

# EEOC Issues Proposed Regulations for Implementation of the Pregnant Workers Fairness Act

August 15, 2023

On December 9, 2022, President Biden signed the Pregnant Workers Fairness (PWFA) into law. The Act requires that covered employers provide “reasonable accommodations” to employees as may be necessitated by pregnancy, childbirth, or related medical conditions, unless the employer can demonstrate that such “reasonable accommodation(s)” would cause undue hardship on the operation of the business. Unlike the Americans with Disabilities Act (ADA), the PWFA expressly requires accommodations for pregnancy, childbirth, and/or related medical conditions by “covered employers” (public and private sector employers with at least 15 employees, Congress, federal agencies, employment agencies, and labor organizations).

The Equal Employment Opportunity Commission (EEOC)’s proposed regulations for implementation of the PWFA were published in the [Federal Register](#) on August 11, 2023. Stakeholders have sixty (60) days from the date of publication to provide comments for consideration.

The following proposed provisions are of significant importance to covered employers:

## Definitions

### ***Known Limitation***

Two-part definition:

- a. “known” – employee, applicant, or representative (i.e. family member, friend, health care provider, or other representative of employee or applicant) has communicated the limitation to employer (orally, in writing, or via any other effective means, cannot require written notice)
- b. “limitation” – physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.

### ***Pregnancy, Childbirth, or Related Medical Conditions***

Includes current pregnancy, past pregnancy, potential or intended pregnancy, labor, and childbirth. EEOC included a long nonexclusive list of specific conditions:

- anemia
- antenatal anxiety, depression, or psychosis

- carpal tunnel syndrome
- cesarean or perineal wound infection
- changes in hormone levels
- chronic migraines
- dehydration
- ectopic pregnancy
- edema of legs, ankles, feet, or fingers
- endometriosis
- fertility treatment
- frequent urination
- gestational diabetes
- HELLP syndrome
- hemorrhoids
- high blood pressure
- hyperemesis gravidarum
- incontinence
- infection
- infertility
- lactation and conditions related to lactation, such as low milk supply, engorgement, plugged ducts, mastitis, or fungal infection
- loss of balance
- lumbar lordosis
- maternal cardio metabolic disease
- menstrual cycles
- nausea or vomiting
- nerve injuries
- pelvic prolapse
- postpartum depression, anxiety, or psychosis
- preeclampsia
- preterm labor
- sciatica
- termination of pregnancy via miscarriage, stillbirth, or abortion
- use of birth control
- vaginal bleeding
- varicose veins
- vision changes

### ***Qualified Employee or Applicant***

- a. Can perform the essential functions of the job with or without reasonable accommodation, **OR**
- b. Cannot perform one or more essential functions of the job where the inability is for a temporary period (i.e., limited time, not permanent), may extend beyond “in the near future” (i.e. may resume

performance within 40 weeks), and the inability to perform the function can be reasonably accommodated.

### ***Reasonable Accommodation Examples***

- Making existing facilities accessible
- Job restructuring
- Part-time or modified work schedule
- Reassignment to a vacant position
- Breaks to use the restroom, eat, drink, and/or rest
- Acquisition or modification of equipment, uniforms, or devices, including those that assist with lifting and/or carrying for jobs that require lifting or carrying
- Modifying the work environment
- Providing seating for jobs that require standing or allowing standing for jobs that require sitting
- Adjustments or modifications of examinations or policies
- Permitting the use of paid leave or providing additional unpaid leave
- Placement in the employer's light or modified duty program or assignment to light duty or modified work
- Telework
- Adjustments to allow the employee to work without increased pain or risk to health
- Temporary suspension of one or more essential functions of the job
- Providing reserved parking
- Reasonable accommodations related to lactation (i.e., breaks, space, etc.)

### **Predictable Assessments**

EEOC has established a list of accommodations that should be considered “reasonable” in virtually all situations and, therefore, should not require any individual assessment, as follows:

- Allowing an employee or applicant to carry water and drink as needed during the workday
- Allowing an employee or applicant additional restroom breaks
- Allowing an employee or applicant whose work requires standing to sit and whose work requires sitting to stand
- Allowing an employee or applicant breaks as needed to eat and drink

### **Interactive Process**

Informal, interactive process between employee/applicant and employer to identify the known limitations and the change or adjustment at work that is needed, **IF** either of these things is not clear from the request

- Note – according to the proposed regulations, if the limitation and/or the accommodation is clear or obvious, there should be no need to engage the interactive process.

## Supporting Documentation

The employer cannot seek supporting documentation where the limitation and/or the needed accommodation are clear and/or obvious. In such situations, self-report should be sufficient. The following are examples where the EEOC would consider it unreasonable to request supporting documentation:

- When the known limitation and need for accommodation are obvious, and the employee confirms the need through self-attestation
- When the employee or applicant has already provided the covered entity with sufficient information to substantiate that the employee or applicant has a known limitation and that a change or adjustment is needed
- When the employee or applicant is pregnant and needs one of the accommodations set forth by the EEOC as examples of reasonable accommodations
- When the employer requires documentation other than self-attestation from the employee or applicant regarding lactation or pumping

When requiring supporting documentation is reasonable, the employer is limited to obtaining only that documentation necessary to describe or confirm the condition and the need for accommodation.

NOTE – an employer is never authorized to require an employee to be examined by a health care provider selected by the employer.

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Covered entities are encouraged to submit comments to the proposed regulations during the comment period to ensure any concerns with the proposed regulations are considered. Stay tuned for additional information as the regulation process moves forward.

For information related to guidance under the PWFA, such as best practices and subsequent litigation related to the Act, members of McGlinchey's Labor and Employment Group are more than happy and available to assist employers.

## Related people

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