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Labor & Employment Update

New Federal Laws Provide Additional Protections to Pregnant Employees and Employees Who are Nursing Mothers

Two recently enacted federal statutes provide additional protections for female workers who are pregnant or who require time at work to express milk.

Pregnant Workers Fairness Act ("PWFA"). On December 29, 2022, President Biden signed the PWFA into law, with an effective date of June 27, 2023. The PWFA requires an employer that has at least 15 employees to "make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee…" In other words, employers will now be required to provide accommodations, such as light duty or frequent bathroom breaks, for pregnant workers. However, an employer is not required to provide accommodations for pregnant workers if that accommodation would impose an undue hardship on the employer's business operations.

The PWFA incorporates the ADA's definitions of "reasonable accommodation" and "undue hardship." Further, the PWFA uses the ADA's framework for an interactive process to determine a reasonable accommodation. Pursuant to the PWFA, an employer cannot require an employee to take leave, whether paid or unpaid, if a reasonable accommodation can be provided. The PWFA differs from the ADA in one important respect concerning essential job functions. If a pregnant worker is not able to perform the essential functions of her job, the employer must excuse that function if the inability is temporary, such that the employee will be able to perform the function "in the near future," and there is no accommodation that will enable the employee to perform that function. By way of example, if an employee cannot lift 50 pounds because she is in the latter stages of pregnancy, and that is an essential function of her job, the employer must work around that inability, since it is only temporary, unless the workaround would cause an undue hardship. In contrast, under the ADA, an employer is not required to eliminate such essential job functions.

The critical change from the Pregnancy Discrimination Act ("PDA"), as interpreted by the Supreme Court in *Young v. United Parcel Services*, is that before the PWFA, an employer was not required to treat pregnant employees any differently than other employees who were similarly situated in terms of their ability to work. A violation of the PDA required proof that the employer intended to discriminate based on pregnancy, such that an employer did not have to provide a light duty assignment, for example, to accommodate a pregnant worker, even if it provided such assignments to non-pregnant employees with work-related disabilities. Now, under the PWFA, an employer must provide light duty assignments, if available, unless it would create an undue hardship. Under prior law, a reasonable accommodation was not required unless the pregnant workers' impairments amounted to a disability under the ADA because of severe complications due to pregnancy. A routine pregnancy was not an "impairment," so it was not considered a protected disability.

A majority of states already have laws that, to a greater or lesser extent, require some form of accommodations for pregnant workers. If you are in one of these states, you will need to compare your local requirements with the PWFA to ensure compliance with both.

Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act"). The PUMP Act was signed into law alongside the PWFA on December 29, 2022, and became effective immediately. The Act amends the Fair Labor Standards Act ("FLSA") to require employers to provide reasonable break times for an employee to express breast milk for up to one year after a child's birth. The employer is required to provide an area that is shielded from view, but is not a bathroom, for employees to express milk. The primary change in the law is that the requirements now apply to both non-exempt and exempt employees, whereas the prior version applied only to non-exempt employees.

Non-exempt employees need not be paid for the break time, unless they are not completely relieved of their duties for the entire break period, if they express breast milk during an otherwise paid break period, or unless otherwise required by federal or state law or municipal ordinance. Since the FLSA requires breaks of less than 20 minutes to be treated as hours worked, it is likely that breaks to express milk similarly must be treated as hours worked if they are less than 20 minutes in duration. Exempt employees cannot have their weekly salary reduced, regardless of the duration of any breaks.

As with the PWFA, this is an area in which many states already have legislation in place and employers must ensure that they are in compliance with state and local laws and ordinances, in addition to the expanded protections of the PUMP Act.