# FEDERAL AND NEW YORK STATE LEGISLATION EXPANDS PROTECTIONS FOR PREGNANT AND NURSING EMPLOYEES

Hodgson Russ Labor & Employment Alert
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A flurry of recent federal and New York State legislation has expanded protections for employees who are pregnant, nursing, or experiencing pregnancy-related medical conditions.

**Federal Legislation**

Employers should be aware of two key laws that were included in the recent federal Omnibus Spending Bill. These laws, the Pregnant Workers Fairness Act ("PWFA") and the Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act"), increase federal protections for pregnant and nursing employees in the workplace.

*Pregnant Workers Fairness Act*

Under the Americans with Disabilities Act ("ADA"), most employers have an obligation to provide reasonable accommodations to qualified employees and applicants with disabilities, unless doing so would cause the employer undue hardship. Generally, the employer and employee or applicant with a disability, as the case may be, engage in an "interactive process" to arrive at an effective reasonable accommodation. However, courts across the country have generally held that a healthy pregnancy, standing alone, does not qualify as a disability for which reasonable accommodations are available under the ADA.

Congress passed the PWFA to provide pregnant employees and job applicants with ADA-style protections. Specifically, the PWFA, which applies to employers with 15 or more employees, requires employers to provide reasonable accommodations to employees and applicants who have known temporary limitations because of a physical or mental condition related to pregnancy, childbirth, or related medical conditions.

The PWFA adopts the same definitions of "reasonable accommodation" and "undue hardship" as used in the ADA. Accordingly, employers should engage in the familiar ADA interactive process when faced with accommodation requests from employee or applicants who are pregnant, recently gave (or are expected to give) childbirth, or are experiencing related medical conditions.

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Like the ADA, the PWFA does not require that employers provide an employee or applicant with the accommodation of her choice, but it does require that the employer provide an effective reasonable accommodation unless doing so would cause the employer undue hardship. In addition, the PWFA makes clear that an employer cannot require an employee to take leave from work – whether paid or unpaid – if another reasonable accommodation can be provided.

Finally, the PWFA prohibits employers from taking adverse action against employees for requesting or receiving a reasonable accommodation for known limitations related to pregnancy, childbirth, or related medical conditions.

The PWFA will take effect on June 27, 2023.

*PUMP for Nursing Mothers Act*

The PUMP Act amends the Break Time for Nursing Mothers Act ("Break Time Act"), which was enacted in 2010 and entitled employees to reasonable break time and a private space, other than a bathroom, in which to pump breastmilk during the workday. Because Congress passed the Break Time Act as an amendment to the Fair Labor Standards Act ("FLSA"), exempt employees (those who are not eligible to receive overtime pay) were generally excluded from the Break Time Act's protections. Congress passed the PUMP Act to fill this gap, extending the protections of the Break Time Act to most exempt executive, administrative, and professional employees.

Thus, FLSA-covered employers are now required to provide all employees with reasonable break time and a private space, other than a restroom, in which to pump breastmilk during the workday. Employers must provide these benefits for one year following the birth of an employee's child. The PUMP Act also clarifies that time spent pumping breastmilk is considered paid working time for purposes of calculating minimum wage and overtime if it is taken during an otherwise paid break or if the employee is not completely relieved from duty for the entirety break. Of course, no deductions should be taken from the salary of an exempt employee because of her pumping breaks.

The PUMP Act allows employees to seek monetary remedies in the event that their employer fails to comply with the Act. Generally, however, employees are required to provide the employer with notice of an alleged violation and a 10-day period in which to cure the violation before initiating a lawsuit.

The PUMP Act does not eliminate the "small employer exception" of the Break Time Act, which excuses employers with fewer than 50 employees from complying where doing so would create an "undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business."

The PUMP Act went into effect on December 29, 2022, although monetary remedies will not be available to employees under it until April 28, 2023.

Employers should review their existing employee handbooks and other workplace polices, including those addressing the availability of reasonable accommodations and break time for pumping, to ensure compliance with these new federal workplace protections. Employers should ensure they are complying with any state or local obligations related to pregnant and nursing employees, as the PWFA and PUMP Act do not preempt such legislation. For example, for several years New York State has required employers to provide reasonable accommodations for pregnancy-related conditions (subject to an

undue hardship exception) and, as addressed below, provides a greater (and expanding) level of protections for nursing employees. New York City's Human Rights Law also contains robust protections for pregnant and lactating employees.

**New York Expands Protections for Nursing Employees**

Not to be outdone by the federal government, New York State recently adopted legislation to expand Section 206-c of the New York Labor Law ("Section 206-c") effective June 7, 2023.

Section 206-c has historically required employers to provide nursing employees with reasonable break time to express milk for up to three years following childbirth and to make "reasonable efforts" to provide a private room or other private location for this purpose. The recent amendments revise Section 206-c to:

- Require employers to provide reasonable break time "each time [an] employee has reasonable need to express breastmilk." This obligation will continue to apply for up to three years following childbirth.
- Expand the statutory requirements for the pumping room/location. Specifically, employers must, upon request from an employee, designate a room or other location for pumping. This room or location must be in close proximity to the work area, well lit, shielded from view, and free from intrusion by others. It must contain, at a minimum, a chair, a working surface, nearby access to clean running water, and, if the workplace has electricity, an electrical outlet. The room or location provided by the employer cannot be a restroom or toilet stall. In addition, if the pumping room/location is not used solely for that purpose, it must be available to the employee when needed and cannot be used for any other purpose while being used for pumping. The employer must also "provide notice to all employees as soon as practicable when such room or other location has been designated for use by employees to express breastmilk."
- Narrow the undue hardship exception. Specifically, even if providing a compliant room/location would pose an undue hardship for the employer "by causing significant difficult or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business," the employer still must "make reasonable efforts to provide a room or other location, other than a restroom or toilet stall, that is in close proximity to the work area where an employee can express breastmilk in privacy."
- Require an employer that provides employees with access to refrigeration to allow employees access to such refrigeration for the purposes of storing expressed milk.
- Require employers to adopt a written policy regarding the rights of nursing employees, which will be developed and published by the New York State Department of Labor. The policy must, at a minimum, inform employees of their rights under Section 206-c, specify the means by which employees may request a room/location for pumping, and require the employer to respond to such requests within a reasonable timeframe not to exceed five business days. Once adopted, this policy must be distributed to each employee upon hire and annually thereafter, and to an employee who is returning to work following the birth of a child.
- Prohibit employers from discharging, threatening, penalizing, or otherwise discriminating or retaliating against an employee for exercising rights under Section 206-c.

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If you have any questions about your obligations to employees under the PWFA, the PUMP Act, or analogous state or local laws, please contact Lura H. Bechtel (416.595.2693), Glen P. Doherty (518.433.2433), Charles H. Kaplan (646.218.7513), Kinsey A. O'Brien (716.848.1287), or any other member of our Labor & Employment Practice.