



Equal Employment Opportunity Commission Issues Proposed Pregnant Workers Fairness Act Regulations

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On August 11, 2023, the U.S. Equal Employment Opportunity Commission (EEOC) published in the Federal Register its long-awaited Notice of Proposed Rulemaking (NPRM) to implement the Pregnant Workers Fairness Act (PWFA). See <https://www.federalregister.gov/documents/2023/08/11/2023-17041/regulations-to-implement-the-pregnant-workers-fairness-act>. The PWFA requires covered employers to provide reasonable accommodations for a worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an undue hardship. The PWFA further prohibits:

- A covered entity from requiring a qualified employee or applicant to accept an accommodation other than one arrived at through the interactive process.
- A covered entity from denying employment opportunities to a qualified employee or applicant if the denial is based on the covered entity's need to make a reasonable accommodation for the known limitation of the employee or applicant.
- A covered entity from requiring a qualified employee with a known limitation to take leave, either paid or unpaid, if another effective reasonable accommodation exists, absent undue hardship.
- A covered entity from taking an adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation for a known limitation.

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Despite the lack of formal EEOC regulations interpreting the PWFA, on June 27, 2023, the EEOC began accepting complaints under the PWFA. The NPRM explains how the EEOC proposes to interpret and enforce the PWFA and its terms.

By way of summary, the key proposed regulations:

1. **Incorporate Existing Terminology.** The proposed regulations make clear existing processes and several terms previously defined by the Commission in other Federal protections are incorporated into the PWFA. For example, the PWFA incorporates Title VII's definition of "employer," and Title VII's enforcement procedures. The PWFA borrows the definitions of "reasonable accommodation," "essential function" and "undue hardship" from the Americans with Disabilities Act ("ADA") and uses the same interactive process and confidentiality requirements as are commonly used under the ADA.
2. **Build Upon Existing Protections.** The proposed regulations make clear the PWFA builds upon existing federal protections by responding to limitations in these protections against pregnancy discrimination under Title VII of the Civil Rights Act, access to reasonable accommodations under the ADA, and leave entitlements under the Family Medical Leave Act ("FMLA"). For example, the proposed regulations construe "limitation" broadly. An employee's condition need not be a "disability" under the ADA to trigger protection under the PWFA. The PWFA does not require a specific level of severity and notes that accommodations are available for non-severe physical or mental conditions. The broad definition endeavors to cover situations where a worker requests an accommodation in order to maintain her health or the health of her pregnancy by seeking general health care for her pregnancy, childbirth, or related medical conditions.
3. **Provide Examples of Key Terms.**

Pregnancy, child birth or related medical condition." The proposed regulations provide a non-exhaustive list of examples of 'pregnancy, childbirth, or related medical conditions' that the Commission has concluded generally fall within the statutory definition. The list in the proposed regulations include:

- current pregnancy;
- past pregnancy;
- potential pregnancy;
- lactation (including breastfeeding and pumping);
- use of birth control;
- menstruation;
- infertility and fertility treatments;
- endometriosis;
- miscarriage;

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- stillbirth; or
- having or choosing not to have an abortion, among other conditions.

“Reasonable Accommodation:” The proposed regulations provide a non-exhaustive list of the types of “reasonable accommodation” a worker may seek under the PWFA. These reasonable accommodations include, but are not limited to:

- job restructuring;
 - part-time or modified work schedules;
 - more frequent breaks;
 - acquisition or modification of equipment, uniforms, or devices;
 - allowing seating for jobs that require standing or standing in jobs that require sitting; appropriate adjustment or modification of examinations or policies;
 - permitting the use of paid leave (whether accrued, short-term disability, or another type of employer benefit) or providing unpaid leave, including to attend health care related appointments and to recover from child birth;
 - assignment to light duty;
 - telework; and
 - accommodating a worker’s inability to perform one or more essential functions of a job by temporarily suspending the requirement that the employee perform that function, if the inability to perform the essential function is temporary and the worker could perform the essential function in the near future.
4. **Define “Qualified” Under the PWFA:** The PWFA defines the term ‘qualified employee’ in two ways. The first definition mirrors the ADA: “an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position.” The second definition allows an employee or applicant to be ‘qualified’ even if the individual cannot perform one or more essential functions of the job if the inability to perform the essential function(s) is “temporary,” the worker could perform the essential function(s) “in the near future,” and the inability to perform the essential function(s) can be reasonably accommodated. The terms “temporary,” “in the near future,” and “can be reasonably accommodated” are not defined in the PWFA.

The proposed regulations seek to define these terms. The proposed rule defines the term “temporary” as lasting for a limited time, not permanent, and may extend beyond “in the near future.” “In the near future” is defined as ‘generally forty weeks’ but notes the actual length of time will depend upon what the employee requires, and the employer always has available the defense that the accommodation would create an undue hardship. The regulations make clear ‘qualified’ as previously defined by regulation and case law under the ADA is broader under the PWFA, and an employee need not be presently able to perform the essential functions of the job in order to be ‘qualified’ for a reasonable

Equal Employment Opportunity Commission Issues Proposed Pregnant Workers Fairness Act Regulations

accommodation.

5. **Suggest a Framework for the Process of Requesting an Accommodation.** The PWFA defines “known limitation” as a limitation that was “communicated to the employer.” The proposed regulations seek to set out what an employee or applicant must communicate to the employer to request an accommodation under the PWFA. The proposed regulations set forth a two part process. First, the employee or applicant (or their representative) must identify a limitation that is a physical or mental condition that is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. Second, the employee or applicant (or their representative) must indicate they need an adjustment or change at work. If each element is met, a request for a reasonable accommodation is “communicated to the employer.”

Members of the public who wish to submit comments on the NPRM and proposed regulations have 60 days to do so at www.regulations.gov.