What You Need to Know: EEOC's New Rule and Interpretive Guidance Implementing Pregnant Workers Fairness Act

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The EEOC's New Rule and Interpretive Guidance Provide Greater Protections for Pregnant Workers and Require Employers to Navigate the Changing Regulatory Landscape Judiciously.

On April 15, 2024, the Equal Employment Opportunity Commission (EEOC) issued a final rule and interpretive guidance (the Rule) to implement the Pregnant Workers Fairness Act (PWFA). The Rule was published in the Federal Register on April 19, 2024 ,and will go into effect 60 days later on June 18, 2024. In this article, we provide a summary of the most notable features of the Rule.

Under the PWFA, employers are required to make reasonable accommodations to a qualified employee's (or applicant's) known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, absent undue hardship on the operation of the employer's business. The definitions of "employer" (15+ employees) and "employee" under Title VII of the Civil Rights Act of 1964 apply to the PWFA.

The Rule defines a "known limitation" 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[.]" 29 *C.F.R.* 1636.3(a). The "physical or mental condition" may be "modest, minor, and/or episodic." 29 *C.F.R.* 1636.3(a)(2). The Rule expressly provides that "[t]he physical or mental condition can be a limitation whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990[.]" 29 *C.F.R.* 1636.3(a)(2).

In the Rule, the EEOC also provides clarity about what qualifies as a "pregnancy, childbirth, or related medical condition" under the PWFA. "Pregnancy" and "childbirth" include "infertility, fertility treatment, and the use of contraception[.]" 29 C.F.R. 1636.3(b). "Related medical conditions" are "medical conditions relating to the pregnancy or childbirth of the specific employee in question[,]" including but not limited to, "termination of pregnancy, including via miscarriage, stillbirth, or abortion; ectopic pregnancy; preterm labor; pelvic prolapse; nerve injuries; cesarean or perineal wound infection; maternal cardiometabolic disease; gestational diabetes; [and] preeclampsia[.]" 29 *C.F.R.* 1636.3(b).

Notably, the Rule provides that an employee is "qualified" and afforded protection – even if the employee cannot perform one or more essential functions of the position so long as:

- Any inability to perform an essential function(s) is for a temporary period. “Temporary” means lasting for a limited time, not permanent, and may extend beyond “in the near future;”
- The essential function(s) could be performed in the near future. This determination is made on a case-by-case basis. If the employee is pregnant, it is presumed that the employee could perform the essential function(s) in the near future because the employee could perform the essential function(s) within generally 40 weeks of its suspension; and
- The inability to perform the essential function(s) can be reasonably accommodated. This may be accomplished by temporary suspension of the essential function(s) and the employee performing the remaining functions of the position or, depending on the position, other arrangements can be made.

29 *C.F.R.* 1636.3(f)(2)(i)-(iii).

The EEOC also has stated that the following requests for accommodations will “in virtually all cases” be considered reasonable and not constitute an undue hardship:

- Allowing an employee to carry or keep water near and drink, as needed;
- Allowing an employee to take additional restroom breaks, as needed;
- Allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and
- Allowing an employee to take breaks to eat and drink, as needed.

29 *C.F.R.* 1636.3(j)(4)(i)-(iv).

Other accommodations that should be considered are schedule changes, part-time work, paid and unpaid leave, telework or remote work, closer parking, making existing facilities accessible or modifying the work environment, and acquiring or modifying equipment, uniforms, or devices.

Nothing in the PWFA limits an individual's rights under any other federal, state, or local law that provides equal or greater protection.

Recommended Actions for Employers

In light of the Rule's broad scope, employers should:

- Review and update existing policies governing requests for reasonable accommodations and the interactive process;
- Provide training to human resources and supervisory employees about the four types of accommodations that almost always will be considered reasonable and not constitute an undue hardship; and
- Provide interim accommodations in time-sensitive situations while the interactive process is ongoing.

Employers also should consult with experienced employment counsel as needed.

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