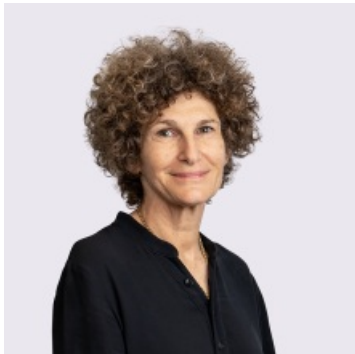


Labor Department Publishes Restaurant, Retail Guidance on Compliance with PUMP Act

By Felice B. Ekelman, Amanda A. Simpson &

January 9, 2024

Meet the Authors



Felice B. Ekelman

Principal
212-545-4005
Felice.Ekelman@jacksonlewis.com



Amanda A. Simpson

Office Managing Principal and
Office Litigation Manager
(407) 246-8408
Amanda.Simpson@jacksonlewis.com

Related Services

Disability, Leave and Health
Management
Hospitality
Pregnant Workers Fairness Act and
PUMP for Nursing Mothers Act
Restaurants
Retail

The Department of Labor (DOL) Wage and Hour Division (WHD) is in the process of publishing industry-specific guidance for compliance with the 2022 Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act). The DOL has published guidance for the restaurant and retail industry that includes a [recorded webinar](#), [presentation slides](#), and [FAQs](#) that provide examples tailored to the restaurant and retail industry.

PUMP Act Coverage

The PUMP Act extended employer obligations under the Fair Labor Standards Act (FLSA) to provide employees reasonable break time and private space to express breast milk for the employee's nursing child to include both non-exempt and exempt employees. The DOL explains, as an example, that an area manager for a multi-state chain of fast-food restaurants who is exempt from receiving overtime pay under the FLSA is entitled to breaks and a private location every time they need to pump for one year after the birth of their child.

Employers with fewer than 50 employees are exempt from the PUMP Act if they can demonstrate undue hardship. Employers with 50 or more employees do not qualify for this undue hardship exemption.

Frequency, Duration of Breaks

Employers must provide nursing employees reasonable break time each time the employee has a need to pump at work for one year after the child's birth. The frequency and duration of breaks will vary and depends on the employee's unique needs — including the timing of the breaks. For example, a sales associate may need to take four 25-minute breaks each day when she returns to work, but another employee who also needs to pump may require two 30-minute pump breaks. In both of these scenarios, the employer must provide the necessary break time and space to the employees.

Retaliation Prohibited

Employers cannot hold time used to pump against employees when determining whether the employee has met a productivity measure or quota. Employers also cannot require employees to make up time the employee used for pumping. Adding time to an employee's schedule, to make up time, could be seen as prohibited retaliation under the FLSA. The DOL provides the example of a sales associate who is directed by the store manager to work additional hours to meet the sales quotas for the week or to make up the time the sales associate spent pumping during the week. The DOL takes the position that this could be unlawful retaliation under the FLSA.

Space Requirement

Employers must provide a space that is not a bathroom and is shielded from view and

free from any intrusion from coworkers and the public and must be available each time the employee needs to pump. Restaurant and retail employers can temporarily convert an existing space, other than a bathroom, into a private space for pumping or make a private space available when necessary. The location must be functional as a space for pumping. Employers can add a table and chair and use dividers and signs to turn a storage room into a temporary space for pumping mothers. Alternatively, a manager's office could also be temporarily used, as long as employees have the ability to block or turn off cameras and use a lock or a sign to prevent intrusion.

The Department of Health and Human Services' Office on Women's Health notes that companies can partner with neighboring businesses to share a space for pumping mothers' use. For example, neighboring restaurants in a food court can provide their employees shared space for pumping that is near the food court. Those who need to use the space receive a code to share the break room and pump in private areas separated by partitions, and the space should have tables, chairs, a cooler, and functional sinks.

Compensation of Breaks

Time for pump breaks may be unpaid unless otherwise required by federal, state, or local law. Some state pregnancy accommodation laws may require pump breaks to be paid. Employers should also pay careful attention to the FLSA's standard requirements for counting and compensating hours worked. Employees must be paid for any time spent pumping when they are not fully relieved from duty or when pumping during an otherwise paid break. For example, if an employee pumps during a staff meeting to discuss upcoming menu specials and promotions, the employee must be paid for the time pumping because they were working. Furthermore, if an employer provides paid breaks, the employer must also pay employees who choose to pump during their paid breaks.

Additional Considerations for Restaurant, Retail Employers

Restaurant and retail employers are also required to provide lactation accommodations, absent undue hardship, under the new federal Pregnant Workers Fairness Act (PWFA). In the Equal Employment Opportunity Commission's (EEOC) [proposed regulations to implement the PWFA](#), lactation (including breastfeeding, pumping, and medical conditions related to lactation) is among the conditions the EEOC says will generally be covered by the PWFA. Many employers are already required to provide reasonable breaks and a private space for pumping under the [PUMP Act](#). For all employers, whether they are covered by the PUMP Act or not, the EEOC views the PUMP Act requirements as potential reasonable accommodations under the PWFA. The EEOC also proposes additional reasonable accommodations related to lactation for employers covered by the PWFA. It proposes extending the period of time during which the employee will be provided breaks and access to a private space beyond what is required under the PUMP Act and providing a lactation area that is reasonably close to the employee's work area, has electricity and appropriate seating, and is reasonably close to a sink and a refrigerator for storing milk, among other things. The EEOC is expected to release final regulations soon, which may provide additional clarification for employers.

In addition, employers should review and comply with relevant state and local wage and hour laws and pregnancy and lactation accommodation laws. If you have any questions about applying the FLSA, the PUMP Act, or state and local laws to your workforce, please reach out to any Jackson Lewis attorney.

©2024 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 employment and labor law since 1958, Jackson Lewis P.C.'s 1,000+ 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 and stable, and share our clients' goals to emphasize belonging and respect for the contributions of every employee. For more information, visit <https://www.jacksonlewis.com>.