Insights, News & Events

THE BIRTH OF NEW WORKPLACE PROTECTIONS FOR PREGNANT AND POSTPARTUM WORKERS: 4 FAQS FOR EMPLOYERS

Insights
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After nearly an 18-month delay, Congress just approved the Pregnant Workers Fairness Act (PWFA), requiring covered employers to provide reasonable accommodations for employees with medical conditions related to pregnancy and childbirth. This legislation – along with the PUMP Act which expands the 2010 federal breastfeeding law — were added to the $1.7 trillion 2023 omnibus spending bill that Congress approved last week and President Biden is soon expected to sign into law. **[Editor's Note: The president signed the bill into law on December 29.]** What do you need to know about the new workplace requirements? Here are the answers to the four most significant questions employers are likely to ask.

History of the Legislation

The House of Representatives passed the PWFA (H.R.1065) in May 2021, by an overwhelmingly bipartisan vote of 315-101. However, the companion bill (S.1486) was not placed on the Senate Legislative Calendar for a full consideration until September 30, 2021. It remained on the calendar until last week when the Senate agreed in a 73-24 vote to include the measure in the spending bill. Senators from both sides of the aisle — Bob Casey (D-Pa.) and Bill Cassidy (R-La.) — led the way with the bipartisan push to pass the PWFA. The House approved the spending bill on December 23, and President Biden said he intends to "sign it into law as soon as it reaches [his] desk."

1. What is the PWFA?

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The PWFA prohibits employers who have 15 or more employees from discriminating against a "qualified employee," defined as "an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the position, with specified exceptions," by:

- Failing to make reasonable accommodations to known limitations of such employees unless the accommodation would impose an undue hardship on an entity's business operation;
- Requiring a qualified employee affected by such condition to accept an accommodation other than any reasonable accommodation arrived at through an interactive process;
- Denying employment opportunities based on the need of the entity to make such reasonable accommodations to a qualified employee;
- Requiring such employees to take paid or unpaid leave if another reasonable accommodation can be provided; and
- Taking adverse action in terms, conditions, or privileges of employment against a qualified employee requesting or using such reasonable accommodations.

In other words, the PWFA requires employers to consider employee and applicant accommodation requests related to pregnancy, childbirth, or related medical conditions the same way it has considered requests for accommodation related to disabilities under the Americans with Disabilities Act (ADA). Additionally, the PWFA prohibits employers from placing a qualified employee on a leave of absence when a different reasonable accommodation option is available. Finally, the act prohibits retaliation against employees for seeking or taking a reasonable accommodation related to their pregnancy, childbirth, or related medical condition.

2. What About Other Similar Federal Laws?

The goal of the PWFA is to expand protections for pregnant workers who need an accommodation to perform their job duties. While the Pregnancy Discrimination Act (PDA) prohibits discrimination against individuals because they are pregnant, it does not affirmatively require employers to accommodate pregnancy or pregnancy related conditions. Instead, it requires only that employers accommodate

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pregnant employees in the same manner they accommodate other employees who are similar in their inability to work.

Pregnant workers also have no refuge under the ADA. That law does not include pregnancy in its definition of an "impairment," meaning that pregnancy is not a disability under the ADA and pregnant workers can only obtain an accommodation under the law if they have a pregnancy-related or some other disability.

Thus, the PWFA closes the gap in federal law by requiring employers to reasonably accommodate individuals who are pregnant, have recently undergone childbirth, or have a medical condition related to such pregnancy and childbirth.

3. What is the PUMP Act?

The Providing Urgent Maternal Protections for Nursing Mothers (PUMP) Act requires organizations to provide time and space for breastfeeding parents. The Affordable Care Act of 2010 already requires employers to provide reasonable time to express breast milk and a place for pumping, other than the bathroom, that is shielded from view and private.

This prior pumping law did not consider all workers, as it excluded most salaried employees. But the PUMP Act extends these rights to all breastfeeding employees for the first year of the baby's life. Additionally, time spent to express breastmilk must be considered hours worked if the employee is also working.

4. What Should Employers Do?

While the PWFA and PUMP Act are significant expansions of employees' rights under federal employment law, many states and cities already have some sort of expanded pregnancy accommodation law. In fact, 30 states and five cities require certain employers to provide some form of accommodations (including specific requirements for lactating employees) to pregnant employees.

- For example, **California's** Fair Employment and Housing Act (FEHA) specifically provides that it is unlawful for an employer "to refuse to provide reasonable accommodation for an employee for a condition related to pregnancy, childbirth, or a related medical condition."

- Similarly, in **Louisiana**, employers are prohibited from "failing or refusing to make reasonable accommodations for employees with medical needs causing limitations arising from pregnancy, childbirth, or related medical conditions, where such limitations are known to the employer, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer."

- In **Virginia**, "employers must make reasonable accommodations to the known limitations of a person for pregnancy, childbirth or related medical conditions (including lactation), unless providing such an accommodation would impose an undue hardship on the employer."

- In **Kentucky**, it is unlawful to "fail to make reasonable accommodations for employees with limitations related to pregnancy, childbirth, or related medical conditions who request an accommodation, including but not limited to the need to express breast milk, unless the employer can demonstrate the accommodation would impose an undue hardship on the employer's program, enterprise, or business."

Thus, if you are an employer in one of the many states or cities that already requires you to reasonably accommodate pregnancy-related medical conditions, including lactation, your practices may not need to change much, or at all.

However, if you live in a state where employers are not currently required to offer reasonable accommodations to employees who are pregnant or recently gave birth, you may want to start considering how to implement such a process in your business. In general, this will mean expanding your accommodations review process to include requests related to pregnancy, childbirth, and related medical conditions. You may also want to expand your mandatory HR trainings to include a discussion of these new laws so that your managers – and employees – understand their rights and obligations under the law.

Conclusion

We will monitor developments related this law, so make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have questions,

contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Employee Leaves and Accommodations Practice Group.