

# New Federal Protections for Pregnant and Nursing Employees in 2023: What Employers Need to Know

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New federal legislation is expanding existing employer obligations to provide reasonable accommodations for pregnant employees and reasonable breaks for nursing employees to express breast milk during the workday. The Providing Urgent Maternal Protections for Nursing Mothers Act ("the PUMP Act") went into effect December 29, 2022, and makes changes to the 2010 Break Time for Nursing Mothers law. The Pregnant Workers Fairness Act took effect June 27, 2023. Employers should review their policies and practices to ensure they are up to date.

## The PUMP Act

### What's New?

- The 2010 Break Time for Nursing Mothers law amended the Fair Labor Standards Act ("FLSA") to require break time for nursing non-exempt employees to express milk. The PUMP Act extends required break time to nearly all exempt and non-exempt nursing employees. Special rules apply to the transportation industry, including an exemption for airline crewmembers and a delayed effective date of December 29, 2025, for rail carriers and motorcoach service operators.
- While the 2010 Break Time for Nursing Mothers law did not require pumping breaks to be paid, the PUMP Act provides that time spent expressing milk is considered hours worked if the employee is not completely relieved from work or is interrupted during the entire pumping break. If the employer provides a paid break time and the nursing employee chooses to use that time to pump, the employee must be compensated in the same way other employees are compensated for break time. Further, remote workers are eligible to take pumping breaks on the same basis as if they were working on-site at an employer's facility.

### Where, When, and Who?

Employers must provide a private place for employees to pump, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public. Privacy can be ensured with a door lock or signage indicating the space is in use. Before an employee may bring a claim against their employer for insufficient space to pump, employers have a grace period of 10 days to remedy any issues. Employees may not be retaliated against for making a request for break time to pump or for raising concerns about the employer's facilities.



For one year following the birth of a child, an employee may take as many pumping breaks throughout the workday as necessary. An employer may not deny a covered employee a needed break to express breast milk.

The PUMP Act applies to all employers, regardless of size. However, employers with fewer than 50 employees may be exempt from the PUMP Act's provisions if they demonstrate compliance would impose an "undue hardship" on the business.

### **Does the PUMP Act preempt state laws?**

No. The PUMP Act does not prohibit states or municipalities from creating additional employer obligations relating to break times for nursing employees, and many states have, in fact, enacted their own local laws.

For example, Minnesota has amended its nursing break laws effective as of July 1, 2023. The new legislation amends the January 2022 nursing mothers and pregnancy accommodations law (Minn. Stat. § 181.939), which requires employers to offer paid breaks for employees to express breast milk during the twelve months following the birth of the child. The amendment (1) eliminates the twelve-month time restriction for paid breaks, (2) eliminates the employer's ability to limit pump breaks if they would "unduly disrupt" business operations, (3) eliminates the past requirement that pump break times "must" run concurrently with any break times provided by the employer, and (4) adds a requirement for an employer to provide a "clean, private, and secure" location to express milk.

### **The Pregnant Workers Fairness Act**

#### **What's New?**

- The federal Pregnancy Discrimination Act only requires employers to make accommodations for pregnant employees in specific situations, such as when an employee's pregnancy, childbirth, or related medical condition qualified as a disability under the Americans Disabilities Act ("ADA"). Now, under the Pregnant Workers Fairness Act, employers with 15 or more employees are required to provide reasonable accommodations for "the known limitations related to pregnancy, childbirth, and related medical conditions of a qualified employee," unless doing so would place an unreasonable burden on the operation. This is true whether or not the medical condition at issue rises to the level of being a "disability" under the ADA.
- The Pregnant Workers Fairness Act mostly incorporates the definitions of "reasonable accommodation" and "undue hardship" contained in the ADA and its regulations. One difference, however, is that a "qualified employee" under the Pregnant Workers Fairness Act includes employees who cannot perform the essential functions of their job, so long as the following conditions are met: (a) the inability to perform the essential function is temporary; (b) the function could be performed in the near future; and (c) the inability to perform the essential function can be reasonably accommodated.



## **What Qualifies as a Reasonable Accommodation?**

The legislation makes no specific mention of what kinds of accommodations may be required, but as noted above, largely mirrors the accommodation requirements of the ADA. The EEOC has been directed to issue regulations to "carry out" the law's provisions.

While we await regulations, the EEOC has provided some guidance on the types of reasonable accommodations contemplated under the legislation, including:

- Light duty, or help with manual labor and lifting;
- Additional, longer, or more flexible breaks to drink water, eat, rest, or use the bathroom;
- Providing a stool to sit on;
- Access to closer parking;
- Changing a uniform or dress code, like allowing wearing maternity pants; and
- Flexible scheduling for prenatal or postnatal appointments.

For guidance on local requirements for nursing and pregnant employees, or if you have any other questions about this alert, please contact either of the authors or your regular Lathrop GPM contact.