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INSIGHTS

What to Expect When You're . . . Under the Pregnant Workers Fairness Act Proposed Rules

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On August 7, 2023, the US Equal Employment Opportunity Commission (EEOC) issued proposed rules for implementing the Pregnant Workers Fairness Act (PWFA). Once published in the Federal Register, the public will have 60 days to comment on the proposed rules.

The PWFA, which was signed by President Biden on December 29, 2022, went into effect on June 27, 2023. As discussed in a ***prior alert***, the PWFA requires employers with 15 or more employees to provide reasonable accommodations to "qualified" employees and applicants with known physical or mental limitations due to pregnancy, childbirth, or related conditions, absent undue hardship on the employer.

The proposed rules not only provide helpful guidance to employers to assist them in complying with the PWFA but also offer a glimpse into the EEOC's stance on workplace accommodations for pregnant individuals and individuals experiencing limitations related to pregnancy, childbirth, and other related conditions.

While many of the proposed rules are what employers would expect given the PWFA's similarities to the Americans with Disabilities Act (ADA), there are several proposed rules employers will want to note:

- The EEOC defines "related medical conditions" as medical conditions that "relate to, are affected by, or arise out of pregnancy or childbirth." The proposed rules provide a broad range of examples of "related medical conditions," including, but not limited to: termination of a pregnancy, including via miscarriage, stillbirth, or abortion; infertility; fertility treatment; postpartum depression, anxiety, or psychosis; use of birth control; and lactation.

- Negative side effects of medication, or burdens associated with a particular treatment regimen, can be considered when determining whether an individual has a limitation.

- An employee or applicant is still considered "qualified" if they are unable to perform the essential functions of their job for a temporary period, but those essential functions could be performed "in the near future." The proposed rules make clear that "in the near future" will generally mean within 40 weeks, which is the typical length of a pregnancy.

- For an employee or applicant who is pregnant, the following accommodations will "virtually always" be found reasonable and not to impose an undue hardship on the employer: allowing the individual to carry and drink water as needed; allowing the individual additional restroom breaks; allowing the individual whose work requires standing to sit and whose work requires sitting to stand; and allowing the individual breaks as needed to eat and drink.

- An employer may require documentation only when it is reasonable to do so under the circumstances in order to decide whether to grant the accommodation. One example where it is not reasonable to require documentation is when the limitation for which an accommodation is needed involves lactation or pumping.

The PWFA requires the EEOC issue its final rules to implement the law by December 29, 2023. While employers will want to watch for the proposed and final rules, the PWFA is current law, and employers should ensure they are in compliance now. Employers should review their policies relating to pregnancy, accommodation and nursing workers (or create such policies if they do not have them) and ensure they are compliant with the PWFA. Further, employers will want to ensure that managers and supervisors are trained on how to handle pregnancy-related accommodations and other related requests.