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INSIGHTS

New Protections for Pregnant and Nursing Workers in 2023

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On December 29, 2022, President Biden signed into law the Pregnant Workers Fairness Act (PWFA) and the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act), expanding federal protections for both pregnant and nursing workers.

Pregnant Workers Fairness Act

The PWFA creates a legal obligation for employers to grant reasonable accommodations for pregnant workers. Under the new law, which will not go into effect until June 2023, employers with 15 or more employees will be required to provide reasonable accommodations for "qualified" employees and applicants with temporary physical or mental limitations due to pregnancy, childbirth or related conditions. Employees and applicants are "qualified" if they, with or without a reasonable accommodation, can perform the essential functions of the employment position. An individual is still "qualified" if the inability to perform an essential function is for a temporary period, the essential function could be performed in the near future, and the inability to perform the essential function can be reasonably accommodated.

The PWFA, like the Americans with Disabilities Act (ADA), obligates employers to provide reasonable accommodations unless doing so imposes an undue hardship. The PWFA incorporates the ADA concept of the "interactive process" – the good faith discussion between the employer and employee to try to identify an appropriate reasonable accommodation. Under the new law, employers will be prohibited from requiring a qualified employee or applicant to accept an accommodation other than one arrived at through the interactive process. An employer may also not require an employee to take a paid or unpaid leave if another reasonable accommodation can be provided. Retaliation against a qualified employee or applicant for requesting a reasonable accommodation under the law is also prohibited.

Previously, under federal law, most courts determined that pregnancy was not considered a disability entitled to a reasonable accommodation under the ADA. Rather, employers were only required to provide reasonable accommodations when an individual's pregnancy, childbirth, or related medical condition rose to the level of a disability under the ADA or when accommodations were made for other similarly situated, but non-pregnant, workers. Some examples of accommodations that may be required under the PWFA are providing additional restroom breaks, reducing lifting requirements, providing leave for an employee who does not qualify for a leave of absence under the Family and Medical Leave Act (FMLA) or other leave policy and providing different office equipment (e.g., providing a stool for an employee who typically is required to stand).

Providing Urgent Maternal Protections for Nursing Mothers Act

The PUMP Act, which amends the Fair Labor Standards Act (FLSA) (effective immediately with the exception of certain changes regarding remedies), requires that employers provide (1) reasonable break time for an employee to express breast milk each time the employee has a need to express the milk for one year after the child's birth and (2) a place, other than a bathroom, that is shielded from view and free from intrusion in which the employee can express breast milk.

While the Affordable Care Act of 2010 (AFCA) amended the FLSA to provide these protections to non-exempt employees, the PUMP Act extends the protections to *all* employees, non-exempt *and exempt*, unless specifically excluded, with a need to express breast milk. (Certain workers in the transportation industry are excluded from the Act.)

An employer is generally not required to provide a paid break under these amendments; however, the PUMP Act re-emphasizes the FLSA principle that time spent to express breast milk is considered "hours worked" if the employee is not completely relieved from duty during the entirety of the break. If an employee continues to work, or is interrupted during the break, then the non-exempt employee must be paid for the entire break (and exempt employees continue to receive their full weekly salary regardless of any break).

Notably, the PUMP Act does not apply to employers with fewer than 50 employees if certain requirements under the law would cause an undue hardship.

PWFA and PUMP

Under both laws, workers can bring a private right of action against their employer for a violation of law. The PWFA requires that an employee first exhaust all administrative remedies.

Employers should note that many state and local laws already provide similar or greater protections and accommodation requirements for pregnant and nursing workers. These Acts do not preempt any state and local laws that provide more generous protections. Further, on a federal level, the Pregnancy Discrimination Act of 1978, which amended Title VII, already prohibited discrimination in employment on the basis of pregnancy, childbirth, or a related medical condition.

While many employers may have policies relating to pregnancy, accommodation and nursing workers, employers should review those policies to ensure they are compliant with these new federal laws and make any necessary updates. Further, employers will want to ensure that managers and supervisors are trained on how to handle pregnancy accommodation requests and requests to express breast milk in the workplace.