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## New Federal Protections for Pregnant and Nursing Workers

Several federal laws protect workers during nursing and pregnancy, but two new federal laws, passed as part of the Consolidated Appropriations Act of 2023, go into effect this year and expand those protections in certain ways. The Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP for Nursing Mothers Act), Pub. L. No. 117-328, 136 Stat. 4459 (2022), expands protections for nursing mothers, requiring break time and appropriate facilities for workers to express breast milk. The Pregnant Workers Fairness Act (PWFA), Pub. L. No. 117-328, 136 Stat. 4459 (2022), requires employers to modify workplace rules and conditions where needed to accommodate pregnancy-related limitations, provided that an accommodation is reasonable and does not present an undue hardship to the employer.

This In Focus summarizes these two statutes, placing them in context and highlighting the ways they draw on and differ from existing laws. It explains who qualifies for accommodations, what employers must provide, and the limits of employers' responsibilities.

### Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP for Nursing Mothers Act)

In the PUMP for Nursing Mothers Act, Congress expanded existing protections for nursing mothers. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 *et seq.*, requires lactation breaks for some nursing mothers. The PUMP for Nursing Mothers Act takes those protections, which previously covered certain overtime-eligible employees, and applies them to nearly all FLSA-covered workers. The new law's substantive requirements largely track the earlier FLSA provisions. They afford qualifying employees break time and a private place (not a bathroom) to express breast milk. The protections apply for one year after a child's birth. Employers need not pay workers for break time designated for pumping, but employees who pump during break times are entitled to compensation on the same terms as those who use their break times for other purposes. The law's enhanced coverage takes effect immediately.

Even as amended, the law does not cover certain workers. In particular, employers with fewer than 50 workers need not comply if doing so would impose an undue hardship. An "undue hardship" is defined in similar terms as Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111–12117, governing workplace disability accommodations: "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 amendments also expand available remedies. Potential legal and equitable remedies include hiring, reinstatement, promotion, lost wages, and other damages, including punitive damages. These penalties are available for violations after April 28, 2023. The Department of Labor enforces the FLSA, including accepting worker complaints. The act does not address congressional employment or amend the Congressional Accountability Act of 1995 (CAA), which specifies FLSA provisions applicable to legislative employees.

### The Pregnant Workers Fairness Act (PWFA)

The PWFA requires reasonable accommodations for worker limitations arising from "pregnancy, childbirth, or related medical conditions." The PWFA does not define this phrase, but the same phrase is also used in Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.* (barring discrimination in employment). Courts construing Title VII have held it to cover complications during pregnancy, such as nausea and lifting restrictions; recovery from childbirth including by caesarian section; and postpartum conditions such as depression. Although there is some judicial variation, some courts have concluded that "related medical conditions" can also include fertility treatment, lactation, and abortion.

The PWFA provides that its requirement for "reasonable accommodations" has the same meaning as in the ADA. Under the ADA, courts have held that a reasonable accommodation is a modification of workplace rules or practices that is feasible or plausible in most cases. Reasonable accommodations for pregnancy might include seating, access to drinking water, bathroom breaks, and light duty. Whether a specific accommodation is required hinges on the facts of each case; reasonableness depends on the employee's limitations and the workplace circumstances.

Under the PWFA's terms, and in line with its ADA model, an employer need not provide an accommodation that imposes an "undue hardship" on business operations. This also requires a case-by-case analysis, considering such factors as the nature and cost of the accommodation, the employer's resources, and the size and function of its workforce. The employer bears the burden of showing an undue hardship once the worker identifies a reasonable accommodation. As with the ADA, the PWFA obliges employers and employees to negotiate in good faith to determine appropriate accommodations. ADA case law has not produced bright-line rules governing the fact-specific, individualized assessment of what constitutes a reasonable accommodation or an undue burden.

Like the ADA and many other antidiscrimination measures, the PWFA bars retaliation against a worker who has requested an accommodation, has opposed any practice barred by the PWFA, or has helped someone make a complaint.

The PWFA, however, differs from the ADA in notable ways. While the ADA requires that disabled employees be able to perform the essential functions of their job, the PWFA would protect employees who cannot perform an essential function if they can resume it in the “near future” and can be reasonably accommodated. The PWFA also directly addresses the potential concern of mandatory leave, requiring that employers not force a qualified employee to take leave if another accommodation would allow the worker to remain on the job. The law states, however, that it will not require modification of any employer-sponsored health plan to “pay for or cover any particular item, procedure, or treatment.”

The PWFA also covers more workers than the ADA, as it includes those who do not claim an impairment within the ADA’s definition of a “disability.” The statute requires accommodations for a pregnancy-related “known limitation,” which is a “physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions . . . whether or not such condition meets the definition of disability.” While there is a substantial body of precedent applying the ADA’s standard defining “disability,” the scope of this new, “known limitation” standard may require further judicial elaboration. The new category, “known limitation,” stands in contrast to many other PWFA provisions. In other areas, as in defining “undue hardship” and “reasonable accommodation,” the PWFA follows prior statutes rather than introducing new rules.

Regarding its scope of coverage, the PWFA, like the ADA and Title VII, applies to employers of 15 or more workers. It protects job applicants, federal workers, and state workers (with sovereign immunity for state employers being waived). Legislative employees, too, are covered through a cross-reference to the CAA. The PWFA applies to religious employers, but it incorporates Title VII’s exemption allowing religious entities to require workers to adhere to the entity’s own faith and religious principles.

Enforcement procedures and remedies in the new law track those of Title VII. The PWFA grants the Equal Employment Opportunity Commission (EEOC) and the Attorney General enforcement authority and charges the EEOC with issuing regulations, including providing examples of reasonable accommodations. The Board of Directors of the Office of Congressional Workplace Rights must promulgate regulations and administer the act for federal legislative employees. Remedies can include equitable relief, compensatory damages, punitive damages, and attorneys’ fees. The law goes into effect on June 27, 2023.

## Other Protections for Pregnant Workers

Other protections still apply to pregnant workers. The Pregnancy Discrimination Act (PDA), in Title VII, protects

job applicants and employees from adverse action because of pregnancy or related conditions. The law also addresses harassment based on pregnancy. As construed by the Supreme Court in *Young v. United Parcel Service*, 575 U.S. 206 (2015), the PDA does not generally require employers to accommodate pregnant workers; this limitation appears to have motivated some PWFA proponents in passing the new law. A worker would rely on Title VII, however, for claims of pregnancy-related adverse action aside from a refusal to provide accommodations.

Other statutes also support pregnant workers. Many workers can invoke the Family and Medical Leave Act (FMLA) for unpaid leave related to childbearing. Some pregnant people face pregnancy-related impairments serious enough to satisfy the ADA’s definition of a “disability,” and many workers may, along with any PWFA claims, bring ADA claims for accommodations. See CRS In Focus IF12227, *The Americans with Disabilities Act: A Brief Overview*, by Abigail A. Graber. The Rehabilitation Act of 1973 creates similar protections for workers in federally funded programs and most federal agencies. In addition, many states have enacted laws protecting pregnant workers in recent years, including requirements for pregnancy accommodations and nursing breaks. The PWFA does not preempt more protective state laws.

## Considerations for Congress

Over the years, Congress has expanded pregnant workers’ protections through piecemeal legislation. Congress may choose to make no further changes. Should it seek to enhance or consolidate protections further, Congress may choose to amend Title VII, the PWFA, the ADA, or the FMLA. Congress might consider enumerating, as some state laws do, presumptively reasonable pregnancy accommodations.

Alternatively, while the PWFA addresses accommodations, Congress might consider enacting pregnancy-specific leave entitlements beyond those qualifying as reasonable accommodations under the PWFA. Congress could make leave available without requiring a pregnancy-related impairment, reasonableness, or lack of undue hardship. For example, Congress could expand the FMLA leave for pregnant workers currently ineligible because of employer size or length of employment. It could also offer FMLA leave specific to pregnancy and childbearing (the FMLA, for example, offers additional leave for caring for a servicemember). Other statutes include leave, promotions, and reemployment for those who leave work for such activities as jury duty or military service.

In any measures defining pregnancy protections, Congress may delineate coverage, deciding whether to exclude smaller employers or religious employers. Congress could consider provisions specific to federal workers, such as amending the CAA to include the PUMP for Nursing Mothers Act among FLSA protections for legislative employees.

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