

EEOC Announces Proposed Regulations to Enforce the Pregnancy Workers Fairness Act

5 min read

Aug 15, 2023

By: Amanda Tzivas

On August 11, 2023, the Equal Employment Opportunity Commission (EEOC) published a notice of proposed rulemaking (NPRM) to issue regulations that would support the implementation and enforcement of the Pregnant Workers Fairness Act (PWFA).^[1] Enacted in 2022, the PWFA requires covered entities (*i.e.*, private and public sector employees with at least fifteen employees, Congress, federal agencies, employment agencies, and labor organizations)^[2] to provide reasonable accommodations to qualified employees or applicants with known limitations relating to pregnancy, childbirth, or related medical conditions, unless the accommodation would impose an undue hardship on the covered entities' business operations. The PWFA became effective on June 27, 2023.

Recognizing the vital contributions women have made to the economic security of the United States, the PWFA and the NPRM seek to provide workers with greater workplace flexibility. The PWFA was introduced in response to perceived gaps in the existing protections available to workers with known limitations relating to pregnancy, childbirth, or related medical conditions. The NPRM proposes to define related medical conditions as including current pregnancy, past pregnancy, potential pregnancy, lactation (including breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, or having or choosing not to have an abortion, among other conditions.

Though Title VII, the Americans with Disabilities Act (ADA), and the Family Medical Leave Act (FMLA) all provide protections for workers affected by these conditions, the NPRM notes that some workers have nevertheless faced an uphill battle in proving wrongful denial of a reasonable accommodation due to the legal standards associated with these laws and the limited protections afforded by them. For example, while the ADA supports workplace accommodations for pregnant workers, pregnancy is not enough of a justification for an accommodation – workers must show they actually suffer from a pregnancy-related disability. The PWFA would cover pregnancies regardless of whether they are accompanied by a disability. Further, the FMLA only mandates that employers

provide unpaid leave to eligible employees, not reasonable accommodations. In contrast, the PWFA would support leave as a possible accommodation.

The NPRM proposes a non-exhaustive list of possible reasonable accommodations for such workers, including: job restructuring, modified work schedules, more frequent breaks, appropriate modification of examinations or policies, leave to attend health care-related appointments, telework, light duty, temporarily suspending one or more essential job functions, etc.

This effort to expand the possible accommodations for workers suggests that employers need to dust off their brainstorming hats and prepare to be more creative about accommodations that might be available to employees, not only to avoid a violation of Title VII or the ADA, but also the PWFA, which is distinctly focused on ensuring that workers are provided access to reasonable accommodations.

The NPRM expresses that “many accommodations requested under the PWFA will be straightforward” and that employers “should permit an employee or applicant to request an accommodation through multiple avenues and means.” Therefore, requests for a reasonable accommodation need not be in writing, and workers should not be expected to use any special words or phrases to bring their requests within the ambit of the PWFA. To the contrary, workers need only use plain language to: (1) identify the limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, and (2) indicate that they require a workplace modification.

The NPRM also conveys the EEOC’s proposed interpretations of several terms used in the PWFA, including “known limitation,” “related to, affected by, or arising out of,” “pregnancy, childbirth, or related medical condition,” “qualified,” “in the near future,” “communicated to the employer,” “essential function,” “reasonable accommodation,” “undue hardship,” “interactive process,” “prohibited acts,” “prohibition on retaliation and coercion,” and more.

Though the NPRM proposes to interpret several of the above definitions consistently with their meanings under federal laws (i.e., Title VII and the ADA), the NPRM’s explanation of their application under the PWFA is notable. For example, the NPRM explains that the relevant inquiry under the PWFA with respect to whether a worker is “qualified” for the job position in question would be “whether the employee **would be able to perform** the essential functions of the position, with or without reasonable accommodation.” Therefore, even employees who cannot perform one or more essential job functions for a period of time may still show that they are “qualified” for the job if they can show that: (1) the inability to perform an essential job function is for a temporary period, (2) the essential function could be performed **in the near future (proposed to be defined as “generally forty weeks from the start of the temporary suspension of an essential function”)**, and (3) the inability to perform the essential job function can be reasonably accommodated.

This interpretation reflects the EEOC’s recognition that pregnancy (and pregnancy-related conditions, to a lesser extent) is a temporary condition and the temporary suspension of an essential job function is presumably reasonable – barring undue hardship. It also indicates that many workers may easily establish the first and second prongs of the “qualified” analysis.

As for the third prong, the NPRM explains that this requirement may be met if the worker can show that the employer is able to reasonably accommodate the inability to perform one or more essential functions *without* undue hardship. This further underscores the EEOC’s view that compliance with the PWFA may require employers “to consider more than one alternative to identify a reasonable accommodation that does not pose an undue hardship.”

Significantly, the NPRM also describes an interpretation of the PWFA that arguably makes it easier for workers affected by pregnancy, childbirth, or related medical conditions to show that the physical or mental limitations complained of are “related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions” protected by the PWFA. Acknowledging that some conditions or limitations may occur even absent pregnancy (*i.e.*, depression, hypertension, constraints on lifting), the NPRM interprets the PWFA as authorizing employers to request supporting medical documentation from the employee, where appropriate. For example, it may be necessary in some instances for employers to gather documentation from workers to determine coverage under the PWFA for pre-existing conditions exacerbated by pregnancy where it is not readily apparent whether such pre-existing conditions actually relate to a worker’s pregnancy or childbirth. Therefore, employers are likely to find that navigating the interactive process under the PWFA is largely the same as that required by the ADA.

The EEOC invites public comment on all aspects of the NPRM. The deadline to submit comments is October 10, 2023. [View instructions for submitting public comments.](#)

[\[1\] Federal Register :: Regulations To Implement the Pregnant Workers Fairness Act](#)

[\[2\] What You Should Know About the Pregnant Workers Fairness Act | U.S. Equal Employment Opportunity Commission \(eoc.gov\)](#)

Hinshaw & Culbertson LLP is a U.S.-based law firm with offices nationwide. The firm’s national reputation spans the insurance industry, the financial services sector, professional services, and other highly regulated industries. Hinshaw provides holistic legal solutions—from litigation and dispute resolution, and business advisory and transactional services, to regulatory compliance—for clients of all sizes. Visit www.hinshawlaw.com for more information and follow @Hinshaw on LinkedIn and X.

Topics

ADA, Equal Employment Opportunity Commission (EEOC), Pregnant Worker Protections, Pregnant Worker Fairness Act