> Client Alert

Important Takeaways from the EEOC's Proposed Regulations to Implement the Pregnant Workers Fairness Act

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The U.S. Equal Employment Opportunity Commission (EEOC) recently published proposed regulations to implement the Pregnant Workers Fairness Act (PWFA) for public comment in the Federal Register on August 11, 2023. As we previously discussed, the PWFA went into effect nationwide on June 27, 2023. Under the PWFA, employers must provide employees with accommodations for known limitations related to pregnancy, childbirth or related medical conditions unless the accommodation would cause the employer undue hardship. Interested members of the public now have 60 days from the date of publication, or until October 10, 2023, to submit comments on the regulations. The EEOC then intends to issue final regulations by December 29, 2023, although targets like this have often been significantly extended, either because the comment period has been enlarged or because of the time required to assess whether the comments require modifications to the proposed regulations.

The proposed regulations offer insight on how the EEOC will interpret and enforce the PWFA. Employers should be mindful of the following key takeaways from the proposed regulations:

- The EEOC's proposed regulations overlap with the EEOC's implementation of Americans with Disabilities Act (ADA) in certain significant ways. For example, under the PWFA, as under the ADA, an accommodation may be denied if it would cause an undue hardship. Further, the PWFA adopts the definition of "undue hardship" under the ADA.

- Although the proposed regulations overlap in some respects with the EEOC's interpretation of the ADA, there are also key differences between the two. For example, the PWFA offers two definitions for determining whether an employee is "qualified." The first definition is consistent with the ADA's definition—the employee or applicant would be able to perform the essential functions of the position with or without reasonable accommodation. However, under the PWFA, an employee or applicant may also be qualified even if the individual cannot perform one or more essential job functions, if a pregnancy-related condition causes inability to perform one or more essential job functions, the inability to perform the essential function is "temporary," and the individual can perform the essential function within the "near future."

The proposed rule defines the term "temporary" to mean that the need to suspend one or more essential functions is "lasting for a limited time, not permanent, and may extend beyond that time period 'in the near future.'" The proposed rule defines "in the near future" to mean forty weeks, roughly the duration of a normal pregnancy. In other words, an employee would still be qualified under the PWFA even if she cannot perform an essential job function throughout the entire duration of her pregnancy.

- The proposed regulations include a broad, non-exhaustive list of conditions that the EEOC has concluded generally fall within the statutory definition of pregnancy, childbirth, or related medical conditions. The list includes current pregnancy, past pregnancy, potential pregnancy, lactation (including breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, or abortion, among other conditions. Thus, employers should be aware that non-pregnant employees may be covered under the PWFA if they seek an accommodation for one of the aforementioned conditions. For example, an employee undergoing fertility treatments in an attempt to become pregnant may request leave under the PWFA to attend related medical appointments. The proposed regulations further make clear that a physical or mental condition does not require a specific level of severity and that employees with healthy and "uneventful" pregnancies may seek accommodations under the PWFA.

- The proposed regulations specify that a "related medical condition" must relate to pregnancy or childbirth. For example, if an employee has high blood pressure that is unrelated to pregnancy or childbirth, the employee might be eligible for an accommodation under the ADA but not the PWFA. However, if the employee's high blood pressure is pregnancy-related, *i.e.*, hypertension associated with eclampsia, the worker would be covered by the PWFA.

- The EEOC's proposed regulations include a comprehensive list of examples of potential reasonable accommodations, including: job restructuring; part-time or modified work schedules; reassignment; more frequent breaks, including for use of a restroom; acquisition or modification of equipment, uniforms, or devices; providing opportunities for seating or standing; appropriate adjustment or modification of examinations or policies; permitting the use of paid leave or providing unpaid leave, including to recover from childbirth or miscarriage and to attend health care appointments; assignment to light duty; remote work; providing a reserved parking space closer to the entrance to the work site; and other similar accommodations for employees or applicants with known limitations.

- The proposed regulations also address circumstances in which employers may request medical documentation. The EEOC anticipates that determining whether a limitation or physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions will be a straightforward determination that can be accomplished through a conversation between the employer and the employee as part of the interactive process and without the need for the employee to obtain documentation or verification. An employer is not required to seek supporting documentation and it is only permitted to do so under the proposed rule if it is reasonable to require documentation to determine whether to grant the accommodation. The documentation itself must also be reasonable. The proposed rule defines "reasonable documentation" as documentation that describes or confirms (1) the physical or mental condition; (2) that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and (3) that a change or adjustment at work is needed for that reason. As with the ADA, medical information related to requests for accommodation under the ADA should be maintained in confidence.

Employers should consider familiarizing themselves with the proposed regulations and stay apprised of any developments as and when the regulations are finalized. Employers will also want to consider drafting updated policies and practices related to accommodations for pregnancy, childbirth or related medical conditions to ensure compliance with the PWFA as soon as the proposed regulations are finalized and implemented.

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Our Labor & Employment Law team is available to help employers navigate their compliance with the PWFA and related regulations and guidance, and to provide counseling and assistance in addressing accommodation requests and updating employment handbook policies, as needed, or with respect to any other employment-related issue.

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