

March 22, 2023

What Employers Need to Know About Upcoming Required Accommodations for Pregnant Workers and Nursing Mothers

**Private: Mark Brookstein**

Human Resources & Employment

Congress passed two laws related to pregnant workers and nursing mothers in December 2022. First, Congress passed the Pregnant Workers Fairness Act (PWFA), which requires employers with at least 15 employees provide “reasonable accommodations” to a worker’s limitations related to pregnancy, childbirth or related medical conditions, unless the accommodations will cause an “undue hardship” to the employer (significant difficulty or expense for the employer). The PWFA is effective June 27, 2023, and will be enforced by the EEOC, which will issue proposed regulations subject to public comment before becoming final.

Like the Americans with Disabilities Act (ADA), “reasonable accommodations” are workplace changes that allow the employee to perform the “essential functions” of the job, which could include things like flexible hours, additional break time, being excused from strenuous activity, or time off to recover from childbirth. Also like the ADA, employers cannot interfere with employees’ rights under the PWFA or retaliate against them for exercising such rights.

Second, Congress also passed the Providing Urgent Maternal Protections for Nursing Mothers Act (the PUMP Act), which amends the Fair Labor Standards Act (FLSA) and requires nearly all employers covered under the FLSA to provide nursing mothers with break times and private space to express breast milk for up to one year after the child’s birth. Employers with fewer than 50 employees are excused if they can demonstrate that compliance will cause an undue hardship.

Last week, the U.S. Department of Labor’s Wage and Hour Division (WHD) provided guidance on employers’ compliance with the PUMP Act. Below is a summary of key requirements:

Frequency and Duration of Breaks

- The PUMP Act provides that reasonable breaks may be taken “each time such employee has need to express the milk” (i.e. “as needed”).
- Frequency and duration of breaks will be dependent on various factors such as: age of the child, how long the mother needs to pump and how many times, how far the site to pump is from where the employee works, whether the employer has a space that already has the pump and equipment ready.
- Employees who telework are also eligible to take pump breaks on same basis as other employees

Break Space Must Be “Functional”

- Although the statute does not explicitly indicate what is considered for a space to be considered “functional,” an employer should keep in mind that the more resources provided in the room, the more likely it will be found to be functional (e.g. “a table” not required per se, but more likely to be a factor weight in favor of finding it being functional).

- Employers should consider whether the private space has refrigerators, appropriate containers and adequate technology in order for the space to be considered “functional.”
- Employers should also consider how many nursing employees they have to determine whether one or more spaces should be designated as private space for employee to express breast milk.

Break Space Must Be “Private Space Other than a Bathroom”

- No matter what, the space must be a private space other than a bathroom (even if the bathroom is private).
- Does not need to be permanently used only for nursing, but it must be available for the employees to nurse whenever they need it (may temporarily designate a space).

Break Space Must Be “Shielded from Public View”

- A private room that is locked and/or has blinds that shield from public view is sufficient as long as it is available to employees whenever it is needed to pump breast milk.
- WHD said that having to install blinds or other things to ensure space is “private/shielded from public” will not be considered an “undue burden” by WHD (only relevant for employers with less than 50 employees).

Compensation for Break Time

- Employees must be completely relieved from duty to be considered on “break,” otherwise, they must be paid for the break time.
- Employees that use employer-provided paid breaks must be compensated the same way as other employees.

PUMP Act Does Not Preempt Other State and Local Laws

- For example, the PUMP Act only applies for one year after the child’s birth, but states and local laws may provide greater protections that employers will need to consider.

Retaliation Is Prohibited

- An employer that interferes with these rights or discriminates against an employee for exercising them (like switching schedule to a lower paid job) may be found to have retaliated in violation of FLSA.
- Employees are protected regardless of whether the complaint is made orally or in writing (WHD noted that “most courts have ruled that internal complaints to an employer are also considered protected activity”).
- Complaints to the WHD will be considered protected activity.

Required FLSA Poster

- FLSA Poster on DOL website, [linked here](#), currently has general information about pumping rights and satisfies statutory requirement.
- WHD may release an updated poster at some point.

For more information or questions about the new laws, please contact a member of Gould & Ratner’s [Human Resources and Employment Law Practice](#).