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This is going to be a bigger deal than I thought: A series of blog posts reflecting on the proposed Pregnant Workers Fairness Act regulations, Part 2 of 5

Takeaway 2: An employee who is unable to perform an essential function of the job for up to 40 weeks is still a qualified individual under the PWFA. Further, an employee who experiences multiple periods of inability to perform essential function(s) may still be a qualified individual even if those periods of inability exceed 40 weeks in the aggregate.

One of the most surprising aspects in the text of the PWFA was its defining "qualified employee" to include individuals who were temporarily unable to perform an essential function, provided the essential function could be performed in the "near future," and that the inability to perform the essential function could be reasonably accommodated. The U.S. House of Representatives Committee Report indicated that this language was based on ADA case law where leaves or transfers were found to be reasonable accommodations for employees with disabilities who were expected to be able to resume their essential job duties in that *near future*.

From this jumping off point, ***the EEOC has proposed that "in the near future" means within 40 weeks***. Insert all of your shocked face emojis and gifs here. Those familiar with ADA case law on leave as a reasonable accommodation know that as a general rule of thumb, leaves in excess of six months (26 weeks) are not reasonable, though employers must always engage in an individualized interactive process. Before his promotion to the U.S. Supreme Court, Justice Gorsuch put it like this for the Tenth Circuit: "[I]t's difficult to conceive how an employee's absence for six months …could be consistent with discharging the essential functions of most any job in the national economy today." *Hwang v. Kan. State Univ.*, 753 F.3d 1159, 1162 (10th Cir. 2014). Incredibly, the EEOC specifically requested comment on whether the rule "should be one year rather than generally forty weeks," a probable indicator that it'll be ignoring employer comments highlighting that even forty weeks is far afield of the obvious legislative intent.

But, wait, it gets worse. ***The EEOC also proposed that employers could not aggregate periods of inability to perform essential function(s) from pregnancy to post-partum or across multiple and shifting incapacities in assessing whether or not an individual is qualified under the PWFA.*** While I understand, logistically, that a pregnant employee unable to perform an essential job function now is unlikely to know if she will be able to resume all essential functions following recovery from childbirth, the EEOC's position here again defies the bulk of ADA caselaw that the legislature said it meant to invoke, which shields employers from having to grant indefinite and cascading requests for leave. *E.g.*, *Santandreu v. Miami Dade County*, 513 Fed. Appx. 902, 905-06 (11th Cir. 2013).

One last twist on this jagged point for employers: ***The amount of time an employee spends on leave in recovery for childbirth or other covered conditions would also not "count" towards the evaluation of whether or not an individual is qualified.***

More to come next week, and we hope you will join us for a webinar on August 23rd at 10am Central, where we'll discuss real-life situations where failing to understand PWFA nuances like this one may trap the unwary and unprepared employer.

If you have any questions or would like to discuss this further, please contact Whitney Brown at 205-323-9274 or wbrown@lehrmiddlebrooks.com.