BARNES & THORNBURG LLP

ALERTS

Congress Tucks Accommodations For Pregnant And Nursing Workers Into Omnibus Spending Bill

December 30, 2022

Highlights

Following the lead of various states and local governments, Congress has expanded protections for pregnant and nursing employees nationwide

The Pregnant Workers Fairness Act extends right to request reasonable accommodation to pregnant workers under same framework as the Americans with Disabilities Act

The Providing Urgent Maternal Protections for Nursing Mothers Act expands protections to express breast milk to salaried employees and expands the remedies available for violations

Racing against the clock, Congress passed a $1.7 trillion omnibus spending bill as the term of 117th Congress neared its end on Dec. 23, 2022. While all eyes have been on avoiding a government shutdown; amending the Electoral Count Act; and providing aid to Ukraine, Congress also tucked two landmark pieces of civil rights legislation into the package for new and expecting mothers in the workplace: The Pregnant Workers Fairness Act (PWFA) and The Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act.

President Joe Biden signed the bill into law on Dec. 29. Each measure

RELATED PRACTICE AREAS

Labor and Employment

was met with broad bipartisan support and presents new mandates employers should be aware of heading into the New Year. Some of the new protections now include salaried employees.

The Pregnant Workers Fairness Act

After multiple attempts at passage, a bipartisan coalition led by Sen. Bob Casey (D-PA) and Sen. Bill Cassidy (R-LA) revived the measure and spearheaded its incorporation into the package before sending the bill back to the House.

The PWFA will extend the same protections available under the Americans with Disabilities Act (ADA) and the Americans with Disabilities Act Amendments Act (ADAAA) to pregnant workers seeking workplace accommodations. Specifically, the new law states it will make it an unlawful employment practice for an employer with 15 or more employees to:

- 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
- 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 referred to in Section 5(7)
- 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 a qualified employee
- 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 a qualified employee
- 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

Although accommodations for pregnancy-related complications have been recognized by federal courts under the ADA and ADAAA, such protections have been piecemeal and inconsistent. And, following the U.S. Supreme Court’s decision in Young v. UPS, pregnant workers

seeking an accommodation have been required to identify similarly situated non-pregnant workers that were given a similar accommodation, to assert an actionable claim when such accommodations have been denied. Workers seeking an accommodation under the ADA or ADAAA for non-pregnancy related accommodation were not burdened with a similar requirement – and now neither will pregnant workers.

The PWFA will be enforced by the Equal Employment Opportunity Commission (EEOC) laws. The PWFA also provides a private right of action after an aggrieved employee has exhausted their administrative remedies with the EEOC. Enforcement of the law will not be immediate, but instead, the EEOC is directed to promulgate rules to implement the law and begin enforcement within two years of its enactment.

Notably, Congress abrogated sovereign immunity under the 11th Amendment for violations of this law by state agencies, clearing the way for suits against such agencies to remedy violations of the law.

The Providing Urgent Maternal Protections for Nursing Mothers Act

Much like the PWFA, after multiple attempts, a second bipartisan coalition led by Sen. Jeff Merkley (D-OR), Sen. Lisa Murkowski (R-AL), and Sen. Patty Murray (D-WA) cemented the inclusion of the PUMP for Nursing Mothers Act into the bill. This new law extends workplace protections for nursing mothers previously adopted under the Affordable Care Act in 2010 – and notably, now includes salaried workers.

Under the PUMP for Nursing Mothers Act, the Fair Labor Standards Act (FLSA) is amended to require employers with 50 or more employees to provide reasonable break time for all employees, including salaried employees, to express breast milk as needed. The bill further clarifies that such breaks need not be paid, unless the employee is still on the clock or "not completely relieved from duty" during such breaks.

Enforcement of the PUMP for Nursing Mothers Act is effective 120 days following its enactment and subject to the remedies provisions of the FLSA, including a private right of action for aggrieved employees who have faced retaliation under the Act.

New Laws Expand State Mandates

The enactment of the PWFA and PUMP for Nursing Mothers Act follows the adoption of similar legislation at the state and local level for workers in states like California, Colorado, Illinois, Kentucky, New York, Tennessee, and Washington, for example.

While the vast majority of U.S. employees were already covered under these state laws, the new federal laws expand such protections to employees all across America. And with their passage, employers need to be cognizant of these forthcoming requirements and continue to be mindful of state law where protections might differ from or exceed federal law.

For more information, please contact the Barnes & Thornburg attorney with whom you work or Aaron Vance at 317-261-7956 or aaron.vance@btlaw.com.