Office of Congressional Workplace Rights

Office of the General Counsel

NEW PROTECTIONS FOR PREGNANT AND NURSING EMPLOYEES
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I. Introduction

The Congressional Accountability Act of 1995 (CAA), 2 U.S.C. §§ 1301 *et seq.*, applies the rights and protections of over a dozen labor and employment laws to the legislative branch. Two laws passed in December 2022 as part of the omnibus spending bill – the Pregnant Workers Fairness Act and the PUMP for Nursing Mothers Act – expand protections for employees who are pregnant or who need to express breast milk during the workday. Additionally, several other laws applied by the CAA contain protections that may be relevant to pregnant or nursing employees.

II. Pregnant Workers Fairness Act

The Pregnant Workers Fairness Act (PWFA) broadens the scope of accommodations available to workers who are pregnant or have recently given birth. Rep. Jerry Nadler (D-NY) has introduced the PWFA in each Congress since 2012. It finally became law in 2022, when Congress included it in the omnibus spending bill.[1] President Biden signed the PWFA into law on December 29, 2022. The PWFA is codified in the U.S. Code at 42 U.S.C. § 2000gg. The law goes into effect on June 27, 2023.

Purpose of the PWFA

Congress enacted the bill to "ensure that pregnant workers . . . have access to reasonable accommodations in the workplace for pregnancy, childbirth, and related medical conditions."[2] The House Committee Report noted that even though both the Pregnancy Discrimination Act (PDA) and the Americans with Disabilities Act (ADA) attempted to eliminate discrimination against pregnant workers, "federal law still falls short."[3]

The Committee cited the Supreme Court's decision in *Young v. UPS*, 575 U.S. 206 (2015) as a primary motivator for enacting the PWFA. According to the Committee, *Young*'s heightened standard for claims under the PDA "does not guarantee pregnant workers a reasonable accommodation."[4] After *Young*, "pregnant workers face high evidentiary hurdles" including a requirement to rebut an employer's justification with comparator evidence.[5] The Committee cited evidence that "over two-thirds of workers lost their pregnancy accommodation cases [and] nearly seventy percent of those losses can be traced" to the Court's standard from *Young*.[6] In addition to being burdensome, the evidentiary hurdles in *Young* are also impractical. Because the

[1] Consolidated Appropriations Act of 2023, Pub. L. 117-328, Division II (Dec. 29, 2022).
[2] H.R. Rep. No. 117-27, pt. 1 at 5 (2021).
[3] *Id.*
[4] *Id.* at 16.
[5] *Id.* at 16.
[6] *Id.* at 16.

pregnant worker can only obtain the comparator evidence through litigation, their claims often outlast their pregnancy.[7]

Moreover, the Committee explained that the PWFA was necessary because courts' interpretations of the ADA and the ADA Amendments Act (ADAAA) have also failed pregnant workers. The Committee noted that numerous courts have held that "pregnancy, absent unusual circumstances, is not considered a disability under the ADA."[8] Courts also find that many pregnancy-related complications are not disabilities under the ADA because of their short duration.[9]

Therefore, Congress passed the PWFA to fill the gaps left by the PDA and the ADA and its amending statutes. By increasing pregnant workers' access to reasonable accommodations, Congress intends to protect pregnant workers' health and economic well-being while reducing litigation and providing clarity for employers.[10]

Coverage and Key Definitions

The PWFA applies to most employers, including all employing offices covered by the CAA.[11] The PWFA specifically provides at 42 U.S.C. § 2000gg(3)(B) that the definition of "employee" includes "a covered employee (including an applicant), as defined in section 1301 of Title 2, and an individual described in section 1311(d) of Title 2" – i.e., covered employees, including applicants, as defined under CAA section 101(d), and unpaid staff as defined under CAA section 201(d).

The PWFA has two key terms, "known limitation" and "qualified employee," designed to offer covered employees more accommodations than what they received from the PDA or the ADA. **"Known limitation"** is defined as a "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee's representative has communicated to the employer whether or not such condition meets the definition of disability" in the ADA.[12]

The PWFA defines **"qualified employee"** 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;

[7] *Id.* at 17.
[8] *Id.* at 19 (internal citations omitted).
[9] *Id.* at 21.
[10] *Id.* at 5.
[11] 42 U.S.C. § 2000gg(2)(B)(ii).
[12] 42 U.S.C. § 2000gg(4).

(B) the essential function could be performed in the near future; and

(C) the inability to perform the essential function can be reasonably accommodated.[13]

The Committee report explains that this definition of "qualified employee" is similar to the ADA's definition because it requires that the employee be able to perform the essential functions of the job, but there is an important caveat. The list at the end of the definition deviates from the ADA's definition by emphasizing that a "temporary inability to perform essential functions due to pregnancy, childbirth, or related medical conditions does not render a worker 'unqualified.'"[14]

The PWFA's definitions of **"reasonable accommodation"** and **"undue hardship"** mirror the ADA's. The Committee offered the following examples of possible accommodations under the PWFA:

- Changing schedules to accommodate morning sickness or pre-natal appointments;
- Job reassignment;
- Additional restroom breaks;
- Access to water to prevent dehydration;
- Assistance with manual labor; and
- Modified seating.[15]

The PWFA also explicitly endorses the ADA's **"interactive process"** which employees and employers must use to arrive at a reasonable accommodation. The Committee provided an example of a six-step interactive process that ensures a collaborative resolution: (1) recognize the request; (2) gather information including documentation of the disability; (3) explore accommodation options; (4) choose an accommodation; (5) implement the accommodation; (6) monitor the effectiveness of the accommodation.[16]

Unlawful Employment Practices

The PWFA establishes five "unlawful employment practices" as the enforcement mechanism to ensure that covered employees and applicants receive accommodations. It is an unlawful employment practice for a covered employer to:

1. Not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless

[13] 42 U.S.C. § 2000gg(6).
[14] H.R. Rep. No. 117-27, pt. 1 at 27.
[15] *Id.* at 29.
[16] H.R. Rep. No. 117-27, pt. 1 at 30.

such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;

2. Require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;

3. Deny employment opportunities to a qualified employee if such denial is based on the need of the covered entity to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee;

4. Require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee; or

5. Take adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee.[17]

Claims for PWFA Violations

If an employee covered by the CAA believes their employer has committed an unfair employment practice described above, the employee must use the OCWR's Administrative Dispute Resolution process.[18] Congress applied the same remedies and procedures available for ADA Title I claims to unfair employment practices under the PWFA.[19] As such, unfair employment practice claims must be filed with OCWR within 180 days of the alleged unlawful conduct.[20] The OCWR will begin accepting claims for PWFA violations on the effective date of the law – i.e., June 27, 2023.

Regulations

The PWFA directs the OCWR Board to issue regulations implementing the PWFA in the legislative branch within 6 months of the Equal Employment Opportunity Commission (EEOC) issuing its own regulations.[21] As with other substantive rulemaking under the CAA, the Board's regulations must be the same as the corresponding regulations promulgated by the appropriate executive branch agency (in this case, the EEOC) "except to the extent that the Board may determine, for good cause shown and stated together with the regulations… that a modification

[17] 42 U.S.C. § 2000gg-1.
[18] 42 U.S.C. § 2000gg-2(b).
[19] *Id.*
[20] 2 U.S.C. §§ 1311(b)(3)(B), 1402(d).
[21] 42 U.S.C. § 2000gg-3(b)(1).

of such substantive regulations would be more effective for the implementation of the rights and protection" of the PWFA.[22]

The OCWR Board will publish a Notice of Proposed Rulemaking in the *Congressional Record*, which will be followed by a period for public comment. The Board will review all comments received, update the proposed regulations as appropriate, and publish a Notice of Adoption in the *Congressional Record*. Those regulations will not become effective until Congress approves them and the OCWR Board then issues the approved regulations in the *Congressional Record*.

The PWFA will still take effect on June 27, 2023, and the OCWR may process claims filed on or after that date, regardless of whether the OCWR Board has issued regulations. Until OCWR regulations become effective, the most relevant substantive executive agency regulations promulgated to implement the statutory provisions at issue in the proceeding will apply. *See* 2 U.S.C. §1411.

III. PUMP Act

The Providing Urgent Maternal Protections for Nursing Mothers Act – also known as the "PUMP for Nursing Mothers Act" or simply the "PUMP Act" – was introduced by Rep. Carolyn Maloney (D-NY) and Sen. Jeff Merkley (D-OR) in May 2021, and signed into law on December 29, 2022 as part of the omnibus bill.[23] The PUMP Act amends the Fair Labor Standards Act of 1938 (FLSA), which applies to the legislative branch through section 203 of the CAA, 2 U.S.C. § 1313.

The bill struck the section of the FLSA that had previously covered breastfeeding accommodations and moved those protections to a newly created section. As discussed below, a technical error in the final version of the bill resulted in a failure to amend the CAA to apply the new section to the legislative branch. Congress is expected to fix this error in the near future, and employing offices are encouraged to comply with the requirements of the PUMP Act in the meantime if they are not already doing so.

History of FLSA Protections for Nursing Employees

The FLSA was amended in 2010 by the Break Time for Nursing Mothers Act, which was part of the Affordable Care Act, and required employers to provide: (1) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and (2) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk. However, these protections had several significant limitations.

[22] 42 U.S.C. § 2000gg-3(b)(2).
[23] Consolidated Appropriations Act of 2023, Pub. L. 117-328, Division KK (Dec. 29, 2022).

First, the breastfeeding accommodation provisions were codified in the now-defunct subsection (r) of section 7 of the FLSA, 29 U.S.C. § 207, which is the section containing the overtime provisions. This eliminated many employees – i.e., all exempt employees under the FLSA – from the breastfeeding protections. The report of the House Committee on Education and Labor[24] regarding the PUMP Act cites the Economic Policy Institute's estimate that 8.65 million women of childbearing age were excluded from the Affordable Care Act's nursing mother protections.[25]

Second, employers were not required to compensate employees for the time spent expressing breast milk, and because the only remedy for violations of section 207 was recovery of unpaid minimum or overtime wages, most employees did not have a private right of action for violations of the breastfeeding accommodation requirements of section 207(r).[26]

According to the Committee report, the purpose of the PUMP Act is to "extend these protections to more employees and ensure employees can recover appropriate forms of relief in court when employers violate the law."[27] Therefore, the PUMP Act strikes 29 U.S.C. § 207(r) and inserts a new section, 29 U.S.C. § 218d, entitled "Breastfeeding Accommodations in the Workplace", which creates protections for both exempt and non-exempt employees, and also amends the penalties section of the FLSA to provide a private right of action for violations of the breastfeeding accommodation requirements.

Breastfeeding Accommodation Requirements

The requirements of the PUMP Act to provide nursing employees with break time and a suitably private location to express breast milk are found at 29 U.S.C. § 218d(a), and are effectively identical to those contained in the erstwhile section 207(r):

> (a) In general
>
> An employer shall provide –
>
> > (1) a reasonable break time for an employee to express breast milk for such employee's nursing child for 1 year after the child's birth each time such employee has need to express the milk; and
> >
> > (2) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

[24] This Committee has since been renamed the Committee on Education and the Workforce.
[25] H.R. Rep. 117-102 at 11 (2022).
[26] *Id*. at 11-12.
[27] *Id*. at 3.

Because this language is essentially identical to that in 207(r)(1)[28], previous case law interpreting that section may still be relevant, and it is likely that courts will apply a similar analysis when determining whether the accommodations provided by an employer are satisfactory.

Further, the PUMP Act at 29 U.S.C. § 218d(b) added an exception to the general rule that break time for expressing breast milk need not be compensated:

> (b) Compensation
>
> > (1) In general
> >
> > Subject to paragraph (2), an employer shall not be required to compensate an employee receiving reasonable break time under subsection (a)(1) for any time spent during the workday for such purpose unless otherwise required by Federal or State law or municipal ordinance.
> >
> > (2) Relief from duties
> >
> > Break time provided under subsection (a)(1) shall be considered hours worked if the employee is not completely relieved from duty during the entirety of such break.

The addition of the clarification in subparagraph (2) marks a change from 207(r)(2), which had provided only that "An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose." This provision is consistent with the FLSA's requirements generally, and with current DOL guidance.[29]

Remedies

As noted earlier, a shortcoming of the protections in section 207(r) was that there was no remedy for most violations of the breastfeeding accommodation requirements. The PUMP Act corrects that problem by revising the FLSA's penalties section to provide that employers who violate the protections codified by the PUMP Act "shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of [the PUMP Act], including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages."[30]

This means that a private right of action now exists for violations of the breastfeeding accommodation provisions, which was not the case under section 207(r).

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[28] The only change is the substitution of the words "such employee's" for the word "her" in subsection (a)(1).
[29] H.R. Rep. 117-102 at 20.
[30] 29 U.S.C. § 216(b).

Under CAA section 203(b), "The remedy for a violation of subsection (a) shall be such remedy, including liquidated damages, as would be appropriate if awarded under section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b))."[31] So the same remedies would be available under the CAA, and covered employees could file claims with the OCWR for violations of the breastfeeding accommodation provisions, just as they already can for other alleged FLSA violations.

Notification Requirement

The PUMP Act adds a notification requirement before employees can commence an action for failure to provide an appropriate space to express breast milk. Employees are first required to: "(A) notify the employer of such employee of the failure to provide the place described in [section 218d(a)(2)]; and (B) provide the employer with 10 days after such notification to come into compliance with such subsection with respect to the employee."[32]

There are some exceptions to the notification requirement, including situations in which "(A) the employee has been discharged because the employee – (i) has made a request for the break time or place described in subsection (a); or (ii) has opposed any employer conduct related to this section; or (B) the employer has indicated that the employer has no intention of providing the place described in subsection (a)(2)."[33]

Exemptions

The PUMP Act adds an exemption at section 218d(c) for employers of fewer than 50 employees "if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." Although some employing offices employ fewer than 50 employees, this exemption likely would not apply, because section 203 of the CAA clearly states that the rights and protections of the FLSA "shall apply to covered employees", and the term "covered employee" is specifically defined in the CAA, without regard to employing office size.[34] Additional exemptions in sections 218(d), (e), and (f) are not relevant, because they apply to certain employees of air carriers, rail carriers, and motorcoach services operators, respectively, and none of the covered employees in the legislative branch are employed by such entities.

Regulations

Under the CAA, the OCWR Board of Directors is required to issue regulations implementing the FLSA, 2 U.S.C. § 1313(c)(1), and those regulations "shall be the same as substantive regulations

[31] 2 U.S.C. § 1313(b).
[32] 29 U.S.C. § 218d(g)(1).
[33] 29 U.S.C. § 218d(g)(2).
[34] 2 U.S.C. § 1313(a)(1); 2 U.S.C. § 1301(a)(3).

promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) except insofar as the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section." 2 U.S.C. § 1313(c)(2).

The current OCWR FLSA regulations date back to 1996 – long before the Affordable Care Act amended the FLSA to include protection for some nursing employees – and do not include any mention of protections for nursing employees. As of April 30, 2023, the regulations applicable to employing offices within the House of Representatives have been updated with respect to exemptions to the overtime provisions of the FLSA, but those regulations were adopted by the OCWR Board of Directors before the PUMP Act was enacted and do not address protections for nursing employees.

When the Department of Labor issues updated regulations implementing the PUMP Act amendments to the FLSA, the OCWR Board will review them and propose updated regulations accordingly, following the procedure set forth in section 304 of the CAA, 2 U.S.C. § 1384.

Effective Dates and Application to Legislative Branch

The PUMP Act's breastfeeding accommodation requirements at section 218d(a) became effective immediately when the law was enacted on December 29, 2022. The penalties provisions became effective 120 days later, on April 28, 2023, meaning that employers violating the provisions of the Act are now liable for those violations.

However, as mentioned above, a drafting error in the legislation has created questions surrounding the PUMP Act's applicability to the legislative branch. Section 203(a)(1) of the CAA applies only certain specified provisions of the FLSA to the legislative branch: "The rights and protections established by subsections (a)(1) and (d) of section 6, section 7, and section 12(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 (a)(1) and (d), 207, 212(c)) shall apply to covered employees."[35]

Originally, the House version of the PUMP for Nursing Mothers Act bill contained language saying the new law would apply to covered legislative branch employees, but somehow that language did not make it into the final omnibus bill. So, by moving the protections for nursing employees from section 207 (which does apply) to section 218d (which currently does not), Congress inadvertently took away those protections for legislative branch employees.

Both the House and Senate are aware of the drafting error and we are hopeful that they will pass legislation to fix the problem in the near future. In the meantime, legislative branch employing offices are encouraged to comply with the requirements of the law if they are not already doing so. It is important to note that, even without the legal obligations imposed by the PUMP Act, the failure to provide break time and a suitable location for lactating employees to express breast milk may subject employing offices to liability under other CAA-applied statutes.

[35] 2 U.S.C. § 1313(a)(1).

IV. Other Relevant Statutes

In addition to the expanded protections in the Pregnant Workers Fairness Act and the PUMP for Nursing Mothers Act, several provisions in other CAA-applied statutes may have implications for pregnant employees and their partners, as well as their employing offices.

Title VII/Pregnancy Discrimination Act (PDA)

The Pregnancy Discrimination Act of 1978 (PDA) amended Title VII of the Civil Rights Act of 1964 to make clear that Title VII's prohibition on discrimination "because of… sex" includes discrimination based on pregnancy, childbirth, and related medical conditions:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e–2(h) of this title shall be interpreted to permit otherwise.[36]

Pregnancy discrimination under Title VII can be based on current, past, or potential pregnancy; medical condition related to pregnancy; having or choosing not to have an abortion; and contraception.[37]

Title VII covers employment discrimination in all aspects of employment, including: hiring or the job application and selection process; pay, job assignments, or promotions; training, employee benefits, or any other term or condition of employment; and firing from a job, reduction of hours, layoff, or termination of employment.

Courts have held that nursing parents are also protected against discrimination under Title VII.[38] An adverse employment action because an employee is lactating or expressing milk may be the basis for a cognizable Title VII sex discrimination claim, and lactation is a "related medical condition" of pregnancy for purposes of the PDA. While courts have held that employers may not take adverse employment actions against employees for lactating, the PDA does not obligate employers to provide accommodations, such as paid or unpaid leave to express breast milk, or a private area in which to do so.

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[36] 42 U.S.C. § 2000e(k).
[37] https://www.eeoc.gov/pregnancy-discrimination
[38] *See*, *e.g.*, *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425 (5th Cir. 2013).

Americans with Disabilities Act (ADA)

The ADA provides certain rights and protections to individuals with disabilities. Section 201 of the CAA, 2 U.S.C. § 1311, prohibits discrimination based on disability within the meaning of Title I of the ADA (the title concerning employment) in the legislative branch. Generally, the ADA requires employers to provide reasonable accommodations to qualified employees with disabilities to enable them to perform the essential functions of their job. While courts have consistently held that pregnancy, in and of itself, is not a disability within the meaning of the ADA, complications stemming from pregnancy may be, and thus pregnant employees may also be entitled to the rights and protections afforded to qualified individuals with other types of disabilities.

Pregnancy-related litigation arising under the ADA often requires courts to resolve the questions of whether the particular complications a pregnant employee has experienced renders them "disabled" within the meaning of the ADA and whether the employer is required to provide the type of reasonable accommodation requested, such as light duty, telework, or part-time scheduling.

Generally, the same framework used for resolving these questions for other disabilities applies to pregnant employees:

- A prima facie ADA discrimination claim requires proof that the plaintiff was (1) disabled, (2) otherwise qualified for the job, with or without reasonable accommodation, and (3) discriminated against because of her disability. To be "otherwise qualified for the job," the employee must be able to show that she can perform the essential functions of her position, with or without reasonable accommodation.

- When an ADA discrimination claim is based on an employer's failure to accommodate, the employee must show, in addition to those first two elements, that (1) her employer knew or had reason to know about her disability; (2) she requested an accommodation; and (3) the employer failed to provide the necessary accommodation. To determine what reasonable accommodation is appropriate for an employee in a given situation, the employer must engage in an informal interactive process with the employee to identify the specific limitations the employee is experiencing because of the disability at issue and the potential accommodations that could overcome those limitations.

Family and Medical Leave Act (FMLA)

The nature of the substantive rights afforded by the FMLA makes this statute particularly relevant for maternity and parental leave issues. The FMLA entitles eligible covered employees to take up to 12 weeks of job-protected unpaid leave in a 12-month period for certain family and medical reasons, including for the birth of a child, placement of a child with the employee through adoption or foster care, to care for the employee's child who has a serious health condition, and because of the employee's own serious health condition. Section 202 of the CAA, 2 U.S.C. § 1312, applies Title I of the FMLA to the legislative branch.

Paid Parental Leave – The Federal Employee Paid Leave Act (FEPLA), passed in 2019, grants federal employees – including covered employees under the CAA – up to 12 weeks of paid leave under the FMLA in connection with the birth of a child or the placement of a child for adoption or foster care. The employee may also choose to substitute other paid leave they have accrued, such as annual or sick leave, during the 12-month FMLA period, and employing offices cannot require their employees to use up their accrued leave before using paid parental leave. The paid parental leave must be used within the 12-month period established by the FMLA.

Under FEPLA, there are two significant differences between the requirements for legislative branch employees and those for executive branch employees:

- First, FEPLA eliminates the FMLA's minimum service requirement with respect to legislative branch employees who wish to take paid parental leave. This means that covered employees under the CAA are not required to have completed at least one year and at least 1,250 hours of service with a covered employing office in order to request paid parental leave.

- Second, covered employees under the CAA are not subject to the limitation regarding failure to return from FMLA leave after the birth or placement of a child: executive branch employees are required to agree in writing before commencing leave that they will return to work for at least 12 weeks after using their leave, but legislative branch employees are exempted from this requirement.

Further, unlike executive branch employers, legislative branch employing offices may not recover the premiums paid for maintaining health insurance coverage during the employee's absence for parental leave.

Regulations – Regulations implementing the FMLA in the legislative branch were originally approved by Congress in 1996. In 2021, the OCWR Board adopted modified regulations which included provisions implementing FEPLA. In 2022, the House of Representatives adopted House Resolution 1516, thereby approving the FMLA regulations for all employees and employing offices of the House. These regulations became effective for House employees and employing offices on April 30, 2023. For other legislative branch employing offices, the 1996 regulations remain in effect.

FMLA Claims – Employees may raise two types of FMLA claims: interference claims, where the employee alleges that the employer denied or otherwise interfered with the employee's substantive FMLA rights, such as denying leave needed for complications from pregnancy or for the birth itself; and retaliation claims, where the employee alleges that the employer discriminated against him or her for FMLA-protected activity, such as requesting FMLA leave.

- Interference claims require proof that the plaintiff was entitled to take FMLA leave; an adverse action by the plaintiff's employer, which interfered with the plaintiff's right to take FMLA leave; and proof that the employer's adverse action was related to the plaintiff's exercise of, or attempt to exercise, FMLA rights.

- FMLA retaliation claims require proof that the employee engaged in a statutorily protected activity; she suffered an adverse employment decision; and the decision was causally related to a protected activity.

Genetic Information Nondiscrimination Act (GINA)

GINA prohibits employers from requesting, obtaining, or disclosing employees' genetic information or basing an employment decision on such information. "Genetic information" is defined to include, among other things, information about genetic tests conducted on the employee or the employee's family members.[39] Additionally, the EEOC regulations implementing GINA – which are not binding on the OCWR Board of Directors, but may be influential – define "genetic information" to include "genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology."[40]

Many pregnant people undergo genetic screening as a routine part of prenatal care, and it is not uncommon for prospective parents to undergo genetic testing to determine their potential for passing certain conditions to their offspring. Even questions that might seem innocuous such as "How did the test go?" could potentially run afoul of the statute, so supervisors should tread carefully around this subject.

Occupational Safety and Health Act (OSHAct)

Several standards under the OSHAct may be relevant to pregnant or lactating workers. Here are some key considerations:

- HAZCOM – The hazard communication (HAZCOM) standards, found at 29 C.F.R. § 1910.1200, require, among other things, that employees have ready access to safety data sheets (SDS) and chemical inventories. Since many chemicals may be particularly harmful to developing fetuses, or to nursing infants by transmission through the employee's breast milk, compliance with these standards is important to ensure that pregnant or lactating employees have access to information about hazardous substances in the workplace.

- PPE – Certain personal protective equipment (PPE) might no longer fit employees as their pregnancies advance. This includes not only protective clothing, which might not fit as the body's dimensions change, but also potentially respirators, which might not work as well due to changes in lung capacity resulting from pregnancy.

[39] 42 U.S.C. § 2000ff(4)(A).
[40] 29 C.F.R. § 1635.3(c)(1)(v).

- Ergonomics – Although there is no OSHA standard governing ergonomics in the workplace, the General Duty Clause requires that employers must maintain workplaces that are free of recognized hazards that could cause serious injury, and there is no doubt that certain physical conditions could cause grievous harm to pregnant workers, including miscarriage and other serious pregnancy complications. Safety considerations for pregnant workers could include:
    - Taking breaks from sitting or standing
    - Avoiding heavy lifting, and using proper techniques for lighter loads
    - Using supportive equipment such as lumbar support or footstools

Federal Service Labor-Management Relations Statute (FSLMRS)

In addition to the protections of the other laws described above, employees in bargaining units might have the option of pursuing grievances under their Collective Bargaining Agreements (CBAs). Some CBAs might include provisions dealing specifically with issues pertaining to pregnant or nursing employees, or other new or prospective parents, such as light duty, nursing breaks, maternity clothes, or leave.

V. Resources

Please see the following for more information:

Pregnant Workers Fairness Act

- EEOC PWFA page: https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act
- Report of the Committee on Education and Labor: https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf

PUMP for Nursing Mothers Act

- DOL Wage and Hour Division PUMP Act page: https://www.dol.gov/agencies/whd/pump-at-work
- Report of the Committee on Education and Labor: https://www.congress.gov/congressional-report/117th-congress/house-report/102/1

Paid Parental Leave Information

- OCWR – Paid Parental Leave: https://www.ocwr.gov/employee-rights-legislative-branch/family-and-medical-leave-act/paid-parental-leave/

- OCWR – Paid Parental Leave Brown Bag: https://www.ocwr.gov/publications/general-counsels-brown-bag-outlines/paid-parental-leave/

- Notice of Issuance of Final Regulations implementing FMLA/FEPLA paid parental leave provisions (for the House of Representatives only): https://www.congress.gov/118/crec/2023/03/01/169/39/CREC-2023-03-01-pt1-PgH1017.pdf

Other Resources

- EEOC – Pregnancy Discrimination and Pregnancy-Related Disability Discrimination: https://www.eeoc.gov/pregnancy-discrimination

- OSHA – Reproductive Hazards: https://www.osha.gov/reproductive-hazards

- National Institute for Occupational Safety and Health (NIOSH) – Pregnancy, Breastfeeding, and Reproductive Health: https://www.cdc.gov/niosh/topics/repro/pregnancy.html

- DOL – GINA guidance: https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/statutes/genetic-information-nondiscrimination-act-of-2008/guidance

- Job Accommodation Network – accommodating pregnant workers: https://askjan.org/disabilities/Pregnancy.cfm#spy-scroll-heading-7