

New Guidance on Federal Protections for Pregnant and Nursing Employees

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The U.S. Department of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC) recently published guidance concerning the Providing Urgent Maternal Protection for Nursing Mothers Act (PUMP Act) and the Pregnant Workers Fairness Act (PWFA). As we explained in our previous client alert, the PUMP Act, effective April 28, 2023, requires employers pay breastfeeding employees for “hours worked” during certain lactation breaks; and the PWFA, effective June 27, 2023, requires employers to provide reasonable accommodations for pregnant employees.

DOL Guidance on Break Time for Nursing Mothers Under the PUMP Act

The DOL Wage and Hour Division recently published an updated Fact Sheet and Frequently Asked Questions (FAQs) to clarify the PUMP Act’s protections for employees and its obligations for employers. The PUMP Act requires all employers covered by the Fair Labor Standards Act (FLSA) to provide reasonable break time to nursing employees to express breast milk for one full year after the birth of a nursing child. However, employers with fewer than 50 employees may be exempt from the PUMP Act if compliance would impose an undue hardship due to the difficulty or expense because of the size, financial resources, nature, or structure of their business. In determining whether an employer has fewer than 50 employees to qualify for the undue hardship exemption, the DOL’s guidance provides that all employees who work for the covered employer will be counted, including all full-time, part-time, and remote employees.

According to the DOL, the frequency and duration of the breaks a nursing mother may need to express breast milk will likely vary depending on factors related to the nursing employee and the child, including the location of the break space, pump set up, and other steps reasonably necessary to express breast milk. Furthermore, the break space provided by the employer cannot be a bathroom and must be shielded from view and free from intrusion. However, if an employer does not have any employees with a need to express breast milk, the employer does not have an obligation to provide a nursing break space.

The DOL also provided guidance concerning compensation for nursing mothers’ pumping breaks. Under the PUMP Act, an employee is not entitled to compensation for their pumping breaks, provided that the employee is fully relieved from their job duties for the entirety of their breaks. If an employee is expected to work during their pumping breaks, however, the breaks will be considered “hours worked,” entitling the employee to compensation. The DOL’s guidance further clarifies that where an employer already provides compensated breaks to its employees, any employee who uses that break time to express milk must be compensated in the same way that the employer’s other employees are compensated for break time.

We are still awaiting explicit compensation guidance from the DOL on how to treat exempt employees who express milk during break times. Until such guidance is released, given the logistical timekeeping challenges in docking exempt employees’ pay for time spent expressing breast milk, we recommend compensating exempt employees for pumping breaks in the same manner in which they are compensated for non-pumping breaks.

Finally, according to the DOL, beginning April 28, 2023, employees who believe their rights have been violated under the PUMP Act may seek reinstatement, lost wages, punitive damages, and other legal remedies. However, before April 28, 2023, remedies for violations of the PUMP Act's reasonable break time and space requirements are limited to unpaid minimum or overtime wages.

EEOC Guidance on Reasonable Accommodations Under the PWFA

The PWFA requires public and private sector employees with at least 15 employees to provide reasonable accommodations to employees and applicants with known physical or mental conditions related to or arising out of pregnancy, childbirth, and related medical conditions.

The text of the PWFA does not address what accommodations are considered "reasonable" for pregnant employees and applicants. However, according to the EEOC's recently published guidance, reasonable accommodations under the PWFA may require employers to ensure their pregnant employees have "the ability to sit or drink water; receive closer parking; have flexible hours; receive appropriately sized uniforms and safety apparel; receive additional break time to use the bathroom, eat, and rest; take leave or time off to recover from childbirth; and be excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy."

Additionally, the EEOC's guidance notes that, under the PWFA, covered employers cannot:

- Require an employee to accept an accommodation without a discussion about the accommodation between the worker and the employer;
- Deny a job or other employment opportunities to a qualified employee or applicant based on the person's need for a reasonable accommodation;
- Require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working;
- Retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
- Interfere with any individual's rights under the PWFA.

As required by the PWFA, the EEOC will be proposing and issuing regulations this year to carry out the law. These regulations will provide further clarity concerning employers' obligations under the law.

What This Means for Employers

To ensure compliance with the PUMP Act and the PWFA, employers may need to develop or amend their existing workplace policies to expand reasonable accommodations offered for pregnancy, childbirth, breastfeeding employees, and related medical conditions.

If you have any questions concerning the PUMP Act and the PWFA, please do not hesitate to contact the Seigfreid Bingham Employment Law Team. We will continue to monitor the latest developments on any forthcoming regulations and guidance issued for the laws.

This article is general in nature and does not constitute legal advice. If you have legal questions, please consult the authors, Katie Conklin (kconklin@sb-kc.com) 816.265.4114 and John Vering (jvering@sb-kc.com) 816.265.4109, or other shareholders in Seigfreid Bingham's Employment Law Group, including: John Neyens (johnn@sb-kc.com) 816.265.4152, Mark Opara (mopara@sb-kc.com) 816.265.4140, Shannon Cohorst Johnson (sjohnson@sb-kc.com) 816.265.4139, Brenda Hamilton (bhamilton@sb-kc.com) 816.265.4103, Julie Parisi (jparisi@sb-kc.com) 816.265.4159, Christopher Tillery (ctillery@sb-kc.com) 816.265.4157, or your regular contact at Seigfreid Bingham at 816.421.4460.