Two New Federal Laws Affecting Pregnant Workers Passed in the Last Days of 2022

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WHILE YOU WERE SLEEPING (OR TRAVELING OR WATCHING FOOTBALL) DURING THE HOLIDAYS. . .TWO NEW FEDERAL LAWS AFFECTING PREGNANT WORKERS WERE PASSED

Two updates to start the New Year include the Providing Urgent Maternal Protections for Nursing Mothers (PUMP) Act and the Pregnant Workers Fairness Act (PWFA).

Providing Urgent Maternal Protections for Nursing Mothers (PUMP) Act

The **Providing Urgent Maternal Protections for Nursing Mothers (PUMP) Act** was signed into law on December 29, 2022 as part of a massive federal government spending law for 2023.

It went into effect immediately and further amends the Fair Labor Standards Act (FLSA), which was previously amended by the Affordable Care Act (ACA) back in 2010 to provide reasonable nursing breaks to hourly employees.

Specifically, the PUMP Act makes the following changes to the prior ACA amendments to the FLSA:

1. "Covered employees" now include exempt as well as hourly employees. (Prior law only covered *hourly* employees.)

2. Nursing breaks are still unpaid for hourly employees under the PUMP Act unless the employee continues to work during the break or unless the breaks last less than 20 minutes.

Such employees also may choose to use available paid leave in order to be paid for these breaks.

Exempt employees will be paid for these breaks (because partial day deductions may not be taken against their salaries under the FLSA in order for such employees to retain their "exempt" status)**.**

3. The new law **creates a private right of action against employers for violating the law** by denying the breaks or not providing a clean, private space which is shielded from others' view *that is not a bathroom* in which to take them.

This private right of action provision will not become effective until April of 2023 (in order to give employers time to learn about and begin complying with the new law). Even after April, employers still will have a 10-day "grace period" to get into compliance upon receiving notice from an employee of a perceived violation before the employee may pursue formal legal action. (This notice requirement is waived, however, if the employee has already been terminated either in retaliation for making a request for a private space to express breast milk or for otherwise opposing an employer's refusal to provide such a space.)

Remedies for violation of the new law are the same as those under the FLSA, including reinstatement, back and front pay, liquidated damages, and attorneys' fees and costs.

Employers with fewer than 50 employees still are not subject to this new law if it would pose an undue hardship by causing the employer "significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business."

4. The new law adds some types of industry to this list of exemptions (regardless of the size of the employer): air carrier crew members, rail carrier crew members, and motor coach operators.

Pregnant Workers Fairness Act (PWFA)

The Pregnant Workers Fairness Act (PWFA) is basically "the Americans with Disabilities Act (ADA) for pregnancy" in that it extends the same obligations to engage in the interactive process in order to provide a reasonable accommodation to pregnant workers that the ADA provides for those with disabilities.

The PWFA does not go into effect until June 27, 2023. Like the federal ADA, **it will cover all employers with 15 or more employees. There is also an "undue hardship" exception** just as under the federal ADA. However, due to the temporary nature of pregnancy versus most "disabilities" that are covered by the ADA, it is anticipated to be more difficult in many cases to make an "undue hardship" showing based on only having to provide the requested accommodation for a few months under the PWFA.

As under the federal ADA, employers may not "force" pregnant workers to "go out on leave" in response to a request for a "reasonable accommodation" if another "reasonable accommodation" other than leave is available.

The PWFA also contains the same anti-retaliation provisions as the federal ADA, prohibiting employers from taking an adverse action against an employee who requests or uses an accommodation under this new law. It also prohibits adverse actions against employees who oppose unlawful conduct or who file a charge, testify, assist, or participate in any manner in an investigation, proceeding, or hearing regarding a PWFA violation. The new law also prohibits coercion, intimidation, threats, or interference directed toward individuals who exercise their rights under the PWFA or who aid or encourage others in the exercise of such rights.

Remedies available for violations of the PWFA are the same as those provided under Title VII, including reinstatement, back pay, front pay, compensatory damages, punitive damages, and recovery of attorneys' fees and costs. The new law requires the Equal Employment Opportunity Commission (EEOC) to issue PWFA regulations by the end of 2023 and directs that these regulations include examples of reasonable accommodations.

We Can Help

As always, please feel free to contact Stacie Caraway or any other member of our Labor & Employment Practice Group with questions regarding these two new laws or other employment-related matters in the New Year.