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October 09, 2023

By electronic submission: http://www.regulations.gov/

Raymond Windmiller
Executive Officer, Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street NE
Washington, DC 20507

RE: RIN number 3046–AB30 - Regulations to Implement the Pregnant Workers Fairness Act.

Dear Mr. Windermiller:

As the voice of all things work, workers and the workplace, SHRM is the foremost expert, convener and thought leader on issues impacting today's evolving workplaces. With nearly 325,000 members in 165 countries, SHRM impacts the lives of more than 235 million workers and families globally.

SHRM's membership of HR professionals and business executives sit at the intersection of work, workers and the workplace. SHRM members help to establish positive collaboration and workplace cultures in which workers and employers thrive together. SHRM and its membership championed the passage of the Pregnant Workers Fairness Act (PWFA), as this historic bipartisan legislation confers important workplace protections for pregnant workers and ensures that employers have flexibility and clarity regarding how to handle workplace accommodations for pregnant employees. SHRM applauds the U.S. Equal Employment Opportunity Commission (EEOC) for developing proposed regulations as requested by Congress in a timely manner. SHRM respectfully offers the following comments to the Notice of Proposed Rulemaking (NPRM).

I. Introduction

As the PWFA was modeled after the Americans with Disabilities Act (ADA), including referencing the ADA for definitions of "reasonable accommodation," "undue hardship" and "essential functions" within the PWFA's legislative text, SHRM advocates that leaning into existing structures for the accommodation processes would allow for organizations to better understand and implement the PWFA. Additionally, HR professionals will already be well-versed in the practical application of the ADA and the reasonable accommodation process in the workplace.

Overall, SHRM's comment to the regulations as proposed seeks to add certain revisions and clarifications in the hopes that they will provide a clear road map for compliance and implementation of the PWFA in the workplace. This can be accomplished by bringing the accommodation process under the PWFA more in line with the process under the ADA, which

organizations and HR professionals already have a strong familiarity with and have had success implementing in their workplaces.

II. A better framework in which to evaluate when an eligible employee or applicant has "communicated" their "known limitation"

While SHRM supports that the proposed regulations stated that the person seeking protection under the PWFA does not need to "mention the PWFA, say any specific phrases, or use medical terms, and the request does not have to be in writing," the accommodation process under the PWFA will only be effective to the extent that an employer is adequately and appropriately put on notice of the need for a reasonable accommodation under the statute. However, it should be clear that the initial onus to kickstart the accommodation process under the PWFA is on the worker who seeks such accommodation so that the PWFA does not unintentionally create an unmanageable process for employers.

The proposed regulation states that a covered worker should be permitted to request an accommodation through multiple avenues and means, including "a supervisor, manager, someone who has supervisory authority for the employee (or the equivalent for an applicant), or human resources personnel, or by following the covered entity's policy to request an accommodation." SHRM supports this definition as consistent with the process that many employers follow for requesting an ADA accommodation, especially since it expressly contemplates that employers can create a policy with their own, more narrow process for making an accommodation request. However, SHRM would caution against expanding the list of persons to whom an accommodation request can be made beyond supervisory personnel or human resources.

There is a simple addition to the final regulations concerning an eligible worker communicating their known limitation that could be added to increase clarity for all parties. Within the proposed regulations, it states that, in order to request a reasonable accommodation, the employee or applicant need only communicate: (1) the limitation, and (2) that the employee/applicant needs an adjustment or change at work. SHRM believes that the proposed regulation should be modified to state that the employee must communicate (1) the limitation; and (2) that the employee/applicant needs an adjustment or change at work *due to the limitation*. This slight change would clarify that the employee may only request accommodations that are necessitated by the limitation. This would also align with an HR professional's understanding of the accommodation process under the ADA, which states that while the burden to provide notice under the ADA sufficient to initiate the reasonable accommodation process is not a heavy one, adequate notice does require that the employee or applicant inform the employer of the disability, the limitations associated with the disability and the need for accommodations based on that disability. Additionally, this would better enable HR professionals to understand the nexus between the reasonable accommodation being sought and the stated known limitation.

Further, while the proposed regulations allow for an employer to require supporting documentation for a request for a reasonable accommodation when it is "reasonable under the circumstances," SHRM submits that it would be more practical to have the regulation state that an employer may require documentation to support a request for reasonable accommodation under the PWFA except in those instances in which the need for the accommodation is obvious

or not aligned with the organization's stated policy surrounding nonpregnancy-related accommodation requests.

This would be consistent with how the process works under the ADA, and a bright-line rule would eliminate the need for an HR professional to know when the "reasonableness" of their decision to request documentation is going be to second-guessed or even challenged by the worker. Requiring medical documentation in this circumstance is no different than an employer requiring medical documentation when an employee requests an accommodation for a disability that is not obvious under the ADA. A pregnant worker's ability to obtain medical documentation is not materially different from that of an employee under the ADA who suffers from a new or nonchronic impairment. In both cases, the worker may not have been already consulting a physician when the limitation arose, but medical documentation can be required under the ADA in such circumstances, so it should be allowed under the PWFA as well. SHRM agrees with the EEOC that it is not reasonable for an employer to require proof of pregnancy when the pregnancy is obvious. However, the proposed regulations should provide that an employer can require proof of pregnancy through noninvasive means when the pregnancy is not obvious.

SHRM believes that these simple changes to the regulations regarding communication and notice will ensure a smooth and workable process that will better serve the needs of the worker and the employer. As previously stated, SHRM championed the passage of the PWFA and supports its transition into the workplace. SHRM is dedicated to deploying resources to ensure that HR professionals are equipped to handle the new obligations properly and legally to reasonably accommodate based on pregnancy alone. However, the regulations must be clear that eligible workers must first put their workplaces on notice of their need for a possible reasonable accommodation and how it is linked to "the known limitations related to the pregnancy, childbirth, or related medical conditions." This cannot be achieved without a clear framework of rights and responsibilities for both employers and eligible workers who seek the PWFA's protections.

III. Clarification on the limits and application of the secondary definition of qualified employee

While the PWFA uses language and concepts from the ADA, one important distinction is that, under the PWFA, an employee shall be considered qualified even if the employee cannot perform one or more essential functions of the job as long as (1) the inability to perform an essential function is for "a temporary period," (2) the essential function(s) could be performed "in the near future" and (3) the inability to perform the essential function can be reasonably accommodated.

The final regulations must add clarity on when an employer cannot "reasonably accommodate" the inability to perform essential functions. SHRM would urge the EEOC to consider concise language that aids employers in understanding the legal limits of the obligation to temporarily suspend essential functions and how to properly evaluate whether an employee's inability to perform the essential functions of their employment on a temporary basis can be reasonably accommodated. SHRM appreciates the EEOC's inclusion of illustrative examples to assist in the understanding of how the PWFA is intended to be applied in practice. However, while the EEOC gives examples of when the temporary inability to perform essential functions can be reasonably accommodated, it does not provide examples of when it cannot be reasonably accommodated.

Adding examples of both scenarios will give a more complete picture of the reasonable accommodation process under the PWFA.

In addition, we believe our members may be confused by the standard that applies to the decision that the employer cannot reasonably accommodate a temporary inability to perform essential functions. The EEOC suggests several times in the NPRM that in order for an employer to take the position that an employee is not "qualified" under the secondary definition it must demonstrate that the proposed accommodation places an undue hardship on the employer. However, this is not what the PWFA or the proposed regulation says. Both the PWFA and the proposed regulation state that an employer must only establish that the temporary suspension of the essential function cannot be "reasonably accommodated" in order to deny an accommodation under the secondary definition. Thus, the proposed regulation should acknowledge this lower burden and state that, in order for the worker to be qualified under the secondary definition, the employer must only have to provide the accommodation if "the inability to perform the essential function can be reasonably accommodated," as opposed to meeting the higher burden of undue hardship. This clarification will limit confusion to those applying the secondary definition of "qualified employee" in practice, as our members are well aware of the high hurdle the "undue hardship" standard presents, especially for large employers.

SHRM supports the goals of the PWFA to allow workers with known limitations related to pregnancy to prioritize their health and safety. The lack of a "severity threshold" allows for greater latitude for workers to seek reasonable accommodations; however, that must come with some considerations to the organization's ability to cope with potential staffing disruptions due to the temporary suspension of a worker's essential functions. SHRM has continuously advocated that the guidance should include specific provisions concerning lateral employment moves and ways in which employers are legally allowed to address staffing disruptions. This would include clarification that an employee's compensation can be adjusted during the period in which essential job functions are suspended or if the employee has to be placed in a lower-paying position as an accommodation. This is not specifically addressed in the proposed regulation but would be consistent with language elsewhere in the NRPM stating that, if a production standard is lowered as an accommodation, the employee's pay can be proportionately reduced.

IV. A more workable definition of "near future" and "temporary" that is better aligned with the plain meaning of those terms and their practical application as it relates to pregnancy-related conditions.

Given that the PWFA provides accommodations for pregnant workers, its primary purpose is to provide a reasonable accommodation on a temporary basis or one with a logical end, because pregnancy, by its very nature, is a temporary condition. As a result, defining "temporary" and "in the near future' in such a way that it can be as long as, or longer than, the length of the average pregnancy does not seem to be a logical interpretation. SHRM believes that the definitions of these terms should have the same meaning that they have under existing case law under the ADA. Under the ADA, when reviewing fact patterns that involve a period of leave, courts have looked to whether or not the leave will allow the employee to perform the essential functions of the job 'in the near future." This term has been interpreted to be generally no more than six months. See e.g., *Roberts v. Board of County Commissioners of Brown County, Kansas*, 691 F.3d 1211, 1218 (10th Cir. 2012) ("[a]lthough this court has not specified how near that future

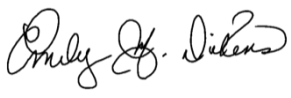
must be, the Eighth Circuit ruled in an analogous case that a six-month leave request was too long to be a reasonable accommodation.")(citing *Epps v. City of Pine Lawn*, 353 F.3d 588, 593 (8th Cir. 2003)); *Hwang v. Kansas State University*, 753 F.3d 1159, 1161-62 (10th Cir. 2019) (reiterating the bright-line test it established in *Roberts* that a six-month leave request is too long to be a reasonable accommodation and is not "in the near future.")

In addition, "temporary" and "the near future" must be defined in a way that promotes a prudent comprehension of what those terms entail and how they relate to the known limitations related to pregnancy. The proposed regulation's allowance for multiple periods of temporary inability that could be stacked to result in the requirement for removal of essential functions far beyond a total of 40 weeks. For example, 40 weeks pre-pregnancy, 40 weeks during pregnancy, then 40 weeks following return from leave/recovery from childbirth, which is over two years, does not seem consistent with the purpose of the PWFA. As the text of the PWFA refers to "*a* period of temporary inability" to perform the essential functions of the job, SHRM would advocate that the final regulations clarify that there is only one period of temporary inability per pregnancy, or that multiple periods together cannot exceed the duration stated in the definition of "in the near future," which was defined as nearly 40 weeks.

V. Conclusion

SHRM appreciates the opportunity to offer these comments to assist the EEOC as they finalize the regulations for the PWFA. SHRM shares the EEOC's interest in addressing the gaps in the federal legal protections for workers affected by pregnancy, childbirth or related medical conditions. In support of those who will be charged with the day-to-day application of this very important workplace protection, it is SHRM's ardent belief that the regulations should seek to provide as much clarity and consistency as possible. For laws to be correctly implemented, they must be understood. By leaning into existing accommodation structures, such as those within the ADA, HR professionals and business executives will be better equipped to provide for their workers who may seek accommodations under the PWFA while also ensuring business continuity. As always, SHRM is committed to elevating the collective experience and expertise of our membership in order to assist the EEOC in creating policies that protect work, workers and the workplace.

Sincerely,



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