New Protections for Pregnant Workers: The PWFA, PUMP Act, and Reproductive Healthcare Privacy

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The legal landscape governing the protection of pregnant workers and reproductive healthcare is changing. Recent updates to federal laws including the PWFA, the PUMP Act, and new HIPAA privacy protections expand current protections for pregnant workers and individuals seeking reproductive medical assistance. This article outlines the impact of these changes on CAAs and steps CAAs can take to account for expanded workplace protections, including updating accommodations processes, ensuring break time and space for nursing and pumping employees, and understanding new healthcare privacy protections.

These updates, in part, attempt to clarify a recent ruling by the U.S. Supreme Court, *Dobbs v. Jackson Women's Health Organization*, which overturned Roe v. Wade and lifted the federal right to abortion access. The *Dobbs* decision led to stricter abortion laws in many states and prompted frequent employer questions regarding abortion-related employment protections. Many of the recent regulations may therefore be subject to legal challenge, and CAPLAW will continue to monitor developments in the federal legal landscape.

This article covers only federal law and does not discuss applicable state or local laws. Generally, whichever law is more protective of employees will govern a CAA's legal obligations. CAAs should thus discuss their obligations under state and local laws with attorneys knowledgeable about employment and privacy laws in their state.

PWFA

The Pregnant Workers Fairness Act (PWFA) went into effect on June 27, 2023. Final regulations clarifying and expanding on the obligations established in the PWFA went into effect on June 18, 2024 (the PWFA Final Rule). The PWFA and the PWFA Final Rule require employers with 15 or more employees to provide reasonable accommodations to qualified employees for their known limitations related to pregnancy, childbirth, or related conditions, unless doing so imposes an undue hardship on the employer. It is imperative for CAAs to understand their obligations under the new regulations because the Equal Employment Opportunity Commission (EEOC), the federal agency charged with regulating the PWFA, indicated that the PWFA is an enforcement priority, and it will look closely if an employee brings a charge against their employer under the PWFA.

The legal obligation to provide reasonable accommodations under the PWFA resembles employer obligations under the Americans with Disabilities Act (ADA). Similar to the ADA, the PWFA requires an interactive process whereby a CAA must enter into a good-faith discussion with a qualified employee to identify a reasonable accommodation. A CAA must then provide a reasonable accommodation unless doing so poses an undue hardship to the employer. The PWFA adopts the same definition of "undue hardship" as used in the ADA; an accommodation would create an undue hardship if it would cause significant difficulty or expense for operations at the CAA. While similar, the PWFA differs from the ADA in a few key ways.

1. **A disability is not required for an accommodation.** The PWFA, unlike the ADA, guarantees workers experiencing pregnancy, childbirth, or related medical conditions the right to reasonable workplace accommodations for "known limitations." A "known limitation" is a physical or mental condition that is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions and is an impediment or problem that may be modest, minor, or episodic. Even workers with normal, uncomplicated pregnancies may experience pregnancy-related limitations that are covered under the PWFA. The PWFA Final Rule provided the following non-exhaustive list of conditions that fall within the broad definition of "pregnancy, childbirth or related medical conditions" and can give rise to a request for accommodation. Note that employers are expressly required to consider abortion accommodations, such as providing time off to attend an abortion-related appointment or for recovery.

    - Current and past pregnancy;
    - Potential or intended pregnancy (including infertility, fertility treatment, and the use of contraception);
    - Labor and childbirth;
    - Termination of pregnancy (including via miscarriage, stillbirth, or abortion);
    - Pregnancy-related sicknesses (ranging from nausea or vomiting to edema, from preeclampsia to postpartum depression, and many other pregnancy-related conditions);
    - Lactation and issues associated with lactation; and
    - Menstruation.

2. **Temporary inability to perform essential functions is permitted.** An employee is entitled to accommodation under the PWFA so long as the employee can perform the essential functions of a job in the near future and can be reasonably accommodated. If the employee is pregnant, the PWFA Final Rule defines "in the near future" to mean generally within 40 weeks, however the determination is made on a case-by-case basis.

3. **Requiring leave is prohibited if another accommodated is preferred.** If the interactive process reveals that multiple accommodations would empower the employee to perform their job, the PWFA prohibits employers from requiring an employee to take leave (unless leave is the employee's preference). See the EEOC's What You Should Know About the Pregnant Workers Fairness Act.

While the accommodations vary and will depend on the employee's specific needs and job duties, the EEOC provided the following list of examples of accommodations under the PWFA. The EEOC indicated that it presumes certain accommodations (the first four bolded in the list below) are reasonable and should be granted in virtually all cases.

1. **Allowing an employee to carry or keep water near and drink;**
2. **Additional restroom breaks;**
3. **Allowing an employee whose work requires standing to sit and whose work requires sitting to stand;**

4. **Food and drink breaks;**
5. More frequent breaks;
6. Schedule changes, part-time work, and paid and unpaid leave;
7. Telework or remote work;
8. Providing a reserved parking space;
9. Light duty;
10. Making existing facilities accessible or modifying the work environment;
11. Job restructuring;
12. Temporarily suspending one or more essential functions of the job;
13. Acquiring or modifying equipment, uniforms, or devices; and
14. Adjusting or modifying examinations or workplace policies.

PUMP Act

The Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) was signed into law on December 29, 2022. The PUMP Act amends the federal Fair Labor Standards Act (FLSA) to expand employer obligations to provide employees with the opportunity to express breast milk at work.

The PUMP Act requires employers to provide reasonable break time and a private space to express breast milk for a nursing child for one year after the child's birth. The PUMP Act extends these protections to nearly all employees covered by the FLSA, regardless of whether they are non-exempt or exempt from minimum wage and overtime requirements. However, the PUMP Act contains an exception for small employers with less than fifty employees if compliance would impose an undue hardship. The undue hardship standard under the PUMP Act is similar to that of the ADA and the PWFA.

The frequency and duration of pumping breaks will vary depending on the employee. Generally, employers are not required to compensate employees for reasonable break time, unless otherwise required by state or local law. However, employers must pay non-exempt employees if the employee expresses breast milk during an otherwise paid break period or if they are not completely relieved of their work duty for the entire break period. Payment of exempt employees is not an issue under the PUMP Act as employers must pay exempt employees their full weekly salary as required by federal, state, and local law, regardless of whether they take breaks to express breast milk.

In addition to break time, employers must provide employees with a place to express breast milk. Space requirements include a location other than a bathroom, which is shielded from view and free from intrusion from coworkers and the public. The Department of Labor (DOL) further indicated that the space must be private and functional for expressing breast milk. FAQ Pumping Breast Milk at Work; DOL Field Assistance Bulletin No. 2023-02. Characteristics of a functional space include a sink, running water, a fridge for storing milk, electricity, appropriate seating, and a surface appropriate for placing a breast pump.

HIPAA Privacy Protections for Reproductive Healthcare

The U.S. Department of Health and Human Services (HHS) recently issued a final rule that took effect on June 25, 2024, which strengthens the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule by adding protections for reproductive healthcare (the HIPAA Final Rule). Generally, HIPAA's Privacy Rule provides national standards for safeguarding individuals' protected health information (PHI), such as their medical records and other individually identifiable health information. Most CAAs are not covered by HIPAA but the few that are must ensure compliance with the HIPAA Privacy Rule.

A CAA should not assume HIPAA applies just because it retains health records. HIPAA only applies to "covered entities" and "business associates." A CAA is a "covered entity" if it is a healthcare provider that transmits health information in electronic form with health plans in connection with certain standard transactions. A CAA is a "business associate" if it has a written business associate agreement with another HIPAA covered entity or business associate. CAAs covered by HIPAA typically run community health clinics. However, HIPAA laws are complex, and a CAA that is unsure if HIPAA applies to it should work with an employee benefits attorney with HIPAA compliance expertise to determine if HIPAA applies. A CAA subject to HIPAA must comply with the new requirements under the HIPAA Final Rule by December 23, 2024, and must update its Notice of Privacy Practices by February 16, 2026.

The HIPAA Final Rule prohibits covered entities and business associates from disclosing PHI when it is sought to investigate or impose liability on those who seek, obtain, provide or facilitate reproductive healthcare, or to identify persons for such activities. This prohibition only applies if the reproductive healthcare (1) is lawful under the law of the state where the care is provided under the circumstances in which it is provided, (2) is protected, required, or authorized by federal law under the circumstances in which such health care is provided, regardless of the state in which it is provided, or (3) falls under the presumption that the reproductive healthcare provided by another person is lawful. This presumption applies unless the covered entity or business associate has "actual knowledge" or factual information demonstrating a "substantial factual basis" that the healthcare was not lawful under the circumstances in which it was provided.

Covered employers must obtain a signed attestation in certain circumstances from those requesting the PHI, stating that its use or disclosure is not for a prohibited purpose. Covered employers are also required to revise their Notice of Privacy Practices to reflect the HIPAA Final Rule. Even where HIPAA does not otherwise apply to an employer, HIPAA applies to a covered entity from which the employer requests PHI. Where a CAA has reason to contact a healthcare provider directly, such as when a CAA needs to verify certain medical information for purposes of providing leave, the HIPAA Final Rule may limit the CAA's ability to obtain this information.

What Should a CAA Do Now?

- Update existing policies providing reasonable accommodations to account for the differences between the ADA and PWFA requirements and to incorporate PUMP Act requirements.
- Ensure compliance with potentially more employee-favorable state and local laws when updating policies and leverage the existing ADA interactive process for addressing pregnancy-related conditions.
- Train managers and supervisors on how to respond to requests for reasonable accommodations, breaks, and private areas from pregnant and nursing employees.
- Educate HR staff about the EEOC's list of suggested accommodations for pregnant employees as provided in the PWFA Final Rule.
- Identify a space appropriate for nursing and pumping employees to express breast milk, which is both private and functional, other than a bathroom.
- If covered by HIPAA, update HIPAA policies and procedures and Notice of Privacy Practices and educate HR staff on when an attestation is required.

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