

# LEGAL NEWS FOR YOUR BUSINESS

February 2023

## *General Business Alert*

# WORKPLACE CONSIDERATIONS AND PROTECTIONS FOR PREGNANT AND NURSING EMPLOYEES

2023 brings increased protections for pregnant and nursing employees, with the passing of the Providing Urgent Maternal Protections for Nursing Mothers Act and the Pregnant Workers Fairness Act on December 29, 2022. Both Acts expand employer obligations to pregnant and nursing employees, including break time and reasonable accommodation requirements. Covered employees include mothers who have given birth (including those with stillborn children), surrogates, or those who are otherwise providing breast milk for an infant.

### ***Providing Urgent Maternal Protections for Nursing Mothers Act***

The Providing Urgent Maternal Protections for Nursing Mothers (“PUMP”) Act went into effect on December 29, 2022, when President Biden signed the 2023 Consolidated Appropriations Act. The PUMP Act amends the Fair Labor Standards Act (“FLSA”) to modify an employer’s obligation to provide adequate break time for pumping breast milk. Under the FLSA, employers are also required to provide a private place, other than a bathroom, that is “shielded from view and free from intrusion” for nursing employees to express breast milk.

Although only workers who are not exempt from FLSA overtime requirements were covered under the FLSA obligations, the PUMP Act covers all employees, exempt and non-exempt alike. While the break time may still be unpaid, employers should ensure that if an employee pumps during an otherwise paid break time, or an exempt employee takes a break to pump, they are still paid for that time. Additionally, the time period during which accommodations may be requested has been expanded from one year to two years after the circumstance necessitating pumping arises.

The PUMP Act also increased the remedies available to employees for violations and requires covered employees to notify their employer if they believe their employer is not in compliance. Employers have 10 days to remedy the situation. While the PUMP Act is in

effect and employers should comply now, the changes in remedies take effect April 28, 2023.

The PUMP Act applies to all employers with 50 or more employees; however, employers with fewer than 50 employees are expected to comply unless significant hardship, difficulty, or expense prevents them from doing so. Additionally, air transport workers, such as flight attendants and pilots, are excluded from the PUMP Act. Enforcement of the PUMP Act begins April 28, 2023.

### ***Pregnant Workers Fairness Act***

The Pregnant Workers Fairness Act (“PWFA”) becomes effective on June 27, 2023, but employers should start taking steps toward compliance now.

The PWFA is modeled on the Americans with Disabilities Act (“ADA”) and applies to employers with 15 or more employees. Employers covered by the PWFA must engage in the interactive process with and provide a reasonable accommodation to any qualified employee with known limitations due to pregnancy, childbirth, or another related medical condition.

#### **UNDER THE PWFA, THE FOLLOWING ARE UNLAWFUL EMPLOYMENT PRACTICES:**

- Not accommodating a qualified employee with limitations related to pregnancy or childbirth, absent an undue hardship;
- Denying employment opportunities to a qualified employee because of their need for reasonable accommodation(s);
- Requiring an employee to take paid or unpaid leave if an alternative reasonable accommodation is available or forcing an employee to take an accommodation not discussed in the interactive process.

A qualified employee is defined as an employee or applicant who can perform the essential functions of a job, with or without accommodation, or, as an employee or applicant who temporarily cannot fulfill the essential functions of their job due to their pregnancy, childbirth, or other related condition. The PWFA uses the same definitions for “reasonable accommodation” and “undue hardship” as the ADA. The EEOC will enforce the PWFA, and the remedies for employees will be the same as those available under Title VII.

To prepare for the PWFA and comply with the PUMP Act, employers should take action now to clarify their break and reasonable accommodation policies for pregnant and nursing employees. Neither the PWFA nor the PUMP Act preempt state law or municipal ordinances, so employers should also be aware of local regulations and requirements. Further, employers should take care to educate their HR teams and managers to ensure policies and procedures are effectively communicated and followed throughout the workplace.

*If you have questions or concerns about your obligations under the PUMP Act and PWFA, please contact any member of Gardner Skelton’s employment team.*

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# EEOC RELEASES UPDATED GUIDANCE REGARDING HEARING DISABILITIES AND ADA COMPLIANCE

On January 24, 2023, the EEOC released an updated guidance document, "**Hearing Disabilities in the Workplace and the Americans with Disabilities Act.**" The guidance specifically focuses on how the Americans with Disabilities Act ("ADA") applies to job applicants and employees with hearing disabilities, including when employers may ask for information regarding a disability, types of accommodations, handling safety concerns, and harassment.

The guidance reminds readers that employers with 15 or more employees are covered, and individuals with disabilities include those who *have, have had, or are regarded as having* a substantially limiting impairment. Employers may not ask about a disability before a job offer, and they may not require job applicants to disclose a disability before accepting an offer. Once a conditional offer is extended, an employer may ask an applicant to undergo a medical examination, as long as all employees are treated equally, regardless of disability status. Importantly, an employer may not withdraw an offer if the individual is capable of performing the job's essential functions and there is no direct threat to the health and safety of the applicant or others that cannot be eliminated or reduced through reasonable accommodation.

An employer may ask about a disability during employment, *in certain circumstances*. If an employee has performance problems and the employer reasonably believes they are related to a disability, such as a hearing condition, they may ask for medical information or offer an accommodation. Additionally, if an employer is concerned about an employee's ability to perform a job safely, they may ask for medical information regarding the hearing impairment.

The guidance stresses that medical information, especially regarding hearing disabilities, must be kept confidential. If an accommodation is provided that would not normally be permitted in the workplace, employers may not disclose to other employees that it is a reasonable accommodation. Alternatively, employers are encouraged to emphasize that employee issues are personal, and to train all employees on the requirements of equal employment laws, including the ADA and reasonable accommodation process.

Employers should review the updated guidance and ensure their reasonable accommodation policies and procedures are up to date.

*If you would like to discuss your ADA compliance policies and procedures, please contact any member of Gardner Skelton's employment team.*



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