CLIENT ALERTS & INSIGHTS

EEOC Proposes New Regulations for the Pregnant Workers Fairness Act

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On August 7, 2023, the U.S. Equal Employment Opportunity Commission (EEOC) issued proposed regulations to implement the Pregnant Workers Fairness Act (PWFA). The PWFA requires covered employers to provide reasonable accommodations to a qualified employee or applicant's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an undue hardship. Our prior alert discussing the PWFA can be accessed here.

These proposed regulations are not final and are subject to a comment period. However, employers should be aware of how the EEOC currently plans to interpret and enforce the PWFA. Below are some key takeaways from the proposed regulations that employers should consider:

- Reasonable Accommodation. Under the PWFA, a "reasonable accommodation" is defined the same as under the Americans with Disabilities Act (ADA). The EEOC provides several examples of reasonable accommodations under the PWFA. These include frequent breaks, sitting or standing, schedule changes, part-time work, paid or unpaid leave, remote work, parking, light duty, making facilities accessible or modifying the work environment, job restructuring, temporary suspension of one or more essential functions of the position, modifying equipment, uniforms, or devices, and modifying examinations or policies. This is a non-exhaustive list of potential reasonable accommodations under the PWFA. Where there is more than one reasonable accommodation available, the employer has the ultimate discretion to choose between the accommodations, but primary consideration should be given to the employee or applicant's preference.
- Qualified Employee or Applicant. An employee or applicant is "qualified" under the PWFA if, with or without a reasonable accommodation, they can perform the essential functions of the position. An employee or applicant is also considered "qualified" if the inability to perform an essential function of the position is temporary, the essential function could be performed in the near future, and the inability to perform the essential function can be reasonably accommodated. The proposed regulations define the term "in the near future" as generally 40 weeks from the start of the temporary suspension of an essential function. The 40-week period is based on the duration of a full-term pregnancy.
- Temporary Suspension of Essential Function. Based on EEOC's proposed definition of "in the near future", if an employee or applicant cannot perform an essential function of their position because of pregnancy, childbirth, or related medical conditions-but the employee or applicant could perform the essential function within 40 weeks and the employer can reasonably accommodate the temporary inability to perform the essential function-then the employee or

applicant is still considered "qualified" under the PWFA and is entitled to a temporary suspension of the essential function. In addition, the EEOC proposes that the 40-week period restart after the employee or applicant returns to work after childbirth. Thus, employees or applicants would also be eligible for a temporary suspension of an essential function for up to 40 weeks after returning to work following childbirth, so long as the employer can reasonably accommodate the employee or applicant's temporary inability to perform the essential function.

- Known Limitations. The EEOC interprets the term "known limitations" to mean a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that has been communicated by the employee or applicant, or a representative of the employee or applicant, to the employer. The term should be construed broadly to include physical or mental conditions regardless of the severity.
- Communicating with the Employer. The proposed regulations provide that employees should communicate their limitations to a supervisor, manager, someone who has supervisory authority over the employee, or human resources personnel. Employees may also communicate their limitations to the employer by following the employer's policies for requesting a reasonable accommodation. The EEOC emphasizes the importance of employees being able to obtain reasonable accommodations by communicating with people who assign them daily tasks and who they would ordinarily go to for questions or concerns. There are no specific words or phrases that must be communicated, but the employee must identify their limitation related to pregnancy, childbirth, or related medical conditions and indicate that they need a change or modification at work.
- Pregnancy, Childbirth, or Related Medical Conditions. Pursuant to the proposed regulations, the term "pregnancy, childbirth, or related medical conditions" under the PWFA is defined the same as under Title VII of the Civil Rights Act. The EEOC provides examples of conditions that generally fall within this definition including, but not limited to, current, past, or potential pregnancy, lactation, use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, and abortion.
- Undue Hardship. Under the PWFA, an "undue hardship" is defined the same as under the ADA. Generally, an undue hardship means significant difficulty or expense for the employer's business. The proposed regulations also identify four modifications called "predictable assessments" that will almost always be deemed a reasonable accommodation that does not impose an undue hardship. The four "predictable assessments" are allowing an employee to carry water and drink in the employee's work area, allowing additional restroom breaks, allowing an employee to sit or stand, and allowing breaks to eat and drink as necessary.
- Interactive Process. The EEOC adopts the interpretation of the "interactive process" contained in the ADA regulations. The interactive process is a discussion between the employer and employee to identify a reasonable accommodation. The proposed rule provides that there are no rigid steps that must be followed when engaging in the interactive process. However, an employer cannot force an employee or applicant to accept an accommodation without engaging in the interactive process.
- Supporting Documentation. The proposed regulations provide that an employer may only require supporting documentation if it is reasonable under the circumstances for the employer to decide

whether to grant the accommodation. Requiring supporting documentation is not reasonable if the employee's limitation and need for a reasonable accommodation are obvious, if the employee has already provided sufficient information to substantiate their request, or if the employee seeks one of the "predictable assessments" at any time during their pregnancy.

- Prohibited Practices. The proposed regulation interprets five practices as prohibited under the PWFA. First, employers cannot deny a reasonable accommodation to a qualified employee with a known limitation, absent undue hardship. Second, employers cannot require employees or applicants to accept an accommodation without engaging in the interactive process. Third, employers cannot deny employment opportunities to qualified employees or applicants based on their current or future need for a reasonable accommodation. Fourth, employers cannot require employees to take leave if another reasonable accommodation can be provided, absent undue hardship. Fifth and finally, employers cannot take adverse action in the terms, conditions, or privileges of employment based on an employee or applicant's request or use of a reasonable accommodation. The proposed regulation also emphasizes the PWFA's prohibition against retaliation and coercion.

What Should Employers Do Now?

The proposed regulations will be published in the Federal Register on August 11, 2023. Employers will be able to provide their comments electronically by accessing the Federal Rulemaking Portal where interested parties can find, review, and submit comments for 60 days after the official publication in the Federal Register. The EEOC has requested general comments, as well as comments on specific topics including certain definitions of statutory terms, examples of reasonable accommodations, whether the 40-week period after childbirth should be extended to 52 weeks, and whether the inclusion of "predictable assessments" will help facilitate compliance with the PWFA. Following the public comment period, the EEOC will have until December 29, 2023 to issue final regulations.

In addition to reviewing the proposed regulations to better understand their obligations under the PWFA, employers should work closely with counsel to update any pregnancy accommodation policies and related forms.

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