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EEOC Issues Proposed Rule for the Pregnant Workers Fairness Act

Law and the Workplace on **August 31, 2023**

On August 11, 2023, the EEOC issued a proposed rule regarding the Pregnant Workers Fairness Act ("PWFA"). The PWFA, which took effect on June 27, 2023 requires covered employers to provide reasonable accommodations to qualified employees or candidates with a known limitation related to pregnancy, childbirth or related medical conditions absent undue hardship.

Below are key provisions of the proposed rule.

Expanded Definition of a "Qualified" Individual

The proposed rule clarifies that (unlike under the Americans with Disabilities Act (ADA)) an individual may be "qualified" under the PWFA even if they cannot perform one or more essential functions of the job, as long as:

- The inability to perform the essential function 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 rule defines "in the near future" to mean "generally forty weeks from the start of the temporary suspension of an essential function." Further, it clarifies that in some cases accommodating the essential function "may mean that one or more of the essential functions are temporarily suspended, with or without reassignment to someone else."

Examples of Related Medical Conditions

The proposed rule broadly defines “pregnancy, childbirth, or related medical conditions” to include (but is not limited to) “pregnancy, past pregnancy, potential pregnancy, lactation (including breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, or having or choosing not to have an abortion.” Additionally, related medical conditions may include conditions that occurred prior to pregnancy but “that may be or have been exacerbated by pregnancy or childbirth, such that additional or different accommodations are needed.”

Examples of Possible Accommodations

Although employers are not required to provide accommodations that impose an undue hardship, the proposed rule provides the following four accommodations that the EEOC believes should be granted in “virtually all cases”:

- Allowing an employee to carry water and drink, as needed in the employee’s work area;
- Allowing an employee additional restroom breaks;
- Allowing an employee whose work requires standing to sit and whose work requires sitting to stand; and
- Allowing an employee breaks, as needed, to eat and drink.

The proposed rule includes other examples of accommodations for employers to consider, such as: job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment, uniforms, or devices, including devices that assist with lifting or carrying; permitting use of paid leave or providing additional unpaid leave; teleworking; and temporarily suspending one or more essential functions of the position.

Violations of the PWFA

The proposed rule also provides further context regarding acts prohibited under the PWFA, as follows:

- **Failing to Provide a Reasonable Accommodation:** An employer will violate the PWFA when it fails to provide an accommodation to a qualified individual with a known limitation absent undue hardship. However, like under the ADA, there must have been a reasonable accommodation the employer could have provided to the

employee (absent hardship) to violate the law.

- **Unnecessary Delay in Responding to a Request for a Reasonable Accommodation:** Like under the ADA, unnecessary delay in providing an accommodation may violate the PFWA. In particular, a delay in responding to a request for one of the four accommodations listed above is presumed to be unnecessary "because of the presumption that these modifications will be reasonable accommodations that do not impose an indue hardship." Whether the employer granted an interim accommodation while the request is pending is another factor that will be considered in evaluating unnecessary delay.
- **Determining an Employee or Applicant is Unqualified Because They Declined a Reasonable Accommodation:** Because the PWFA allows essential duties to be temporarily suspended, an employer must consider whether it is possible to suspend the duty that needs accommodation absent undue hardship prior to determining an employee or is not qualified.

Comments on the proposed rule are due on October 10, 2023. We will continue to report on further developments with regard to the PWFA.

View original.

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