



The Pregnant Workers Fairness Act & The PUMP Act – What Employers Need to Know When Employees Are Expecting

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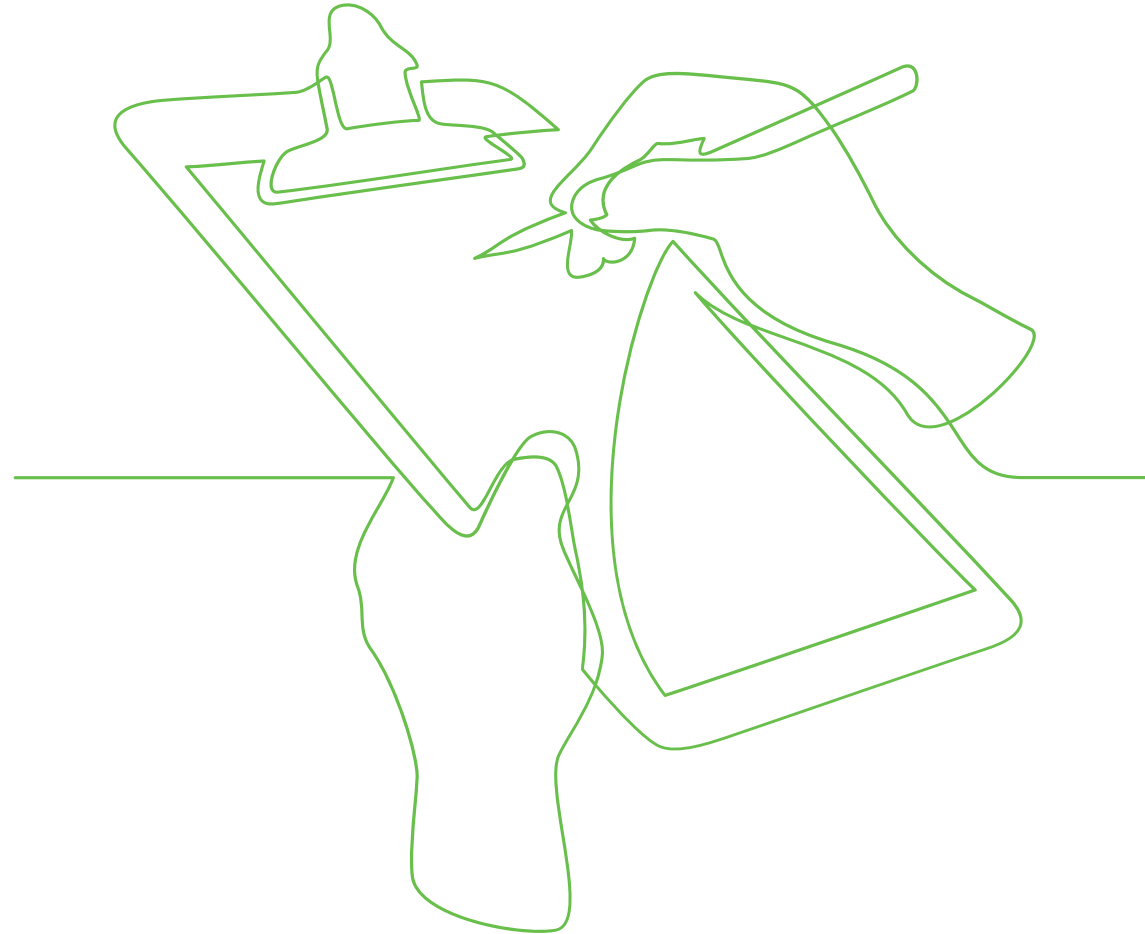
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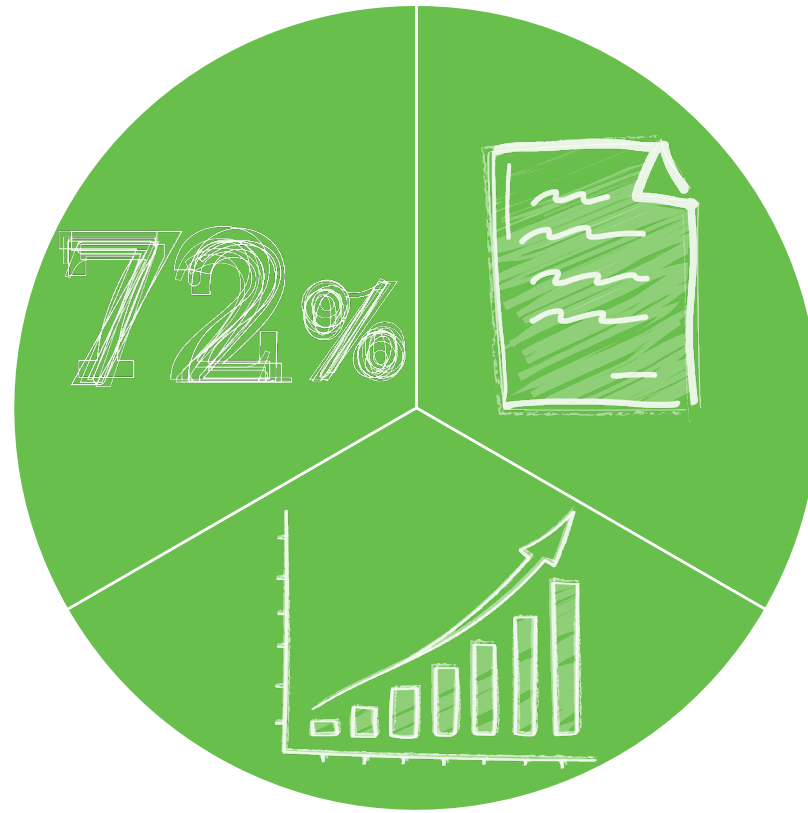
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Agenda

- What is the intent of these laws?
- What do they require?
- What steps can employers take to ensure compliance?
- What are the remedies for violations of these laws?
- What are best practices?



Statistics



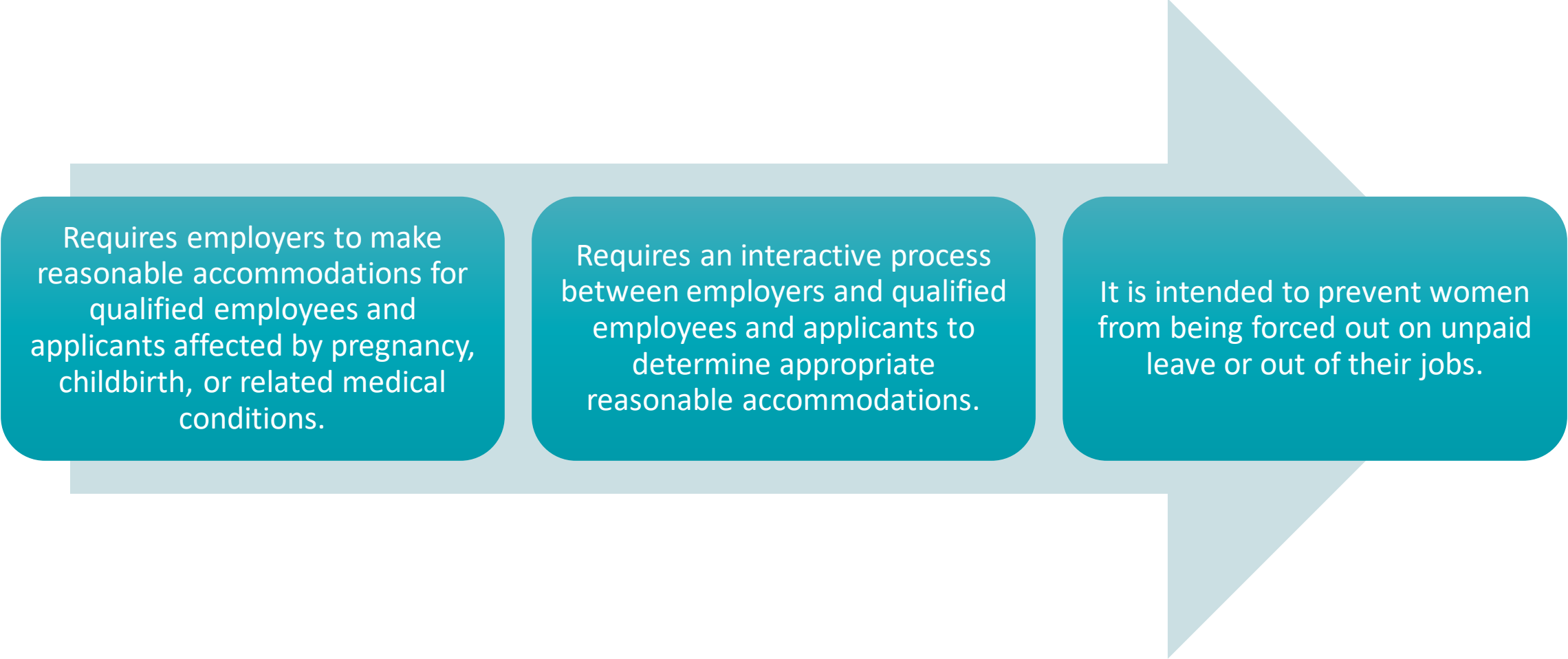
Pregnant Workers Fairness Act



[T]o eliminate discrimination and promote women's health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition.

Rep. Jerry Nadar

What Does the PWFA Do?



Requires employers to make reasonable accommodations for qualified employees and applicants affected by pregnancy, childbirth, or related medical conditions.

Requires an interactive process between employers and qualified employees and applicants to determine appropriate reasonable accommodations.

It is intended to prevent women from being forced out on unpaid leave or out of their jobs.

Who Does it Cover?

Qualified employee:

- An employee or job applicant who can perform the essential functions of the employment position, **except** that an employee or applicant shall be considered qualified if—
 - The any inability to perform an essential function is for a temporary period;
 - The essential function could be performed in the near future; and
 - the inability to perform the essential function can be reasonably accommodated.


Covered employer:

- Applies to employers with 15 or more employees.

Known Limitation:

- Physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or the employee's representative has communicated to the employer, whether or not the condition meets the definition of disability under the ADA.

What Does the PWFA Require?



Provides an exemption for businesses if an accommodation imposes an undue hardship on an employer.

Protects pregnant workers from retaliation, coercion, intimidation, threats or interference if they request or use an accommodation.

Pregnancy Accommodations

Conditions

- Preeclampsia
- Morning sickness
- Lactation needs

Examples

- Chair
- Access to food/water
- Additional break time
- Excused from certain activities

Sources

- Medical provider
- Expectant mother



Sample Scenario



An activity director at a nursing home requests a reasonable accommodation for some physical aspects of her job (such as lifting) to prevent having another miscarriage.

Sample Scenario



A retail worker
asks to carry a
water bottle to
stay hydrated
and prevent
bladder
infections.

Sample Scenario



A hardware assembler's doctor recommends that she not work more than an eight-hour shift or lift more than 20 pounds due to gestational diabetes and the threat of pre-term labor.

Undue Hardship

- Reasonable accommodation is not required if providing the accommodation would impose an **undue hardship** on the employer's business operations.
 - Undue hardship refers to an action that fundamentally alters the nature or operation of the business or is unduly costly, extensive, substantial, or disruptive.



Undue Hardship Factors

- The **nature and net cost** of the accommodation.
- The overall **financial resources** of the employer.
- The **number of employees** employed by the employer.
- The **number, type, and location** of the employer's facilities.
- The employer's **operation**, including:
 - composition, structure, and functions of the workforce; and
 - geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.

Undue Hardship Factors for Specific Facility

For accommodations provided by a specific facility:

- The **financial resources** of the facility;
- The **number** of employees at the facility; and
- The effect of the accommodation on **expenses and resources** of the facility.



Effective Dates

June 27,
2023

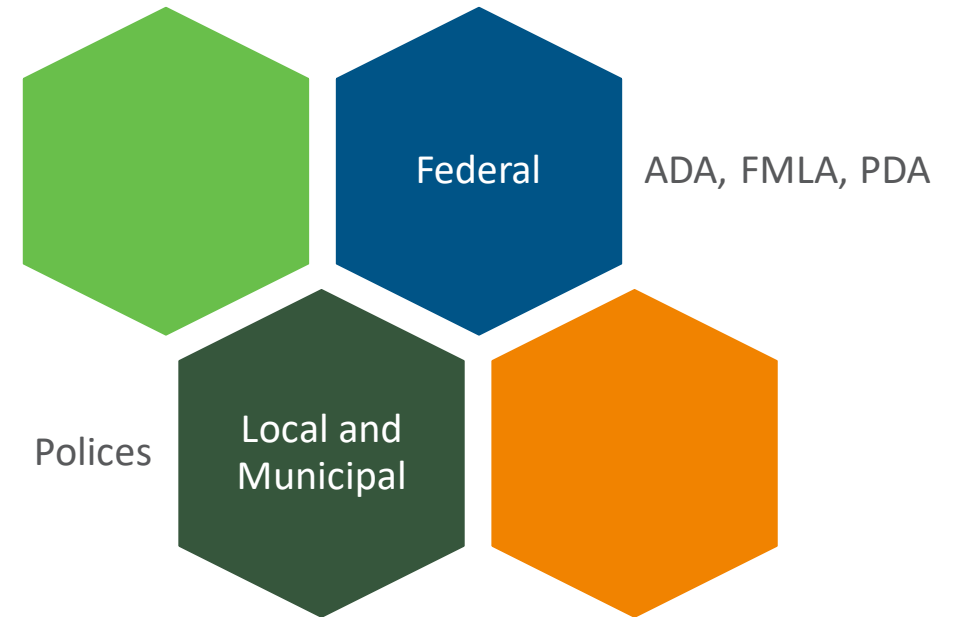
No notice
provisions

EEOC

Relief / Damages

- **Private-sector employees** are provided in the same way as provided under Title VII, including reinstatement, back pay, front pay, compensatory damages, punitive damages, and the right to recover reasonable attorneys' fees and costs.
- **Public-sector employees** are provided similar relief as that offered under the Congressional Accountability Act, Title V of the United States Code, and the Government Employee Rights Act of 1991.
 - The PWFA expressly **waives** state immunity under the Eleventh Amendment to the Constitution.

Interaction with Other Laws



ADA & PWFA



Similarities

- Reasonable accommodation
- Undue hardship



Distinctions

- Temporary nature of pregnancy
- Must consider removing an essential function of the employee's job
- May not require an employee to take paid or unpaid leave if another reasonable accommodation is available



FMLA & PWFA



Both address conditions related to childbirth

– before, during and after

FMLA provides for unpaid job-protected leave

PWFA provides on-the-job accommodations

Practical Advice

01

Review and update policies that relate to reasonable accommodations, equal employment opportunity, and harassment for federal, state, and local compliance

02

Train HR on the different process for considering reasonable accommodations due to a pregnancy-related limitation and/or condition

03

Note that requesting supporting documentation from medical provider is permitted under the PWFA, but it might be permitted only in limited circumstances in some states and municipalities

Additional Resources

- What You Should Know About the Pregnant Workers Fairness Act | U.S. Equal Employment Opportunity Commission (eeoc.gov)
 - <https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act>
- Questions and Answers about EEOC's Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities | U.S. Equal Employment Opportunity Commission
 - <https://www.eeoc.gov/questions-and-answers-about-eeocs-enforcement-guidance-unlawful-disparate-treatment-workers>
- Pregnancy Discrimination and Pregnancy-Related Disability Discrimination | U.S. Equal Employment Opportunity Commission (eeoc.gov)
 - Pregnancy Discrimination and Pregnancy-Related Disability Discrimination | U.S. Equal Employment Opportunity Commission (eeoc.gov)

Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act)

Background on the PUMP Act

- The American Academy of Pediatrics and the World Health Organization recommend exclusive breastfeeding for about the first 6 months, with continued breastfeeding along with introducing appropriate complementary foods for up to 2 years of age or longer.
- Per the CDC, breastfeeding can help protect a breastfeeding mother and her baby against some short- and long-term illnesses and diseases.



What Does the PUMP Act Do?



IT'S NOT NEW!

It expands upon the protections for employees who are nursing afforded in a 2010 amendment to the FLSA

What the 2010 Law Provided

- Employers must provide non-exempt employees with reasonable unpaid break time to express breast milk for **up to 1 year** after the birth of a child.
- Employers must provide a **place**, other than a bathroom, shielded from view and free from intrusion from coworkers and the public for employees to express breast milk.
- **Undue hardship** exception for employers with less than 50 employees

Who Does the PUMP Act Cover?

Subject to certain exemptions, nearly all FLSA-covered employees are covered under the PUMP ACT



Coverage under the FLSA

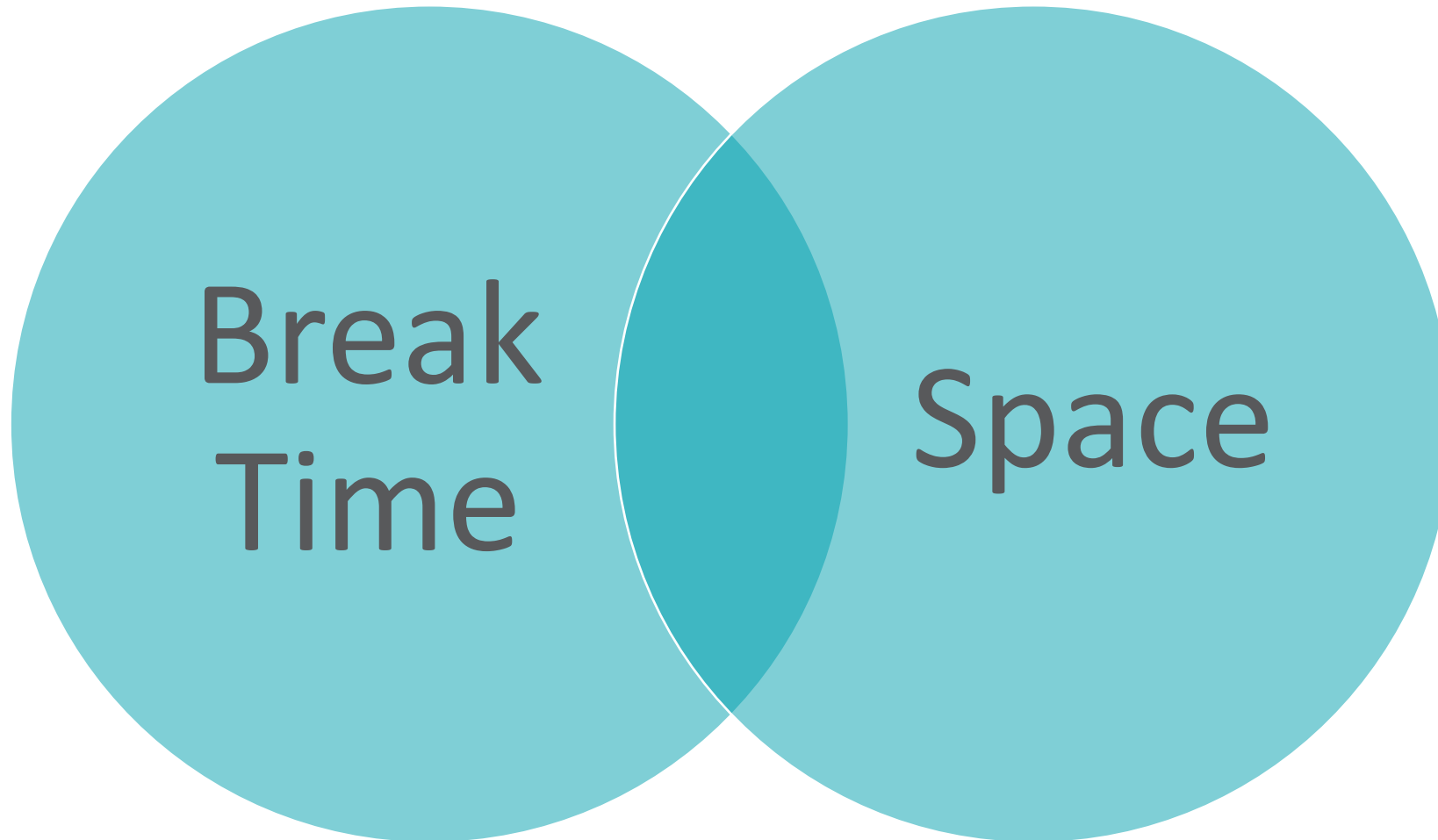
Enterprise Coverage

- Interstate commerce, has 2+ employees, and \$500,000/year in business, or
- Operation of hospital, residential medical/nursing care facilities, schools (incl. preschools), or public agency

Individual Coverage

- Interstate commerce, even if employer is not a covered Enterprise
 - *i.e.*, out-of-state communication (incl. emails), ordering from out-of-state suppliers, credit card transactions, accounting or bookkeeping for activities
- Domestic service workers are typically covered

Two Key Components



Requirements for Break Time



In effect - **December 29, 2022**

- Reasonable break time
- Each time as needed
- For up to 1 year*

Teleworkers are also entitled to pump breaks

Frequency & Duration of Breaks Will Vary

- Nursing employee
- Child
- Location of space
- Steps to express milk
 - pump set up/clean up
 - comfort of nursing employee



Breaks / Paid v. Unpaid Time

The break time may be unpaid unless otherwise required by federal or state law or municipal ordinance.



Non-exempt employees must be paid if they express breast milk during an otherwise paid break period or if they are not completely relieved of duty for the entire break period.



Exempt employees should be paid their full weekly salary as required by federal, state, and local law, regardless of whether they take breaks to express breastmilk.

Examples – Paid Lactation Break Requirements



Georgia



Minnesota



Illinois

Requirements for Space

- Functional private space
 - Some local jurisdictions have specific requirements
- Can be temporary
- Shielded from view and free from intrusion by the public and colleagues

CANNOT BE A BATHROOM



Space Doesn't Always Mean a Room

Subject to local jurisdictional requirements, options include:

- Use of curtains, partitions and/or privacy screens
- Private workspace (like a conference room or private office)
- Converting a small space, such as a storage space or utility closet
- Pop-up privacy tent
- Use of a shared space with nearby other small business/worksites, such as a lactation pods

Examples – Space Requirements



Notice of Alleged Failure to Provide Private Space



The PUMP Act added a provision requiring employees to give employer **ten days notice** before filing an action if an employer fails to provide a private space other than a bathroom for an employee to express breastmilk

- UNLESS -

- Employee is discharged for requesting rights or opposing employer conduct related to PUMP Act, or
- Employer refuses to comply with PUMP Act

Relief / Damages Expanded as of April 28, 2023

Reinstatement

Back and front pay

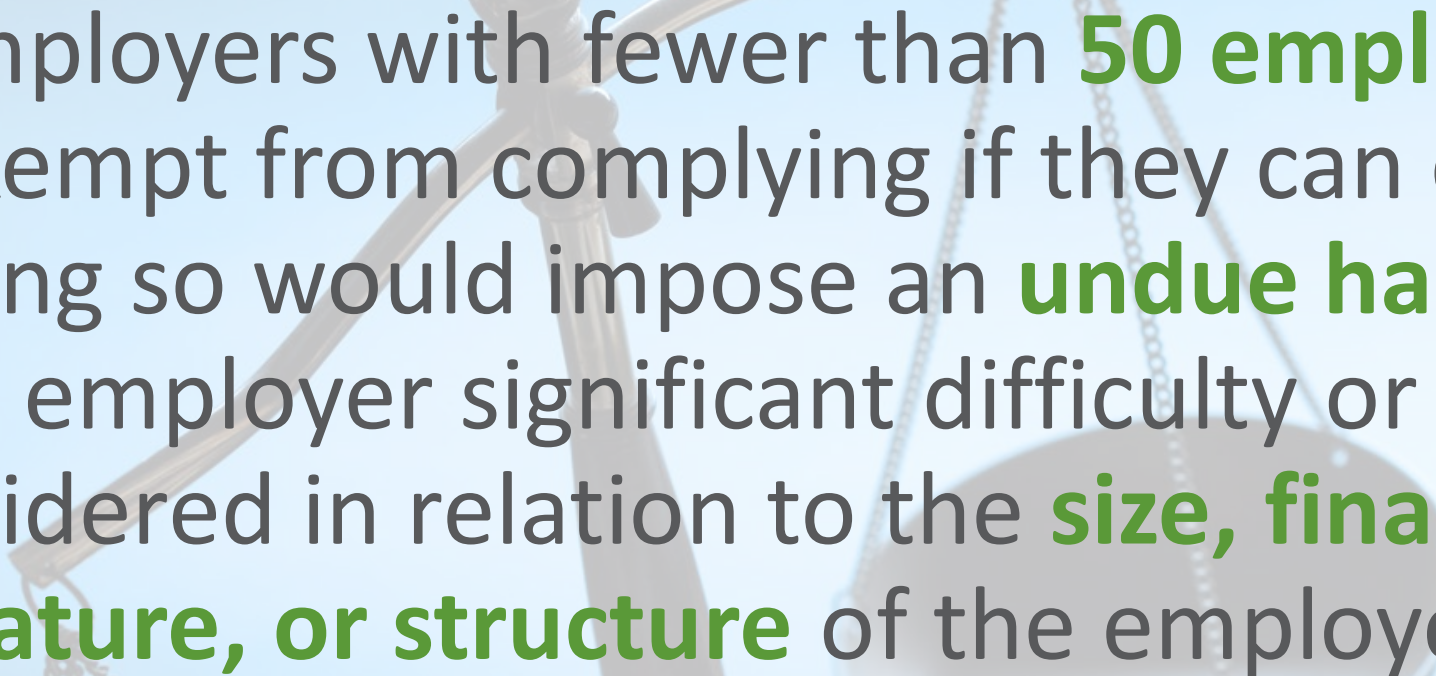
Liquidated damages (double)

Compensatory damages

Punitive damages



Exemption – Undue Hardship



Employers with fewer than **50 employees** may be exempt from complying if they can establish that doing so would impose an **undue hardship** causing the employer significant difficulty or expense when considered in relation to the **size, financial resources, nature, or structure** of the employer's business.

Exemption – Air Carriers

Specific exemption for crewmembers of air carriers,
subject to other laws and contractual agreements

Crewmember - person assigned to perform
duty in an aircraft during flight time

Exemptions – Rail Carriers & Motorcoaches

Delayed Coverage for certain train crews of rail carriers and motorcoach services operators until **December 29, 2025**

- **Train crew members** involved in the movement of a locomotive or rolling stock or who maintain the right of way of a rail carrier
- Employees who are involved in the **movement of a motorcoach**

Exception if compliance requires **significant expense*** or results in **unsafe conditions**

Sample Scenario

Michelle is a shift manager for a nationwide retail store who meets all requirements to be exempt from overtime pay under the FLSA. She had a baby 7 months ago.

Is she entitled to break time and space?

Sample Scenario

Ari is a part-time accountant in Florida. She does data entry while pumping breast milk.

Must she be compensated for this time?

Sample Scenario

Ari relocates to Georgia, where she takes a new position as a part-time accountant. She does data entry while pumping breast milk.

Must she be compensated for this time?

Sample Scenario

LaToya is a delivery truck driver for a delivery company and takes breaks to pump breast milk a couple of times each day. Her supervisor complains that the breaks are interfering with the delivery schedule and moves LaToya to a lower-paying job as a result.

Is this lawful?

Practical Advice



Emphasis on communication – educate frontline workers on updated law

Break times

Private space (not a bathroom)

Report concerns of inadequate private space promptly (provide opportunity to cure)



Does not need to be a permanent location

Certain jurisdictions may have more stringent requirements

- Access to a place to store expressed milk
- Longer time (i.e. 2 years)
- Requirement for written policy

Practical Advice

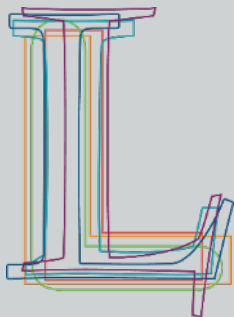
- Beware of retaliation
 - Reduced schedule, write-ups, etc.
- Entitlement is to be taken **as needed**
 - Will vary from employee to employee
 - Will vary from time of day / age of child
 - Will vary due to distance of location / pump set up
 - If interrupted, employer must pay for time
- FLSA provides 1 year, but does not stand in way of other laws

Practical Advice

- What if employee **refuses** to use the designated space?
 - Obligation to provide space
 - Not a bathroom
 - Private, free from intrusion
 - Functional use
 - Obligation to provide break time

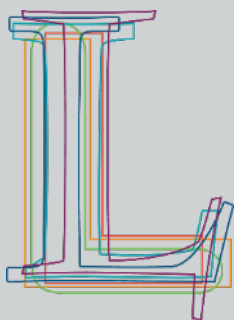
Additional Resources

- Fact Sheet #73: Break Time for Nursing Mothers under the FLSA | U.S. Department of Labor (dol.gov)
 - <https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers>
- What to Expect from Your Employer When You're Expecting | U.S. Department of Labor (dol.gov)
 - <https://www.dol.gov/agencies/whd/maternal-health>
- Supporting Nursing Moms at Work | Office on Women's Health (womenshealth.gov)
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Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.



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