Congress Creates New Workplace Protections for Pregnant and Nursing Employees

The "Pregnant Workers Fairness Act" and the "Providing Urgent Maternal Protections for Nursing Mothers Act" were enacted as part of the omnibus spending bill and are respectively designed to extend ADA-style protections to pregnant employees and/or employees experiencing medical conditions related to pregnancy/childbirth, and to provide reasonable break periods to nursing mothers.

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As part of the $1.7 trillion omnibus spending bill enacted on December 23, 2022, Congress enacted two significant pieces of employment-protection legislation that all employers should have on their radar. The two bills—the "Pregnant Workers Fairness Act" ("PWFA") and the "Providing Urgent Maternal Protections for Nursing Mothers Act" ("PUMP" Act)—received broad bi-partisan support and serve distinct, but related, policy objectives. Employers will need to be well-versed with the provisions of both bills and be prepared to comply with the new requirements that they present.

While these bills are new, their framework should be familiar to most employers. Prior to the PWFA, the courts had ruled that "pregnancy" itself was not a disability under the ADA, though medical conditions relating to pregnancy could be covered, which required a fact-intensive analysis. The PWFA was enacted to respond to the piecemeal protections that had previously been afforded to pregnant workers and to create a uniform, national set of protections for such employees. Specifically, the PWFA operates to extend protections to pregnant employees (and employees with medical conditions related to pregnancy/childbirth) that are similar to those provided by the Americans with Disabilities Act ("ADA") and the Americans with Disabilities Amendments Act ("ADAA"). Like the ADA, the PWFA applies to employers with 15 or more employees and requires employers to make reasonable accommodations for "known" limitations related to pregnancy, childbirth, or other related medical conditions, unless the provision of such an accommodation would impose an undue hardship on the employer's operation. The PWFA also prohibits employers from taking adverse action against PWFA-covered employees for requesting accommodation or otherwise exercising rights under the PWFA, and further prohibits the denial of employment opportunities to PWFA-covered employees if the denial is based on the need for an accommodation. Lastly (and significantly), the PWFA prohibits employers from *requiring* PWFA-covered employees to take paid or unpaid leave if a reasonable accommodation that would enable them to perform the essential functions of the position exists.

Employers should note that the definitions of the terms "reasonable accommodation" and "undue hardship" are the same under the PWFA as they are under the ADA. Thus, a "reasonable accommodation" under the PWFA consists of a modification to a job or the application process that enables a pregnant employee (or an employee experiencing medical limitations related to pregnancy/childbirth) to perform the essential functions of the position or a pregnant applicant to be considered for a position, or modifications that enable pregnant workers to enjoy equal benefits of employment as are enjoyed by other employees. Likewise, an "undue hardship" under the PWFA refers to the significant difficulty or expense that may be related to a particular accommodation. To comply with the PWFA, then, employers should therefore engage in an "interactive process" with pregnant workers and workers experiencing pregnancy/childbirth-related limitations, just as they would with other employees seeking accommodations for traditional ADA disabilities.

This "interactive process" can, of course, include requests for medical documentation supporting the need for an accommodation, and just like under the ADA, the "interactive process" *does not* mean that a PWFA-covered employee *must* get the accommodation of her choice. Employers need not compromise the essential functions of a position via the provision of a PWFA accommodation, and the PWFA, like the ADA, provides protections to employers who in good faith propose reasonable alternative accommodations that meet the employee's needs but do not present "undue hardships."

The PUMP Act, on the other hand, is an amendment to the Fair Labor Standards Act that requires employers with fifty (50) or more employees (and employers with fewer employees, unless the employer can demonstrate compliance would pose an undue hardship) to provide reasonable break times that employed nursing mothers (whether exempt or non-exempt under the FLSA) may use to express breast milk. Unless employees are still "on the clock" or otherwise are not totally relieved from duty during these breaks, these breaks need not be paid. The PUMP Act therefore expands protections that already existed for nursing mothers (including requirements that employers provide a private place away from co-workers and the public that may be used to express milk). While the PUMP Act deals with a much narrower range of issues than the PWFA, its passage still requires employers to ensure that they are prepared to comply and that supervisors, HR officials, etc., are informed of the legal requirements surrounding these break times.

Employers have time to prepare for compliance with the PWFA, as it does not become effective until June 27, 2023. The PUMP Act, on the other hand, went into effect on December 29, 2022, and is therefore already in force. Employers should engage in a review of their employment policies and, where necessary, revise their policies to ensure that pregnant employees are entitled to the protections of the law.

The PWFA, like the ADA, will be enforced by the EEOC. As of the date of this article, the EEOC has yet to publish guidance concerning the PWFA. The attorneys at Campbell Durrant will be monitoring the EEOC's publications for any updated guidance in this area. We stand ready to assist employers in preparing for compliance with both of these acts.