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New pregnancy accommodation rules coming soon

On August 11, the EEOC proposed regulations to implement the Pregnant Workers Fairness Act, which expanded employment protections to employees and applicants with pregnancy-related limitations. The proposed regulations, which provide a road map for compliance with broad new employer accommodation obligations, are expected to be finalized by year-end.

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Background

Signed into law in December 2022, the Pregnant Workers Fairness Act (PWFA) requires employers with at least 15 employees to offer reasonable workplace accommodations for qualified employees' or applicants' known pregnancy-related limitations. Intended to fill the coverage gap between the Pregnancy Discrimination Act of 1978 and the Americans with Disabilities Act ("ADA"), the new law recognizes that even nondisabling impairments related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions may create limitations for workers.

When the PWFA became effective on June 27, employers had only limited guidance from the Equal Employment Opportunity Commission ("EEOC", "Commision" or "agency") on what the new law would require of them. (See our July 13, 2023 FYI.) On August 11, the EEOC released proposed regulations interpreting employer obligations under the PWFA.

EEOC's proposed regulations

The PWFA mirrors the ADA in many ways and the proposed PWFA regulations incorporate many of the ADA's reasonable accommodation concepts — but there are significant differences. Because the proposed regulations take a far more expansive view of who may qualify for workplace accommodations, employers will need to analyze requests for accommodations under the PWFA differently than disability-based requests under the ADA.

Pregnancy-related conditions

Unlike the ADA, the physical or mental condition leading the worker to seek an accommodation under the PWFA need not rise to the level of a disability. Rather, limitations stemming from modest, minor or episodic conditions or a worker’s need for pregnancy-related health care may trigger an employer’s reasonable accommodation obligation.

The proposed regulations allow workers with normal pregnancies as well as those with pre-existing conditions that are exacerbated by pregnancy or childbirth (e.g., high blood pressure) to seek workplace accommodations. Even as the regulations expand coverage for pre- and postpartum conditions, they do not require an employee or applicant to be or have been pregnant to qualify for an accommodation under the PWFA. Other medical conditions that may qualify include lactation (including breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, and having or choosing not to have an abortion.

“Qualified” employees and applicants

Like the ADA, the PWFA defines a “qualified employee” as an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of a job. Unlike the ADA, an individual may still be “qualified” under the PWFA if they are temporarily unable to perform one or more essential functions due to pregnancy, childbirth, or a related condition — as long as they are able to perform the essential function “in the near future” (i.e., within 40 weeks). Recognizing that post-pregnancy complications are common, the EEOC proposes to restart a 40-week period when a worker returning from leave after childbirth needs an essential function temporarily suspended.

Reasonable accommodation and documentation requests

Like the ADA, the PWFA requires employers that receive pregnancy-related accommodation requests to engage in the interactive process and to offer workers a reasonable accommodation, unless it would pose an undue hardship on the operation of the business. Recognizing that many accommodations sought under the PWFA will be short-lived and require only modest changes in the workplace, the regulations provide examples of possible reasonable accommodations including: frequent breaks; sitting/standing; schedule changes; part-time work; paid and unpaid leave; telework; reserved parking; light duty; making existing facilities accessible or modifying work environment; job restructuring; temporarily suspending one or more essential functions; acquiring or modifying equipment, uniforms or devices; and adjusting or modifying examinations or policies.

Requesting an accommodation

The proposed regulations lay out a two-step process to request an accommodation under the PWFA. First, the employee or applicant (or their representative) must communicate their limiting physical or mental condition and its pregnancy-related nature to the employer. Second, they must indicate verbally or in writing the need for an adjustment or change at work.

Predictable assessments. Even though the PWFA requires an individualized assessment, the EEOC proposes that four accommodations be deemed “presumptively” reasonable in virtually all

cases. The four “predictable assessments” include allowing an employee to: (1) carry water and drink, as needed, in the employee’s work area; (2) take additional restroom breaks; (3) sit if their work requires standing and vice versa; and (4) take breaks, as needed, to eat and drink. Despite the presumption, an employer may still demonstrate that a proposed accommodation — even a predictable assessment accommodation — imposes an undue hardship for its business.

Documentation

The proposed regulations recognize that employers may require “reasonable documentation” to confirm the physical or mental condition as well as its pregnancy-related nature along with the change or adjustment needed. However, they generally prohibit employers from seeking certification when: (1) the limitation and need for a reasonable accommodation is obvious; (2) the employer already has sufficient information; (3) the request is for one of the four “predictable assessment” accommodations; or (4) the request is for a lactation accommodation. Where additional information may be needed, the Commission proposes that employers grant interim accommodations while waiting for supporting documentation.

In closing

In anticipation that the final regulations will likely look very much like those that have been proposed, employers should revisit, review and, as needed, revise their current accommodation policies and processes to ensure compliance with the PWFA as well as state and local laws.

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