especially large employers, can say, 'Oh, I didn't know.'"

Unpaid Leave Should Not Be A Knee-Jerk Response

The EEOC's lawsuit also noted that Wabash improperly defaulted to sending the pregnant employee out on

unpaid leave, which it called a "forced accommodation." Leave, especially unpaid leave, was not something she had asked for, it said.

"Instead of assessing Knight's individual needs, Wabash responded to Knight's request by immediately placing her on unpaid leave," the agency alleged.

Furthermore, that response could scare off other pregnant workers from exercising their rights under the PWFA because they might fear they too would be sent home without pay, the EEOC said.

"I think employers should back up and or take a step back and think about the purpose of the law. Yes, in some cases, it is to provide leave to people who don't have it," Morris said.

One example is providing time for recovery and bonding after a baby is born, she said.

"But forcing somebody out on leave totally undermines the central purpose of this law, which is to protect people's economic security and to protect their livelihoods when they're pregnant," Morris said.

Experts said that the EEOC has already spelled this out in its regulations on the law. Carne said employers should take a closer look at the requirements and think about their options accordingly. For example, an employee can be temporarily reassigned as a reasonable accommodation instead of being sent on leave until the pregnancy is over, she said.

O'Donnell noted that the PWFA's broad reach — the law applies to all employers with 15 or more workers — means the resources employers have for compliance vary broadly.

"I think unpaid leave — there could be certain circumstances where it could be appropriate," she said. "But I think it's important to create a record that you've tried other alternatives first, before you resort to unpaid leave."

For example, employers should ask themselves whether they could modify the job role, transfer the pregnant worker, afford to send her out on paid leave of some kind, or have her use accrued sick or PTO time.

O'Donnell also emphasized the importance of keeping a record of the interactive process with the worker. It's also important to get the process going quickly, because pregnancy is temporary and the PWFA therefore requires more expediency than the ADA does.

And employers should also be wary of putting a worker out on unpaid leave while they go through the interactive process, experts warned.

"That doesn't mean that every request for accommodation should be allowed just because someone is pregnant. There just needs to be careful, thoughtful, and perhaps faster responses to some of these accommodation requests than just under general ADA-type requests," O'Donnell said.

Make Sure Third-Party Administrators Are Up To Speed

Larger employers that outsource benefits and other human resources logistics to third parties also should ensure those companies understand the nuances of the PWFA, experts said. Morris said that issue has come up on the WorkLife Law helpline as well, which she finds "shocking."

"The reason that an employer uses these types of companies is because they want to outsource that responsibility, because they rely on those companies to have that expertise. And so the fact that they are still working in this disability framework is a huge problem," she said.

There's plenty of guidance available for benefits and HR providers to use to be sure they're following current procedures, Morris said.

"Just update your paperwork and have a different form. It's not that heavy of a lift, to be honest, especially for a company whose entire business model is providing employers with these services," she said.

Management-side lawyers agreed that an employer would be liable for a PWFA violation committed by a third-party contractor. Carne said that's something she warns her clients about periodically.

"It happens all the time when it seems like our clients are almost obligated to go back to their third-party vendors and say, 'Okay, are you handling this correctly?'" she said. "When they're not doing it correctly, [employers are] still on the hook."

The responsibility is with the employer either way: If it's a small manufacturing company with no HR department, the onus is on the CEO to make sure employees are aware of their rights and that the law is followed, Carne said.

Morris said that while there will always be violations of the PWFA, just like any other law, she thinks the shift in mindset is on its way.

"I think a lot of employers are still stuck in the mindset that we're in the world of disability accommodation," she said. "But the Pregnant Workers Fairness Act is a new world."

--Editing by Amy Rowe and Nick Petruncio.