Special Report

A Deep Dive Into the EEOC's Proposed Pregnant Workers Fairness Act Regulations

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The U.S. Equal Employment Opportunity Commission (EEOC) formally published its proposed regulations to implement the Pregnant Workers Fairness Act(PWFA) in the Federal Register on Aug. 11, 2023. Although the PWFA borrows from existing laws, including Title VII of the Civil Rights Act and the Americans with Disabilities Act (ADA), the PWFA imposes unique obligations on covered employers and the EEOC's proposed regulations throw many familiar concepts out the window. The result is that employers will often bear the burden of establishing undue hardship, even in cases where an employee is unable to perform their essential job functions for 40+ weeks.

The proposed regulations are subject to a 60-day comment period and changes are typically made in the final version of the regulations based on comments submitted by interested stakeholders. The PWFA requires the EEOC to issue final regulations by December 29, 2023.

The PWFA went into effect on June 27, 2023, and requires that employers with at least 15 employees provide reasonable accommodations, absent undue hardship, to qualified employees and applicants with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.

The EEOC's proposed regulations provide the agency's view of how the PWFA should be interpreted. Below is a non-exhaustive summary of some of the new or clarifying information found in the EEOC's 275+ pages of proposed regulations, as well as the preamble and interpretative guidance.

1. Who is entitled to an accommodation?

Qualified employees who are limited due to pregnancy, childbirth, and related medical conditions, as long as the accommodation does not create an undue hardship. Unlike the ADA, an employee who cannot perform their essential duties may still be qualified.

If an employee has a "known limitation" due to pregnancy, childbirth, or related medical condition, then the employee may request a reasonable accommodation. (The PWFA covers both employees and applicants. Here, we use the term employee to refer to both employee and applicant.) As long as the employee is "qualified," the employer must grant the requested accommodation or an equally effective accommodation, unless doing so imposes an undue hardship.

2. What is a "known limitation"?

A mental or physical impediment or problem related to pregnancy, childbirth or related medical conditions, including common or minor conditions that has been communicated to the employer.

While many of the concepts in the PWFA model the ADA, "known limitation" is a unique

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statutory term that employers will grapple with.

Unlike the ADA, an employee does not have to show that a limitation meets a specific level of severity to be covered under the PWFA. Rather, the PWFA is intended to cover even uncomplicated and healthy pregnancies. The proposed rule says that a "limitation" means a modest, minor, or episodic impediment or problem. In addition to "impediments or problems," the proposed definition of "limitation" includes "needs or problems related to maintaining the employee's health or the health or their pregnancy," as well as when the employee is seeking healthcare for a covered condition. According to the EEOC, an employee can also request accommodation to reduce increased pain or increased risk to the employee's health that is related to pregnancy, childbirth, or a related medical condition.

Employers are only responsible for accommodating "*known* limitations." A known limitation must be communicated to the employer by the employee or the employee's representative, which is interpreted broadly. The employee is not required to use specific language and requesting an accommodation should not be a difficult task given that most requests will be straightforward, according to the EEOC. A request for accommodation requires only the employee (or their representative) to communicate that they have a limitation that is related to pregnancy, childbirth, or related medical conditions and they need an adjustment or change at work. The employer then has the obligation to respond. As explained further below, some types of accommodations are so common that the request can be granted immediately, others may require a more detailed interactive process.

3. What types of conditions and circumstances are included under the umbrella of "pregnancy, childbirth and related medical conditions"?

Conditions that are commonly associated with pregnancy and childbirth, as well as many others that may not be.

The terms pregnancy, childbirth, and related medical conditions are not defined in the PWFA. In the proposed rules, the EEOC explains that these terms have the same meaning in the PWFA as under Title VII. The EEOC construes these terms broadly and offers non-exhaustive examples of conditions that may be covered by the PWFA.

"Pregnancy" and "childbirth" include current pregnancy, past pregnancy, potential or intended pregnancy, labor, and childbirth (including vaginal and cesarean delivery).

"Related medical conditions" are conditions that "related to, are affected by, or arise out of pregnancy or childbirth." Examples in the proposed regulations include termination of pregnancy, including by miscarriage, stillbirth, or abortion; infertility; fertility treatment; lactation and conditions related to lactation; use of birth control; menstrual cycles; postpartum depression, anxiety or psychosis; vaginal bleeding; preeclampsia; pelvic prolapse; preterm labor; ectopic pregnancy; gestational diabetes; cesarean or perineal wound infection; maternal cardiometabolic disease; endometriosis; changes in hormone levels; and many other conditions.

The proposed regulations also reference conditions that are not unique to pregnancy or childbirth, such as chronic migraine headaches, nausea or vomiting, high blood pressure; incontinence, carpal tunnel syndrome, and many other medical conditions. These

conditions are only covered under the PWFA if the condition relates to pregnancy or childbirth (although the ADA or other civil rights statutes may apply) or are exacerbated by pregnancy or childbirth.

4. The PWFA says that an employee can be "qualified" and therefore eligible for accommodations when the employee has a temporary inability to perform the essential job functions. How long does an employer have to excuse an employee from performing essential functions for an employee to remain "qualified"?

The proposed regulations require employers excuse essential job functions for generally up to 40 weeks for each accommodation request, unless it would impose an undue hardship on the employer.

The PWFA requires employers to reasonably accommodate "qualified employees." This is a term we are familiar with from the ADA, but the PWFA includes a significant twist. The proposed regulations explain that the PWFA has two definitions of "qualified." The first definition tracks the ADA: "an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position" is qualified. Under the second definition, however, even if an employee cannot perform one or more essential functions of their job, they are still qualified if: (1) the inability to perform an essential job function is for a *temporary* period; (2) the essential job function(s) could be performed in the *near future;* and (3) the inability to perform the essential function(s) can be *reasonably accommodated.*

The EEOC's proposed rules define "temporary" as "lasting for a limited time, not permanent, and may extend beyond 'in the near future.'" "In the near future" is generally defined as 40 weeks from the start of the temporary suspension of an essential function. According to the EEOC, "in the near future" could be applied during pregnancy and then "in the near future" could restart during the post-partum period once the pregnancy is over and the employee has returned to work. The childbirth recovery leave period is not included in the definition of "in the near future" for the post-partum period. The EEOC discusses a number of ways that the employee's inability to perform an essential function(s) could be reasonably accommodated, including by temporarily suspending the essential function(s) the employee is unable to perform, temporarily transferring the employee, or allowing the employee to participate in a light duty program. If no other reasonable accommodation is available, then a leave of absence may be offered.

The EEOC seeks comment on the proposed definition of "in the near future" including: (1) whether the definition of "in the near future" post-pregnancy should be one year rather than generally 40 weeks; (2) whether periods of temporary suspension of an essential function during pregnancy and post-pregnancy should be combined, and, if so, how should that be done and what rule should be adopted to ensure a pregnant worker is not required to predict what limitations they will experience after pregnancy, given that a pregnant worker will not generally be able to do so; and (3) whether there are alternative approaches that would more effectively ensure that workers are able to seek the accommodations they need while limiting the burden on employers.

As with any other accommodation, employers are not required under the PWFA to remove essential job functions or otherwise accommodate an employee who is unable to perform essential job functions if the employer can show that doing so would impose an undue hardship on the operations of the employer.

5. If the employee can perform the essential functions of the job but will need an accommodation to do so, does the limitation have to be temporary?

No.

According to the EEOC, based on the overall structure and wording of the statute, the issue of whether a limitation is temporary is only relevant when an employee or applicant cannot perform one or more essential functions of the job. In other words, if an employee can perform the essential functions with a reasonable accommodation, the employer may be required to provide the accommodation on a long-term basis (like the ADA), subject to undue hardship.

6. When does accommodating an employee who cannot perform the essential functions of the job create an undue hardship?

An employer may be able to demonstrate an undue hardship when removing an essential function would impose significant difficulty or expense. The proposed regulations identify factors for employers to consider.

Undue hardship has the same meaning as under the ADA and generally means significant difficulty or expense for the operation of the employer. However, when an employer is considering whether suspension of an essential function will create an undue hardship, employers should consider: (1) the length of time that the employee or applicant will be unable to perform the essential function(s); (2) whether there is work for the employee to accomplish by allowing the employee to perform all the other functions of the job, transferring the employee to a different position, or otherwise; (3) the nature of the essential function, including its frequency; (4) whether the covered entity has temporarily suspended the performance of essential job functions for other employees in similar positions; (5) whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function(s); and (6) whether the essential function(s) can be postponed or remain unperformed for any length of time and, if so, for how long.

7. Do the proposed regulations provide a list of common accommodations for pregnant employees that employers should usually grant quickly and without supporting documentation?

Yes.

There are four specific accommodations that the EEOC believes, "in virtually all cases," will be reasonable accommodations that do not impose undue hardship when requested by a pregnant employee. The EEOC refers to these as "predictable assessments." The four accommodations are: (1) allowing an employee to carry water and drink, as needed, in the employee's work area; (2) allowing an employee additional restroom breaks; (3) allowing an employee whose work requires standing to sit and whose work requires sitting to stand; and (4) allowing an employee breaks, as needed, to eat and drink. The EEOC takes the position that the individualized assessment in these situations should be "simple and straightforward" and that requesting documentation, beyond a self-attestation, would *not* be reasonable. The EEOC recognizes, however, that some workplaces may be unique and that, in unique circumstances, an employer may be able to demonstrate that these common accommodations impose an undue hardship.

8. If an employee requests leave as an accommodation, how much leave must an employer provide?

There is no bright line rule.

The EEOC takes the position that leave, including intermittent and reduced schedule leave, may be a reasonable accommodation even if the employer does not offer it as an employee benefit. If an employee requests leave as an accommodation or if there is no other reasonable accommodation that does not cause an undue hardship, the proposed regulations state that the employer must consider providing leave as a reasonable accommodation, even if the employee is not eligible or has exhausted leave under the employer's policies (including leave exhausted under the Family and Medical Leave Act or similar state or local laws). The EEOC takes the position that a leave of absence to recover from pregnancy, childbirth, or related medical conditions does not count as time when an essential function is suspended, and therefore it does not matter if the need for leave is temporary or whether the employee can return in the near future, *i.e.,* generally 40 weeks.

Like all other accommodations, an employer is not required to provide leave if doing so would impose an undue hardship. The EEOC's position, however, is that an employer who claims a requested leave of absence would cause an undue hardship must provide leave up to the point that it would cause an undue hardship. This may mean providing a shorter period of leave than requested and reassessing whether reasonable accommodations are available at the end of the leave.

9. If an employee has paid leave available under a state or local paid sick leave law or under an employer-provided paid leave policy or benefit program, can the employee be required to use that paid leave to run concurrently with time off as a reasonable accommodation under the PWFA?

No, employees must be given the opportunity to choose in the same manner employees on other types of leave are permitted to choose.

The EEOC explains that workers protected by the PWFA must be permitted to choose whether to use paid leave (whether accrued, as part of a short-term disability program, or as part of any other employee benefit) or unpaid leave to the same extent that the employer allows employees using leave for reasons unrelated to pregnancy, childbirth, or related medical conditions to choose between these various types of leave. However, as under the ADA, an employer is not required to provide additional *paid* leave under the PWFA beyond the amount to which the employee is otherwise entitled.

10. Can an employer choose to provide an alternative, effective accommodation?

In most cases, yes.

The proposed regulations explain that if there is more than one effective accommodation, the employee's preference should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between potential reasonable accommodations and may choose, for example, the less expensive accommodation or the accommodation that is easier for it to provide, or generally the accommodation that imposes the least hardship. Where the employer is choosing between reasonable accommodations and does not provide the worker's

preferred accommodation, the employer does not have to show that it is an undue hardship to provide the employee's preferred accommodation.

11. Can employers ask for medical documentation to support an accommodation request?

Sometimes.

The EEOC anticipates that employers can navigate many accommodation requests without the need for medical or other supporting documentation. The proposed regulations explain that employers may only request supporting documentation if it is reasonable under the circumstances for the employer to determine whether to grant the accommodation and any documentation requested must itself be reasonable. The proposed regulations include several examples of when it would *not* be reasonable to request documentation: (1) when both the limitation and the need for reasonable accommodation are obvious; (2) when the employee or applicant has already provided sufficient information, *i.e.,* the employee has already provided a medical note imposing lifting restrictions for a specific time period; (3) when an employee states or confirms they are pregnant and requests one of the four common accommodations discussed above (carrying water and drinking as needed, taking additional restroom breaks, sitting or standing, and breaks, as needed, to eat and drink); and (4) when the limitation is lactation or pumping.

To the extent supporting documentation is permitted, under the proposed regulations, the employer may seek documentation that describes or confirms: (1) the physical or mental condition; (2) the condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and (3) a change or adjustment at work is needed for that reason. If the pregnancy is obvious, and the worker states or confirms that they are pregnant, but the limitation related to the pregnancy or parameters of a potential accommodation are not, the EEOC's position is that the employer may only request documentation relevant to the accommodation. According to the EEOC, information related to PWFA accommodation requests should be treated as confidential, consistent with the provisions of the ADA.

The EEOC recognizes in its guidance, that some physical or mental conditions or limitations may occur even if a person is not pregnant (*e.g.,* depression, hypertension, constraints on lifting). To the extent that an employer has reasonable concerns about whether a physical or mental condition or limitation is "related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions," the employer may request information from the employee regarding the connection, using the interactive process and the guidance in the proposed rule regarding requests for documentation. Employers should remember some conditions may qualify as disabilities under the ADA.

12. How long should it take to process a PWFA reasonable accommodation request?

It depends.

The EEOC advises employers that an "unnecessary delay" may result in a violation of the PWFA. The EEOC anticipates that requests for one of the four common accommodations (carrying water and drinking as needed, taking additional restroom breaks, sitting or standing, and breaks, as needed, to eat and drink) will be processed quickly without medical documentation or an elaborate interactive process. However, more complicated

requests may take longer. In all cases, employers should not unnecessarily delay processing an accommodation request. The EEOC encourages employers to provide interim accommodations if processing the request will take some time so the employee can continue working.

13. Are employers required to provide lactation accommodations under the PWFA?

Yes, absent undue hardship.

Lactation, including breastfeeding, pumping, and medical conditions related to lactation are among the conditions that the EEOC says will generally be covered by the PWFA. Many employers are already required to provide reasonable breaks and a private space for pumping under the PUMP Act. For all employers, whether they are covered by the PUMP Act or not, the EEOC views the PUMP Act requirements as potential reasonable accommodations under the PWFA. The EEOC also proposes additional reasonable accommodations related to lactation for employers covered by the PWFA (*i.e.,* extending the period of time during which the employee will be provided breaks and access to a private space beyond what is required under the PUMP Act, and providing a lactation area that is reasonably close to the employee's work area, has electricity and appropriate seating, and is reasonably close to a sink and a refrigerator for storing milk, among other things).

14. How should employers manage concerns that the workplace or the position presents safety risks for the pregnant employee or the pregnancy?

Safety can still be part of the undue hardship analysis.

There is no "direct threat" defense under the PWFA. The Act says it is an unlawful employment practice for an employer to require a qualified employee "to accept an accommodation other than any reasonable accommodation arrived at through the interactive process." The EEOC explains this means employers cannot unilaterally require an employee to accept an accommodation or curtail an employee's duties based on its assumptions the employee needs help. However, employers may still consider the safety of coworkers or customers when analyzing whether a requested accommodation presents an undue hardship.

If an employer claims that pregnant workers create a safety risk (as opposed to a safety risk related to the pregnancy-related limitation), it will be addressed under Title VII's bona fide occupational qualification standard.

15. Other than the four common accommodations for pregnant employees discussed above, does the EEOC give employers guidance on what kind of accommodations might be considered reasonable, absent undue hardship?

The EEOC has provided a non-exhaustive list of what it considers potential accommodations.

Whether a particular request has to be provided turns on the individual circumstances of each situation, including whether the request would impose an undue hardship. The list includes job restructuring; part-time or modified work schedules; more frequent breaks; acquisition or modification of equipment, uniforms, or devices; allowing seating for jobs that require standing or standing in jobs that require sitting; appropriate adjustment or

modification of examinations or policies; permitting the use of paid leave (whether accrued, short-term disability, or another type of employer benefit), or providing unpaid leave, including to attend healthcare-related appointments and to recover from childbirth; assignment to light duty; telework; and accommodating a worker's inability to perform one or more essential functions of a job by temporarily suspending the requirement that the employee perform that function, if the inability to perform the essential function is temporary and the worker could perform the essential function in the near future.

16. If the employee is granted an accommodation that reduces the employee's work time, does the employer have to do anything else to make the accommodation effective?

Perhaps.

According to the EEOC, an employer may have to prorate or change a performance or production standard so that the accommodation is effective. That means the employer will have to consider their ordinary workplace policies or practices, so they do not operate to penalize employees for utilizing such accommodations. For example, when a reasonable accommodation involves a pause in work — such as a break, a part-time or other reduced work schedule, or leave — an employee cannot be penalized for failing to perform work during such a non-work period. Similarly, policies that monitor workers for time on task (whether through automated means or otherwise) and penalize them for being off task may need to be modified to avoid imposing penalties for non-work periods that the employee was granted as a reasonable accommodation. If the reasonable accommodation is leave, and if there is a production standard, the production standard may need to be prorated to account for the reduced amount of time the employee worked. The employee's pay for the time off work could be reduced too. Alternatively, the accommodation could allow the employee to voluntarily make up the time at a different time during the day, so that the employee's production standards and pay would not be reduced.

Six Steps to Consider Taking Now

Employers may want to consider taking these steps now:

1. Review the proposed regulations and the examples included in the proposed regulations, so you can better understand how the EEOC is currently interpreting the new law.

2. When handling accommodation requests, keep in mind that if another federal, state, or local law provides greater protection or different requirements, those laws will also apply. Currently, there are 30 states and five local jurisdictions with their own version of the PWFA or a pregnancy accommodation law.

3. Covered employers are required to post notices describing the PWFA. An updated EEO poster is available on the EEOC website.

4. Consider whether changes need to be made to existing forms and practices to comply with the PWFA while recognizing that these regulations are subject to change in light of the proposed regulations.

5. Consider training your HR professionals, managers, and first-line supervisors on how to identify and respond to requests for PWFA accommodations.

6. Consider whether you want to submit comments on the EEOC's proposed regulations during the 60-day comment period.

The most important thing to do at this stage is to keep in mind that these proposed regulations are just that — proposed. They represent the EEOC's current interpretation of the PWFA before the agency has had an opportunity to consider comments and questions from the public. The proposed regulations will undoubtedly be revised after the comment period expires and a final set of regulations issued.

Want to Learn More?

Please register to join us on September 14, for an in-depth discussion about these proposed regulations: EEOC's Proposed PWFA Regulations: Oh Mama! - Jackson Lewis

If you have any questions about the PWFA, the implications of the proposed regulations for your organization, or are interested in working with Jackson Lewis to provide comments to the EEOC, please contact a Jackson Lewis lawyer. As always, if you want to stay on top of changes and updates regarding the PWFA, subscribe to our Disability, Leave and Health Management Blog.