

Employer's Guide to Expanded Protections for Pregnant and Nursing Workers

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The Pregnant Workers Fairness Act and the Providing Urgent Maternal Protections for Nursing Mothers Act are new laws affecting most employers and their employees who are pregnant and/or breastfeeding their infant children.

The Pregnant Workers Fairness Act (PWFA)

The PWFA, which went into effect on June 27, 2023, applies to private employers with 15 or more employees.

The PWFA prohibits any employment practice that discriminates against qualified employees who are affected by pregnancy, childbirth, or related medical conditions by failing to provide reasonable accommodations, unless the accommodation would create an undue hardship on the operation of the business. Employers should consult with counsel to determine whether an undue hardship may exist under the circumstances.

Specifically, the PWFA provides that employers are not permitted to:

- Require an employee to accept an accommodation without engaging in the interactive process;
- Deny a job or other employment opportunities to a qualified employee or applicant based on that person's need for a reasonable accommodation;
- Require an employee to take a leave of absence from work if another reasonable accommodation can be provided that would allow the employee to keep working;
- Retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding, such as an investigation; or
- Interfere with any individual's rights under the PWFA.

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While the legal analysis associated with the PWFA is similar to that of the Americans with Disabilities Act, as amended (ADA), one important difference between the PWFA and ADA is who is a “qualified individual” and entitled to protection. Under the ADA, a “qualified individual” is an individual with a disability who is able to perform essential functions of a job “with or without a reasonable accommodation.” The PWFA has a similar definition, except for one notable distinction. Under the PWFA, an employee is still “qualified” *even if the employee is temporarily unable to perform the essential functions of the job*, so long as the temporary inability to perform the job can be reasonably accommodated and the possibility of performing the essential functions “in the near future” exists.

Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act)

The PUMP Act went into effect on December 29, 2022, with expanded remedies effective April 28, 2023. The PUMP Act builds on the Break Time for Nursing Mothers Act, passed in 2010 as part of the Affordable Care Act and which amends the Fair Labor Standards Act (FLSA).

Currently, the law requires most employers to provide reasonable accommodations for breastfeeding mothers who are overtime-eligible to express breastmilk while at work for up to one year after the birth of their child. The PUMP Act extends these protections to most breastfeeding mothers, regardless of whether they are exempt or non-exempt from the overtime provision of the FLSA.

Reasonable accommodations in this context include providing breaks and a private space, which can never be a bathroom, for employees to express their breastmilk. The PUMP Act clarifies that, although the breaks are unpaid unless otherwise required by federal or state law, the break time to express breastmilk will be considered “hours worked” for non-exempt employees if they are not completely relieved from their duties during the break. Exempt employees must receive their full weekly salaries without deductions for break time to express breastmilk.

Employers with fewer than 50 employees do not need to comply with the PUMP Act if doing so would impose an undue hardship. Again, undue hardship is a legal analysis that should be determined after consulting with counsel.

The PUMP Act also expanded the remedies available to employees who are denied breaks and a private space (again, never a bathroom) to express breastmilk or who are not completely relieved of their duties during an unpaid break to express breastmilk. Remedies include, but are not limited to, unpaid wages and liquidated damages as well as compensatory damages and, if appropriate, punitive damages.

Employers should consult with counsel, review relevant policies, and update employee handbooks to reflect these recent changes. Lowndes attorneys stand ready and available to assist with the associated analyses and revisions required as a result of this legislation.