

Townsend: Employers must heed rights of pregnant, breastfeeding workers

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Federal laws passed at the close of 2022 have enhanced the rights of pregnant and breastfeeding workers. The Pregnant Workers Fairness Act takes effect on June 27 and now defines pregnancy as a condition that entitles an employee to an Americans with Disabilities Act-type accommodation. The Providing Urgent Maternal Protections for Nursing Mothers Act, or PUMP Act, took effect on Dec. 29, 2022, and becomes enforceable by private civil suits on April 28. The PUMP Act extends workplace breastfeeding rights to salaried, exempt workers and now gives the employer a 10-day cure period to address employee complaints.

Pregnant Workers Fairness Act

Under the PWFA, employers must provide reasonable job adjustments to accommodate pregnancy, childbirth or related medical conditions without requiring a comparison to nonpregnant coworkers and without proof of a disability. 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 continue working during pregnancy. 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. But the employer cannot insist that the employee take paid or unpaid leave in lieu of another reasonable accommodation.

The PWFA responds to Supreme Court rulings that required pregnant workers to fit themselves within existing Title VII constructs in order to prove pregnancy discrimination under the Pregnancy Discrimination Act, a 1978 amendment to sex discrimination laws of Title VII. *See Young v. United Parcel Service*, 575 U.S. 206 (2015). Title VII and the PDA have no accommodation requirement specific to any condition related to pregnancy. So, under prior law after *Young*, an employee could prove discrimination only by showing less favorable treatment than a similarly situated nonpregnant employee with disabilities.

Indiana law likewise requires no pregnancy accommodation and states expressly that the employer need not accommodate pregnancy or make any exception to the employer’s

existing policies “unless existing federal or state laws require that an accommodation must be made.” (Indiana Code § 22-9-12.) Federal law now does.

PUMP Act

The PUMP Act, an amendment to the Fair Labor Standards Act, now extends breastfeeding protections to exempt employees, meaning salaried professionals and other employees who don't qualify for minimum wage and overtime. Employers must provide unpaid break time and private lactation areas other than restrooms for one year after the birth of a child. But if the employee is doing any work while pumping, the break must be paid. Employers with fewer than 50 employees can seek an exemption if they show that compliance would impose an undue hardship.

A violation of the PUMP Act exposes the employer to FLSA remedies, including employment, reinstatement, promotion, lost wages, liquidated damages, compensatory damages and punitive damages where appropriate. Before making a claim of liability against an employer, however, an employee generally must notify the employer of the noncompliance and allow 10 days to comply. The amendment to the FLSA took effect on Dec. 29, 2022, but remedies are limited until April 28.

Indiana already requires employers with more than 25 employees to provide a private location (other than a toilet stall) to express breast milk away from the employee's assigned duties. I.C. 22-2-14-2. Indiana additionally continues to require the employer “to the extent reasonably possible” to provide cold storage or allow the employee to bring a portable cold storage device to keep expressed milk during the workday. I.C. 22-2-14-2. Indiana public employees have enhanced protections, including paid breast pumping breaks, to run concurrent with other break time. I.C. 5-10-6-2.

The PUMP Act carries different requirements for transportation workers, including a three-year delay in application of the law to long-distance bus drivers and some railroad workers. The PUMP Act does not apply to airline flight crews.

Compliance tips

Employers should be urged to:

1. Update existing pregnancy accommodation and breast pumping break policies, devise procedures for proper response to complaints of noncompliance requests for accommodations, and train managers, supervisors and HR professionals to apply the new policies.
2. Consider options for private breast pumping spaces. If a spare office or other room with a locking door is not available, alternatives like privacy screens, curtains and portable pumping stations may work. An employer in a multioffice building may consider cooperating with other employers or asking the landlord to designate private spaces for expressing breast milk.
3. Know whether local and state laws mandate further protections for pregnant workers and breastfeeding parents. In general, the law where the pregnant employee works will

apply.

4. Be aware of comments that could be viewed as retaliation or discrimination, 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?”

5. Take proactive steps to inform employees of their rights and encourage their exercise of these rights. Identify as a mother-friendly worksite — besides being good for employees and, therefore, good for employee retention, these steps could soften the impact of future complaints. •

Nancy J. Townsend is a partner in the Merrillville and Chicago offices of Krieg DeVault LLP. Opinions expressed are those of the author.