

More Than I Expected: Examining the EEOC's Proposed Regulations For the PWFA



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Pregnant Workers Fairness Act

- Effective June 27, 2023.
- Key component is a direct right to reasonable accommodation for employees with pregnancy-related or childbirth-related limitations, or other limitations arising out of a medical condition related to pregnancy or childbirth.
 - For brevity, I'll use “pregnancy” or “pregnant” to refer to all such conditions.
 - Also, “employee” = employees and applicants.



Pregnant Workers Fairness Act

- Statute told EEOC to issue regulations “to carry out this Act. Such regulations shall provide examples of reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions.”
- EEOC’s deadline was December 27, 2024.
- EEOC published proposed regulations on August 11, 2023. We are in a 60 day review and comment period.



Key Surprises in the Proposed PWFA Regs

- No severity threshold for impairment.
 - Four presumptive accommodations.
- Definition of qualified employee.
- Emphasis on leave as accommodation.
- Restrictive view of employer right to request medical information.
- Employer will bear burden of showing undue hardship in most scenarios.



Examining the Proposed PWFA Regs

Proposed PWFA Regs: Surprise 1 – No Threshold for Severity of Impairment

- Employers may be used to looking for disabilities, *i.e.*, substantial impairments, but PWFA is explicitly *not* a disability statute.
- Qualifying impairments may also be very general in a way that differs from ADA norms. *E.g.*, “pain,” or “I need to pee every hour.”



Proposed PWFA Regs: Surprise 1 – No Threshold for Severity of Impairment

- The PWFA contains four presumptive reasonable accommodations:
 - Allowing an employee to carry water and drink throughout the day.
 - Allowing an employee additional bathroom breaks.
 - Allowing standing and sitting breaks.
 - Allowing additional breaks for eating and drinking.



Examining the Proposed PWFA Regs

Proposed PWFA Regs: Surprise 2 – Definition of Qualified Employee

PWFA (Statute):

“the term ‘qualified employee’ means an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position, except that an employee or applicant shall be considered qualified if –

- (A) any inability to perform an essential function is for a **temporary period**;
- (B) the essential function could be performed **in the near future**;
and
- (C) the inability to perform the essential function can be reasonably accommodated[.]”



Examining the Proposed PWFA Regs

Proposed PWFA Regs: Surprise 2 – Definition of Qualified Employee

PWFA Proposed Regulations:

“an employee or applicant shall be considered qualified if they cannot perform one or more essential functions if ...

- (i) Any inability to perform an essential function is for a temporary period, where “temporary” means lasting for a limited time, not permanent, and may extend beyond “in the near future”;
- (ii) The essential function(s) could be performed in the near future, where “in the near future” means the ability to perform the essential function(s) will generally resume within forty weeks...



Examining the Proposed PWFA Regs

Proposed PWFA Regs: Surprise 2 – Definition of Qualified Employee

PWFA Proposed Regulations, Appendix:

“In keeping with the requirement that the determinations as to whether an individual is qualified under the PWFA should be made based on the situation at hand and the accommodation currently at issue, the determination of ‘in the near future’ shall be made when the employee asks for each accommodation that requires the suspension of one or more essential functions.”

In other words, the forty-week periods can be stacked from pre-pregnancy, pregnancy, and post-partum.



Examining the Proposed PWFA Regs

Proposed PWFA Regs: Surprise 3 – Emphasis on Leave

Examples of Leaves as Accommodation in the Proposed Regs

- Use of paid leave, including STD, LTD.
- Leave for recovery.
- Leave for appointments.
- Emergency leave
- Other statutory leaves (like FMLA)
- Additional breaks
- Lactation breaks, potentially beyond first year of birth



Examining the Proposed PWFA Regs

Proposed PWFA Regs: Surprise 3 – Emphasis on Leave

PWFA Proposed Regulations, Appendix:

The Commission notes that leave related to recovery from pregnancy, childbirth, or related medical conditions does not count as a time when an essential function is suspended and thus is not relevant for the ... definition of qualified.





Proposed PWFA Regs: Surprise 3 – Emphasis on Leave

However, the duration, frequency, or unpredictable nature of leaves may lead to conclusion of undue hardship.

Also, employer still may not impose leave, but employee may prefer leave and seek it as accommodation of first choice.



Proposed PWFA Regs: Surprise 4 – Hostility to Requests for Corroborating Information

- The proposed regs say an employer violates the PWFA if it delays or denies a request based on the failure to provide supporting documentation, unless the documentation is reasonably necessary to determine if the accommodation should be provided.



Proposed PWFA Regs: Surprise 4 – Hostility to Requests for Corroborating Information

Requests are reasonable if they seek documentation that describes or confirms:

- The physical or mental condition
- That it is related to pregnancy, childbirth, or related medical condition,
- That a change or adjustment at work is needed.



Proposed PWFA Regs: Surprise 4 – Hostility to Requests for Corroborating Information

Requests will be found to be unreasonable if:

- Need and pregnancy-relatedness are obvious.
- If employee has already provided “sufficient information to substantiate” the need for accommodation.
- When the four presumptively reasonable accommodations are requested.
- Lactation-related requests.



Examining the Proposed PWFA Regs

Proposed PWFA Regs: Surprise 5 – Employers to Bear Burden of Proving Undue Hardship

Without thresholds for severity of limitation and an expansive definition of “qualified,” employers will bear the burden of either the good faith defense of identifying an alternative accommodation and/or that any accommodation would have imposed an undue hardship.



Examining the Proposed PWFA Regs

Action Steps

- Review accommodation policy to ensure it includes disability, pregnancy, and religion.
- Instruct supervisors how to direct pregnancy-related requests and not to screen out any requests.
- Practice creativity to find alternative accommodations.
- Improve vocabulary about “light duty.”
- Ensure FMLA is run concurrently, where applicable.



QUESTIONS & ANSWERS





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