CLIENT ALERTS & INSIGHTS

UPDATE: Congress Enacts New Protections for Pregnant and Nursing Workers

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The validity of the Pregnant Workers Fairness Act ("PWFA") is being questioned less than one year after it went into effect. On February 27, 2024, a federal judge for the U.S. District Court for the Northern District of Texas ruled that the PWFA is unenforceable against the State of Texas because it was passed in violation of the Quorum Clause of the U.S. Constitution. Congress passed the PWFA in late 2022 as part of the Consolidated Appropriations Act of 2023. The PWFA was passed with only 205 members of the House of Representatives physically present to vote. The remaining 226 members who voted on the PWFA were not physically present and voted by proxy. While the House of Representatives had determined that a quorum was present by including the absent members who voted by proxy, the federal judge disagreed, instructing that "[t]reating absent members as present via proxy in order to create a non-present majority violates the Quorum Clause." Accordingly, the federal judge issued a permanent injunction blocking enforcement of the PWFA against the State of Texas. The federal government has seven days to appeal the ruling. While the permanent injunction only applies to the State of Texas, employers across the country should be aware of this ruling because other states may follow suit in challenging the enforceability of the PWFA.

Congress recently passed two pregnancy-related acts, the Providing Urgent Maternal Protections for Nursing Mothers (PUMP) Act and the Pregnant Workers Fairness Act (PWFA), both of which create new legal rights and remedies for thousands of employees. These laws expand employment protections for individuals who are pregnant, have related medical conditions, or are nursing.

Providing Urgent Maternal Protections for Nursing Mothers (PUMP) Act

The PUMP Act became law in December 2022. It expands on the requirements set forth in the Break Time for Nursing Mothers Act, which became law in 2010. That law requires employers to provide nursing mothers a reasonable break time to express breast milk and a place to do so that is shielded from view and private for at least one year after giving birth. But those provisions only applied to employees who were not exempt from the Fair Labor Standards Act's overtime pay requirement, so salaried, exempt employees were not covered.

The PUMP Act expands the obligations set forth in the Break Time for Nursing Mothers Act to include exempt employees. The PUMP Act requires employers to provide a reasonable break for an employee to express breast milk each time the employee has a need to express milk for one year

after the child's birth. The PUMP Act considers an employee's time spent expressing breast milk as hours worked unless the employee is completely relieved of duties during the entire break. If the employee is interrupted during the break, the employee must be paid for the entire break.

The PUMP Act also creates a private right of action for employees to sue an employer for failing to comply with the law. The portion of the law providing employees a private right of action does not go into effect until April 28, 2023. Remedies are back pay, front pay, liquidated damages, attorneys' fees and costs.

With the exception of airline flight crewmembers and certain select railroad and motorcoach employees, the PUMP Act applies to all employers. However, employers with fewer than 50 employees may be excused from compliance with the PUMP Act if they can demonstrate that compliance would impose 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."

Pregnancy Workers Fairness Act (PWFA)

Pregnancy is generally not considered a "disability" under the Americans with Disabilities Act (ADA) in the absence of significant medical complications. Accordingly, the requirement that employers provide reasonable accommodations under the ADA typically does not apply to pregnant employees. And while discrimination against pregnant employees is prohibited by the Pregnancy Discrimination Act, that law does not impose separate accommodation requirements. The PWFA, which goes into effect on June 27, 2023, fills in these gaps.

The PWFA makes it an unlawful employment practice for an employer with 15 or more employees to:

- Not make reasonable accommodations to the known limitations of a **qualified employee** related to pregnancy, childbirth, or related medical condition unless the employer can demonstrate that the accommodation would impose an undue hardship.
- Deny employment opportunities to a qualified employee based on the need of the covered employer to make reasonable accommodations.
- Take adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation.
- Retaliate against employees who have opposed any act or practice made unlawful by the PWFA, or coerce, intimidate, threaten, or interfere with an individual in the exercise of rights granted by the PWFA.

The PWFA and the ADA share some concepts. For instance, the PWFA defines a "qualified employee" as an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of a job. Unlike the ADA, however, the PWFA expressly provides that an individual may still be "qualified" if the inability to perform an essential function is for a temporary period, the essential function could be performed in the near future, and the inability to perform the essential function can be reasonably accommodated. Therefore, under the PWFA, the employer must consider temporarily waiving that essential job function as an accommodation and permit the

pregnant employee to continue working in that role. The PWFA also provides that an employer cannot require a qualified employee to take leave, whether paid or unpaid, if an alternative reasonable accommodation that allows the employee to continue to work can be provided.

The PWFA adopts the same meaning of "reasonable accommodation" and "undue hardship" as used in the ADA, including the interactive process that will typically be used to determine an appropriate reasonable accommodation. And as with the ADA, what is "reasonable" under the circumstances, and what might constitute an "undue hardship" such that granting the accommodation is not legally required, will be heavily fact dependent.

Relief for employees is the same as that provided under Title VII, including reinstatement, back pay, front pay, compensatory damages, punitive damages, and the right to recover reasonable attorneys' fees and costs. Moreover, enforcement procedures are the same as available under Title VII meaning that individuals who believe their rights were violated can file charges with the U.S. Equal Employment Opportunity Commission and/or state and local fair employment practices agencies for investigation. The PWFA does not limit the ability of states and localities to pass laws with greater protections.

Implications for Employers

Enforcement guidance for both the PWFA and the PUMP Act is expected in the coming months. In the meantime, employers should update their reasonable accommodation and employee break policies to reflect the requirements in these laws. Employers subject to the PUMP Act should locate and designate adequate space for employees to express breast milk. In addition, employers may need to update their break and timekeeping policies and practices to ensure compliance with the PUMP Act.

As always, employers should consult legal counsel for advice on complying with legal requirements or responding to employee requests for accommodations.

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