EEOC Issues Proposed Regulations for Pregnant Workers Fairness Act

By: Shannon Johnson

As explained in our previous client alert, the Pregnant Workers Fairness Act ("PWFA"), effective June 27, 2023, requires public and private sector employers with at least 15 employees to make reasonable accommodations for employees or applicants with known limitations related to or arising out of pregnancy, childbirth, and other related conditions, absent undue hardship. The PWFA did not define what constitutes a reasonable accommodation, and Congress required the Equal Employment Opportunity Commission ("EEOC") to propose regulations by the end of the year to provide examples of reasonable accommodations, among other things.

This week, as required by the PWFA, the EEOC unveiled its proposed regulations for implementation of the PWFA, which were published in the Federal Register on Friday, August 11, 2023. The full text of the regulations can be found here.

The public now has 60 days, until October 10, 2023, to comment on the proposed regulations. A summary of the key points of the proposed regulations follows, which should help employers continue compliance with the PWFA going forward.

Key Provisions

The EEOC, in the proposed regulations, provides clarity on a number of provisions in the PWFA. While it would be impossible to discuss all 275 pages of the regulations, some key takeaways include:

- Definition of "Known Limitation" – As noted previously, the PWFA requires employers to provide reasonable accommodation for a "known limitation" related to or arising out of pregnancy, childbirth, and other related conditions. The proposed regulations define a "known limitation" as a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or a related medical condition that has been communicated to the employer. A physical or mental condition is an impediment or problem that may be modest, minor, or episodic, and may also be related to maintaining the employee's health or the health of the pregnancy, or related to seeking health care related to the pregnancy, childbirth, or related condition. *Importantly, the physical or mental condition need not meet the definition of a disability under the Americans with Disabilities Act ("ADA").* In sum, given the regulations provide the condition may be minor or episodic and need not rise to the level of a disability, there is no threshold level of severity to which the condition must arise in order to be considered a physical or mental condition covered by the law.
- Definition of "Pregnancy, Childbirth, or Related Medical Conditions" – The proposed regulation includes a non-exhaustive list of examples of pregnancy, childbirth, or related medical conditions, which are very broad. Pregnancy and childbirth include (but are not limited to) both current and past pregnancy, potential or intended pregnancy, labor, and childbirth. "Related medical conditions" are defined very broadly to include a host of conditions, including but not limited to: termination of pregnancy (including miscarriage, stillbirth, and abortion), infertility and fertility treatment, ectopic pregnancy, gestational diabetes, preeclampsia, nausea, dehydration, frequent urination, menstruation, use of birth control, and lactation and conditions related to lactation such as low milk supply, among others. The regulations are clear that the defined list of "other

conditions" is non-exhaustive, and the employee need not specify a condition on this list or use medical terms to describe a condition on the list in order to be eligible for reasonable accommodation.

- "Predictable Assessments" – The EEOC regulations provide four accommodations that will "as a factual matter, virtually always be found to be reasonable accommodations that do not impose significant difficulty or expense." The EEOC calls these "predictable assessments," and these four modifications will virtually never constitute an undue hardship:
    - Allowing an employee or applicant to carry water and drink as needed during the workday;
    - Allowing additional restroom breaks;
    - Allowing an employee or applicant whose work requires standing to sit, or if their work requires sitting, allowing them to stand; and
    - Allowing breaks as needed to eat or drink.

Just because an accommodation appears on the list of "predictable assessments" does not prohibit an employer from arguing an undue hardship based on particular circumstances. Also, the EEOC has specifically sought public comment on whether this list should be narrowed or expanded to include other possible accommodations.

- Examples of Reasonable Accommodations – The EEOC provides many examples of other possible reasonable accommodations, including but not limited to job restructuring; modifying work schedules (including part-time work); telework; modifying break schedules for use of the restroom, eating and drinking; acquiring devices to assist with lifting or carrying, or placement of the employee in modified or light duty programs; permitting use of paid leave or providing additional unpaid leave; providing reserved parking spaces; making modifications to make the facility more accessible; breaks and a space for lactation (as more fully required by the PUMP Act); and temporary suspension of one or more essential functions of the position under certain circumstances. The EEOC has provided a very lengthy recitation of examples of reasonable accommodations that can be reviewed here.

If there is more than one effective accommodation, the EEOC cautions that the employee or applicant's preference is to be given primary consideration. However, the employer "has the ultimate discretion to choose between potential reasonable accommodations." An employer's "ultimate discretion" to choose a reasonable accommodation is limited by certain other considerations set out in the proposed rule and will be dependent upon the circumstances.

- How Requests for Reasonable Accommodation may be Communicated – To be considered "communicated to an employer," the regulations provide that a request for accommodation can be made orally, in writing, or by any other effective means, to a supervisor, manager, human resources, or by following company policy, and the employer may not require that the communication be made in writing, in any specific format, or on any particular form. The employee or applicant must merely communicate they have a limitation and need an adjustment or change at work. The EEOC has stated that to the extent an employer has reasonable concerns about whether a physical or mental condition is "related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions" the employer may request information from the employee regarding the connection using the interactive process which is defined in the regulations, but cautions that the EEOC expects this will, in most situations be a "straightforward determination that can be accomplished through a conversation."
- The Interactive Process and Limitations on Supporting Documentation – The regulations define the process as an "informal, interactive process," which should identify the known limitation and

change or adjustment at work that is needed, if not already clear from the request, and potential reasonable accommodations. The EEOC cautions that there are no rigid steps that must be followed, and states an employer is not required to seek supporting documentation; however, an employer who seeks supporting documentation for an accommodation request is limited to requiring documentation that is reasonable under the circumstances for the employer to determine whether to grant the accommodation. The employer may not require that the employee or applicant be examined by a health care provider of the employer's choosing. Further, an employer cannot deny or delay an accommodation based on an employee or applicant failing to provide supporting documentation, unless requiring the documentation is reasonable under the circumstances for the employer to determine whether to provide the accommodation at all.

- Reasonable documentation is documentation sufficient to describe or confirm (a) the physical or mental condition; (b) that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical condition; and (c) that a change or adjustment at work is necessary.
- The EEOC notes the following are situations where requiring documentation is *not reasonable*: (a) the known limitation and need for accommodation is obvious; (b) the employee or applicant has already provided information to substantiate the limitation and need for a change or adjustment at work; (c) the employee or applicant is pregnant and the accommodation requested is one of the "predictable assessments" an the employee provides self-attestation; and (d) the employer requires documentation other than self-attestation regarding lactation or pumping.

With these rules, there is much left unclear about what will be considered a "reasonable" request for documentation by an employer. However, employers should be cautious; the EEOC is clearly discouraging employers from seeking documentation simply to establish, for example, that a pregnancy exists, and requests for documentation that violate the proposed regulations could be considered coercion or retaliation prohibited by the law.

- Potential Liability/Violations under the PWFA – Potential liability for an employer may arise where an employee or applicant alleges an employer denied a reasonable accommodation absent undue hardship, unnecessarily delayed in responding to or granting an accommodation request, or unreasonably required supporting documentation. If an employee declines a reasonable accommodation without which they could not perform an essential function of their job, employers must also consider whether one or more essential functions can be temporarily suspended before a determination is made that the employee is not "qualified."

Unlike the ADA, the PWFA permits the temporary suspension of one or more essential functions of a job if the employee can perform the essential duties "in the near future" (which is defined in the proposed regulations to mean generally forty weeks from the start of the temporary suspension of an essential job function) unless the employer can show undue hardship. "Undue hardship" means, with respect to the provision of an accommodation, significant difficulty or expense incurred by an employer in light of several factors, including the nature and cost of the accommodation; the overall financial resources of the facility and the employer; the number of employees at the facility; the type of operation of the employer; and the impact of the accommodation on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

Further, the PWFA prohibits an employer from requiring a qualified employee with a known limitation to take leave, either paid or unpaid, if another effective reasonable accommodation exists, absent undue hardship; prohibits an employer from requiring an employee or applicant to accept an accommodation other than one arrived at through the interactive process; prohibits an employer from denying employment opportunities if the denial is based on the employer's need to make a reasonable accommodation for the known limitations; and prohibits an employer from taking an adverse action in the

terms, conditions, or privileges of employment due to a request or use of a reasonable accommodation for a known limitation.

Takeaways and Next Steps for Employers

The proposed regulations are lengthy and complex and not everything could be fully summarized in this alert given the depth and breadth of the proposed regulations. Employers should seek legal counsel for assistance with evaluating known limitations or requests for reasonable accommodation for employees or applicants under the PWFA. Employers who only offer light duty to employees who have sustained on the job injuries need to review that policy with employment counsel. The most suitable approach to complying with the PWFA will depend on the employer and employee/applicant's specific circumstances and available reasonable accommodations based on the limitations of the employee and the employee's specific job duties. Whether and to what extent the employer can request supporting documentation will be subjective based on the particular circumstances.

Employers should review their current policies and procedures to ensure compliance with the PWFA and the proposed regulations, and, given the EEOC's listed "predictable assessments," specifically ensure the four accommodations delineated by the EEOC are available accommodations to qualified employees or applicants.

Finally, Employers can make their voices heard. If you would like to submit comments to the proposed rule, they must be received by the EEOC by October 10, 2023, and we are happy to provide you with contact information for the commission and instructions for submitting comments, which may be provided online, by fax, or US Mail. Comment instructions can also be found here.

The Seigfreid Bingham team will continue to monitor the latest developments and legal requirements in this area of law. If you have any questions concerning the EEOC's proposed rule and how it may affect your business operations or employees, please do not hesitate to contact the firm's employment law attorneys for further information concerning compliance for your specific situation.

This article is general in nature and does not constitute legal advice. If you have legal questions, please consult the author, Shannon Johnson (sjohnson@sb-kc.com) 816.265.4139 or other attorneys in Seigfreid Bingham's Employment Law Group, including: John Vering (jvering@sb-kc.com) 816.265.4109, John Neyens (johnn@sb-kc.com) 816.265.4152, Mark Opara (mopara@sb-kc.com) 816.265.4140, Brenda Hamilton (bhamilton@sb-kc.com) 816.265.4103, Julie Parisi (jparisi@sb-kc.com) 816.265.4159, Christopher Tillery (ctillery@sb-kc.com) 816.265.4157, Katie Conklin (kconklin@sb-kc.com) 816.265.4114, Cody Weyhofen (cweyhofen@sb-kc.com) 816.265.4163, or your regular contact at Seigfreid Bingham at 816.421.4460.