EEOC Issues Regulations Pursuant to the Pregnant Workers Fairness Act

BY BRIGID A. HARRINGTON • AUGUST 8, 2023

Yesterday, the Equal Employment Opportunity Commission (EEOC) issued a Notice of Proposed Rulemaking (NPRM) that would impact how employers are required to accommodate employees who have work-related limitations due to pregnancy or a related condition. The proposed rules apply to all employers with at least 15 employees, employment agencies, labor unions, and the federal government.

The proposed rules are not yet final, but they do signal the likely regulatory path that the EEOC will follow in implementing the requirements of the federal Pregnant Workers Fairness Act (PWFA). The EEOC is currently soliciting comments from the public and may edit the proposed rules based on that feedback. The final rules will be published at some point after the comment period closes on October 10, 2023. The EEOC will then set a date by which covered employers must comply.

The framework for compliance with the new rule will be familiar to many employers, as it tracks Title VII and the Americans with Disabilities Act: it prohibits discrimination and retaliation, and requires employers to make reasonable accommodations. The class of employees that the rules protect includes workers who are pregnant, or who have a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The employer does not have to provide an accommodation if it would cause an undue hardship on the operation of the employer's business.

Some notable aspects of the proposed rules include:

- Employers are only required to provide accommodations if the employee has communicated to them that they have a limitation arising out of pregnancy or a related condition.
- An individual may be considered a "qualified" applicant or employee even if they cannot perform the essential functions of their job, if their inability to perform essential functions is temporary, could be resolved in the "near future" (generally meaning within 40 weeks), and the person could be reasonably accommodated during the period

of time that they cannot perform the essential functions.

- Employers may also not require employees who have experienced pregnancy, childbirth, or related conditions to take leave – even if that employee's ability to do their job is limited – if they can reasonably accommodate the employee in another way.
- Conditions related to pregnancy is interpreted broadly: it includes not only childbirth, breastfeeding, miscarriages, and abortions, but also includes limitations due to menstruation, infertility and fertility treatments, and endometriosis.
- Medical documentation for pregnancy accommodations may only be required by an employer when it is reasonable under the circumstances. Medical documentation is not necessary for accommodations including: (1) carrying water and drinking, as needed; (2) taking additional restroom breaks; (3) sitting, for those whose work requires standing, and standing, for those whose work requires sitting; and (4) breaks, as needed, to eat and drink. These accommodations are expected to be provided in virtually all circumstances.
- Employers may not unnecessarily delay the process for considering and providing accommodations under the PWFA.
- Employers will be required to post notices in conspicuous places describing applicable PWFA provisions.
- Employers are prohibited from retaliating against employees for exercising rights under the PWFA, and from coercing employees to forgo rights under the PWFA.

CLIENT TIP

These regulations will be enacted under the federal Pregnant Workers Fairness Act. Employers in Massachusetts have been required, since 2018, to comply with the Massachusetts Pregnant Workers Fairness Act, which has many similar provisions. Massachusetts employers should review the federal requirements, to ensure that they make the necessary adjustments to their policies as required by federal regulations.