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# JOURNAL

## **The PWFA and the PUMP Act: What to Know About Expanded Protections for Pregnant and Nursing Workers**

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*In this article, the authors discuss two new federal laws that provide protections for pregnant and nursing employees.*

At the tail end of the last legislative session, Congress passed the Pregnant Workers Fairness Act (PWFA)<sup>1</sup> and the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act).<sup>2</sup> Upon their passage, the PWFA and PUMP Act joined a host of other federal laws – including the Pregnancy Discrimination Act (PDA), the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and the Fair Labor Standards Act (FLSA) – which provide protections for pregnant and nursing employees. Like their predecessors, the PWFA and PUMP Act confer obligations on employers that are important to understand and uphold. Here is what employers need to know.

### **THE PREGNANT WORKERS FAIRNESS ACT**

The PWFA requires covered employers to offer reasonable accommodations to pregnant workers. Although the PWFA adopts a framework similar to the ADA, PWFA accommodations are available to

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pregnant workers regardless of whether they are disabled within the meaning of the ADA.

The PWFA covers public and private sector employers of 15 or more (as well as employment agencies, labor organizations, Congress, and Federal agencies). The PWFA became effective June 27, 2023, and on that date the U.S. Equal Employment Opportunity Commission (EEOC) began accepting charges for alleged PWFA violations occurring on or after June 27, 2023. The EEOC has also committed to issuing PWFA regulations by December 27, 2023.

Pursuant to the PWFA, covered employers must provide “reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee” unless the accommodation “would impose an undue hardship on the operation of the business.” Let’s break down each of the foregoing key terms.

### ***Reasonable Accommodations***

Reasonable accommodations under the PWFA include, but are not limited to: flexible work hours, the ability to sit or drink water, closer parking, appropriately sized uniforms and safety apparel, and exemption from strenuous activities.

Employers may not force a pregnant employee to accept an accommodation, unless one has been requested and the employer has engaged in the interactive process. In addition, under the PWFA, an employer cannot require an employee to take leave if another reasonable accommodation can be provided that would allow the employee to continue working.

### ***Known Limitations***

Known limitations, as defined by the PWFA, are mental or physical conditions the pregnant employee communicates to the employer – which need not amount to a disability.

### ***Arising Out of Pregnancy, Childbirth or Related Medical Conditions***

Pregnancy-related conditions meriting accommodation under the PWFA include the normal physical changes of pregnancy and childbirth, complications of pregnancy and childbirth (e.g., diabetes, depression, preeclampsia), and related medical conditions like lactation, miscarriage and pregnancy loss, fertility treatment and menstruation.

### ***Qualified Employee***

Consistent with the language of the ADA, a qualified employee under the PWFA is an individual who can perform essential job functions with or without accommodation. Unlike the ADA, however, an individual who cannot perform essential job functions is still qualified under the PWFA if: the individual's inability to perform essential functions is temporary, the essential job functions can be performed in the near future, and the inability can be reasonably accommodated.

### ***Undue Hardship***

As under the ADA, employers are required to provide a PWFA reasonable accommodation unless doing so would cause an undue hardship (i.e., a significant difficulty or expense) to operations.

## **PROVIDING URGENT MATERNAL PROTECTIONS FOR NURSING MOTHERS ACT**

The FLSA requires employers to provide nonexempt employees with reasonable break time to express breast milk for up to one year after the child's birth. The PUMP Act – which amends the FLSA – expands these requirements, affording breaktime and a private space to express breast milk to all nursing employees. And as discussed further below, the PUMP Act expands an employee's options to enforce these requirements, providing for a private right of action.

Beginning April 28, 2023, an employee who perceives a violation of the PUMP Act may either file a complaint against the employer with the DOL, or bring a suit against the employer in the federal court system. Prior to doing so, in most instances, the employee must inform the employer of its failure to comply with the PUMP Act and allow 10 calendar days for the employer to achieve compliance. This 10-day cure window is not required, however, if the employee has been discharged because of a request for a lactation space or break time, or if the employer has indicated that it will not comply with the PUMP Act.

The PUMP Act generally covers employers subject to the requirements of the FLSA. Certain employees of airlines, railroads and motor-coach carriers, however, are exempt from PUMP Act protections. While the PUMP Act went into effect December 29, 2022, its enforcement mechanism first becomes effective on April 28, 2023. The U.S. Department of Labor (DOL) notably has already issued PUMP Act guidance.<sup>3</sup>

Under the PUMP Act, covered employers must provide all employees with “reasonable break time” to express breast milk for 1 year after the child’s birth “each time such employee has need to express the milk.” Employers must also provide “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public,” unless the employer has “fewer than 50 employees” and “such requirements would impose an undue hardship” on the employer’s business. These key requirements are further defined below.

### ***Reasonable Break Time, Each Time***

Employees may take a reasonably long break each time the employee needs to express breast milk, for up to one year after the child’s birth. The frequency and duration of these pump breaks will likely vary depending on certain factors, including the location of the break space, the steps reasonably necessary to express breast milk (e.g., pump setup), and the condition of the nursing employee and child. Notably, employees who telework are eligible to take pump breaks on the same basis as in-office employees.

When an employee is using break time to express breast milk, the employee must either be completely relieved from duty or paid for the break time. If, however, the employer provides a compensated break, an employee who expresses milk during a break must be compensated in the same way that other employees are compensated for break time.

### ***A Private Place, Other Than a Bathroom***

The PUMP Act provides that a bathroom, even if private, is not a suitable workplace location for pumping breast milk. Instead, the pumping location must be functional as a space for expressing breast milk. If the space is not dedicated to a nursing employee’s use, it must be available whenever needed by the employee. A space temporarily created or converted into a space for expressing breast milk or made available when needed by the nursing employee is sufficient provided that the space is shielded from view and free from any intrusion from co-workers and the public.

Notably, remote workers must also be free from observation while expressing breast milk, including with respect to any employer-provided or required video conferencing system.

## ***Undue Hardship for Small Employers***

Employers with fewer than 50 employees are not subject to PUMP Act break time and space requirements if compliance with the provisions would impose undue hardship. For purposes of determining whether an employer meets this 50-employee threshold, all employees, regardless of location, must be counted.

Whether compliance with PUMP Act would pose an undue hardship is determined by assessing the difficulty and expense of compliance “when considered in relation to the size, financial resources, nature, or structure of the employer’s business.” For example, a small coffee shop with just five employees may be exempted from PUMP Act requirements if the coffee shop cannot designate a private pumping location without incurring significant difficulty or expense.

## **CONCLUSION**

The time is now for employers to focus on updating their policies and procedures as necessary to ensure compliance with the PWFA and the PUMP Act. Notably, the PWFA and the PUMP Act do not preempt state or local laws that provide greater protections to pregnant and nursing workers.

## **NOTES**

1. <https://www.congress.gov/bill/117th-congress/senate-bill/1486>.
2. <https://www.congress.gov/bill/117th-congress/senate-bill/1658?s=1&r=1&q=%7B%22search%22%3A%22PUMP+Act%22%7D>.
3. <https://www.dol.gov/agencies/whd/pump-at-work>.

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