Updates

The recently enacted Pregnant Workers Fairness Act (PWFA) requires covered employers (i.e., public or private employers with more than 15 employees) to provide reasonable accommodations to "qualified" employees or candidates with a known limitation related to pregnancy, childbirth, or related medical conditions, absent an "undue hardship."

The PWFA applies only to accommodations (and related retaliation) and is not a general anti-discrimination law.

Prior to the passage of the PWFA, pregnancy was not considered a disability under the Americans with Disabilities Act (ADA), and not all pregnancy-related conditions met the ADA's definition of a "disability." Under the PWFA, however, employees and applicants with a range of pregnancy-related conditions may now seek reasonable accommodations under federal law.

The U.S. Equal Employment Opportunity Commission (EEOC) issued an expansive proposed rule regarding the PWFA on August 11, 2023. The comment period on the proposed rule is set to close on October 10, 2023. The proposed rule expands protections for covered employees and applicants beyond what is available under existing federal employment laws. We highlight some of the more notable provisions below:

- **The proposed rule explains that pregnancy and childbirth or "related medical conditions" include conditions that may not be immediately obvious to some employers.** The proposed rule defines these terms to include "pregnancy, past pregnancy, potential pregnancy, lactation (including breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, or having or choosing not to have an abortion, among other conditions." The EEOC emphasizes that this list is nonexhaustive.
- **The proposed rule's definition of a "qualified" individual is broader than that of the ADA.** Unlike the ADA, the proposed rule provides that an individual may be "qualified" for their position, even if they cannot perform one or more essential functions of the job. The circumstances under which someone may be qualified while unable to perform an essential function of the job include whether: (1) the inability is temporary; (2) the essential function can be performed in the "near future" (i.e., "generally forty weeks from the start of the temporary suspension of an essential function"); and (3) the inability can be reasonably accommodated. A reasonable accommodation may, in some cases, "mean that one or more of the essential functions are temporarily suspended, with or without reassignment to someone else."
- **Like under the ADA, employers must work together under the PWFA's mandatory interactive process to determine a reasonable accommodation, but under the proposed rule, four accommodations are to be granted in "virtually all cases."** The accommodations (referred to in the proposed rule as "predictable assessments") include allowing an employee to: (1) take additional restroom breaks; (2) carry water and drink, as needed, in the employee's work area; (3) sit if the employee's work requires standing and stand if the employee's work requires sitting; and (4) take breaks, as needed, to eat and drink. Other potential reasonable accommodations listed in the proposed rule include (but are not limited to):
    - 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.
    - Acquiring or modifying equipment, uniforms, or devices.
    - Adjusting or modifying examinations or policies.
- **Employers may only require limited documentation.** The proposed rule defines "reasonable documentation" as that which "describes or confirms (1) the physical or mental condition; (2) that it is related to, affected by, or arising out of pregnancy, childbirth or related medical conditions; and (3) that a change or adjustment at work is needed for that reason." Documentation cannot be required from the employee if their known limitation is obvious or if the employer already has sufficient information. An employer also cannot require documentation for a "predictable assessment" or if the accommodation needed involves lactation.

Employers may violate the PWFA if they fail to provide a reasonable accommodation when one is available, unnecessarily delay when responding to a request for an accommodation (interim accommodations will be evaluated as part of this analysis), or determine an employee is unqualified because they declined a reasonable accommodation (e.g., whether an essential function can be suspended must be considered).

Perkins Coie will continue to monitor developments around the proposed rule and the PWFA.

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