



## LAW UPDATE LABOR AND EMPLOYMENT

PHONE: (661) 636-4830 • FAX: (661) 636-4843  
E-mail: [sls@kern.org](mailto:sls@kern.org) • [www.schoolslegalservice.org](http://www.schoolslegalservice.org)

May 2023

### FEDERAL LEGISLATION UPDATE: PREGNANT WORKERS FAIRNESS ACT & REVISION OF NURSING MOTHERS ACT (PUMP ACT)

Two important pieces of federal legislation were neatly tucked into the federal Consolidation Appropriations Act of 2023 – the enactment of the [Pregnant Workers Fairness Act](#) (PWFA) and a revision of the Nursing Mothers Act (PUMP Act)<sup>1</sup> of the Fair Labor Standards Act (FLSA).

#### Pregnant Workers Fairness Act (PWFA)

The PWFA is a newly enacted federal law that creates a federal requirement for **covered employers**<sup>2</sup> to provide **reasonable accommodations**<sup>3</sup> to a worker’s known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an “**undue hardship**.” This new legislation goes into effect on June 27, 2023.

The most important thing to understand about PWFA is that it applies only to the issue of accommodations. PWFA defines reasonable accommodation as changes to the work environment or the way things are usually done at work. The legislation provides several examples of what a reasonable accommodation under PWFA could include, such as:

- The ability to sit or drink water
- Receive closer parking
- Flexible work hours
- Appropriately sized uniforms and safety apparel
- Additional break time to use bathroom, eat, and/or rest
- Leave or time off to recover from childbirth
- Excusing an employee from strenuous activities or activities that involve exposure to compounds not safe for pregnancy

---

<sup>1</sup> 29 U.S.C. § 218d; [DOL Pump Act Fact Sheet #73](#).

<sup>2</sup> **Covered employer** is defined as all private and public sector employers with at least 15 employees, Congress, federal agencies, employment agencies, and labor organizations.

<sup>3</sup> **Reasonable accommodation** and **undue hardship** both have the same definition provided under the Americans with Disabilities Act of 1990 (42 U.S.C. 12111).

The above list of sample accommodations is illustrative only and should not be considered the only options an employer and **qualified employee** may agree upon. **Qualified employee** is defined as an *employee or applicant*, who with or without reasonable accommodation, can perform the essential functions of the employment position, except that an employee or applicant shall be considered qualified if:

- A. Any inability to perform an essential function is for a temporary period.
- B. The essential function could be performed in the near future.
- C. The inability to perform the essential function can be reasonably accommodated.

PWFA specifically prohibits employers from requiring an employee to accept an accommodation without a discussion about the accommodation between the employer and employee. It also prohibits the following:

- Denying a job or other employment opportunity to a qualified employee or applicant based on the person's need for a reasonable accommodation;
- Requiring an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working;
- Retaliating against an individual for reporting or opposing an unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
- Interfering with any individual's rights under PWFA.

PWFA does not replace any other federal<sup>4</sup> or state law that provides workers with greater protection with respect to pregnancy, childbirth, or related medical conditions.

California workers are already provided significant workplace protections for pregnancy and related medical conditions by the California Pregnancy Disability Leave (PDL)<sup>5</sup>. PWFA is complementary to the worker protections provided by state law under PDL provisions related to reasonable accommodation. Of note, California regulation 2 C.C.R. 11050, a regulation regarding implementation of California PDL statute, sets out a detailed requirement regarding an employer's response to an employee's request for reasonable accommodation for pregnancy or a pregnancy-related medical condition.

The most important additional benefit to workers from PWFA is that the right to reasonable accommodation is now doubly protected under both state and federal law, and now there is an additional federal enforcement mechanism and remedy. The Equal Employment Opportunity Commission (EEOC) will be the enforcement agency for PWFA violation complaints, and will begin accepting filings on June 27, 2023, for alleged violations that occur on that date or later. However, at this time we do not know what remedies or penalties employers could be subject to for sustained violations. The EEOC has one year from PWFA's effective date, or until June 27, 2024, to issue enforcement regulations. For now, EEOC has issued a publication

---

<sup>4</sup> Title VII, the ADA, and the Family Medical Leave Act.

<sup>5</sup> Government Code § 12945.

entitled [What You Should Know About the Pregnant Workers Fairness Act](#). Our office will continue to monitor this new legislation and provide updated information when available.

### Revision of PUMP Act

The federal Nursing Mothers Act, better known as the PUMP Act, was originally signed into law as part of the FLSA in 2010. On April 28, 2023, a significant revision to the PUMP Act went into effect that requires **covered employers**<sup>6</sup> to allow nursing employees reasonable break time to express breast milk for their nursing child for one year after the child's birth. The PUMP Act revision now specifically prohibits employers from denying a covered employee reasonable break time as needed to pump breast milk. Reasonable break time is defined as *break time each time such employee has need to express milk*. This means that employers are required to allow nursing employees to take break time to pump breast milk based on the employee's individual pumping needs. Employers must also provide employees a designated pumping space and the pumping space is prohibited from being a bathroom.

#### *How many breaks does the PUMP Act require an employer give a nursing employee?*

Under the revised PUMP Act, the frequency and duration of the breaks an employee will need will vary depending on the factors related to the nursing employee and child. This means there is no maximum number of breaks a nursing employee can be limited to, nor a maximum amount of break time for each break. Additionally, under the FLSA if an employee is using break time to express breast milk they must be either (1) completely relieved of duty, or (2) paid for the break time. If an employer provides paid breaks, an employee who uses such break time to pump breast milk must be compensated in the same way that other employees are compensated during break time.

#### *Can employers still limit pumping breaks to scheduled break time?*

No. The [Department of Labor \(DOL\) has provided guidance in its free PUMP Act webinar](#) to explain that if an employer has an existing policy that allows employees to use their scheduled break times to pump breast milk, this revision to the PUMP Act will now also require employers to allow nursing employees additional breaks to pump, if their needs require, and even if the employee did not use their scheduled break time to pump. The DOL specifically emphasized that the breaks are required to be provided based on the nursing employee's needs, and cannot be restricted to scheduled break times.

---

<sup>6</sup> The PUMP Act defines covered employers as all employers subject to the FLSA. FLSA covered employers are enterprises with at least two employees, and are: (1) those with an annual dollar volume of sales or business done of at least \$500, 000; (2) hospitals, businesses providing medical or nursing care for residents, schools and preschools, and government agencies.

***Do California employers have to follow this expanded federal requirement?***

Yes. The PUMP Act creates a greater federal employee protection than California Labor Code section 1030 et seq., because it expressly prohibits denying a nursing employee a break when the employee has need of one. California employers must comply with this higher federal requirement instead of the lower state standard that allows employers the option to limit pumping break times to times that would run concurrently with scheduled break times, if possible.

***Is the PUMP Act's pumping space requirement also greater than California's lactation accommodation requirements?***

No. California's Labor Code section 1031 lactation room or location requirements are detailed and specific regarding the required features a pumping location must include. California requires employers to provide nursing employees with the use of a room or other location to express milk that is private. The room or location may include the place where the employee normally works if it otherwise meets specified requirements.

A lactation room or location cannot be a bathroom and must be in close proximity to the employee's work area, shielded from view and free from intrusion while the employee is expressing milk. When a multipurpose room is used for lactation, among other uses, the use of the room for lactation must be given precedence over the other uses, but only for the time used for lactation purposes. A lactation room or location must comply with all the following requirements:

- Be safe, clean, and free of hazardous materials;
- Contain a surface to place a breast pump and personal items;
- Contain a place to sit; and
- Have access to electricity or alternative devices, including but not limited to, extension cords or charging stations needed to operate an electric or battery-powered breast pump.

The employer must also provide access to a sink with running water and a refrigerator suitable for storing milk in close proximity to the employee's workspace. If a refrigerator cannot be provided, an employer may provide another cooling device suitable for storing milk, such as a cooler. Employers can access the [Department of Industrial Relations \(DIR\) Lactation Accommodation FAQ](#)<sup>7</sup> as a reference tool on lactation room requirements. Compliance with the California standards will meet the federal requirements of the PUMP Act.

***Do employers need to update their lactation accommodation policies and notices?***

Yes. Our office previously recommended clients review and adopt a lactation accommodation policy, such as CSBA template board policy 4033. The PUMP Act no longer allows employers to deny an employee a lactation accommodation in most instances, so BP 4033 needs to be reviewed and revised to comply with this higher federal standard. Currently, the DOL

---

<sup>7</sup> Printable materials from this presentation are available [here](#).

has not issued a workplace notice poster, only a fact sheet. We will continue to monitor both DOL and DIR websites for issuance of updated notice posters.

-Tumara M. Thelen

<sup>7</sup> Printable materials from this presentation are available [here](#).

Hyperlink Addresses:

1. Pregnant Workers Fairness Act: <https://www.congress.gov/117/bills/hr2617/BILLS-117hr2617enr.pdf#page%3D1626>
2. DOL Pump Act Fact Sheet #73: <https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers>
3. What You Should Know About the Pregnant Worker's Fairness Act: <https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act>
4. PUMP Act Free Webinar: <https://usdolevents.webex.com/recording-service/sites/usdolevents/recording/52a1c42aa652103b9ffe005056818699/playback>
5. PUMP Act Printable Materials: <https://www.dol.gov/sites/dolgov/files/WHd/flsa/PUMP-ppt.pdf>
6. DIR Lactation Accommodation Fact Sheet: [https://www.dir.ca.gov/dlse/Lactation\\_Accommodation.htm](https://www.dir.ca.gov/dlse/Lactation_Accommodation.htm)

---

*Education Law Updates are intended to alert Schools Legal Service clients to developments in legislation, opinions of courts and administrative bodies and related matters. They are not intended as legal advice in any specific situation. Consult legal counsel as to how the issue presented may affect your particular circumstances.*