

NEW FEDERAL PROTECTIONS FOR PREGNANT AND NURSING EMPLOYEES

I. INTRODUCTION

The Pregnant Workers Fairness Act (PWFA) and the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP) were included in the 2023 Consolidated Appropriations Act and impose new federal requirements on employers with respect to accommodations for pregnancy-and-childbirth-related conditions and nursing mothers.

II. PREGNANT WORKERS FAIRNESS ACT

The Pregnant Workers Fairness Act gives workers with conditions arising from pregnancy or childbirth the right to reasonable accommodations in the workplace. The Act requires an employer to provide reasonable accommodation for a known physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, regardless of whether the condition meets the definition of disability under the ADA. The PWFA applies to employers with 15 or more employees and to “qualified employees” meaning an employee or job applicant who can perform the essential functions of the position, with or without reasonable accommodation.

However, under the PWFA, an employee is still “qualified” even if she is temporarily unable to perform the essential functions of the job, so long as her temporary inability to perform the job can be reasonably accommodated and the possibility of performing the essential functions “in the near future” exists.

The PWFA requires an employee to put the employer on notice of the employee’s limitations. The PWFA allows either the employee or the employee’s representative to communicate the limitations to the employer. The PWFA also requires employers and employees to engage in the same interactive process as required under the ADA to determine a suitable reasonable accommodation. Additionally, the PWFA provides a good faith defense to liability for damages if an employer demonstrates a genuine effort to work with an employee to find a reasonable accommodation that would provide an equally effective opportunity for the employee without causing undue hardship to the employer.

III. PROVIDING URGENT MATERNAL PROTECTIONS FOR MOST NURSING MOTHERS ACT (PUMP ACT)

The PUMP of Nursing Mothers Act expands employers’ obligations under the Fair Labor Standards Act (FLSA). With the passage of the PUMP Act, an employer must, in addition to existing requirements to provide a private location for nursing employees to express breast milk, allow the

employee a reasonable break. For the expression of breastmilk for one year following the birth of an employee's nursing child.

The new act requires all employees to be paid for time spent expressing breast milk. If expressing breastmilk over an otherwise paid break or if not relieved from duty completely. However, while exempt employees must be paid their salary regardless of whether they use a break period to express breast milk, an employer is not obligated to pay non-exempt employees over an otherwise *unpaid* break period, unless it is required under some other municipal ordinance or state or federal law.

Employers with less than 50 employees may be eligible for an exemption if the employer can demonstrate that compliance with the law would inflict an undue hardship on the employer's business operations due to the expense and difficulty in relation to the resources or nature of the business.

Prior to filing a suit for a violation of the PUMP Act, an employee must bring the alleged violation to the employer's attention and allow the employer a 10-day grace period to cure the alleged violation. However, this requirement does not apply to retaliation claims or claims alleging an employer expressed an intent to not comply with the law.

The Wage and Hour Division of the United States Department of Labor has issued a bulletin (Field Assistance Bulletin No. 2023-02) relating to the enforcement of protections for employees to pump breastmilk at work, which may be found at: <https://www.dol.gov/sites/dolgov/files/WHD/fab/2023-2.pdf>

The foregoing Compliance Update is for informational purposes only, and does not constitute legal advice. As a reminder, the NBA general counsel is the attorney for the Nebraska Bankers Association, not its member banks. The general counsel is available to assist members with finding resources to help answer their questions. However, for specific legal advice about specific situations, members must consult and retain their own attorney.