Summary of Key Provisions of the EEOC's Proposed Rule to Implement the Pregnant Workers Fairness Act (PWFA)

The U.S. Equal Employment Opportunity Commission issued a Notice of Proposed Rulemaking (NPRM) to implement the Pregnant Workers Fairness Act (PWFA). The NPRM was posted by the Federal Register for public inspection on Aug. 7, 2023 and published in the Federal Register on Aug. 11, 2023. The NPRM is available at **https://www.federalregister.gov/documents/2023/08/11/2023-17041/regulations-to-implement-the-pregnant-workers-fairness-act (https://www.federalregister.gov/documents/2023/08/11/2023-17041/regulations-to-implement-the-pregnant-workers-fairness-act)** . The public may submit comments on that page by clicking on the green "Submit a Formal Comment" button until Oct. 10, 2023. This document provides a summary of key portions of the NPRM. This document is provided for informational purposes only. It is not a substitute for the full text of the proposed rule. It does not discuss all of the provisions in the proposed rule and does not contain details, examples, or explanations that are provided in the proposed rule.

The PWFA requires an employer to provide reasonable accommodations, absent undue hardship, to a qualified employee or applicant with a known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The Commission's proposed rule addresses each element of this requirement. As required by the PWFA, the proposed rule also provide examples of reasonable accommodations.

1. Coverage:

   The PWFA covers employers (as well as unions and employment agencies), employees, applicants, and former employees who are currently covered by (1) Title VII of the Civil Rights Act of 1964 (Title VII); (2) the Congressional Accountability Act of 1995; [1] (3) the Government Employee Rights Act of 1991 (GERA); or (4) section 717 of Title VII, which covers federal employees. Whoever satisfies the definition of an "employer" or "employee" under any of these statutes is an employer or employee for purposes of the PWFA.[2]

2. Remedies and Enforcement:

   The procedures for filing a charge or claim under the PWFA, as well as the available remedies, including the ability to obtain damages, are the same as under (1) Title VII; (2) the Congressional Accountability Act; (3) GERA; and (4) section 717 of Title VII, for the employees covered by the respective statutes. Limitations regarding available remedies under these statutes likewise apply under the PWFA. As with the Americans with Disabilities Act, as amended (ADA), damages are limited if the claim involves the provision of a reasonable accommodation, and the employer makes a good faith effort to meet the need for a reasonable accommodation.

3. Definitions:

   a. "Known limitation" is defined in the PWFA is a "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or the employee's representative has communicated to the covered entity whether or not such condition meets the definition of disability" under the ADA.

      i. In the proposed rule, "known" means "the employee or applicant, or a representative of the employee or applicant, has communicated the limitation to the covered entity."

      ii. In the proposed rule, "limitation" means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The physical or mental condition that is the limitation may be a modest, minor, and/or episodic impediment or problem. The physical or mental condition also may be that a worker affected by pregnancy, childbirth, or

related medical conditions has a need or problem related to maintaining their health or the health of their pregnancy. The definition also includes when a worker is seeking health care related to pregnancy, childbirth, or a related medical condition itself. Under the proposed rule, the physical or mental condition required to trigger the obligation to provide a reasonable accommodation under the PWFA does not require a specific level of severity.

iii. "Pregnancy, childbirth, or related medical conditions" is a phrase used in Title VII (42 U.S.C. 2000e(k)), and in the proposed rule it has the same meaning under the PWFA as under Title VII; the proposed rule also provides additional examples of related medical conditions.

iv. Under the proposed rule, to the extent that an employer has reasonable concerns about whether a physical or mental condition or limitation is "related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions," the employer may request information from the employee regarding the connection, using the principles set out in the sections in the proposed rule about the interactive process and supporting documentation. However, for the most part, the Commission anticipates that determining whether a limitation or physical or mental condition is related to, affected by, or arises out of pregnancy, childbirth, or related medical conditions, will be a straightforward determination that can be accomplished through a conversation between the employer and the employee as part of the interactive process and without the need for the employee to obtain documentation or verification.

b. The PWFA has two definitions of "qualified."

i. First, the PWFA uses language from the ADA: "an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position" is qualified.

ii. Second, the PWFA allows an employee or applicant to be "qualified" even if they cannot perform one or more essential functions of the job if the inability to perform the essential function(s) is

"temporary," the worker could perform the essential function(s) "in the near future," and the inability to perform the essential function(s) can be reasonably accommodated. The terms "temporary," "in the near future," and "can be reasonably accommodated" are not defined in the PWFA.

1. The proposed rule defines the term "temporary" as lasting for a limited time, not permanent, and may extend beyond "in the near future."

2. The proposed rule defines "in the near future" as generally forty weeks. The proposed definition in this section does not mean that the essential function(s) must always be suspended for forty weeks, or that if an employee seeks the temporary suspension of an essential function(s) for forty weeks it must be automatically granted. The actual length of the temporary suspension of the essential function(s) will depend upon what the employee requires, and the employer always has available the defense that it would create an undue hardship. However, the mere fact that the temporary suspension of one or more essential functions is needed for any time period up to and including generally forty weeks will not, on its own, render a worker unqualified under the PWFA.

3. The proposed rule also discusses the meaning of the PWFA's requirement that the inability to perform the essential function(s) can be reasonably accommodated. For some positions, this may mean that one or more essential functions are temporarily suspended, with or without reassignment to someone else, and the employee continues to perform the remaining functions of the job. For other jobs, some of the essential functions may be temporarily suspended, with or without reassignment to someone else, and the employee may be assigned other tasks to replace them. In yet other situations, one or more essential functions may be temporarily suspended, with or without reassignment to someone else, and the employee may perform the functions of a different job to which the employer temporarily transfers or assigns them, or the employee may participate in the

employer's light or modified duty program. Throughout this process, as with other reasonable accommodation requests, an employer may need to consider more than one alternative to identify a reasonable accommodation that does not pose an undue hardship.

c. "Essential function" is a term from the ADA, and the proposed rule uses the same definition as in the ADA. In general terms, it means the fundamental duties of the job.

d. "Reasonable accommodation" is a term from the ADA, and the PWFA uses a similar definition as in the ADA. Generally, it means a change in the work environment or how things are usually done. The proposed rule provides specific examples of possible reasonable accommodations under the PWFA, including:

    i. Frequent breaks;
    ii. Sitting/Standing;
    iii. Schedule changes, part-time work, and paid and unpaid leave;
    iv. Telework;
    v. Parking;
    vi. Light duty;
    vii. Making existing facilities accessible or modifying the work environment;
    viii. Job restructuring;
    ix. Temporarily suspending one or more essential function;
    x. Acquiring or modifying equipment, uniforms, or devices; and
    xi. Adjusting or modifying examinations or policies.

e. "Undue Hardship" is a term from the ADA, and the PWFA uses a similar definition as in the ADA. Generally, it means significant difficulty or expense for the operation of the employer. The proposed rule outlines some factors to be considered when determining if undue hardship exists. These are the same factors as under the ADA.

i. Additionally, to address that under the PWFA an employer may have to accommodate an employee's temporary inability to perform an essential function, the proposed rule adds additional factors that may be considered when determining if the temporary suspension of an essential function causes an undue hardship. These additional factors in the proposed rule include consideration of the length of time that the employee or applicant will be unable to perform the essential function(s); whether there is work for the employee or applicant to accomplish; the nature of the essential function, including its frequency; whether the employer has provided other employees or applicants in similar positions who are unable to perform essential function(s) of their positions with temporary suspensions of those functions and other duties; if necessary, whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function(s) in question; and whether the essential function(s) can be postponed or remain unperformed for any length of time and, if so, for how long.

ii. The proposed rule also identifies a limited number of simple modifications that will, in virtually all cases, be found to be reasonable accommodations that do not impose an undue hardship when requested by an employee due to pregnancy. These modifications in the proposed rule are: (1) allowing an employee to carry water and drink, as needed, in the employee's work area; (2) allowing an employee additional restroom breaks; (3) allowing an employee whose work requires standing to sit and whose work requires sitting to stand, and (4) allowing an employee breaks, as needed, to eat and drink. The predictable assessments provision in the proposed rule does not alter the meaning of the terms "reasonable accommodation" or "undue hardship." Likewise, it does not change the requirement under the PWFA that employers must conduct an individualized assessment when determining whether a modification is a reasonable accommodation that will impose an undue hardship. Instead, the proposed paragraph informs covered entities that for these specific and simple modifications, in virtually all cases, the Commission expects that individualized assessments will result in a finding that the

modification is a reasonable accommodation that does not impose an undue hardship.

f. The “interactive process” is a method from the ADA to help the employer and the worker figure out a reasonable accommodation; the PWFA anticipates that employers will use it for requests to accommodate known limitations related to pregnancy, childbirth, or related medical conditions. Generally, it means a discussion or two-way communication between an employer and an employee or applicant to identify a reasonable accommodation.

g. Supporting Documentation. Under the proposed rule, an employer is not required to seek supporting documentation from a worker who seeks an accommodation under the PWFA. If an employer decides to require supporting documentation, it is only permitted to do so under the proposed rule if it is reasonable to require documentation under the circumstances for the employer to determine whether to grant the accommodation. When requiring documentation is reasonable, the employer is limited also to requiring documentation that itself is reasonable. The proposed rule and appendix set out examples of when it would not be reasonable for the employer to require documentation. The proposed rule also defines “reasonable documentation” as documentation that 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.

4. Requesting an Accommodation:

Under the proposed rule, a request for an accommodation has two parts. First, the employee or applicant (or their representative) must identify the limitation that is the physical or mental condition and that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. Second, the employee or applicant (or their representative) must indicate that they need an adjustment or change at work. Under the proposed rule, a request for a reasonable accommodation under the PWFA does not need to be in writing or use any specific words or phrases. Instead, employees or applicants may request accommodations in conversation or may use another mode of communication to inform the employer.

5. Prohibited Acts:

   a. The PWFA prohibits an employer from denying a qualified employee or applicant with a known limitation a reasonable accommodation, absent undue hardship. The proposed rule sets out additional considerations for covered entities and employees in complying with this provision. Under the proposed rule:

      i. An unnecessary delay in responding to a request for a reasonable accommodation may result in a violation of the PWFA if the delay results in a failure to provide a reasonable accommodation. This can be true even if the reasonable accommodation is eventually provided, when the delay was unnecessary.

      ii. If an employee declines a reasonable accommodation, and without it the employee cannot perform one or more essential functions of the position, then the employee will no longer be considered qualified. However, because the PWFA allows for the temporary suspension of one or more essential functions in certain circumstances, an employer must also consider whether one or more essential functions can be temporarily suspended before a determination is made pursuant to this section that the employee is not qualified.

      iii. If the request for documentation was not reasonable under the circumstances for the employer to determine whether to grant the accommodation, an employer cannot defend the denial of an accommodation based on the lack of documentation provided by the worker.

      iv. If there is more than one effective accommodation, the employee's or applicant's preference should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between potential reasonable accommodations. An employer's "ultimate discretion" to choose a reasonable accommodation is limited by certain other considerations set out in the proposed rule.

   b. The PWFA prohibits an employer from requiring a qualified employee or applicant to accept an accommodation other than one arrived at through the interactive process.

c. The PWFA prohibits an employer from denying employment opportunities to a qualified employee or applicant if the denial is based on the employer's need to make a reasonable accommodation for the known limitation of the employee or applicant.

d. The PWFA prohibits an employer from requiring a qualified employee with a known limitation to take leave, either paid or unpaid, if another effective reasonable accommodation exists, absent undue hardship.

e. The PWFA prohibits an employer from taking an adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation for a known limitation.

6. Prohibition on Retaliation and Coercion:

   a. The PWFA prohibits retaliation against any employee, applicant, or former employee because that person has opposed acts or practices made unlawful by the PWFA or has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the PWFA.

   b. The PWFA prohibits coercion, intimidation, threats, or interference with any individual in the exercise or enjoyment of rights under the PWFA or with any individual aiding or encouraging any other individual in the exercise or enjoyment of rights under the Act. The proposed rule also provides that the PWFA's retaliation and coercion provisions prohibit harassment based on an individual's exercise or enjoyment of rights under the PWFA or aid or encouragement of any other individual in doing so.

7. Relationship to Other Laws:

   a. The PWFA does not limit the rights of individuals affected by pregnancy, childbirth, or related medical conditions under a Federal, State, or local law that provides greater or equal protection.

   b. The PWFA provides a "[r]ule of construction" stating that the law is "subject to the applicability to religious employment" set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1(a). The relevant portion of section 702(a) provides that "[Title VII] shall not apply . . . to a religious corporation, association, educational institution, or society with

respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." The proposed rule provides that when this PWFA provision is asserted by a respondent employer, the Commission will consider the application of the provision on a case-by-case basis.

---

[1] The EEOC does not have enforcement authority for the Congressional Accountability Act; thus, these proposed regulations do not apply to workers or employers covered by that law. The PWFA directs the Office of Congressional Workplace Rights to issue regulations within six months after the Commission issues a final rule in this rulemaking.

[2] This document uses the term "employer," but the requirements apply to all covered entities.