

Employment & Labor Law FLASHPOINTS September 2023

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EEOC Releases Proposed Regulations for Pregnant Workers Fairness Act

On August 10, 2023, the Equal Employment Opportunity Commission (EEOC) published proposed rulemakings [<https://www.federalregister.gov/documents/2023/08/11/2023-17041/regulations-to-implement-the-pregnant-workers-fairness-act>] to implement the Pregnant Workers Fairness Act, Pub.L. No. 117-328, Div. II, 136 Stat. 6084 (2022). Regulations To Implement the Pregnant Workers Fairness Act, 88 Fed.Reg. 54,714 (Aug. 11, 2023). The Act took effective on July 27, 2023, is enforced by the EEOC, and applies only to accommodations in the workplace. Specifically, the Act requires covered employers to provide “reasonable accommodations” to an employee’s or applicant’s known limitations related to “pregnancy, childbirth, or related medical conditions,” which includes but is not limited to current, past, and potential pregnancy; menstruation; use of birth control; lactation; and termination of pregnancy, including miscarriage and abortion (88 Fed.Reg. at 54,767), unless the accommodation will cause an “undue hardship” on the employer. Notably, although the rulemaking process is not yet finalized, the EEOC began accepting charges on June 27, 2023. For the Act to apply, the situation complained of in the charge must have happened on June 27, 2023, or later. If the charge pertains to an earlier date, it may still be processed under Title VII of the Civil Rights Act of 1964 (Title VII), Pub.L. No. 88-352, Title VII, 78 Stat. 253, or the Americans with Disabilities Act of 1990 (ADA), Pub.L. No. 101-336, 104 Stat. 327.

While the proposed rule recognizes that there is no one-size-fits-all approach to assessing whether an accommodation will cause an “undue hardship” on the employer, the rule identifies several examples of possible reasonable accommodations, including

- 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 functions (NOTE: This exceeds the requirements of the ADA, which requires employers to provide a reasonable

accommodation to qualified individuals with a disability only if doing so enables them to perform essential job functions.)

- acquiring or modifying equipment, uniforms, or devices
- adjusting or modifying examinations or policies

The employer has the burden of establishing if a requested accommodation would cause an “undue hardship.” The proposed rule identifies additional factors for consideration in connection with whether temporarily suspending one or more essential job functions would constitute an “undue hardship,” 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.” 88 Fed.Reg. at 54,785.

The proposed regulations also make clear that the following accommodations are reasonable and would not constitute an “undue hardship” on an employer:

- 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.

The employee or applicant is responsible for making a request for an accommodation in the workplace. In so doing, an employee/applicant must (1) identify the limitation (a physical or mental condition, which does not need to be a disability) and (2) communicate to his or her employer that he or she needs an adjustment or change at work. Employees do not need to cite or mention the Act or use any specific language. Once a request is made, the proposed rule encourages that the employer and employee/applicant engage in an interactive process to identify and agree on a reasonable accommodation. The proposed rule makes clear that an employer may only require supporting documentation if both the need for the documentation and the documentation itself are reasonable. In essence, the Commission anticipates that under most circumstances, this will be a straightforward determination.

The public may submit formal comments

[<https://www.federalregister.gov/documents/2023/08/11/2023-17041/regulations-to-implement-the-pregnant-workers-fairness-act>] on the proposed rule on or before October 10, 2023.

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