



LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

LABOR • EMPLOYMENT • IMMIGRATION

August 21, 2023

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 3 of 5

Takeaway 3: The proposed regulations disfavor employer requests for medical information.

Citing the costs and availability of medical care generally, the Commission takes a stance in the proposed regulations that an employer is not entitled to require medical documentation except to verify (1) the existence of the physical or mental condition; (2) that the condition is related to, affected by, or arising out of pregnancy, childbirth, or medical conditions; and (3) that a change is needed at work due to the condition. Further, per the proposed regulations, *an employer should not make even these limited requests for medical information in circumstances where the limitation and accommodation are obvious, are for one of the four presumptively-reasonable accommodations, or where the employee articulates a specific limitation that is typical for her course of pregnancy or related condition (that's the biggie).*

Recall the lesson of [Part 1 of this series](#): that the obligation to accommodate includes the obligation to accommodate very minor limitations. So, it certainly makes sense that an employer may not require an employee to obtain medical verification for very obvious and very minor accommodations. A reasonable corollary to this is that an employee should not be required to provide medical verification of her need for one of the proposed regulation's four presumptive accommodations: (a) ability to carry water with her or otherwise have regular access to water for drinking; (b) restroom breaks; (c) posture breaks – sitting or standing; and (d) breaks for eating and drinking. And, given the PUMP Act, hopefully no employer would ask an employee for medical verification that they are lactating and need breaks to express milk. *Side note – the proposed regulations use an example of a mother requesting leave to pump 14 months after birth, which is beyond the PUMP Act requirement of 12 months.*

But what about the circumstance when an employee provides specific information? The proposed regulation says that it is unreasonable for an employer to require medical documentation when “the employee or applicant already has provided [the employer] with sufficient information to substantiate that the employee or applicant has a known limitation and that a change or adjustment at work is needed.” (29 C.F.R. 1636.3(l) (proposed)) (emphasis added). The Commission uses the example of an employee who “provided documentation” that due to a recent C-section, she has a lifting restriction of 20 pounds for 2 months, as an example of this scenario under which no further verification is required. However, I’m worried, and you should be too, about the use of *information* in the proposed regulation. If an employee requests an accommodation that’s specific as to type and duration, and generally in line with limitations experienced commonly in pregnancy and childbirth, does an employer have the right to verify

with a medical provider? Under the ADA, I frequently work with clients on job duty-specific physician questionnaires based on employee limitations or requests that may be related to disability, so that my clients (a) can avoid getting medical information that's not job-related and consistent with business necessity, and (b) avoid getting indecipherable jottings on a prescription pad that often conflict with what an employee actually requested. Under these proposed regulations, I think the EEOC is saying that employers have to accept those indecipherable prescription pad jottings or even possibly an employee's verbal representation of what their provider said.

Two more blog posts to go. Plus, we hope you will join us [for a complimentary 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.