

# EEOC Proposes Rules to Implement the Pregnant Workers Fairness Act

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On 11 August 2023, the US Equal Employment Opportunity Commission (EEOC) issued a Notice of Proposed Rulemaking (NPRM)<sup>1</sup> to implement the Pregnant Workers Fairness Act (PWFA),<sup>2</sup> a new law that protects the rights of pregnant and postpartum workers and applicants.<sup>3</sup> With the NPRM, the EEOC is providing a framework for how it will interpret the PWFA, including its defined terms, while also highlighting various potential forms of reasonable accommodations for covered workers. Interested members of the public have 60 days from publication of the NPRM to submit comments.<sup>4</sup> The EEOC will have until 29 December 2023 to issue the final regulations once the comment period closes. While the final regulations may change between the NPRM and final rule, employers can use this time to review the proposed regulations and their current accommodation practices to ensure compliance with the PWFA, which has been in effect since 27 June 2023.

## OVERVIEW OF NPRM AND FOUNDATIONAL TERMS

The definitions and concepts used in the NPRM are familiar because the goal of the PWFA is to allow pregnant and postpartum workers to remain actively employed with the support of a reasonable accommodation. The NPRM, therefore, borrows from a number of civil right acts, and its definitions largely track the Americans with Disabilities Act's (ADA) foundational terms.

The PWFA extends protections to workers who require an accommodation due to a known limitation as a result of pregnancy, childbirth, or a related medical condition. A "related medical condition" includes "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." According to the NPRM, reasonable accommodations also may be required for conditions related to infertility, miscarriage, postpartum depression, and pre-existing medical conditions exacerbated by pregnancy, such as hypertension, diabetes, depression, or anxiety.

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The NPRM also provides guidance on applying for accommodation requests under the PWFA and incorporates the ADA's definitions for "essential function," "reasonable accommodation," "undue hardship," and "interactive process," with some distinctions. *First*, unlike the ADA, the NPRM's definition of "limitation" for purposes of determining whether the impairment limits a major life activity does not require a specific level of severity to trigger the employer's obligation to provide a reasonable accommodation. This is because the PWFA is intended to cover employees whose limitations do not reach the threshold for accommodations under the ADA. *Second*, the NPRM replaces the ADA's references to an "individual with a disability" with an "employee with a known limitation." Third and *finally*, like the ADA, the NPRM does not require any "magic words" to trigger a request for an accommodation.

## **QUALIFIED INDIVIDUAL UNDER THE PWFA**

The PWFA has two definitions to determine who is "qualified" for an accommodation. The first is borrowed from the ADA.<sup>5</sup> The second provides that an employee or applicant is "'qualified'—*even if they 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." "In the near future" is generally defined to mean 40 weeks (i.e., the duration of a full-term pregnancy).<sup>6</sup>

## **EXAMPLES OF REASONABLE ACCOMMODATIONS**

A significant portion of the NPRM previews the breadth and unique nature of possible accommodations under the PWFA. Examples of potential reasonable accommodations include:

- Providing frequent breaks;
- Changing schedules, including reducing the employee's hours to part-time work, and providing paid and unpaid leave;<sup>7</sup>
- Remote work;
- Providing reserved parking spaces, if available;
- Providing light duty work;
- Modifying the work environment, such as allowing access to an elevator not normally used by employees, moving the employee's workspace closer to a bathroom, or modifying the work environment to allow the employee to pump breast milk at work;
- Restructuring the employee's job, such as removing a marginal function that requires a pregnant employee to climb a ladder or occasionally retrieving boxes from a supply closet;
- Temporarily suspending one or more essential functions; and
- Modifying equipment, uniforms, or devices, to account for changes in body size during and after pregnancy, adding seating or a standing desk, or providing an ergonomic keyboard to accommodate pregnancy-related hand swelling or tendonitis.

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The commentary to the NPRM highlights other forms of reasonable accommodation that may not be obvious, including attending infertility treatments, obtaining an amniocentesis, therapy for postpartum depression, or limited exposure to chemicals or secondhand smoke in the workplace.

## **UNDUE HARDSHIP**

The NPRM applies the ADA's "significant burden or expense" to the undue hardship standard for purposes of evaluating whether a request for an accommodation is reasonable. To evaluate a request to temporarily suspend an essential function, the NPRM outlines other factors to consider, including:

- The length of time that the qualified employee would be unable to perform the essential functions;
- Whether there is available work for the employee if the accommodation is provided;
- The nature of the essential function, including how often it is performed;
- Whether the employer has provided other workers in similar positions who are unable to perform the essential function with temporary suspensions of those functions and other duties;
- If applicable, whether other employees, temporary employees, or third parties can perform the essential function in question; and
- Whether the essential function can be postponed or remain unperformed for any length of time, and for how long.

When evaluating whether a temporary suspension of an essential function would cause an undue hardship, the employer must grant the accommodation for the period of time that there is not an undue hardship, even if it means that it is unable to grant the accommodation for the full period requested.

As under the ADA, the NPRM cautions that an employer cannot demonstrate undue hardship based on an assumption or speculation that other employees might seek a reasonable accommodation or that the same employee might seek another reasonable accommodation in the future. Similarly, an employer that receives numerous requests for the same or similar accommodation at the same time cannot deny all of them simply because processing the volume of the requests is burdensome or because it is unable to grant all of the requests.

Further, in an effort to reduce litigation, and to improve the speed at which a PWFA accommodation request is granted, the NPRM identifies four modifications or "predictable assessments" "that in virtually all cases ... are reasonable accommodations that do not impose undue hardship when requested by an employee due to pregnancy." They are:

1. Allowing an employee to carry water and drink, as needed, in the employee's work

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area;

2. Allowing additional restroom breaks;
3. Allowing employees whose work requires standing to sit and whose work requires sitting to stand; and
4. Allowing breaks, as needed, to eat and drink.

## **SUPPORTING DOCUMENTATION**

Consistent with the ADA, employers are not required to seek supporting documentation from a worker seeking an accommodation, and may require supporting documentation only if it is reasonably necessary to determine whether to grant the accommodation. As a best practice, the EEOC encourages an employer that requires documentation to grant interim accommodations if there is a delay in the employee providing the supporting documentation.

Examples of circumstances in which the EEOC would consider a request for documentation unreasonable include when the limitation and the need for the accommodation are obvious, such as when a visibly pregnant worker requests a different uniform size or larger equipment. Other examples include when the qualified employee has already provided sufficient information to substantiate the request (such as leave for a medical appointment), when the employee requests a “predictable assessment”, and when the accommodation request involves lactation. Under the NPRM, unreasonable requests for documentation and unnecessary employer delays that result in a failure to accommodate may violate the PWFA.

An employer may violate the law if it forces an accommodation on an employee that was not discussed during the interactive process or that is intended to help the employee out of concern, but is not based on a request or actual limitation. Finally, requiring an employee to take leave if there is another accommodation that will permit them to remain at work, may run afoul of the PWFA.

## **LOOKING AHEAD**

While many employers may already have policies in place that comply with the PWFA and the proposed regulations within the NPRM, covered employers should review and, if applicable, update their accommodation policies<sup>8</sup> and procedures to ensure compliance with the PWFA as well as applicable state law. Further, employers should consider training managers on identifying and addressing requests for an accommodation under the PWFA. Finally, since the NPRM provides significant examples of possible accommodations, including the predictable assessments, employers should evaluate how these may impact their operations and plan accordingly.

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