EEOC's Expansion of Accommodations Under the Pregnant Workers Fairness Act

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The Legal Intelligencer
December 14, 2023
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On June 27, the Equal Employment Opportunity Commission (EEOC) began accepting charges of discrimination for alleged violations of the Pregnant Workers Fairness Act (PWFA). That law requires covered employers to provide reasonable accommodations to 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 also notes that covered employers cannot:

- Require the employee to accept an accommodation without having a discussion with the employee about the accommodation;
- Deny a job or other employment
- opportunities to an employee or an applicant based on the individual's needs for an accommodation;
- Require the employee to take a leave of absence if another accommodation would allow the employee to continue working;
- Retaliate against an individual for reporting or opposing discrimination under the PWFA (or for requesting an accommodation under the PWFA); or
- Interfere with any individual's rights under the PWFA.

At the time the law went into effect, the EEOC published guidance for employers which included examples of reasonable accommodations for pregnant workers. Specifically, the EEOC noted that the "House Committee on Education and Labor Report on the PWFA provides several examples of possible reasonable accommodations including the ability to sit or drink water; receive closer parking; have flexible hours; receive appropriately sized uniforms and safety apparel; receive additional break time to use the bathroom, eat, and rest; take leave or time off to recover from childbirth; and be excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy."

Notice of Proposed Rulemaking

More recently, however, the EEOC issued a notice of proposed rulemaking to implement the PWFA, announcing its proposed regulations. While the final regulations are

expected to go into effect by Dec. 29, it is evident that the EEOC has expanded upon the accommodations initially listed in its first guidance on the topic for a variety of medical conditions that are related or may be impacted by pregnancy.

For instance, the proposed rule gives examples of "related medical conditions," "which relate to, are affected by, or arise out of pregnancy or childbirth," including termination of pregnancy; fertility treatments; anxiety, depression, or psychosis; carpal tunnel syndrome; menstrual cycles; chronic migraines; high blood pressure; and lactation and conditions related to lactation.

Moreover, the proposed rule provides its examples of reasonable accommodations, which include: frequent breaks; sitting/standing; schedule changes, part-time work, and paid and unpaid leave; telework; parking; light duty; making existing facilities accessible or modifying the work environment; job restructuring; temporarily suspending one or more essential function; acquiring or modifying equipment, uniforms, or devices; and adjusting or modifying examinations or policies.

While the proposed rule borrows a number of provisions from the Americans with Disabilities (ADA), the regulations expand on what it means to be a "qualified" individual by requiring employers to suspend one or more essential functions of a position if the inability to perform the essential function is "temporary," the individual could perform the essential functions "in the near future" and the essential functions could be reasonably accommodated. The proposed regulations define "in the near future" as being up to 40 weeks. The EEOC also summarized the requirements that the inability to perform the essential function can be reasonably accommodated as follows:

> For some positions, this may mean that one or more essential functions are temporarily suspended, with or without reassignment to someone else, and the employee continues to perform the remaining functions of the job. For other jobs, some of the essential functions may be temporarily suspended, with or without reassignment to someone else, and the employee may be assigned other tasks to replace them. In yet other situations, one or more essential functions may be temporarily suspended, with or without reassignment to someone else, and the employee may perform the functions of a different job to which the employer temporarily transfers or assigns them, or the employee may participate in the employer's light or modified duty program. Throughout this process, as with other reasonable accommodation requests, an employer may need to consider more than one alternative to identify a reasonable accommodation that does not pose an undue hardship.

Undue hardship is another term borrowed from the ADA and the proposed rule outlines some of the same factors to consider if an undue hardship exists. However, in order to address the requirement of accommodating an employee by suspending the

performance of one or more essential job functions, the proposed regulations offer additional factors for employers to consider, including "the length of time that the employee or applicant will be unable to perform the essential function(s); whether there is work for the employee or applicant to accomplish; the nature of the essential function, including its frequency; whether the employer has provided other employees or applicants in similar positions who are unable to perform essential function(s) of their positions with temporary suspensions of those functions and other duties; if necessary, whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function(s) in question; and whether the essential function(s) can be postponed or remain unperformed for any length of time and, if so, for how long."

The proposed rule also outlines a "number of simple modifications that will, in virtually all cases, be found to be reasonable accommodations that do not impose an undue hardship when requested by an employee due to pregnancy" and the EEOC "expects that individualized assessments will result in a finding that the modification is a reasonable accommodation that does not impose an undue hardship." Specifically, the modification includes "allowing an employee to carry water and drink, as needed, in the employee's work area; allowing an employee additional restroom breaks; allowing an employee whose work requires standing to sit and whose work requires sitting to stand, and allowing an employee breaks, as needed, to eat and drink."

As we wait for the final regulations to be published, employers should be flexible in the accommodations they offer to individuals covered under the PWFA, and begin training staff members who handle accommodation requests on what the EEOC views as reasonable accommodations under it. Moreover, since there are a number of "related medical conditions" that could also qualify as a disability under the ADA, employers must make certain that they do not reject an accommodation under the ADA that it would be required to make under the PWFA. While the EEOC's expansion of reasonable accommodations under the PWFA could lead to an uptick in litigation, the goal for employers is to engage in that open dialogue with employees through the interactive process to determine what would be an appropriate accommodation. A thoughtful and thorough exploration within that realm should allow employers to avoid receiving a charge of discrimination in the first place.

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