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CLIENT ALERT: NEW PREGNANT WORKERS FAIRNESS ACT (PWFA) AND PROVIDING URGENT MATERNAL PROTECTIONS FOR NURSING MOTHERS ACT (PUMP ACT): WHAT DO PRIVATE EMPLOYERS NEED TO KNOW TO COMPLY?

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By: Ruth Vafek

As part of the federal Consolidated Appropriations Act, 2023 signed into law on December 29, 2022, private employers with **15+ employees*** need to know about the Pregnant Workers Fairness Act (**PWFA**), which goes into effect **June 27, 2023**.

Private employers also need to know about the PUMP for Nursing Mothers Act (**PUMP Act**), which is **already in effect** (with the exception of some remedies provisions).

Here is an overview of each Act's requirements and thoughts on practical ways to ensure compliance.

Pregnant Workers Fairness Act
Applies to: Private sector employers with 15 or more employees, * public sector employers.
Effective Date: June 27, 2023
Requires: Covered employers to provide reasonable accommodations to an employee's or applicant's known limitations (physical or mental) related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an undue hardship.

In general, if your organization is subject to the Americans with Disabilities Act (ADA), it will also be subject to the PWFA starting in June. Essentially, the PWFA requires that limitations related to pregnancy, childbirth, and related medical conditions should be treated like disability-related limitations under the ADA. The same requirement for an interactive process applies in terms of arriving at a reasonable accommodation, and job protections akin to those under the ADA apply. One potentially important difference from the ADA is that the PWFA defines a "qualified employee" to include those with a temporary inability to perform an essential function of the job, if that inability can be reasonably accommodated and the essential function can be performed in the "near future."

The EEOC will be proposing and issuing regulations under the PWFA. In the interim, here are some key takeaways and suggestions:

- A House Committee Report on the PWFA suggests examples of possible reasonable accommodations under the PWFA, including: the ability to sit; the ability to drink water more frequently; closer parking; flexible hours; provision of appropriately sized uniforms/ safety apparel; additional break time to use the restroom, eat, and/or rest; leave or time off to recover from childbirth; and reduced lifting requirements.
- Retaliation for requesting a reasonable accommodation under the PWFA is prohibited; the Pregnancy Discrimination Act of 1978 already prohibited discrimination in employment on the basis of pregnancy,

childbirth, or a related medical condition, and continues to do so.

- Communication is key! The interactive process means a good faith discussion between the employer and employee. When revising your policies and addressing PWFA requirements in the workplace, take a realistic look at how employees are directed to advise of limitations and to request accommodations, and provide options in the event an employee is uncomfortable discussing limitations or accommodations with an immediate supervisor, for example—and vice versa, ensure your managers are prepared to have professional conversations and to direct employees to the appropriate resources for the best results.
- Covered employers may not require a qualified employee to take leave (whether paid or unpaid) if another reasonable accommodation can be provided.
- As with the ADA, if no reasonable accommodation can be identified, be prepared to demonstrate that accommodation would impose an "undue hardship" on the business.

PUMP for Nursing Mothers Act

Applies to: Most private and public sector employers. Employers with fewer than 50 employees* may not be required to comply if requirements would cause an undue hardship.

Effective Date: December 29, 2022

Requires: Employers to provide reasonable break time to express milk for 1 year after birth of child, and to provide a sanitary place shielded from view and free from intrusion in which to do so.

The PUMP Act amends the Fair Labor Standards Act and extends the noted protections to exempt as well as non-exempt employees with a need to express breast milk. (Certain transportation industry workers are excluded.)

Breaks: A reasonable break time must be allowed each time an employee has a need to express milk. For non-exempt workers, employers do not need to provide a paid break, except if an employee continues to work or is interrupted by work during the break, then the employee must be paid for the entire break. Also, if employers provide paid breaks, employees should still be paid if they use an otherwise paid break period to express milk. Exempt employees, meanwhile, must be paid their full weekly salary as required by federal, state, and local laws, regardless of breaks taken under the PUMP Act.

Facilities: Covered employers must provide a sanitary place (NEVER a bathroom) that is shielded from view and free from intrusion. Key takeaways and suggestions include:

- Think practically and creatively. Employers are not required to maintain one permanent, dedicated space for all nursing mothers. Multiple employers who share space could, for example, partner to provide private pumping/nursing spaces. An office with a door that locks (and no glass, or with coverings provided for glass panels) can be convenient but is not the only solution. Solutions such as portable pumping stations, privacy screens, or curtains may be practical in some environments.
- Educate your organization, especially managers, on the requirements, and ensure employees who may need breaks have a clear channel of communication.
- Again, communication is key! Consider your organization's culture and environment to ensure employees are comfortable with the space provided and with the process for obtaining breaks. E.g., if there are employees who will barge through closed doors, perhaps more education and/or signage, or a lock, will be necessary to ensure freedom from intrusion.
- Teleworking employees who need PUMP Act breaks must be free from observation by any employer-provided or required video system for the duration of each break.

*When counting employees to ascertain applicability of these laws, in general an employer should count the highest number of employees they had on payroll for 20 or more weeks, during either the current or the prior calendar year.

For more information on relevant considerations for your business, please contact the author, Ruth Vafek, or any attorney on Berger Singerman's Labor and Employment group.

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