

# Insights On New Protections For Pregnant, Nursing Workers

By **Amy Epstein Gluck** (January 12, 2023)

As 2022 wound down, federal legislators passed two new workplace laws: the Pregnant Workers Fairness Act[1] and the Providing Urgent Maternal Protections for Nursing Mothers Act, or PUMP Act.

Employers may wonder about the necessity of the PWFA when employers with more than 15 employees must comply with the Pregnancy Discrimination Act. Similarly, what additional protections does the PUMP Act require that the current law, the Fair Labor Standards Act, does not?

In this article, I will examine and compare these laws — but first, why these laws now?



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It can be difficult to find and retain affordable, reliable, and warm and loving child care.

The COVID-19 pandemic shone a light on the disproportionate effect that child care[2] has on working mothers — many of whom left the workforce during the pandemic for lack of support.

In December 2021, addressing the National Conference of State Legislatures, U.S. Department of Labor Women's Bureau Director Wendy Chun-Hoon referenced the huge amount of data gathered "showing that women still take up the majority of caregiving and household work — that is the unpaid work, but still work."

She continued, "You couple that with a lack of care infrastructure and 3 million women have suddenly gone from the workplace." [3]

These new laws were born this perspective of how child care issues disproportionately and catastrophically affect working mothers.

## **Enter the PWFA: What workplace protections does the PWFA offer pregnant workers that the PDA does not?**

Like the PDA, the PWFA prohibits employers from denying jobs or other opportunities because a female employee is pregnant.

Unlike the PDA, the PWFA requires employers to provide reasonable accommodations for pregnant employees. The PWFA closes holes unaddressed by the PDA.

The PDA amended Title VII of the Civil Rights Act and requires employers to treat pregnant employees the same as those who are "similar in their ability or inability" to work.

But the PDA does not protect pregnant workers with pregnancy-related conditions like severe morning sickness and other serious conditions. How could it? Only pregnant people experience pregnancy-related conditions like preeclampsia or the horrible morning sickness famously suffered by Amy Schumer — hyperemesis gravidarum.[4]

This left a loophole. Employers could deny requests for accommodations based on pregnancy because they could not identify coworkers in similar roles who could possibly ask

for the same accommodations as these pregnant workers.

The PWFA requires employers with at least 15 employees to provide reasonable accommodations for all pregnant workers, unless doing so causes an employer undue hardship or burden.[5] Women can continue working with accommodations, such as:

- Light duty;
- A chair, if a worker is in a position that requires lots of standing;
- Breaks to walk around, if a worker is in a position that requires prolonged sitting; and
- Additional bathroom breaks.

If language like "reasonable accommodations" or "undue hardship" sounds familiar to you — it is! The Americans with Disabilities Act,[6] which requires employers to make reasonable accommodations for disabled workers, poses as a model for the PWFA.

The ADA can't do the job that the PWFA is designed to do because pregnancy alone is not considered a disability. The PWFA attempts to cover the gaps in both laws by providing protections not already codified in the ADA or the PDA.

### **Why the need for the PUMP Act?**

The Women's Bureau, in conjunction with the DOL's Wage and Hour Division, recently released a resource on workplace protections for nursing mothers.[7]

The FLSA requires employers to provide eligible employees with reasonable break time to pump breast milk for a nursing child for one year after birth.[8] Under the FLSA, employers are required to allow eligible employees reasonable break time to pump whenever they need.

The FLSA only requires employers to provide these breaks to nonexempt employees, and breaks are unpaid.

The PUMP Act expands coverage and provides additional protection, though pumping breaks remain unpaid. While the FLSA protects hourly employees' rights to pump at work, it fails to consider salaried workers and those in nonhourly positions.

The PUMP Act makes up for that oversight, and requires employers to designate time and space for nursing employees to pump during the day. And the time spent pumping counts as hours worked if employees are doing their jobs at the same time. That's a big difference.

Further, like the FLSA, the PUMP Act requires employers to provide somewhere private for a nursing employee to pump. The act clarifies that "somewhere" cannot be a bathroom.

Employers with less than 50 employees can seek an exception if compliance would cause the organization undue hardship, defined as a significant expense or difficulty. There are additional, industry-specific exceptions.

### **What should employers do?**

Next steps for employers may include:

1. Revising reasonable accommodation policies and procedures to specifically include pregnancy and pregnancy-related medical conditions like the ones mentioned above. If you don't have written policies and procedures, the new calendar year is a good time to create them.
2. Now that the PUMP Act applies to exempt employees, and given that the payment for breaks to pump are not required, employers must take care not to reduce the pay of an exempt employee. Exempt employees must be paid in full for any week in which they perform any work, regardless of the days or hours worked.
3. Train your managers and human resources on the requirements of these new laws. For example, under the PWFA, a manager or human resources director needs to know that they cannot require a qualified employee to accept a specific accommodation, like leave, without engaging in the interactive process to arrive at reasonable accommodation.
4. Employers should document any attempts to accommodate pregnant or nursing employees.
5. Remember, state or local laws may include greater protections for pregnancy or nursing employees. For example, New York law requires employers to provide access to a room to nurse or one with access to a sink and refrigerator near the employee's workplace.[9]

While these protections may seem obvious or unnecessary to employers, the need is patent. In 2019, the Center for WorkLife Law estimated that 27.6 million women workers lacked basic protections such as break time, space and a right to receive other reasonable accommodations that would allow them to continue breastfeeding, and that workers who breastfed suffered discrimination in the workplace.[10]

Employers must comply with these new laws so that workers need not choose between work, and nursing a child or pregnancy.

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[1] <https://edlabor.house.gov/imo/media/doc/PWF%20Act%20-%20Fact%20Sheet.pdf>.

[2] <https://employmentlaw.fisherbroyles.com/2021/05/27/workin-moms-during-covid-19/>.

[3] <https://www.ncsl.org/research/labor-and-employment/working-women-continue-to-feel-pandemic-s-effects-magazine2021.aspx>.

[4] <https://www.wmagazine.com/story/amy-schumer-hospitalized-during-pregnancy-with-hyperemesis-gravidarum>.

[5] <https://employmentlaw.fisherbroyles.com/2021/04/13/employers-how-are-you-handling-ruff-requests/>.

[6] <https://www.eeoc.gov/publications/ada-your-responsibilities-employer>.

[7] [https://www.dol.gov/sites/dolgov/files/WB/media/508\\_nursing-mothers\\_05052022.pdf](https://www.dol.gov/sites/dolgov/files/WB/media/508_nursing-mothers_05052022.pdf).

[8] <https://employmentlaw.fisherbroyles.com/2022/05/09/usdol-reminds-employers-to-give-nursing-mothers-at-work-a-break/>.

[9] <https://dol.ny.gov/system/files/documents/2021/03/fact-sheet-your-right-as-a-nursing-mother-to-pump-breast-milk-at-work-p708.pdf#:~:text=You%20have%20the%20right%20to,pump%20breast%20milk%20at%20work>.

[10] [www.pregnantatwork.org/wp-content/uploads/WLL-Breastfeeding-Discrimination-Report.pdf](http://www.pregnantatwork.org/wp-content/uploads/WLL-Breastfeeding-Discrimination-Report.pdf).