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What Employers Should Know About the EEOC Proposed Rulemaking on the Pregnant Workers Fairness Act

The Pregnant Workers Fairness Act (PWFA) went into effect on June 27, 2023. The PWFA protects pregnant employees and job applicants by filling the gaps in protections for pregnant workers under existing federal laws (Title VII, Americans with Disabilities Act (ADA), Family Medical Leave Act). Specifically, the PWFA imposes broader and more widely available reasonable accommodation responsibilities for employers with 15 or more employees. On August 7, 2023, the Equal Employment Opportunity Commission (EEOC) posted its Notice of Proposed Rulemaking (NPRM), to implement the PWFA. On August 11, 2023, the EEOC published the NPRM for public comment in the [Federal Register](#). The purpose of this alert is to present a high-level overview of particularly relevant considerations within the proposed regulations and highlight some potential pitfalls and protections under the PWFA of which employers should be aware.

As noted above, the intention of the PWFA is to fill in gaps existing within federal legislation, while at the same time streamlining the accommodation process and making it less burdensome for workers affected by pregnancy, childbirth, or related medical conditions. In essence, the PWFA aims to make pregnancy accommodations more accessible, while still preserving the spirit of the interactive accommodation process. Indeed, there are many similarities in the PWFA and the ADA interactive process. In addition, the PWFA intentionally borrowed language from Title VII and the ADA, specifically as it relates to the enforcement procedures. For example, the definitions of “employer,” “reasonable accommodation,” and “undue hardship” come directly from Title VII and the ADA, respectively. Fortunately, the similar language will allow employers to more easily adapt their existing policies and processes, but employers should recognize that the accommodation obligation and process under the PWFA will not operate identically to the ADA accommodation process.

While the PWFA provides similar accommodation coverage for pregnant workers as Title VII and the ADA, the PWFA is broader and acknowledges that “even uncomplicated pregnancies may create limitations for workers.” As such, the PWFA requires covered entities to provide reasonable accommodations, absent undue hardship, to a qualified employee or applicant with a “**known limitation**.” The regulations broadly define “limitation” as “a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.” This includes modest, minor, and/or episodic impediments. The “known limitation” definition is a significantly lower standard from the traditional definition of disability and, in turn, affords a much lower threshold for pregnant employees to seek and receive accommodations. Under the “known limitation” definition, an employee or applicant need only “communicate” the limitation to the covered entity for the protections of the PWFA to be triggered.

Importantly, the actual conditions covered under “pregnancy, childbirth, or related medical conditions” were not defined under the PWFA. However, the EEOC defines the terms in line with the definitions under Title VII. Therefore, “pregnancy” and “childbirth” include, but are not limited to, current pregnancy; past pregnancy; potential or intended pregnancy; labor; and childbirth (including vaginal and cesarean delivery). “Related medical conditions” are defined as “medical conditions which relate to, are affected by, or arise out of pregnancy or childbirth, as applied to the specific employee or applicant in question, including, but not limited to, termination of pregnancy, including via miscarriage, stillbirth, or abortion; infertility; fertility treatment; ectopic pregnancy; preterm labor; pelvic prolapse; nerve injuries; cesarean or perineal wound infection; maternal cardiometabolic disease; gestational diabetes; preeclampsia; HELLP (hemolysis, elevated liver enzymes and low platelets) syndrome; hyperemesis gravidarum; anemia; endometriosis; sciatica; lumbar lordosis; carpal tunnel syndrome; chronic migraines;” and even dehydration (there are many more examples found within the proposed rules, which have been omitted here). Clearly, for covered employers, this means that the aforementioned “limitation” stemming from pregnancy, childbirth, or related medical conditions is very broad.

Employers must recognize that accommodations under the PWFA may be “small” or “temporary modifications” that, according to the NPRM, “may not always lend themselves to medical documentation.” Employers are entitled to request documentation, but only insofar as it is “reasonable to require documentation under the circumstances ... to determine whether to grant the accommodation.” Further, the employer may only require documentation that itself is reasonable. Indeed, the NPRM proposes a blanket prohibition on seeking certification in a number of instances: (1) when the limitation and need for a reasonable accommodation is obvious; (2) when the employer already has sufficient information to support a “known limitation” related to pregnancy; (3) when the request is for one of the four “predictive assessment” accommodations; and (4) when the request is for a lactation accommodation. The clear intent is to make the accommodation process less cumbersome for the employee.

The NPRM’s inclusion of a non-exhaustive list of potential reasonable accommodations is further evidence of the PWFA’s broad scope. The following non-exhaustive list in the NPRM contains examples of reasonable accommodations that would address “known limitations” related to “pregnancy, childbirth, or related medical conditions”:

- Frequent breaks
- Sitting/standing
- Schedule changes, part-time work, and paid and unpaid leave
- Telework
- Reserved parking
- Light duty
- Making existing facilities accessible or modifying the work environment
- Job restructuring
- Temporarily suspending one or more essential functions
- Acquiring or modifying equipment, uniforms, or devices
- Adjusting or modifying examinations or policies

There are some additional nuances of which employers should be aware. For example, a “qualified” employee or job applicant under the PWFA includes someone who cannot perform essential job functions temporarily, but could do so in the near future. The NPRM now proposes to define “temporary” as lasting for a limited time, not permanent, and may extend beyond “in the near future.” The rule further defines “in the near future” as “generally forty weeks from the start of the temporary suspension of an essential function.” The practical reality of these definitions is that even if a pregnant worker cannot perform the essential functions of their job due to pregnancy or a related medical condition, but that person is expected to be able to perform the duties in 40 weeks, the person is considered a “qualified” employee.

Although the concepts of reasonable accommodations and interactive process have been around for decades, the PWFA provides an entirely new approach and will almost certainly increase requests for accommodations, providing very little room for an employer to push back. Employers should consult with their attorneys to review and revise policies and procedures to ensure that accommodation requests under the PWFA are afforded the streamlined and speedier consideration process envisioned by the law and the proposed regulations.

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