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Employment and Healthcare Updates

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Implications for Rural Health Leaders

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Pregnant Workers Fairness Act

Review and Updates



- Law went into effect June 27, 2023, final regulations effective April 2024.
- Per 2024 guidance, the EEOC considers the PWFA a top enforcement priority.

Note: Title VII prohibits discrimination, ADA requires accommodation
Some pregnancy related conditions, like severe morning sickness, could be considered disabilities, but pregnancy itself is not a disability.



PWFA Purpose:

The Pregnant Workers Fairness Act (“PWFA”) requires a covered employer to provide a “reasonable accommodation” to a qualified employee’s or applicant’s known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an “undue hardship.”

Covered Employers:

The PWFA applies to private employers and public sector employers (state and local governments) that have 15 or more employees. It also applies to Congress and Federal agencies, and to employment agencies and labor organizations.



Scope of Pregnancy and Related Conditions Covered:

“Pregnancy, childbirth, or related medical conditions” includes uncomplicated pregnancies, vaginal deliveries or cesarian sections, miscarriage, postpartum depression, edema, placenta previa, and lactation. Also, potential pregnancy, use of birth control, fertility/infertility treatments, etc.



Forms of Reasonable Accommodation:

Some Examples of possible reasonable accommodations under the PWFA include:

- Additional, longer, or more flexible breaks to drink water, eat, rest, or use the restroom;
- Changing food or drink policies to allow for a water bottle or food;
- Changing equipment, devices, or workstations, such as providing a stool to sit on, or a way to do work while standing;
- Changing a uniform or dress code or providing safety equipment that fits;
- Changing a work schedule, such as having shorter hours, part-time work, or a later start time;
- Telework;
- Temporary reassignment;
- Temporary suspension of one or more essential functions of a job;
- Leave for health care appointments;
- Light duty or help with lifting or other manual labor; or
- Leave to recover from childbirth or other medical conditions related to pregnancy or childbirth.



PWFA Prohibitions & Limitations on Leave as an Accommodation

Covered Employers must not:

- Fail to make a reasonable accommodation for the known limitations of an employee or applicant, unless the accommodation would cause an undue hardship;
- Require an employee to accept an accommodation other than a reasonable accommodation arrived at through the interactive process;
- Deny a job or other employment opportunities to a qualified employee or applicant based on the person's need for a reasonable accommodation;
- Require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working;
- Punish or retaliate against an employee or applicant for requesting or using a reasonable accommodation for a known limitation under the PWFA, reporting or opposing unlawful discrimination under the PWFA, or participating in a PWFA proceeding (such as an investigation);
- Coerce individuals who are exercising their rights or helping others exercise their rights under the PWFA.



PWFA Distinction from ADA:

PWFA goes above and beyond the normal accommodation standard, and it effectively requires an employer to eliminate one or more essential job functions as a form of reasonable accommodation if the following requirements are met:

- (A) any inability to perform an essential function is for a temporary period;
- (B) the essential function could be performed in the near future (regulations suggest within 40 weeks if the employee is currently pregnant—otherwise, for post or pre-pregnancy issues, not defined, suggest using ADA, indefinite period is not “near future,” might exceed 6 months); and
- (C) the inability to perform the essential function can be reasonably accommodated without undue hardship.



Examples/EEOC Enforcement

EEOC v. Polaris Industries, Inc.



EEOC v. Urologic Specialists of Oklahoma, Inc.



EEOC v. Wabash National Corporation



EEOC v. Comfort Keepers



Scope of Practice Considerations for Midlevels/Non-Physician Practitioners



State Law/Scope of Practice Per License, Certificate, Etc.

Potential Collaboration, supervision, and other requirements



Payor Considerations and Sett-Based Limitations

- CMS Considerations of Participation/Payment;
- Inpatient vs. Outpatient;
- Hospital/CAH, Rural Health Clinic, etc.



Other Considerations

- Medical Staff
- Liability / Malpractice / Negligent Credentialing



HIPAA Issues



Note: not all HIPAA violations are breaches; distinction between privacy and security rules



Potential Breaches/Risk Assessments

- Step 1:
Determine whether there was an unauthorized use or disclosure of PHI under HIPAA (i.e., use was not permitted under HIPAA privacy or security rules)

- Step 2:
If so, determine whether violation actually constitutes a breach per 4-part risk assessment



An impermissible use or disclosure of protected health information is presumed to be a breach unless the covered entity or business associate, as applicable, demonstrates that there is a low probability that the protected health information has been compromised based on a risk assessment of at least the following factors:

- The nature and extent of the protected health information involved, including the types of identifiers and the likelihood of re-identification;
- The unauthorized person who used the protected health information or to whom the disclosure was made;
- Whether the protected health information was actually acquired or viewed; and
- The extent to which the risk to the protected health information has been mitigated. See 45 C.F.R. 164.402.



Operational Issues and Best Practices for Handling Confirmed Breaches and Complying with Notice Requirements



Review of Breach Notification Requirements



Determinative Factors for Handling Breach:

- Small versus large breach
- Who caused the breach (covered entity versus business associate)
- Involvement of insurance/cyberinsurance



Practices for Subpoenas under HIPAA

- Is the subpoena court ordered vs. lawyer issued?
- Is the subpoena HIPAA compliant per 45 CFR 164.512(e)(1)(ii)?
 - If not, options include reissuing compliant subpoena with satisfactory assurances; obtaining a court order/motion to quash; valid protective order; independently seeking assurances, obtaining HIPAA compliant authorization, etc.

Note: subpoena scope issues, i.e., documents, testimony, etc.



Other HIPAA Issues of Note/Uptick

No private cause of action under HIPAA, but increase in privacy litigation

- Marketing considerations: making sure tracking/cookie settings are right for health care; click wrap, etc. (related note re: password management)
- Personal devices/ensuring security



Other Areas for Review



Employee Handbooks and Policies

Documentation and Review Practices



Questions?



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