EEOC Proposes Regulations for New Pregnant Worker Accommodation Law: 7 Key Takeaways for Employers

Insights
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Employers may soon have more clarity on providing pregnancy-related reasonable accommodations now that the Equal Employment Opportunity Commission (EEOC) released proposed regulations this week – but questions may still remain about how broadly the protections will be applied. Once finalized, the rule will help employers comply with the Pregnant Workers Fairness Act (PWFA), a new law that requires employers to broadly consider pregnancy-related accommodation requests from job applicants and employees. The proposed rule provides more detail about how the EEOC will interpret and enforce the new law – but you still have time to provide meaningful feedback about how it may impact your workplace. Here are the seven key takeaways you need to know about the proposal, including why you should consider submitting a comment before the regulations are finalized.

1. Broad Coverage May Prompt Significant Changes

The PWFA strengthens pregnancy-related workplace protections by essentially requiring employers with at least 15 employees to consider employee and applicant accommodation requests related to pregnancy, childbirth, or related medical conditions the same way you consider requests for accommodation related to disabilities under the Americans with Disabilities Act (ADA). Just as with the ADA, employers can deny accommodation requests if they would impose an undue hardship on their business operations. You can read our detailed FAQs about the PWFA here.

Notably, the PWFA may require you to change your workplace accommodation and leave practices in a significant way. Indeed, the EEOC's proposed rule implementing the new law – which was announced on August 7 and will be published in the Federal Register on August 11 – includes a broad definition of "pregnancy, childbirth or related medical conditions." The definition includes:

- current, past, and potential pregnancy;
- lactation;
- use of birth control;
- menstruation;
- miscarriages; and

Additionally, workers with healthy and normal pregnancies are permitted to seek accommodations under the PWFA, and there's no threshold for the severity of the physical or mental conditions for accommodation requests.

***Key takeaway:** As the regulations are finalized, you'll want to keep track of new developments and explanations about what is and isn't covered under the new law. Be sure to review your employee handbook, accommodation policies, training programs, and other material to ensure they align with any new requirements in the PWFA and final EEOC regulations.*

2. Some Definitions are Unique to Pregnancy-Related Accommodations

You're likely familiar with the accommodation rules and regulations under the ADA. While the EEOC's proposed regulations for the PWFA generally align with that law, there are some aspects that are unique. The PWFA requires employers to "provide reasonable accommodations, absent undue hardship, to a qualified employee or applicant with a known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions."

Notably, there are two definitions of "qualified." The first aligns with the ADA's definition and the second recognizes that an employee can still be qualified if their inability to perform the essential functions is just temporary and the essential functions can be performed "in the near future."

The proposal includes the following noteworthy definitions:

- **"Temporary"** means **"**lasting for a limited time, not permanent, and may extend beyond "in the near future."
- **"In the near future"** generally – but not automatically – means 40 weeks. The proposal says that the "actual length of the temporary suspension of the essential function(s) will depend upon what the employee requires, and the employer always has available the defense that it would create an undue hardship."

The proposal discusses the meaning of the PWFA's requirement that the inability to perform the essential functions can be reasonably accommodated. "For some positions, this may mean that one or more essential functions are temporarily suspended, with or without reassignment to someone else, and the employee continues to perform the remaining functions of the job," according to the proposal.

Additionally, a **"known limitation"** is defined in the PWFA as "a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or the employee's representative has communicated to the covered entity *whether or not such condition meets the definition of disability [under the ADA].*"

***Key takeaway:** Review any written policies related to accommodations and incorporate any new*

definitions, considerations, and obligations as necessary. You may also want to expand your mandatory HR trainings to include a discussion of the new laws (and the regulations when they are finalized) so that your managers – and employees – understand their rights and obligations.

3. You May Ask for Documentation in Certain Circumstances

The EEOC expects the process to be fairly clear-cut for determining whether a limitation or physical or mental condition is pregnancy-related and that most issues can be resolved during the interactive process without the need for documentation or verification. However, an employer that 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," may request information from the employee regarding the connection, according to the proposed rule.

When requesting documentation, the EEOC expects employers to follow relevant parts of the proposal that address the interactive process and supporting documentation. The agency noted that the "interactive process" is "a method from the ADA to help the employer and the worker figure out a reasonable accommodation" and it generally means "a discussion or two-way communication between an employer and an employee or applicant to identify a reasonable accommodation."

***Key takeaway:** While you should already be conducting an interactive process with those employees or applicants who are seeking accommodations as a best practice, the PWFA requires it as a matter of law for employees seeking pregnancy-related accommodations, requiring you to fold it into your HR processes. And while you have the right to seek documentation in some cases, you should be sure your managers aren't abusing the process and requesting medical information when not necessary, as that could lead to claims of adverse treatment.*

4. Many Accommodations Are Straightforward

"Reasonable accommodation" is also a term borrowed from the ADA, which generally involves making a change to the work environment or how work is performed. The proposed rule provides several examples of potential accommodations for workers covered under the PFWA, including:

- Frequent breaks;
- Sitting or standing;
- Schedule changes, part-time work, and paid and unpaid leave;
- Telework;
- Parking;
- Light duty;
- Making existing facilities accessible or modifying the work environment;
- Job restructuring;

- Temporarily suspending one or more essential function;
- Acquiring or modifying equipment, uniforms, or devices; and
- Adjusting or modifying examinations or policies.

You should note that this list is not exhaustive and other accommodations may be "reasonable."

Key takeaway: *The EEOC has said that certain "simple modifications" will "in virtually all cases" be deemed reasonable accommodations for employees seeking pregnancy-related accommodations, such as allowing an employee to carry and drink water in their work area; allowing additional restroom breaks; allowing an employee to sit when standing is generally required or vice versa, and providing breaks as needed to eat and drink.*

5. An Accommodation Can Be Denied If It Would Cause an Undue Hardship

The PWFA has a similar definition of "undue hardship" as the ADA. In general, an accommodation creates an undue hardship if it causes significant difficulty or expense for the employer's operations. The proposed rule highlights certain factors that are the same as under the ADA and adds some factors to consider specifically under the PWFA.

The following factors may be considered, according to the proposal, when determining whether temporarily suspending an essential function of the job will cause an undue hardship:

- The length of time the employee or applicant will be unable to perform the essential function;
- Whether there is work for the employee or applicant to accomplish;
- The nature of the essential function, including its frequency;
- Whether the employer has provided other employees or applicants in similar positions who are unable to perform essential functions with temporary suspensions of those functions and other duties;
- Whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function in question, if needed; and
- Whether the essential function can be postponed or remain unperformed for any length of time and, if so, for how long.

Key takeaway: *Under the PWFA, employers must conduct an individualized assessment when determining whether a modification will impose an undue hardship. You may want to consult with your legal counsel each and every time you consider denying an accommodation request under the undue hardship theory, as the ramifications of an improper denial could be significant.*

6. Federal, State, and Local Laws May Provide Greater Protections

The proposed rule confirms that PWFA does not replace federal, state, or local laws that are more protective of workers affected by pregnancy, childbirth, or related medical conditions. Many states and cities already have some sort of expanded pregnancy accommodation law.

Key takeaway: *At least 30 states and five cities require certain employers to provide some form of accommodations to pregnant employees. If you are an employer in one of these locations, your practices may not need to change much, or at all.*

7. Significant Questions Remain Unanswered: Your Opportunity to Comment

There are significant questions that remain despite the depth of the 279-page proposal from the EEOC. For example, the proposed regulations indicate that workers with "potential pregnancies" should receive protection, but this vague reference could create confusion in some situations. Another example: do employers need to accommodate an employee's request for time off work to attend appointments with a fertility doctor? Yet another unanswered question: how will the proposed regulations impact employers in states where abortion is illegal or highly restricted but an employee is requesting an accommodation to have such a procedure?

Key takeaway: *Employers, business groups, and other interested parties will have an opportunity to comment on the rule before it is finalized. The EEOC's proposed rule is scheduled to be published in the Federal Register on August 11, and you'll have 60 days to submit a comment through www.regulations.gov. Specifically, the proposal provides many examples of possible reasonable accommodations, and the EEOC wants to know whether there should be more examples and for what different situations. The agency is also seeking "existing data quantifying the proportion of pregnant workers who need workplace accommodations and existing data on the average cost of pregnancy-related accommodations." But you can also comment on any aspect of the proposed regulation that you believe you would like more clarity on – or areas where you disagree with the scope or the proposal.*

Conclusion

We will monitor developments related this law, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Employee Leaves and Accommodations Practice Group.

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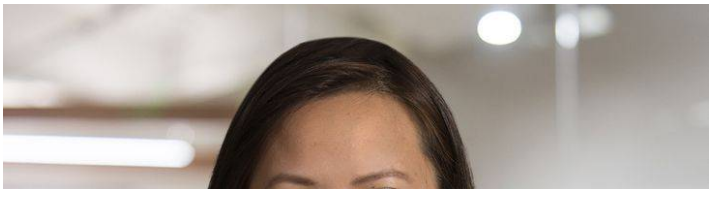

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