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EEOC issues final regulations on the Pregnant Workers Fairness Act

Last summer, the EEOC proposed regulations to implement the Pregnant Workers Fairness Act, which expanded employment protections to employees and applicants with known pregnancy-related limitations. Today, the EEOC issued the final rule and accompanying interpretive guidance to help employers understand their reasonable accommodation obligations under the law.

Background

The Pregnant Workers Fairness Act (PWFA) requires most employers with at least 15 employees to make reasonable accommodations to a qualified employee's or applicant's known pregnancy-related limitations unless the accommodation would cause the employer undue hardship. Intended to fill the coverage gap between the Pregnancy Discrimination Act of 1978 and the Americans with Disabilities Act ("ADA"), the PWFA recognized 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 went into effect in June 2023, employers had only limited guidance from the Equal Employment Opportunity Commission ("EEOC", "Commission" or "agency") on their new compliance obligations. (See our July 13, 2023 *FYI*.) Several months later, the EEOC released proposed regulations interpreting those obligations. (See our October 6, 2023 *FYI*.)

EEOC's final rule

On April 19, the EEOC published the final version of the regulations with accompanying interpretive guidance that explains and illustrates how the final rule will apply. The final rule will take effect on June 18. According to the EEOC, the final rule "provides clarity to employers and workers about who is covered, the types of limitations and medical conditions covered, how individuals can

request reasonable accommodations, and numerous concrete examples." Key provisions are summarized below.

Coverage

The Commission clarified who is an "employee" and who is an "employer" for purposes of the final rule and interpretive guidance. The term "employee" includes applicants and former employees where relevant. The term "covered entity" and "employer" are interchangeable, and include public and private employers with 15 or more employees, unions, employment agencies, and the federal government.[1]

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 even if they cannot perform one or more of the essential job functions as long as they are or are expected to be able to perform the essential function(s) "in the near future" (generally within 40 weeks for pregnant employees) and their inability to perform the essential function(s) can be reasonably accommodated. The final rule clarifies that a request to indefinitely suspend an essential function is not "in the near future" and would not entitle an employee to an accommodation.

Pregnancy-related conditions broadly defined

The final rule maintains the EEOC's expansive interpretation of what the law covers. It provides a broad definition of "pregnancy, childbirth, or related medical conditions" for which employees may seek reasonable accommodation along with a non-exhaustive list of examples that include, among other things: current, past, and potential pregnancy; infertility and fertility treatment; the use of contraception; termination of pregnancy (including via miscarriage, stillbirth, or abortion); preeclampsia; postpartum depression; lactation and associated issues; and menstruation.

A physical or mental condition "related to, affected by, or arising out of" pregnancy, childbirth, or related medical conditions can be a PWFA limitation regardless of whether it meets the definition of "disability" under the ADA. Under the final rule, pregnancy, childbirth, or related medical conditions need not be the sole, original, or a substantial cause of the condition to qualify for accommodation. Even limitations stemming from modest, minor, or episodic conditions (e.g., morning sickness) or a worker's need for pregnancy-related health care must be accommodated. However, the underlying physical or mental condition must be a pregnancy-related condition of the employee (or applicant) themselves. The PWFA does not recognize a right to a reasonable accommodation based on an individual's association with someone who may have a PWFA covered limitation, or cover time for bonding or childcare.

[1] The final rule confirms that employees covered by the Congressional Accountability Act of 1995 (i.e., employees of the House, Senate, Capitol Guide Service, Capitol Police, Congressional Budget Office, Office of the Architect of the Capitol, Office of the Attending Physician, Office of Compliance, or the Office of Technology Assessment) are not covered by the final rule because the Commission does not have authority to regulate those employees.

Addressing the interplay between the PWFA and the Providing Urgent Maternal Protections for Nursing Mothers ("PUMP") Act, the final rule clarifies that accommodations required under the PWFA may exceed what the PUMP Act requires. (See our July 13, 2023 *FYI*.) For example, the EEOC said that reasonable accommodations may include refrigeration for storing milk as well as providing breaks that the PUMP Act would not afford. The final rule also adds nursing during working hours to the list of potentially reasonable accommodations under the PWFA.

Like the proposed regulations, the final rule interprets pregnancy, childbirth, or related medical conditions to include the decision to have or not to have an abortion, While the final rule requires employers to consider accommodations such as time off for abortion-related medical appointments or for recovery, the EEOC noted that "nothing in the PWFA requires, or forbids, an employer to pay for health insurance benefits for an abortion."

Reasonable accommodation and documentation requests

Like the ADA, the PWFA requires employers that receive pregnancy-related accommodation requests to engage in an interactive process and 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 final rule provides numerous examples of possible reasonable accommodations such as additional water, food or restroom breaks; a stool to sit on while working; time off for health care appointments; temporary reassignment; temporary suspension of certain job duties; light duty; telework; remote work; change in worksites; or time off to recover from childbirth or a miscarriage, among other things.

> **Buck comment.** Because the final rule takes a more expansive view of who may qualify for workplace accommodations than the ADA, employers will need to analyze requests for accommodations under the PWFA differently than disability-based requests under the ADA.

Requesting an accommodation

The final rule, like the proposed rule, lays out a two-step process to request a reasonable accommodation. First, the employee (or their representative) must communicate the limiting physical or mental condition and its pregnancy-related nature to the employer. Second, they must indicate the need for an adjustment or change at work. The final rule, like the proposed rule, borrows the "interactive process" from the ADA to help the employer and employee identify the limitation and potential reasonable accommodations. The EEOC encourages early and frequent communication between employers and workers to timely raise and resolve accommodation requests.

Predictable assessments

In addition to providing a lengthy list of potential accommodations employers may need to consider, the final rule maintains the proposed regulations' list of workplace accommodations that are presumptively reasonable in virtually all cases when requested by a pregnant employee. They include allowing an employee to carry or keep water in the employee's work area, take breaks as

needed to eat and drink, take additional restroom breaks, and work while sitting instead of standing or vice versa.

Documentation
The final rule permits employers to seek documentation supporting an accommodation request but only if it is reasonable under the circumstances to (1) confirm the employee's physical or mental condition, (2) confirm its pregnancy-related nature, and (3) describe the change or adjustment needed. As the final rule explains, it would not be reasonable to seek supporting documentation when the known limitation and need for reasonable accommodation is obvious, request is for one of the predictable assessments, requested accommodation is available under the employer's existing policies (e.g., telecommuting), or the request relates to lactation following childbirth.

Given the temporary nature of pregnancy-related conditions, the EEOC encourages employers to consider granting interim accommodations when additional information may be needed or there is a delay in providing the reasonable accommodation. The final rule notes that, while not required, providing an interim reasonable accommodation is a best practice under the PWFA and may help limit an employer's exposure to liability.

Undue hardship
The final rule explains when an accommodation would impose an undue hardship — significant difficulty or expense — on an employer and the operation of its business. It outlines the same factors to be considered in the undue hardship analysis as under the ADA.

The final rule also identifies additional factors that may be considered when determining if the temporary suspension of an essential function(s) causes an undue hardship under the PWFA, including, among other things: the length of time the employee will be unable to perform the essential function(s); whether there is other work for the employee; the nature of the essential function; whether the employer has provided the same or similar accommodations in the past; whether there are others who can perform the essential function(s); and whether the essential function(s) can be postponed or remain unperformed for any length of time.

Employer defenses and exemptions
The final rule provides information on how employers may assert defenses or exemptions, including those based on religion.

Impact on other laws
The final rule confirms that the PWFA does not supersede federal, state, or local laws that are more protective of workers affected by pregnancy, childbirth, or related medical conditions.

In closing

While the final rule will not become effective until June 18, the EEOC has been accepting charges alleging noncompliance with the PWFA since last summer. In light of that, employers should revisit, review, and update their current accommodation policies and processes as soon as possible to ensure compliance.

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