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Insights

Pregnant Workers Fairness Act And The Pump Act: What's Changed?

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The Pregnant Workers Fairness Act (PWFA) and the PUMP (Providing Urgent Maternal Protections) for Nursing Mothers Act, included as part of the recent Congressional spending bill, expand and clarify rights for pregnant and nursing workers.

PREGNANT WORKERS FAIRNESS ACT

The PWFA applies to employers with at least 15 employees and becomes effective on June 27, 2023.

Like the Americans with Disabilities Act (ADA), the PWFA requires employers to provide reasonable accommodations to pregnant employees (and job candidates), so long as they do not impose an undue hardship on the employer. Employers must provide reasonable accommodations to employees and applicants with known temporary limitations on their ability to perform the essential functions of their jobs based on a physical or mental condition related to pregnancy, childbirth, and related medical conditions.

The Pregnancy Discrimination Act (an amendment to sex discrimination laws of Title VII), had been interpreted narrowly by the Supreme Court to require a pregnant employee to fit herself into the employer's existing accommodation policies. The employee could only prove discrimination by showing less favorable treatment than a similarly situated non-pregnant employee with disabilities. Title VII and the PDA contain no reasonable accommodation requirement specific to any condition related to pregnancy.

The PWFA neutralizes those earlier court decisions and allows employees reasonable job adjustments simply to accommodate the pregnancy. Now, a pregnant employee need not compare herself to other coworkers or prove a disability. Instead, an employee who informs the employer of limitations due to pregnancy will be entitled to the same interactive process to determine "reasonable accommodations" --- such as schedule changes, seated work assignments, extra bathroom breaks, or a respite from heavy lifting — to enable the worker to stay in the workforce during pregnancy. The employer cannot require an employee to take a paid or unpaid leave of absence if another reasonable accommodation can be provided. As with the ADA, employees cannot insist on any particular accommodation and employers will have a defense to damages if they work with the employee in good faith to identify equally effective reasonable accommodations that do not cause an undue hardship.

Best practices for PWFA Compliance

1. Managers, supervisors, and HR professionals should be made aware of this expansion of federal accommodation rights and should be trained in proper responses to employees' requests for pregnancy accommodations.
2. Employers should update existing reasonable accommodations policies to include pregnancy and to provide proper processing of employees' requests for accommodations due to pregnancy-related limitations.
3. Many states and municipalities, including Illinois[1], Kentucky[2], Michigan[3], and Ohio[4] (but not Indiana) had already enacted their own laws for pregnant workers. These laws may be more generous than the PWFA, may apply to smaller employers, and may prohibit employers from requesting medical documentation to confirm an employee's pregnancy, childbirth, or related medical conditions as part of the accommodation process (which is allowed under the PWFA). So, it's important to know the law of the state where the pregnant employee is working, especially in this era of remote work.
4. An employer's proactive steps to inform employees of their rights to accommodations and to engage cooperatively in the interactive process may enhance employee retention and could later be viewed favorably as good-faith efforts to comply with the PFWA to counter future charges of discrimination.

PUMP FOR NURSING MOTHERS ACT

The PUMP for Nursing Mothers Act amends the Fair Labor Standards Act (FLSA) to include salaried employees and other types of workers who were not covered under prior laws that required employers to allow reasonable break time to express breast milk for the employee's nursing child. Covered employees may seek accommodation under the PUMP Act for up to one year[5] following the child's birth. The employer must provide a place (other than a bathroom) to express milk, shielded from view and intrusion from coworkers and the public. Time spent to express breast milk may be unpaid unless otherwise required by federal or state law or municipal ordinance or unless the employee is also working. Before making a claim of liability against an employer, an employee generally must first notify the employer that they are not in compliance and provide them with ten days to comply with the required accommodations.

The amendment to the FLSA took effect on December 29, 2022, but remedies for violations will not take effect until April 28, 2023.

Employers with fewer than 50 employees can still rely on the small employer exemption, if compliance with the law would cause undue hardship because of significant difficulty or expense. Transportation workers are treated differently under the PUMP Act, with bus drivers for long-distance bus companies and some railroad workers having a three-year delay in the bill applying to them. There is also an exemption for air carriers and a difference in how the law affects some railroad workers.

Best Practices for PUMP Act Compliance

1. Educate the HR team and front-line managers on the update to the law and refresh them on the process for providing break time and private spaces to express breast milk.
2. Like the PWFA, the law does not preempt state law or municipal ordinances that provide greater protection than provided by the PUMP for Nursing Mothers Act. Depending on where employees are located, policies, practices, and the private space provided to express breast milk may need to be modified.
3. Creativity is the key to fashioning staffing solutions and private spaces for nursing mothers to express breast milk. The employer need not maintain a permanent, dedicated space for nursing mothers. A temporary or converted space for expressing breast milk suffices if it is shielded from view and free

from intrusion by coworkers and others. A spare office or other room with a locking door may be ideal, but other options like privacy screens, curtains, and portable pumping stations may work too. An employer in a multi-office building may consider cooperating with other employers or asking the landlord to designate private spaces for expressing breast milk in the building.

4. Be aware of comments that could be viewed as retaliation or discrimination against protected employees, such as those that sexualize breastfeeding or implicitly discourage it: “You’re not breastfeeding on Zoom, are you?” “You have to go pump again?” “Your door is always closed.” “How much longer are you going to do this?” The employee has one year; assume she will use it.
5. Empowering and inviting workers to use their lactation accommodations may aid in retaining and attracting valuable employees by cementing the employer’s identity as a mother-friendly worksite. Those efforts may also be useful in the face of future charges of discrimination or retaliation by lactating parents.

Our Labor and Employment team is continuing to monitor local, state, and federal protections for pregnant and breastfeeding employees. If you need assistance in implementing updates to your organization’s policies, contact **Nancy J. Townsend** or any member of our **Labor and Employment** team.

[1] 775 Ill. Comp. Stat. 5/2-102(J)
[2] Ky. Rev. Stat. §§ 344.030, 344.040
[3] Mich. Comp. L. § 37.2202
[4] Ohio Rev. Code § 4112.01(A)(15)
[5] A prior version of our alert referenced two years from the birth of the child as the length of time an accommodation may be requested. This has been corrected to one year to reflect the final version of the PUMP Act.

Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.