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New Protections for Pregnant and Parenting Employees

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This article was submitted prior to publishing of the EEOC's final regulations for the Pregnant Workers Fairness Act (PWFA). All references to the EEOC's commentary and regulations are from the proposed version of the rules. Please review the final regulations to ensure accuracy of the references and text cited in this article.

NEW PROTECTIONS FOR PREGNANT AND PARENTING EMPLOYEES

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While a patchwork of federal and state protections related to pregnancy and pregnancy-related disabilities or conditions previously existed, these laws have failed in several significant ways to fully protect pregnant workers. In 2022, Congress passed two federal laws intended to fill these gaps and expand the rights and protections for pregnant and parenting employees – the Pregnant Workers Fairness Act (PWFA), 42 U.S.C. § 2000gg *et seq.*, and the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act), 29 U.S.C. § 218d. The EEOC released proposed regulations for the PWFA on August 11, 2023, and the comment period closed October 10, 2023. The EEOC submitted final regulations to the Office of Information and Regulatory Affairs (OIRA) on December 27, 2023. Final regulations will be published in 29 C.F.R. Part 1636. Covered employers must ensure their policies, procedures, and practices are in full compliance with these news laws and regulations.

PREGNANT WORKERS FAIRNESS ACT

The PWFA, signed into law on December 29, 2022, and effective as of June 27, 2023, is the result of significant bipartisan efforts by both legislators and advocates working for more than a decade to pass federal legislation that would protect the rights of millions of individuals from being denied accommodations that would allow them to continue to work while experiencing pregnancy, childbirth, or related medical conditions. *See* Cassie Miller, *A 'momentous victory': Advocates celebreate anniversary of Pregnant Workers Fairness Act*, PENNSYLVANIA CAPITAL STAR, Dec. 22, 2023, https://www.penncapital-star.com/government-politics/a-momentous-victory-advocates-celebrate-anniversary-of-pregnant-workers-fairness-act/. Although certain rights were already available under existing civil rights laws, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. (as amended by the Pregnancy Discrimination Act (PDA)) (Title VII), the Americans with Disabilities Act of 1990, 42 U.S.C. § 12111 *et seq*. (ADA), the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq*. (FMLA), Title IX of the Education Amendment Acts of 1972, 20 U.S.C. § 1681 *et seq*. (Title IX), and various state and local laws, the PWFA recognizes that there are gaps in the federal legal protections for workers affected by pregnancy, childbirth, or related medical conditions. The new law responds to these gaps and limitations and requires a covered entity to provide reasonable accommodations to a qualified employee's or applicant's known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause an undue hardship on the operation of the business of the covered entity. *See* 42 U.S.C. § 2000gg-1. Employers will likely recognize much of the language used in the PWFA, as it is borrowed from existing civil

rights laws such as Title VII and ADA, both in describing coverage and in imposing requirements. However, employers should take note of some significant differences under the PWFA.

Who is a covered entity?

A "covered entity" includes private and public sector employers with at least 15 employees, Congress, Federal agencies, employment agencies, and labor organizations. 42 U.S.C. § 2000gg(2); 29 C.F.R. § 1636.2(b).

Who is a qualified employee or applicant?

As with the ADA, a "qualified employee or applicant" means an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position. 42 U.S.C. § 2000gg(6); 29 C.F.R. § 1636.3(f)(1). However, the PWFA goes further in its protections and expands this definition to also provide that an employee or applicant shall be considered qualified if - (i) any inability to perform an essential function is for a temporary period; (ii) the essential function could be performed in the near future; and (iii) the inability to perform the essential function can be reasonably accommodated. 42 U.S.C. § 2000gg(6); 29 C.F.R. § 1636.3(f)(2).

The term "temporary" is defined by the proposed regulations to mean that the need to suspend one or more essential functions is "lasting for a limited time, not permanent, and may extend beyond 'in the near future.'" 29 C.F.R. § 1636.3(f)(2)(i). The proposed regulations define "in the near future" to mean generally forty (40) weeks from the start of the temporary suspension of an essential function. *Id*. § 1636.3(f)(2)(ii).

The EEOC recognizes there may be physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions for which workers may seek the temporary suspension of an essential function when the worker is not currently pregnant. These conditions include pre-pregnancy limitations such as infertility, and post-pregnancy limitations such as acute cardio-vascular problems that are a consequence of the pregnancy. Although the length of pre- and postpartum physical or mental conditions will vary, the EEOC proposes using ''generally forty weeks'' to measure whether the worker meets the "in the near future" requirement in the second definition of "qualified" in every situation where the reasonable accommodation sought under the PWFA is the temporary suspension of one or more essential functions. Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714, 54724 (proposed August 11, 2023) (to be codified at 29 C.F.R. pt. 1636) (hereinafter referred to as "PWFA Proposed Rule").

If an accommodation is sought that requires the temporary suspension of an essential function, regardless of the amount of time sought, the employer may raise the undue hardship defense.

What is a known limitation?

According to the proposed regulations, the term "known limitation" means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee's representative has communicated to the employer

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