



# New Protections for Pregnant and Nursing Employees

Office of Congressional Workplace Rights

Office of the General Counsel

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*advancing workplace rights, safety & health, and accessibility in the legislative branch*

**Welcome**

### **Overview**

- Pregnant Workers Fairness Act
- PUMP for Nursing Mothers Act
- Other relevant statutes applied by the CAA

### **Presenters**

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## **Pregnant Workers Fairness Act**

### **Pregnant Workers Fairness Act (PWFA)**

- Signed into law on December 29, 2022 as part of omnibus spending bill
- Goes into effect on June 27, 2023
- Broadens scope of accommodations for workers who are pregnant or have recently given birth
- Specifies five unlawful employment practices, which can be redressed by filing a claim with the OCWR
- The PWFA was proposed to make up for shortcomings in protections for pregnant employees under previous laws, such as the Pregnancy Discrimination Act and the Americans with Disabilities Act

### Previous protections under the Pregnancy Discrimination Act

- The Pregnancy Discrimination Act prohibited discrimination based on pregnancy, childbirth, or related condition
- In *Young v. UPS*, 575 U.S. 206 (2015), SCOTUS required Pregnancy Discrimination Act plaintiffs seeking accommodations to show that employer provided accommodations to other employees
- House Committee report found:
  - *Young* standard was unworkable and burdensome
  - More employees lost their cases after *Young*
  - Employees who won got a judgment years after their pregnancies ended

H.R. Rep. No. 117-27, pt. 1 at 16-17 (2021)

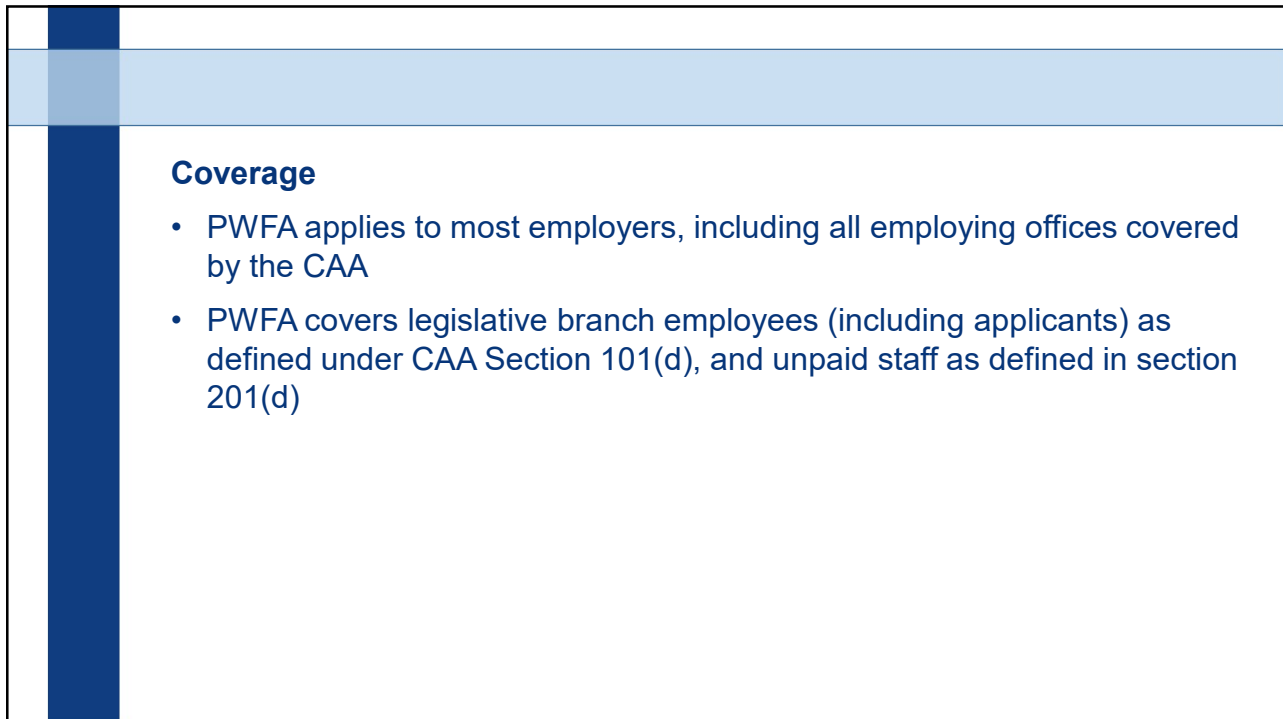
### Previous protections under the ADA

- The Americans with Disabilities Act requires employers to provide a reasonable accommodation to employees with an impairment that substantially limits a major life activity, unless doing so would cause an undue hardship on the employer
- Some pregnancy-related conditions qualified as disabilities under the ADA, but courts have repeatedly found that pregnancy is itself not a disability
- Moreover, courts frequently find that pregnancy-related complications are not disabilities because of their short duration

H.R. Rep. No. 117-27, pt. 1 at 19, 21



# PWFA – Key Definitions

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- ## Coverage
- PWFA applies to most employers, including all employing offices covered by the CAA
  - PWFA covers legislative branch employees (including applicants) as defined under CAA Section 101(d), and unpaid staff as defined in section 201(d)

**“Known Limitation”** defined as:

“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

42 U.S.C. § 2000gg(4)

**“Qualified employee”** 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; and
- (C) the inability to perform the essential function can be reasonably accommodated.

42 U.S.C. § 2000gg(6)

### **“Reasonable accommodation” and “undue hardship”**

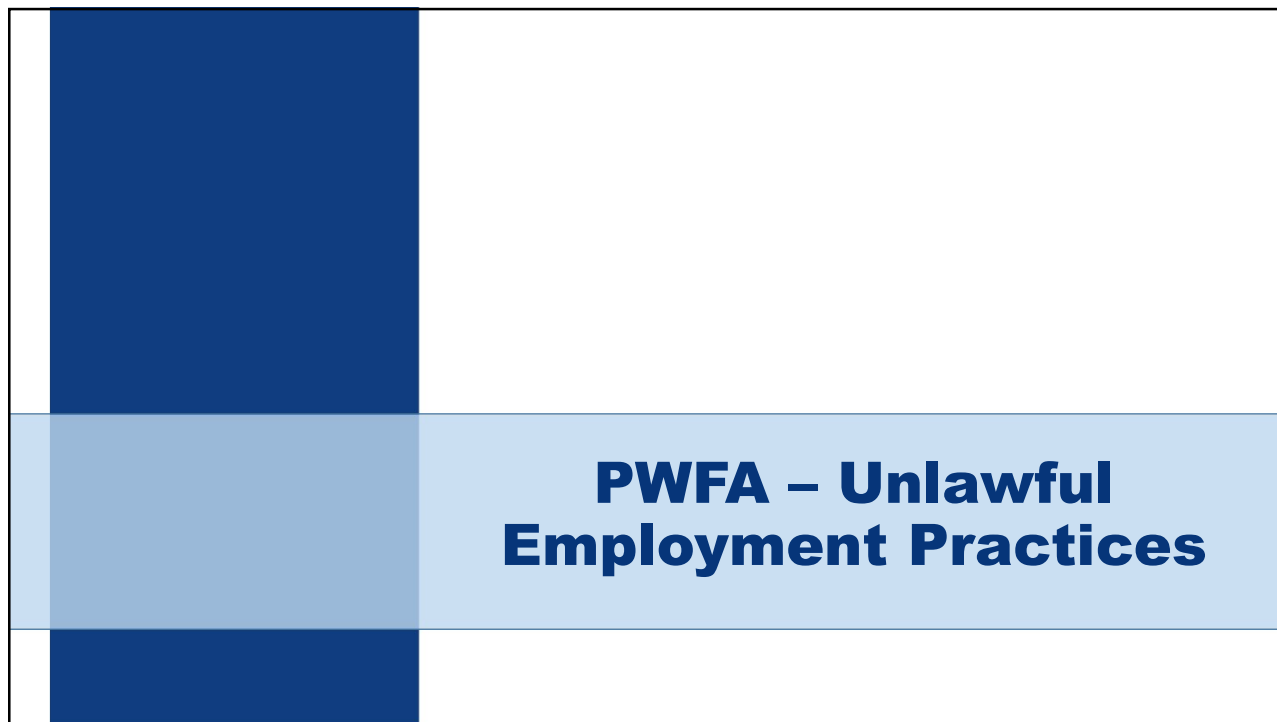
- Definitions mirror those in the ADA
- Examples of possible reasonable accommodations under the PWFA as presented in House Committee Report:
  - Changing schedules to accommodate morning sickness or pre-natal appointments
  - Job reassignment
  - Additional restroom breaks
  - Access to water to prevent dehydration
  - Assistance with manual labor
  - Modified seating

H.R. Rep. No. 117-27, pt. 1 at 30

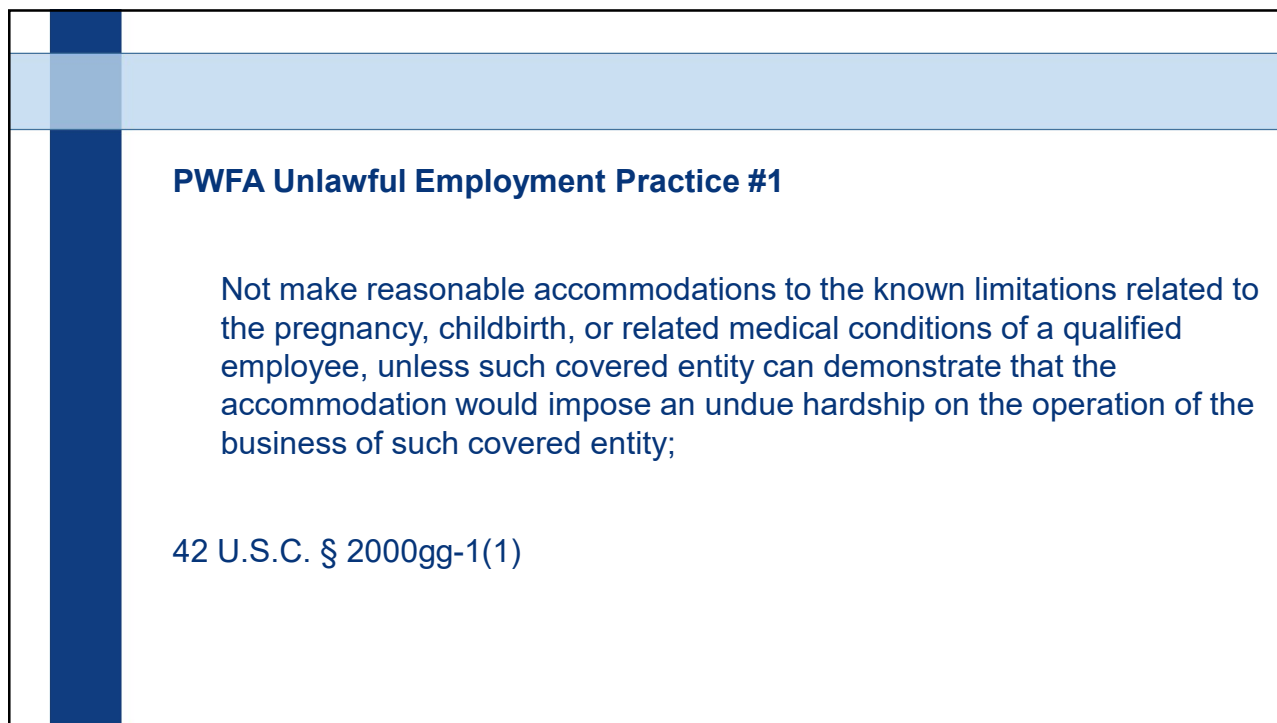
### **“Interactive process”**

- The PWFA explicitly incorporates the ADA’s “interactive process” which employees and employers must use to arrive at a reasonable accommodation
- House Committee Report endorsed this six-step example:
  - (1) recognize the request;
  - (2) gather information including documentation of the disability;
  - (3) explore accommodation options;
  - (4) choose an accommodation;
  - (5) implement the accommodation; and
  - (6) monitor the effectiveness of the accommodation.

H.R. Rep. No. 117-27, pt. 1 at 30.



## **PWFA – Unlawful Employment Practices**



### **PWFA Unlawful Employment Practice #1**

Not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;

42 U.S.C. § 2000gg-1(1)



**PWFA Unlawful Employment Practice #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;

42 U.S.C. § 2000gg-1(2)

**PWFA Unlawful Employment Practice #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;

42 U.S.C. § 2000gg-1(3)

**PWFA Unlawful Employment Practice #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

42 U.S.C. § 2000gg-1(4)

**PWFA Unlawful Employment Practice #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.

42 U.S.C. § 2000gg-1(5)

### OCWR ADR Process and Remedies

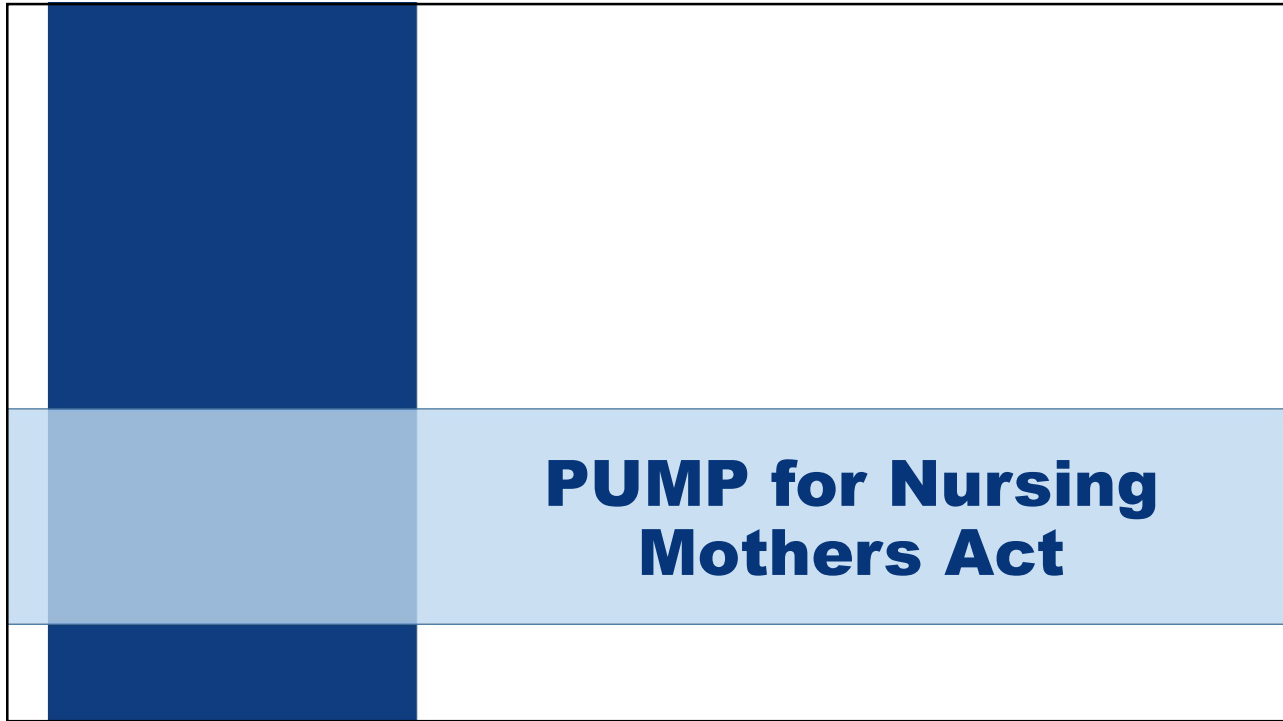
- Claims for PWFA violations follow the same procedures as claims for violations of CAA section 201(a)
- Claims must be filed with the OCWR within **180 days** of alleged unlawful conduct
- Remedies are the same as those available under CAA section 201

42 U.S.C. § 2000gg-2(b); 2 U.S.C. § 1311

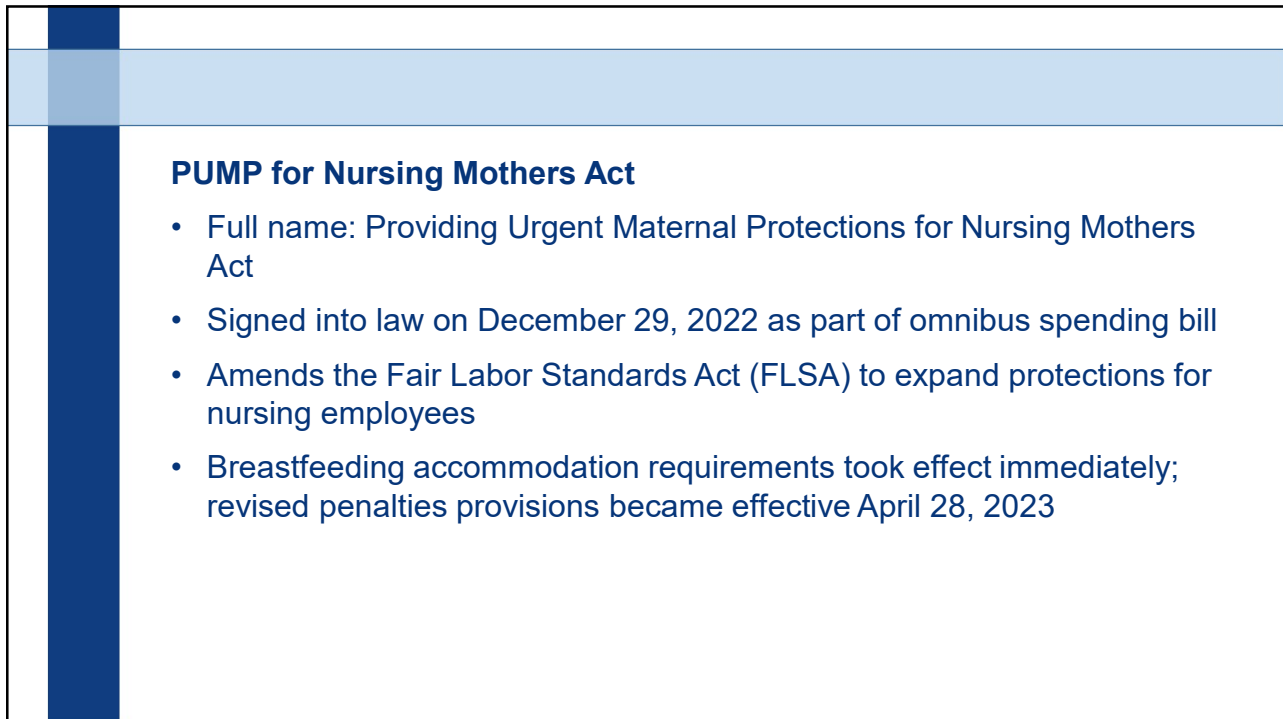
### Regulations

- The PWFA directs the OCWR Board to issue regulations implementing the PWFA in the legislative branch, within 6 months of the EEOC issuing its own regulations
- As with other OCWR regulations, the Board must follow the equivalent executive branch regulations “except to the extent that the Board may determine, for good cause shown and stated together with the regulations... that a modification of such substantive regulations would be more effective for the implementation of the rights and protection” of the PWFA.
- The OCWR Board will publish a Notice of Proposed Rulemaking in the *Congressional Record*, review all comments received during the public comment period, and publish adopted regulations, which will be issued and become effective once approved by Congress

42 U.S.C. § 2000gg-3(b)



# **PUMP for Nursing Mothers Act**

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- ## **PUMP for Nursing Mothers Act**
- Full name: Providing Urgent Maternal Protections for Nursing Mothers Act
  - Signed into law on December 29, 2022 as part of omnibus spending bill
  - Amends the Fair Labor Standards Act (FLSA) to expand protections for nursing employees
  - Breastfeeding accommodation requirements took effect immediately; revised penalties provisions became effective April 28, 2023

### **Previous protections for nursing employees**

- In 2010 the Affordable Care Act created section 207(r) of the FLSA, which required reasonable break time and a suitable location for employees who needed to express breast milk in the workplace
- Section 207 only applied to non-exempt employees, so many employees were excluded from these protections (an estimated 8.65 million women of childbearing age)
- Violations of section 207 only allowed recovery of unpaid minimum and overtime wages, so because employers were not required to compensate employees for break time used to express breast milk, there was no available remedy for violations of section 207(r) in most cases

### **Expanded Protections under the PUMP Act**

- The PUMP Act strikes section 207(r) and moves the breastfeeding accommodation requirements to a newly created section 218d of the FLSA, 29 U.S.C. § 218d
- These protections now apply to both exempt and non-exempt employees
- The PUMP Act also amends the penalties section of the FLSA, 29 U.S.C. § 216(b), to provide employees a private right of action and remedies for violations of the breastfeeding accommodation provisions

### **So, here's the thing...**

- Section 207 of the FLSA applies through the CAA, but due to a drafting error, the new section 218d does not (yet)
- Congress is aware of the problem, and hopefully will pass legislation to fix it soon
- Legislative branch offices are encouraged to comply with the requirements pending correction of the error, if not already doing so

### **Employers' obligation to provide accommodations**

- Employers are required to 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.
- This language is effectively the same as under the old section 207(r)

29 U.S.C. § 218d(a)

### **Compensation under the PUMP Act**

- Employers generally are not required to compensate employees receiving reasonable break time to express breast milk, unless otherwise required by federal or state law or municipal ordinance
- However, break time provided for the purpose of expressing breast milk shall be considered hours worked if the employee is not completely relieved from duty during the entirety of the break

29 U.S.C. § 218d(b)

### **Exemptions**

- 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.”
- Certain employees of air carriers, rail carriers, and motorcoach services operators
- However – CAA section 203 explicitly applies the FLSA provisions to covered employees as defined by the CAA, so these exemptions may not apply

29 U.S.C. § 218d(c), (d)-(f); 2 U.S.C. § 1313(a)(1)

### Notification Requirement

- Before commencing an action for a violation of section 218d(a)(2), “an employee shall –
  - (A) notify the employer of such employee of the failure to provide the place described in such subsection; and
  - (B) provide the employer with 10 days after such notification to come into compliance with such subsection with respect to the employee.”
- Exceptions to this requirement include situations in which:
  - an employee has been discharged because they made a request for accommodation under section (a) or opposed any employer conduct related to this section; or
  - the employer has indicated that the employer has no intention of providing the place described in subsection (a)(2)

29 U.S.C. § 218d(g)

### OCWR ADR process and remedies

- Like other claims under the FLSA, claims for violations of the breastfeeding accommodation provisions would be filed with the OCWR, and would have to be filed within **180 days** of the violation
- The same remedies are available as for other FLSA violations, including employment, reinstatement, promotion, payment of lost wages, and liquidated damages

29 U.S.C. § 216(b); 2 U.S.C. § 1313(b)



### **Regulations**

- Existing OCWR regulations implementing the FLSA date back to 1996 – predating the Affordable Care Act – and do not mention accommodations for nursing employees
- The OCWR Board has adopted updated regulations pertaining to overtime under the FLSA, but these do not pertain to accommodations for nursing employees, and thus far have only been approved with respect to the House of Representatives
- Once the Department of Labor issues regulations implementing the PUMP Act, the OCWR Board will review them and propose updated regulations as required by section 304 of the CAA, 2 U.S.C. § 1384

### **Other Relevant Statutes**

### **Title VII / Pregnancy Discrimination Act (PDA)**

- PDA provides that Title VII prohibition on sex discrimination includes a prohibition on discrimination because of pregnancy, childbirth, or related medical conditions
- 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
- Courts have held that nursing parents are also protected against discrimination under Title VII, so an adverse employment action because an employee is lactating or expressing milk may be the basis for a cognizable Title VII sex discrimination claim

### **Americans with Disabilities Act (ADA)**

- Pregnancy itself is not a disability under the ADA, but complications associated with pregnancy might be
- Employing offices must provide reasonable accommodations and are prohibited from discriminating against employees on the basis of disability
- The PWFA requires accommodations for pregnancy and pregnancy-related conditions, but the ADA may cover certain additional forms of discrimination on the basis of pregnancy-related disabilities

### **Family and Medical Leave Act (FMLA)**

- Provides up to 12 weeks of job-protected leave for birth of a child or placement of a child for adoption or foster care
- Federal Employee Paid Leave Act (FEPLA) gives federal employees, including CAA covered employees, up to 12 weeks of paid parental leave under the FMLA for birth of a child or placement for adoption or foster care
- Legislative branch employees are exempt from two key provisions:
  - No minimum service requirement
  - No requirement to return at conclusion of leave period
- Legislative branch employing offices may not recover premiums paid for maintaining health insurance coverage during employee's absence for parental leave
- Two types of FMLA claims: interference and retaliation
- OCWR Board has adopted regulations implementing FEPLA, but only the House has approved them so far

### **Genetic Information Nondiscrimination Act (GINA)**

- The statute prohibits employing offices from requesting, obtaining, or disclosing employees' genetic information or basing an employment decision on such information, which includes genetic testing performed on employees or their family members
- EEOC regulations implementing GINA define "genetic information" to include genetic information of an employee's fetus or an employee's embryos used in assisted reproductive technology
- Pregnant employees often undergo genetic testing, and even well-intentioned inquiries about how an appointment went could potentially run afoul of GINA

### **Occupational Safety and Health Act (OSHAct)**

- Hazard Communication (HAZCOM) – certain chemicals may be especially hazardous to fetuses or nursing infants, so training and access to Safety Data Sheets (SDSs) are important for pregnant and nursing employees
- Personal Protective Equipment (PPE) – adjustments to protective clothing and respiratory protection may be required for pregnant employees
- Ergonomics – considerations for pregnant employees may include lifting restrictions and techniques, breaks from standing or sitting, and supportive equipment such as footstools or lumbar support

### **Federal Service Labor-Management Relations Statute (FSLMRS)**

- Collective bargaining agreements (CBAs) may contain provisions related to pregnant or nursing employees, such as light duty, nursing breaks, maternity clothes, or leave
- Employees may have the option to pursue grievances for violations
- Unions, employing offices, or employees may file unfair labor practice (ULP) charges with the OCWR General Counsel



**PWFA Resources**

- 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 Act Resources**

- DOL PUMP Act page: <https://www.dol.gov/agencies/whd/pump-at-work>
- Report of the Committee on Education and Labor:  
<https://www.congress.gov/117/crpt/hrpt102/CRPT-117hrpt102.pdf>

### **Paid Parental Leave Resources**

- 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>

**Questions?**

<p><a href="http://www.ocwr.gov">www.ocwr.gov</a></p> <p>(202) 724-9250</p> <p>110 2<sup>nd</sup> Street SE Room LA-200 Washington, DC 20540</p>	