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What Employers Should Know About the EEOC's Proposed PWFA Regulations

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On August 7, 2023, the U.S. Equal Employment Opportunity Commission (EEOC) released its highly anticipated Notice of Proposed Rulemaking (NPRM) related to its proposal for the implementation of the Pregnant Workers Fairness Act (PWFA). The NPRM, which outlines how the EEOC plans to enforce the PWFA, will be published in the Federal Register on August 11, 2023, and the public will then have 60 days, or until October 10, 2023, to provide comments.

In this client alert, we provide background related to the purpose of the PWFA, discuss certain notable aspects of the 275-page NPRM, and provide key takeaways.

Background

The PWFA went into effect on June 27, 2023, and applies to employers with 15 or more employees. In many respects, the PWFA mirrors the Americans with Disabilities Act (ADA), namely the requirement that employers provide reasonable accommodations to qualified employees and applicants, beyond pregnancy-related conditions that qualify as a "disability" to include "the known limitations related to pregnancy, childbirth and related medical conditions of a qualified employee." Like the ADA, employers with 15 or more employees are required to provide reasonable accommodations "unless such [a] covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business." However, the PWFA closes a gap in coverage under federal law for pregnant and postpartum employees and applicants as it provides an affirmative right to receive reasonable accommodations for known limitations related to pregnancy, childbirth, or related medical conditions absent an "undue hardship" on the employer. The PWFA removes the prior requirement that pregnant or postpartum employees seeking reasonable accommodations must either have a pregnancy-related disability or identify other "similar" non-pregnant co-workers with accommodations.

The PWFA does not specify the types of reasonable accommodations that may be required under the law. Instead, the PWFA directs the EEOC to issue regulations to "carry out" its provisions that include "examples of reasonable accommodations." The NPRM is intended to provide such clarity, and includes explanations of how the EEOC will interpret key elements and contains real-world examples of how the PWFA would be applied in the workplace.

Regulations

- In the NPRM, "known" means the employee or applicant has actually communicated the limitation to the covered entity.
- While the covered entity may request information regarding the limitation if there are "reasonable concerns" about whether it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, the EEOC anticipates that these concerns can be addressed through a conversation, as opposed to the need for an employee to obtain documentation or verification.
- The NPRM proposes that the covered entity consider granting accommodations on an interim basis even where it feels additional information might be required and indicates that the provision of an

interim accommodation could be used as a defense to a claim of delay. The EEOC further notes that appropriate accommodations should be clear to the covered entity in most instances.

- The NPRM contains a broad view of conditions falling within the scope of the law – the "nonexhaustive 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 having or choosing not to have an abortion, among other conditions."
- Consistent with the intent that the PWFA is intended to cover conditions that would not qualify as a "disability" under the ADA, the NPRM does not include a requirement that the condition be of a particular severity.
- The PWFA contains two definitions of "qualified," (1) "an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position" (adopting language from the ADA); and (2) an employee or applicant whose inability to perform one or more essential functions of the employment position is "temporary" such that the work could perform the essential function(s) "in the near future," and the inability to perform the essential function(s) can be reasonably accommodated.
- The NPRM defines "in the near future" to mean generally 40 weeks from the start of the suspension of an essential function. Within the proposed regulations, the EEOC indicates a pregnant worker may seek a suspension of an essential function and would still meet the definition of "qualified" because the pregnancy will be over in less than 40 weeks. Further, if the same worker returns from leave after giving birth and needs an essential function temporarily suspended, the worker will again meet the definition of "qualified" for "in the near future" if the worker can perform the essential function within 40 weeks of the suspension. The EEOC is requesting comments as to whether that period should be extended up to 52 weeks.
- The NPRM notes that the covered entity may not dictate the reasonable accommodation without consideration of the particular employee's circumstances and may not require an employee to accept a reasonable accommodation if one is not requested.
- The EEOC has indicated that, while there is a requirement for an individualized assessment, requests for bathroom breaks, food and drink breaks, drinking water on the job, and sitting or standing (if necessary) should almost always be granted.
- The EEOC sets out a list of other reasonable accommodations that would address limitations related to pregnancy, childbirth or related medical conditions, including, but not limited to, reserved parking, telework, light duty, job restructuring, modifying equipment or uniforms, and schedule changes.

Takeaways for Employers

While comments will continue and further guidance is anticipated, it is a good idea for employers to take action now to ensure compliance with the PWFA.

- The PWFA law is already in effect and the EEOC has been accepting charges since June 27, 2023.
- Employers should ensure that their policies and postings are updated to verify that employees and managers are aware of the relevant changes.

- Employers should confirm that appropriate mechanisms for reporting and addressing requests for pregnancy accommodations should be in place.

If you have any questions regarding the PWFA law, the proposed regulations, or your current policies or forms, please reach out to [Erin Pelleteri Howser](#), [Emily Olivier Kesler](#), or any member of Baker Donelson's [Labor and Employment Group](#).