



BY ALAN C. OLSON

A Gift for Families: More Workplace Rights for Women



Recent changes to federal employment laws will provide greater protections for the health, safety, and well-being of pregnant workers and new mothers.





Two recently enacted federal laws provide unprecedented protection in the form of accommodations to pregnant women and new mothers in workplaces. The Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act),¹ effective April 28, 2023, expands protections for employees who need to express breast milk while at work. Also groundbreaking is the Pregnant Workers Fairness Act (PWFA),² effective June 27, 2023, which expands the duties of employers to accommodate pregnant employees' needs. Such accommodations might include allowing pregnant employees to sit or drink water while working; providing parking relatively close to the workplace; allowing flexible schedules; offering additional break time to use the bathroom, eat, and rest; being excused from strenuous activities; and providing leave or time off to recover from childbirth.

This article discusses how these two laws fill gaps in women's workplace rights, the functional operation of these laws in the workplace, the steps employers should take to comply, and the resulting benefits to employers.

Existing Laws Were Inadequate to Protect Pregnant Employees

Congress's objective when it passed the Pregnancy Discrimination Act of 1978 (the PDA),³ which amended Title VII of the Civil Rights Act of 1964 (Title VII),⁴ was to eradicate pregnancy discrimination in the workplace. Yet, the PDA still fell short of guaranteeing that all pregnant workers had reasonable workplace accommodations. According to Seventh Circuit precedent analyzing the PDA, employers could "treat pregnant women as badly as they treat similarly affected but nonpregnant employees."⁵ This meant that if a pregnant woman could no longer lift 25 pounds while working, for example, she was entitled to no accommodation (such as help from a coworker) unless that same accommodation was being provided to non-pregnant employees.

Pregnant employees fared no better under Wisconsin law. The Wisconsin Fair Employment Act (WFEA)⁶ does not require the employer to accommodate a pregnant worker in a manner that goes beyond the type of accommodation provided by the employer to non-pregnant

employees.⁷ Because pregnancy is considered a short-term condition and not a permanent disability, it does not trigger the disability-accommodation requirements set forth in the WFEA. Indeed, all that is required under the WFEA and the PDA is that a pregnant employee be treated the same as other employees with non-pregnancy-related short-term disabilities.⁸

Furthermore, the protections provided to employees who need to express breast milk while at work were minimal.⁹ Protections applied only to employees who were covered by the Fair Labor Standards Act (FLSA), meaning that many employees, such as teachers, received no protection at all.¹⁰ Additionally, the existing law did not provide for a private right of action against employers for failing to comply, making the law limited in scope and toothless in application.¹¹

PWFA Enhances Pregnant Workers' Rights by Providing for Accommodation

The shortcomings of the PDA and WFEA changed when the PWFA was enacted to ensure that "pregnant workers who work for employers with 15 or more employees have access to reasonable accommodations in the workplace for pregnancy, childbirth, and related medical conditions."¹² Some people might question why this change was needed. Information about the potential effects of pregnancy suggest an answer. One scientific study showed that the physical intensity of being pregnant is the same as running a 40-week marathon or climbing Mount Everest.¹³ Pregnancy-related physical changes combined with a demanding workload might put a pregnant worker in a vulnerable position if she does not have access to reasonable workplace accommodations. A pregnant worker might be forced to choose between financial stability and a healthy pregnancy – the proverbial rock and a hard place in which one alternative might harm the woman or the baby and the other choice will hurt them economically. And for many people, the prospect of quitting a job during pregnancy and interviewing for less demanding work is also untenable.

Unfortunately, after the enactment of the PWFA there is still a hole in protection for employees of small companies, which

SUMMARY

It is not unusual for pregnancy-related physical changes to make women more vulnerable if they lack access to reasonable workplace accommodations. In such situations, a pregnant worker might be forced to choose between financial stability and a healthy pregnancy. The prospect of quitting a job during pregnancy and interviewing for less demanding work might also be untenable.

Two recently enacted federal laws, the Pregnant Workers Fairness Act and the PUMP Act, should reduce the number of situations in which women must make these choices. The laws provide unprecedented protection in the form of accommodations to pregnant women and new mothers in workplaces. The first expands employers' duties to accommodate pregnant employees' needs and the second expands protections for employees who need to express breast milk while at work.

This article discusses how these two laws fill gaps in women's workplace rights, the functional operation of these laws in the workplace, the steps employers should take to comply, and the resulting benefits to employers.



comprise about 85% of all Wisconsin businesses.¹⁴ The “Forward State” is not very advanced in comparison to the 31 states, the District of Columbia, and the four cities that have passed laws requiring some employers to provide reasonable accommodations to pregnant workers.¹⁵ For now, under Wisconsin law, employers with fewer than 15 employees have no legal duty to accommodate pregnant employees beyond what is provided to their non-pregnant counterparts.

Accommodation Starts with Interactive Process

Like the Americans with Disabilities Act of 1990 (the ADA),¹⁶ the PWFA defines a *qualified employee* as an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the position.¹⁷ Covered employers must provide “reasonable accommodations” to a worker’s

known limitations related to pregnancy, childbirth, or related medical conditions unless the accommodation will cause the employer an “undue hardship.”¹⁸

Determining how to accommodate a pregnant employee requires an interactive process between the employer and the employee. There are no magic words to trigger an employer’s obligation to engage in an interactive process. An employer must openly communicate with an employee about the need for accommodations and the specific accommodations that might be necessary.¹⁹ Requests for accommodation do not have to be in writing and can be requested in a face-to-face conversation or using any other method of communication. However, a paper trail could be particularly important in litigating a PWFA claim because the party that caused the interactive process to fail likely will lose on the accommodation issue.

Pregnancy Requires Accommodation in Ways Not Previously Considered

Morning sickness, one of the more common afflictions during pregnancy, can now be accommodated under the PWFA. This accommodation was not previously available under the PDA: “Some of [plaintiff’s] absences may have been due to morning sickness, which was, of course, a consequence of her pregnancy. But the [PDA] does not protect a pregnant employee from being discharged for being absent from work even if her absence is due to pregnancy or to complications of pregnancy unless the absences of nonpregnant employees are overlooked.”²⁰ But now, pregnant employees experiencing morning sickness are granted the protections of the PWFA that were lacking under the PDA.

In addition to describing possible accommodations for people with morning sickness, the House Committee on Education and Labor Report on the PWFA²¹ contains several examples of possible reasonable accommodations for pregnant employees that might not have been on an employer’s radar, such as appropriately sized uniforms and safety apparel and avoidance of compounds not safe for pregnancy. The report also lists the more obvious accommodations now available under the PWFA, such as allowing pregnant employees to sit while working, park nearby, have flexible schedules, take restroom breaks, and take leave from work. Although leave might be a reasonable accommodation, the employer cannot force the employee to take leave

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if another reasonable accommodation can be provided.

A pregnant employee might hesitate to ask for “favors” from managers for fear of retribution by the employer or coworkers. The PWFA addresses this concern, too. Once the employer provides a reasonable accommodation, provision of the accommodation cannot be used as an excuse to deny employment opportunities to the pregnant employee. Moreover, the PWFA prohibits employers from taking adverse actions in terms, conditions, or privileges of employment against a pregnant employee who is requesting or using an accommodation.²²

PUMP Act Covers FLSA-exempt Employees and Provides Remedies

To feed breast milk to a baby while working outside the home, a mother will need to feed the baby immediately before and after work. For babies fed exclusively with breast milk, mothers who work away from home will have to express milk on the job and then transport it home. This requires the use of a breast pump. Surveys show that many of those polled did not have access to a clean, private place to pump breast milk at work, and their schedule at work was not flexible enough for them to take pumping breaks.²³ The PUMP Act directly addresses these problems associated with employees who were forced to express milk in a bathroom, a car, or asking to use her boss’s office for 20 minutes.

The PUMP Act, which amends the FLSA, covers employers engaged in interstate commerce with at least two employees and doing at least \$500,000 per year in business. However, if 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,” the PUMP Act exempts employers with fewer than 50 employees. Also exempted are certain jobs, such as flight attendants and pilots.²⁴

With the PUMP Act expanding previous FLSA protections to FLSA-exempt employees, almost all employers are now required to provide nursing mothers, for one year after a child’s birth, “reasonable break time” to use a private space other than a bathroom that is shielded from view and free from intrusion from coworkers and the public. The PUMP Act also clarified that pumping time counts as time worked when calculating minimum wage and overtime if an employee is not completely relieved from work

duties during the pumping break.²⁵

Another provision of the PUMP Act allows an employee to file a lawsuit against an employer that violates the law or retaliates against an employee for exercising rights under the law. The remedies available under the PUMP Act include employment, reinstatement, promotion, the payment of lost wages or additional liquidated or compensatory damages, and make-whole relief for economic losses suffered as a result of a violation.²⁶ Based on Seventh Circuit

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precedent under the FLSA, punitive damages can also be awarded in cases of retaliation against an employee who exercises PUMP Act rights.²⁷

Employers May Take Certain Steps to Prepare for Compliance

To prepare for compliance with the PUMP Act, employers can train human resources and management personnel, update policies, and modify the physical workplace. If a space to express milk is not already available, the employer should designate an area that is shielded from view (not a bathroom) and free from intrusion. The space need not be permanent, though it must be made available to employees when they need to express milk. Communication with the affected employees is also key – ensuring that breaks are being afforded and that the space functions the way it should. This type of communication could avert complaints such as the one from an employee who found office chairs crammed into the lactation room, coworkers and visitors using the phone, items in the refrigerator, and one of the

maintenance personnel almost walking in on her as he tried to unlock the door because it wasn't an "in-use office."²⁸

Employers also Benefit from These New Laws

While employers may initially view these new laws as onerous – adding more expense, reducing productivity, and cutting profits – the opposite is true. According to the Centers for Disease Control and Prevention, "one-day absences to care for sick children occurred more than twice as often for mothers of formula feeding infants than for mothers of breastfed infants."²⁹ When babies are healthy, their parents tend to get more sleep, which usually leads to higher employee productivity. Employers who are concerned about employee retention might keep in mind that recruiting costs might decrease when morale improves and fewer dissatisfied workers depart for positions with more accommodating environments.

Another concern for employers and employees is the cost of medical

insurance claims. A study by Mutual of Omaha found that health-care costs were three times lower for newborns whose mothers participated in the company's maternity and lactation program, saving thousands of dollars in health-care costs for each employee participating in the program.³⁰ These benefits to employers should offset the expenses of compliance with the PWFA and the PUMP Act.

Conclusion

The PUMP Act and the PWFA provide unprecedented accommodations that are necessary for pregnant workers to perform their jobs safely. After pregnancy, new mothers will have a clean secure place and the time they need to express milk. With careful planning, training, and open communication, covered employers will adapt their operations to these new requirements and can expect less absenteeism, increased productivity, improved morale, and lower medical insurance claims. **WL**

ENDNOTES

¹Pub. L. No. 117-328, div. KK, § 102(a)(2), 136 Stat. 6093 (Dec. 29, 2022) (codified at 29 U.S.C. § 218d).

²Pub. L. No. 117-328, div. II, §§ 102-108, 136 Stat. 6084 (Dec. 29, 2022) (codified at 42 U.S.C. §§ 2000gg to 2000gg-6).

³42 U.S.C. § 2000e(k).

⁴42 U.S.C. §§ 2000e-2000e-17.

⁵*Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994).

⁶Wis. Stat. §§ 111.31-.395; Wis. Admin. Code ch. DWD 218.

⁷*Slife v. Mt. Morris Mut. Ins. Co.*, ERD Case No. CR200300282 (LIRC Nov. 3, 2005).

⁸*Peterson v. Alter Trading Corp.*, ERD Case No. CR201602690 (LIRC June 27, 2019).

⁹29 U.S.C. § 207(e).

¹⁰See 29 C.F.R. § 541.303(d), 29 C.F.R. § 541.600(e).

¹¹See *Hicks v. City of Tuscaloosa*, No. 7:13-cv-02063-TMP, 2015 WL 6123209, at *29 n.14 (N.D. Ala. Oct. 19, 2015) (unpublished).

¹²<https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf>.

¹³Caitlin Thurber et al., *Extreme Events Reveal an Alimentary Limit on Sustained Maximal Human Energy Expenditure*, *Science Advances*, vol. 5, no. 6 (June 5, 2019), <https://www.science.org/doi/10.1126/sciadv.aaw0341>.

¹⁴SBE Council, *Facts & Data on Small Business and Entrepreneurship*, <https://sbecouncil.org/about-us/facts-and-data/> (last visited June 14, 2023).

¹⁵Nat'l Partnership for Women & Fams., *Reasonable Accommodations for Pregnant Workers: State and Local Laws* (Apr. 2022), <https://nationalpartnership.org/wp-content/uploads/2023/02/reasonable-accommodations-for-pregnant-workers-state-laws.pdf>.

¹⁶42 U.S.C. § 121.

¹⁷42 U.S.C. § 2000gg(6).

¹⁸42 U.S.C. § 2000gg-1.

¹⁹*Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996).

²⁰*Dormeyer v. Comerica Bank-Ill.*, 223 F.3d 579, 583-84 (7th Cir. 2000).

²¹<https://www.congress.gov/congressional-report/117th-congress/house-report/27/1>.

²²See 42 U.S.C. § 2000gg-1.

²³Beth H. Olson & Ingrid Fulmer, *BEST: Breastfeeding and Employment Study Survey*, Univ. of Wis.-Madison Dep't of Nutritional Scis. & UW Health Innovation Program (2017), <https://www.hipxchange.org/BreastfeedingAndEmployment>.

²⁴29 U.S.C. § 218d.

²⁵*Id.*

²⁶*Id.*

²⁷*Shea v. Galaxie Lumber & Const. Co.*, 152 F.3d 729 (7th Cir. 1998).

²⁸<https://abcnews.go.com/Business/nursing-moms-employer-makes-hard-pump-job/story?id=13547943>.

²⁹Carissa M. Rocheleau, Albeliz Santiago-Colon & Heidi Hudson, *Promoting Worker Well-Being through Maternal and Child Health: Breastfeeding Accommodations in the Workplace*, CDC, NIOSH Science Blog (Feb. 11, 2019), <https://blogs.cdc.gov/niosh-science-blog/2019/02/11/breastfeeding-work/>.

³⁰U.S. Dep't of Health & Hum. Servs., Health Res. & Servs. Admin., *The Business Case for Breastfeeding: Steps for Creating a Breastfeeding Friendly Worksites*, <https://www.womenshealth.gov/breastfeeding/breastfeeding-home-work-and-public/breastfeeding-and-going-back-work/business-case> (Click on "For Business Managers") (last updated Feb. 18, 2021). **WL**