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Blog Post

Baby on the Way!… And So Are Accommodations for Pregnant Workers

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Pregnant workers seeking workplace accommodations can expect a less bumpy ride ahead, due to the delivery of the Pregnant Workers Fairness Act (PWFA). The PWFA protects employees and applicants who have known limitations relating to pregnancy, childbirth, or a related medical condition by requiring employers to provide them reasonable accommodations, absent an undue hardship on the employer's business. The PWFA is intended to fill the void for pregnant workers not otherwise protected under other federal laws. Covered employers must ensure HR professionals and supervisors are trained for compliance with the PWFA, and are aware of the necessity to engage in the interactive process before implementing any accommodations under this new law. Employers should review their current policies and procedures to ensure these new protections are incorporated.

Expanded Coverage Under the PWFA

Before the PWFA took effect on June 27, 2023, pregnant and postpartum employees had certain employment related rights under existing laws, like Title VII (as amended by the Pregnancy Discrimination Act), the Family and Medical Leave Act, and the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP). However, in order to receive an accommodation, these workers typically needed to identify other similarly situated employees in the workplace who received

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accommodations or establish that they had a "disability" requiring accommodation under the ADA. The PWFA is meant to smooth the bumps in the road for pregnant and postpartum employees needing workplace accommodations.

EEOC's Proposed Regulations

To implement the PWFA, the EEOC unveiled proposed regulations on August 11, 2023, which are subject to a 60 day public comment period. The proposed regulations include the EEOC's interpretations of the PWFA and detailed examples intended to assist employers in understanding and complying with their obligations under the PWFA.

The EEOC has requested input on specific areas including defining key terms, examples of reasonable accommodations under the law, and assurances that employees wouldn't face consequences for using such accommodations. The EEOC's proposed regulations signal the agency's intent to have the PWFA interpreted broadly. The EEOC defines "pregnancy" to include past pregnancies and potential or intended pregnancies. The EEOC amplifies the term "related medical condition" with examples to include the termination of a pregnancy, infertility and fertility treatment, anxiety, depression, psychosis, postpartum depression, menstrual cycles, use of birth control, and lactation and conditions related to lactation. Whether the EEOC's proposed regulations are adopted as is or with modifications, the PWFA is expected to bring about significant change.

"Qualified" Employees

The PWFA protects "qualified" employees, like the ADA. Consistent with the expansion of other definitions, the EEOC seeks to expand the definition of a "qualified" employee to include employees who ***cannot*** perform one or more essential job functions ***if the following three things are true***: (i) the inability is for a "temporary period," (ii) the essential job function can be resumed "in the near

future," and (iii) the inability to perform the job function can be reasonably accommodated.

As of now, the EEOC defines "in the near future" as 40 weeks, which restarts every time an employee requests an accommodation regarding their inability to perform an essential function of the job. Potentially, this means an employee may be "excused" from performing certain essential functions of the job for more than 40 weeks. However, the proposed regulations contemplate that the essential function can be assigned to another employee during the temporary period. As it relates to the 40 week "in the near future" period, the EEOC is specifically requesting comments to determine whether the period should be increased to 52 weeks (i.e., one year).

Reasonable Accommodations Under the PWFA

The definition of "reasonable accommodation" under the PWFA conveniently tracks the language of the ADA as "a modification or adjustment to a job or the work environment that enables an employee with a disability an equal opportunity to successfully perform a job." The EEOC included in its proposed regulations examples of *possible* reasonable accommodations, among them:

- Frequent breaks
- Sitting/standing
- Schedule changes and part-time work
- Telework
- Job restructuring
- Temporarily suspending one or more essential job functions

The proposed regulations also provide four specific accommodations as *per se* reasonable and presumptively not an undue hardship: (1) carrying water and drinking in the employee's work area, (2)

taking additional restroom breaks, (3) alternating sitting/standing, and (4) taking breaks to eat and drink. Employers should be careful to promptly and reasonably respond to a request for an accommodation, as an "unnecessary delay" may be considered a violation of the PWFA.

In determining whether and what reasonable accommodation is appropriate for an applicant or employee, covered employers and employees must work together under the PWFA's mandatory "interactive process" to identify available accommodations. Covered employers are required to provide reasonable accommodations unless it would cause an "undue hardship" on the employer's business. The PWFA also expressly prohibits an employer from taking adverse action in the terms, conditions, or privileges of employment against a qualified individual on account of their requesting or using a reasonable accommodation afforded under the law.

Employer Compliance with the PWFA

The EEOC began accepting charges under the PWFA on June 27, 2023, and any underlying allegations must be based upon actions which occurred on or after that date. The EEOC also released an updated "Know Your Rights" poster, which includes references to pregnancy accommodations and is required to be posted in most workplaces.

Private and public employers with at least 15 employees (as well as Congress, federal agencies, employment agencies, and labor organizations) are considered "covered employers" under the PWFA. To ensure compliance, the PWFA provides that employers cannot:

- Require an employee to accept an accommodation without a discussion about the accommodation between the individual and the employer;
- Deny a job or other employment opportunities to an employee or applicant based on the person's

need for a reasonable accommodation;

- Require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working;
- Retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
- Interfere with any individual's rights under the PWFA.

The PWFA only covers pregnancy related accommodations in the workplace. Covered employers should continue to ensure that they are complying with other or more restrictive federal, state, or local laws that are not affected by the PWFA. Akerman will continue to monitor the PWFA developments as they impact the workplace, including any changes to the EEOC's proposed regulations. For assistance addressing issues in your workplace, contact your Akerman labor and employment attorney.
