EMPLOYMENT LAWSCENE ALERT: PREGNANT AND NURSING EMPLOYEES HAVE NEWLY EXPANDED RIGHTS

On December 29, 2022, President Biden signed the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) and the Pregnant Workers Fairness Act (PWFA) into law. Both expand the protections for pregnant, postpartum, and nursing employees, who may also have protections under the Pregnancy Discrimination Act, the Americans with Disabilities Act, and the FMLA.

The PUMP Act expands the 2010 amendment to the FLSA that required employers to provide a nursing mother reasonable break time to express breast milk for up to one year after childbirth and to provide a place other than a bathroom for the employee to express breast milk, shielded from view and free from intrusion from coworkers and the public.

Although significant, the 2010 amendment only entitled non-exempt workers to protection because it only covered those workers who were entitled to overtime pay under the FLSA. The PUMP Act expands the protections of break time to nurse and a private place to pump to all exempt and non-exempt employees, which is estimated to cover an additional nearly nine million workers. In addition to expanded coverage, under the PUMP Act, employees have a private right of action to bring suit against employers that do not comply with the Act.

The PUMP Act applies to all employers covered under the FLSA; however, if an employer with fewer than fifty employees can demonstrate that compliance with the break time requirement would impose an undue hardship, the employer may be exempt. Undue hardship is determined by looking at the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, or structure of the employer's business.

The required break time for pumping under the PUMP Act does not have to be paid unless either (1) the employer provides compensated breaks for other employees during similar break times, (2) the employee is not completely relieved from duty during the break, or (3) the break is otherwise required by law to be paid. However, exempt employees may not have their salaries reduced due to breaks covered by the PUMP Act. The PUMP Act requires the pumping space to not necessarily be permanent but does require that the space be available "each time such employee has a need to express the milk." If an employer does not currently have any eligible employees, the employer does not have an obligation to provide a space, but employers should consider where they will make space if an employee becomes eligible. It is crucial that the space to express breast milk not be a bathroom.

The PWFA requires employers with fifteen or more employees to engage in an interactive process with pregnant and postpartum applicants and employees and to make reasonable accommodations for any limitations related to pregnancy, childbirth, or related medications, unless such accommodation would pose an undue hardship to the employer. Additionally, employers may not deny employment to, take adverse action against, or retaliate against applicants or employees who request a reasonable accommodation or engage in other protected activity under the PWFA. Much like the ADA, employers and employees must engage in an interactive process to determine what accommodations are necessary for the individual employee; employers cannot unilaterally decide what accommodations are appropriate.

Prior to the end of 2023, the EEOC will issue final regulations related to PWFA. The EEOC has already provided examples of potential accommodations that may be appropriate under the PWFA, including longer and more flexible breaks to eat, drink, and use the restroom; schedule flexibility, including to deal with morning sickness; exemption from strenuous activities; leave for medical appointments and to recover from childbirth; and closer parking. On June 27, 2023, the EEOC began accepting complaints under the PWFA, which also has a private right of action.

In addition to becoming familiar with the new requirements under the PUMP Act and PWFA, employers should review their policies in order to make sure that they comply with the expanded requirements of the laws. As always, O’Neil Cannon is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have.