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EEOC ISSUES FINAL REGULATIONS INTERPRETING THE PREGNANT WORKERS FAIRNESS ACT

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On Monday, April 15, 2024, the Equal Employment Opportunity Commission ("EEOC") issued its highly anticipated final regulations interpreting the Pregnant Workers Fairness Act ("PWFA"). The final regulations, which will become effective June 18, 2024, provide comprehensive guidance for employers on their obligations to accommodate employees' and applicants' pregnancy-related limitations in the workplace.

The PWFA, which took effect in June 2023, mandates that employers with 15 or more employees provide reasonable accommodations for known limitations related to, affected by, or arising out of pregnancy, childbirth, or a related medical condition, unless such accommodations would impose an undue burden on the employer. With this requirement comes three important definitions:

1. *"Limitations"* may be modest, minor, or episodic, and importantly, they need not be a disability.
2. "*Pregnancy*" and "*childbirth*" include, but are not limited to, current pregnancy; past pregnancy; potential or intended pregnancy; labor; and childbirth.
3. "*Related conditions*" may include the use of contraception, menstruation, infertility and fertility treatments, miscarriage, and abortion, where there is a nexus in those conditions to pregnancy or childbirth. This includes not only new conditions, but pre-existing conditions that are exacerbated by pregnancy or childbirth.

Under the PWFA, employers are prohibited from denying a reasonable accommodation that does not cause an undue hardship or from unnecessarily delaying the provision of such an accommodation. Furthermore, employers cannot require an employee to accept an accommodation other than one arrived at through the interactive process, ensuring that employers do not presume the need for an accommodation against an employee's wishes. Employers also cannot require an employee to take leave if another reasonable accommodation is available unless the employee requests or selects leave.

REASONABLE ACCOMMODATIONS

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Reasonable accommodations under the PWFA may include a wide range of adjustments to the work environment or job duties, such as job restructuring, modified work schedules, reassignment to a vacant position, or the acquisition or modification of equipment. Employers are required to provide accommodations—identified through the interactive process—that provide employees with equal employment opportunities to attain the same level of performance or enjoy the same benefits and privileges as similarly situated employees.

One accommodation that employers must consider is suspending one or more essential functions of the job, provided that the employee's inability to perform such functions is (1) temporary, (2) may be resumed in the near future, and (3) can be reasonably accommodated. For a current pregnancy, the term "in the near future" generally means 40 weeks from the start of the temporary suspension. The regulations do not provide a time period for the suspension of essential functions due to conditions other than a pregnancy because there is no consistent measurement of how long these conditions will last.

REQUESTS FOR DOCUMENTATION

The final regulations outline the process for requesting and providing supporting documentation for accommodations. Employers may only seek the "minimum documentation that is sufficient," (1) to confirm the physical or mental condition (i.e., swollen ankles, need to avoid certain chemicals, lifting restrictions, vomiting), (2) to confirm that the physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions and, (3) to describe the adjustment or change at work (i.e., lifting restriction, a later start time, temporary removal of a job function). Employers cannot require an employee to see a healthcare provider of the employer's choosing, nor can employers require that supporting documentation be submitted on a specific form.

Under the PWFA, it is unreasonable to seek documentation under the following circumstances:

1. When the known limitation and need for accommodation are obvious, and the employee provides self-confirmation;
2. When the employee already provided sufficient information;
3. When the reasonable accommodation is listed as a predictable assessment (described below);
4. When an employer's existing policies already allow the accommodation without documentation; or
5. When the reasonable accommodation is related to lactation.

UNDUE HARDSHIPS AND PREDICTABLE ASSESSMENTS

The analysis of whether an accommodation imposes an undue hardship on the employer will be similar to that under the Americans with Disabilities Act. Factors to consider include the duration of inability to perform tasks, availability of alternative work, frequency of essential functions, past accommodations for similar positions, availability of other employees or third parties to perform tasks, and the feasibility of postponing or leaving essential functions unperformed.

Given the simple and straightforward nature of certain accommodations, the EEOC has identified several "predictable assessments" that will virtually always be found to be reasonable accommodations that do not impose an undue hardship. Thus, employers must virtually always allow pregnant employees to:

- carry or keep water near, as needed;
- take additional restroom breaks, as needed;
- sit if the job typically requires standing, and stand if the job typically requires sitting, as needed; and
- take breaks to eat and drink, as needed.

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Unless an employer can show that providing one or more of these accommodations will impose a unique undue hardship, employers should grant these “predictable assessment” requests as a matter of course and should not request documentation to support these specific accommodations.

TAKEAWAYS

As employers prepare for the PWFA regulations to take effect in June, they should take steps now to ensure their organizations remain in compliance with the law. This includes training supervisors to recognize requests for reasonable accommodations under the PWFA and updating employment policies to align with the new regulations. Employers should work closely with employment counsel to implement these important changes.

FOR MORE INFORMATION

If you have questions or want more information regarding the Pregnant Workers Fairness Act, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific needs. For more information, contact Tara Eberline at 913.253.2136 or teberline@foulston.com or Morgan E. Geffre at 316.291.9577 or mgeffre@foulston.com. For more information on the firm, please visit our website at www.foulston.com.

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