

Complying With New Federal Pregnant Workers Fairness Act, PUMP for Nursing Mothers Act

By Joseph J. Lynett, Katharine C. Weber & Catherine A. Cano

January 4, 2023

Meet the Authors



Joseph J. Lynett

(Joe)

Principal

212-545-4000

Joseph.Lynett@jacksonlewis.com

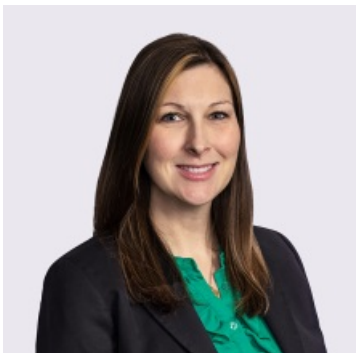


Katharine C. Weber

Principal

(513) 898-0050

katharine.weber@jacksonlewis.com



Catherine A. Cano

The new Pregnant Workers Fairness Act (PWFA) and the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP For Nursing Mothers Act) were adopted when President Joe Biden signed the Consolidated Appropriations Act, 2023 on Dec. 29, 2022.

PWFA: Pregnancy Finally Given Disability-Like Protection

The PWFA applies to employers with at least 15 employees and becomes effective on June 27, 2023.

Like the Americans with Disabilities Act (ADA), the PWFA includes the obligation to provide reasonable accommodations so long as they do not impose an undue hardship. Many courts have determined that pregnancy alone was not a disability entitled to accommodation under the ADA. Under the PWFA, employers will be required to provide reasonable accommodations to employees and applicants with known temporary limitations on their ability to perform the essential functions of their jobs based on a physical or mental condition related to pregnancy, childbirth, and related medical conditions.

The PWFA adopts the same meaning of “reasonable accommodation” and “undue hardship” as used in the ADA, including the interactive process that will typically be used to determine an appropriate reasonable accommodation.

The PWFA provides that an employee or their representative can make the employer aware of the employee’s limitations. It also provides that an employer cannot require an employee to take a paid or unpaid leave of absence if another reasonable accommodation can be provided. Of course, that does not mean the employee gets the accommodation of their choice. The statute provides a defense to damages for employers that, in good faith, work with employees to identify alternative accommodations that are equally effective and do not cause an undue hardship.

Practical Advice for PWFA Compliance

1. Employers do not have to have a policy for every rule or practice that applies in the workplace. However, if an employer has a reasonable accommodations policy, that policy should be reviewed and updated, as necessary.
2. Human resources professionals are not the only ones who need training. If managers are not trained as well, they may unwittingly say something in response to an employee’s question that is inconsistent with your policies and practices.
3. Create a process to follow when employees request an accommodation due to pregnancy-related limitations. The process should be similar to the ADA process, including requesting supporting documentation from the treating healthcare

Related Services

Disability, Leave and Health
Management
National Compliance and Multi-
State Solutions
Pregnant Workers Fairness Act
and PUMP for Nursing Mothers
Act

provider. Have employees in states or cities that have adopted versions of the pregnant workers fairness law or other similar laws that are more generous than the federal PWFA? The federal PWFA does not preempt more generous state and local laws. Therefore, any policy, practice, or form may need to be modified depending on where employees are located. As an example, some city and state laws, except in specific circumstances, prohibit employers from requesting medical documentation to confirm an employee's pregnancy, childbirth, or related medical conditions as part of the accommodation process.

4. Like under the ADA, when an employee requests an accommodation under the PWFA, Human resources professionals should think about how to make this work, not this will never work. This simple shift in approach makes finding a reasonable accommodation that does not impose an undue hardship on operations more likely.

PUMP for Nursing Mothers Act

The PUMP for Nursing Mothers Act expands existing employer obligations under the Fair Labor Standards Act (FLSA) to provide an employee with reasonable break time to express breast milk for the employee's nursing child for one year after the child's birth. The employer obligation to provide a place to express milk shielded from view and intrusion from coworkers and the public (other than a bathroom) continues.

Except for changes to available remedies, the amendment to the FLSA took effect on December 29, 2022. The changes to remedies will take effect on April 28, 2023.

What Changed Under PUMP for Nursing Mothers Act

The PUMP for Nursing Mothers Act covers all employees, not just non-exempt workers. The break time may be unpaid unless otherwise required by federal or state law or municipal ordinance. Employers should ensure that non-exempt nursing employees are paid if they express breast milk during an otherwise paid break period or if they are not completely relieved of duty for the entire break period. Exempt employees should be paid their full weekly salary as required by federal, state, and local law, regardless of whether they take breaks to express breast milk.

With some exceptions, the law requires employees to provide notice of an alleged violation to the employer and give the employer a 10-day cure period before filing a suit.

Employers with fewer than 50 employees can still rely on the small employer exemption, if compliance with the law would cause undue hardship because of significant difficulty or expense. Crewmembers of air carriers are exempted from the law. Rail carriers and motorcoach services operators are covered by the law, but there are exceptions and delayed effective dates for certain employees. No similar exemption is provided for other transportation industry employers.

Practical Advice for PUMP for Nursing Mothers Act Compliance

1. Educate the HR team and front-line managers on the update to the law and refresh them on the process for providing break time and private spaces to express breast milk.
2. Like the PWFA, the law does not preempt state law or municipal ordinances that provide greater protection than provided by the PUMP for Nursing Mothers Act. Depending on where employees are located, policies, practices, and the private

space provided to express breast milk may need to be modified.

3. Creativity is the key to being able to come up with staffing solutions and private spaces for nursing mothers to express breast milk. Nothing in the law requires employers to maintain a permanent, dedicated space for nursing mothers. A space temporarily created or converted into a space for expressing breast milk and made available when needed by a nursing mother is sufficient if the space is shielded from view and free from intrusion from coworkers and the public. In other words, allowing an employee to use an office with a door that locks would be convenient, but not practical for many worksites. Depending on the workplace settings, privacy screens, curtains, signage, portable pumping stations, and partnerships with other employers to provide private spaces for nursing mothers are all possibilities.

If you have any questions regarding the new PWFA or the PUMP for Nursing Mothers Act or need assistance updating your policies and practices or finding creative solutions for complying with these new laws, please contact a Jackson Lewis attorney.

©2023 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 1000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.