

Expanded Job Protections for Pregnant and Nursing Workers

BY JOHN HUSBAND



This article discusses employment protections available to pregnant and nursing workers in Colorado, including the recently enacted Pregnant Workers Fairness Act and PUMP Act.

Two new federal laws greatly expand employment protections for pregnant and nursing workers nationwide: the Pregnant Workers Fairness Act (PWFA),¹ which took effect on June 27, 2023, and the Providing Urgent Maternal Protections For Nursing Mothers Act (PUMP Act),² which took effect on April 28, 2023. While these laws fill in the gaps that existed under current laws, they do not replace federal, state, or local laws that are more protective of workers affected by pregnancy, childbirth, or related medical conditions. This article provides an overview of the current laws that apply to Colorado employers and summarizes the provisions of the two new laws.

Current Laws Dealing With Pregnancy Issues

In addition to federal pregnancy-related laws, more than 30 states and cities have laws that provide accommodations for pregnant workers. Some key federal and state laws that apply to Colorado employers are outlined below.

Federal Pregnancy-Related Laws

Pregnancy discrimination has been specifically prohibited since 1978 when the Pregnancy Discrimination Act (PDA)³ was passed, amending Title VII of the Civil Rights Act of 1964.⁴ The PDA requires that employers treat employees with pregnancy-related issues the same as other employees. Enforced by the Equal Employment Opportunity Commission (EEOC), Title VII protects an employee from discrimination based on pregnancy, childbirth, or related medical conditions.

The Americans With Disabilities Act of 1990 (ADA)⁵ requires employers to provide reasonable accommodations to employees with certain pregnancy-related conditions that qualify as a disability. Also enforced by the EEOC, the ADA prohibits discrimination based on disability.

The ADA requires covered employers to provide reasonable accommodations to a person with a disability unless the accommodation would cause an undue hardship for the employer. Although pregnancy is not a disability under the ADA, some pregnancy-related conditions may qualify.

The Family and Medical Leave Act of 1993⁶ (FMLA) provides workers with unpaid, job-protected leave for a variety of family and medical reasons, including pregnancy. A mother can use 12 weeks of FMLA leave for the birth of a child, for prenatal care, for incapacity related to pregnancy, and for her own serious health condition following the birth of a child. However, many common pregnancy issues are not covered under the PDA, ADA, or FMLA.

Colorado Pregnancy-Related Laws

Under Colorado's Pregnant Workers Fairness Act, which has been in place since 2016, disabilities caused by pregnancy, miscarriage, abortion, and childbirth are considered temporary disabilities for all job-related purposes.⁷ Employers must treat pregnancy-related disabilities the same as other temporary disabilities with respect to such matters as leave duration, leave extensions, job reinstatement, and health insurance coverage. Written or unwritten employment policies or practices cannot exclude employees or applicants from employment because of pregnancy (unless the pregnancy renders her physically unable to perform the duties of the position in question).⁸

It is an unfair employment practice for an employer to fail to provide a reasonable accommodation for an applicant or employee for health conditions related to pregnancy or physical recovery from childbirth, absent a showing of undue hardship on the business. Employers must engage in an interactive process to assess potential reasonable accommodations related to pregnancy and childbirth.⁹

Colorado's Workplace Accommodations for Nursing Mothers Act, effective in 2008, requires employers to (1) allow employees to use paid or unpaid breaks to express breast milk for a nursing child for up to two years after the child's birth, and (2) make reasonable efforts to provide a place in close proximity to the work area, other than a toilet stall, for the mother to express breast milk.¹⁰

Pregnant Workers Fairness Act

The PWFA requires employers to provide reasonable accommodations for known limitations related to pregnancy, childbirth, or related medical conditions. The employer can avoid accommodating if it can show an "undue hardship." The PWFA extends additional protections for pregnancy-related issues and prohibits covered employers from:

- requiring an employee to accept an accommodation without discussing the accommodation with the worker;
- 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 unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
- interfering with any individual's rights under the PWFA.¹¹

Reasonable accommodation under the PWFA draws its essence from the ADA. A reasonable accommodation is a modification or adjustment to a job that enables an employee with a disability an opportunity to successfully perform the job. This is determined by engaging in the interactive process.¹²

Notably, the PWFA applies only to "known limitations related to pregnancy, childbirth, or related medical conditions," and not to pregnancy itself. There is no specification as to the types of conditions that will be considered a known limitation other than it must be a physical or mental condition related to pregnancy issues.

To receive accommodations or protection under the PWFA, the employee must communicate the physical or mental condition to the employer.¹³

Damages under the PWFA follow those available under Title VII of the Civil Rights Act. Employees proving discrimination could recover backpay, compensatory and punitive damages, and reasonable attorney fees.¹⁴ The EEOC will promulgate regulations that provide enforcement guidance and examples by the end of 2023.¹⁵

The PUMP Act

The PUMP Act amends the Fair Labor Standards Act (FLSA)¹⁶ and expands federal law related to breastfeeding accommodations in the workplace. The PUMP Act requires employers to (1) provide employees with reasonable break times to express breast milk for nursing children for one year after their child's birth, and (2) provide a private space other than a bathroom for purposes of expressing breast milk. The PUMP Act specifically notes that remote workers are also entitled to take reasonable pump breaks. Employers are not required to compensate employees if they are completely relieved from work duty for these breaks. If an employer provides employees with paid breaks, a pump break must be compensated in the same manner.¹⁷

The PUMP Act is silent as to what is considered a reasonable break time or how many breaks are permitted. The writers of the PUMP Act intended for these issues to be determined based on the individual needs of the employee. An employer cannot deny a break for a covered employee who needs to pump.¹⁸

Employees must inform their employer of a failure to provide adequate private space for expressing breast milk to activate the protections of the PUMP Act. Once notified, employers have a 10-day cure period before an employee may file suit. Remedies available to employees are the traditional FLSA remedies, including reemployment, reinstatement, and promotion, and payment of lost wages, liquidated and compensatory damages, and punitive damages, where appropriate.¹⁹

Like other FLSA provisions, employers with fewer than 50 employees are exempt from the requirements if compliance would impose

undue hardship, factoring in the nature of the employer's business, size, and resources.²⁰

Conclusion

Now may be a good time for employers to review and update policies, practices, and procedures related to workplace accommodation and hiring to ensure compliance with the PWFA and the PUMP Act. Employers should also make sure there is a designated private space for nursing employees to ensure compliance with the PUMP Act. **CL**

NOTES

1. Pregnant Workers Fairness Act, 42 USC §§ 2000gg to -ggg.
2. PUMP for Nursing Mothers Act, Pub. L. No. 117-328, 136 Stat. 4459.
3. Legislative History of the Pregnancy Discrimination Act of 1978, <https://www.congress.gov/bill/95th-congress/senate-bill/995/all-info>.
4. Civil Rights Act of 1964 § 7, 42 USC §§ 2000e et seq.
5. ADA, 42 USC §§ 12101 et seq.
6. FMLA, 29 USC §§ 2601 et seq.
7. CRS § 24-34-402.3.
8. 3 CCR 708-1-80.6.
9. CRS § 24-34-402.3.
10. CRS §§ 8-13.5-101 to -104.
11. 42 USC § 2000gg-1.
12. 42 USC § 2000gg.
13. *Id.*
14. *Id.*
15. The EEOC issued a proposed rule on August 11, 2023, and the comment period ends on October 10, 2023. 29 CFR § 1636, <https://www.federalregister.gov/documents/2023/08/11/2023-17041/regulations-to-implement-the-pregnant-workers-fairness-act>.
16. FLSA, 29 USC §§ 201 et seq.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*



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