



Webinar

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Implementing Workplace Protections for Pregnant or Lactating Personnel

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Today's Speakers



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Agenda

- Introduction
- Pregnant Workers Fairness Act ("PWFA") Final Regulations
- Providing Urgent Maternal Protections ("PUMP") Act
- Examples from the PWFA Final Rule
- Recommendations for Next Steps
- Audience Q&A



Pregnant Workers Fairness Act (PWFA)

42 U.S.C. Section 2000gg

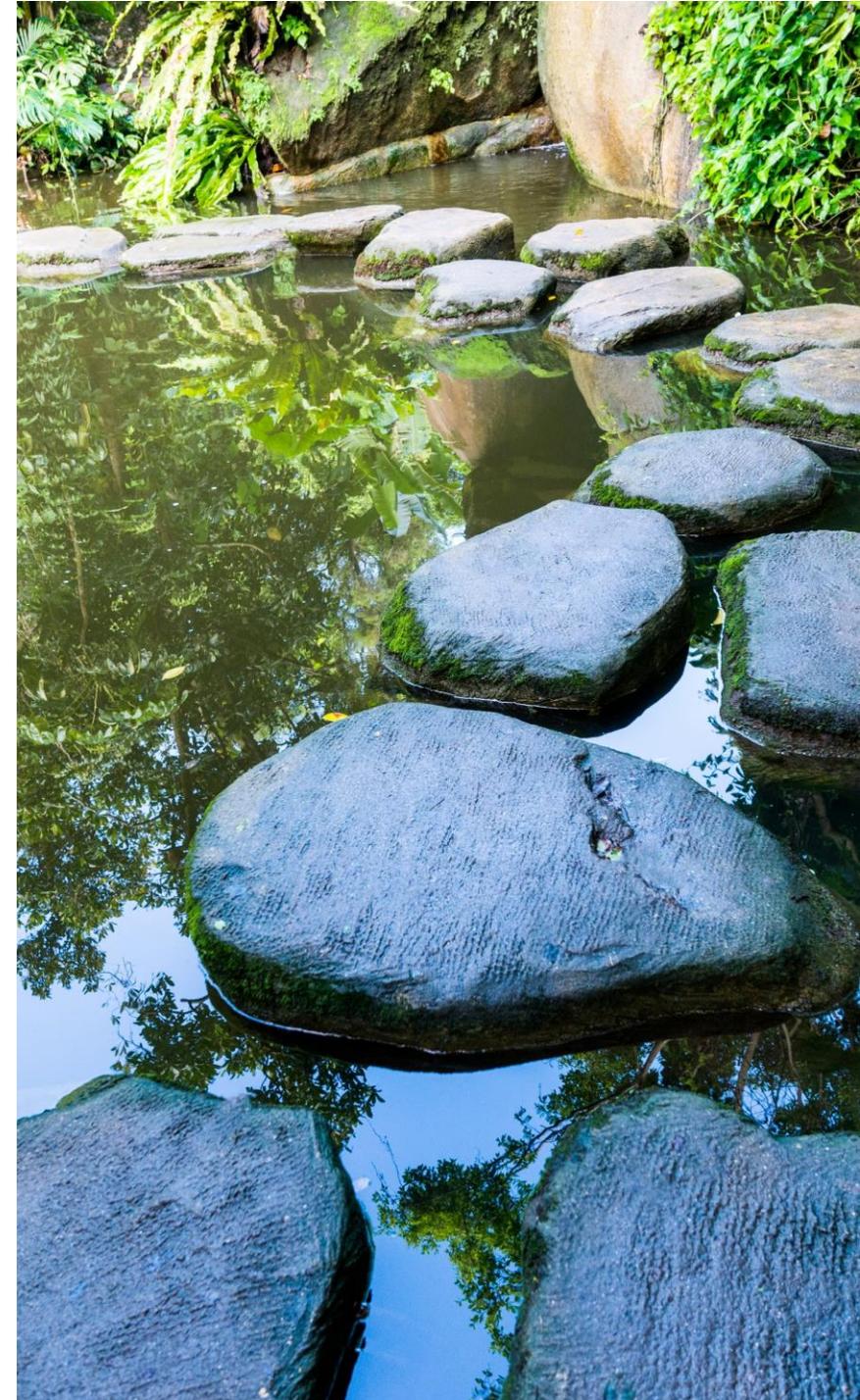


What is the Pregnant Workers Fairness Act?

- The PWFA requires covered entities to provide **reasonable accommodations** to a **qualified** employee's or applicant's **known limitations** related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause **undue hardship** on the operation of the employer's business
- "Ensuring pregnant workers have reasonable accommodations helps ensure that pregnant workers remain healthy and earn an income when they need it the most."

The Path to Final Regulations

- June 27, 2023: PWFA in effect and the EEOC began accepting charges
- August 11, 2023: EEOC published proposed regulations
- April 19, 2024: EEOC published final regulations
- April 25, 2024: 17 states filed suit to enjoin the EEOC's abortion-accommodation obligation in the final regulations
- June 18, 2024: Final regulations become effective



The PWFA Says Employers Cannot:

- Fail to “make reasonable accommodations to the known limitations related to 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”
- Require an employee to accept accommodations without engaging in the interactive process
- Deny employment opportunities based on the employer needing to provide reasonable accommodations

The PWFA Says Employers Cannot:

- Mandate leave for an employee when a reasonable alternative accommodation can be provided
- Retaliate/discriminate against an employee for requesting or utilizing a reasonable accommodation, opposing unlawful conduct, or participating in a proceeding
- Coerce individuals who exercise their rights or help others

Who is Eligible for Reasonable Accommodations?

Step 1: Known Limitation

Employee has a known limitation related to pregnancy, childbirth, or related medical conditions.

Known Limitation:

Physical or mental condition related to, affected by, or arising out of P, CB, or RMC.

Impediment or problem. Can be modest, minor, and/or episodic. Includes healthcare.

Does not have to meet standard for ADA disability!

Step 1: Known Limitation

Communicated to the employer by employee or representative

- "**Employee's representative**" means a family member, friend, union representative, health care provider, or other representative of the employee.
- "**Communicated to the employer**" means an employee or the employee's representative has made the employer aware of the limitation by communicating with a supervisor, a manager, someone who has supervisory authority for the employee or who regularly directs the employee's tasks, human resources personnel, or another appropriate official, or by following the steps in the covered entity's policy to request an accommodation.

Step 1: Known Limitation

- The communication may be made orally, in writing, or by another effective means.
- The communication need not be in writing, be in a specific format, use specific words, or be on a specific form.

Step 2: Pregnancy, Childbirth, or Related Medical Conditions

Pregnancy, Childbirth, or Related Medical Conditions

Current, past, potential, or intended pregnancy

RMC includes termination of pregnancy, ectopic pregnancy, preterm labor, gestational diabetes, and MANY more conditions such as carpal tunnel, chronic migraines, etc.

Other Examples of Related Medical Conditions

- Pain when standing for long periods of time
- Prenatal health care appointments
- Therapy for postpartum depression
- In vitro fertilization (IVF)
- Pre-existing medical conditions exacerbated by pregnancy or childbirth (Ex: Type 2 diabetes, high blood pressure)

Step 3: Employee Must be Qualified

The Act explains there are two paths:

ADA-Like employees. These employees can perform the essential functions of their job with or without a reasonable accommodation.

ADA-Plus employees. These employees cannot perform the essential functions of their position for a temporary period but can in the near future and can be reasonably accommodated without undue hardship.

Who is NOT entitled to an accommodation?

- Family members and others are **not** entitled to accommodations. Only the individual who is pregnant, experiences childbirth, or has a RMC is entitled to accommodation.
- The definition of “**limitation**” is revised in final regulations to state that limitation means a physical or mental condition related to, affected by, or arising out of P, CB, RMC “of the specific employee in question.”

Reasonable Accommodations

When Can an Employee or Applicant Request a Reasonable Accommodation

- When an employee needs a modification or adjustment to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed
- When an applicant needs a modification or adjustment to a job application process that enable them to be considered for a desired position
- When an employee needs a modification or adjustment that allows them to enjoy equal benefits and privileges of employment as are enjoyed by similarly situated employees

What Triggers a Reasonable Accommodation?

To request an accommodation, an employee/representative must communicate the need for adjustment/change at work due to a limitation

Importantly, the employee/representative does not have to identify a medical condition or use medical terms



Examples of Requests for Reasonable Accommodations

- A pregnant employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of morning sickness."
- An employee tells a manager of her need for more frequent bathroom breaks, explains that the breaks are needed because the employee is pregnant, but does not complete the employer's online form for requesting an accommodation.

Examples of Requests for Reasonable Accommodations

- An employee tells a human resources specialist that they are worried about continuing to lift heavy boxes because they are concerned that it will harm their pregnancy.
- At the employee's request, an employee's spouse requests light duty for the employee because the employee has a lifting restriction related to pregnancy; the employee's spouse uses the employer's established process for requesting a reasonable accommodation.

Predictable Assessment Reasonable Accommodations

The EEOC says there are four accommodations that are reasonable and do not impose an undue hardship “in virtually all cases,” including allowing a pregnant employee, as needed:

-  To carry or keep water near and drink;
-  Additional restroom breaks;
-  Whose work requires standing to sit and whose work requires sitting to stand; and
-  Breaks to eat and drink.

When Does Eliminating an Essential Job Function(s) Impose an Undue Hardship?

Undue Hardship

- General Rule: Undue hardship is significant difficulty or expense incurred by the employer
- EEOC's general factors:
 - Nature and net cost of the accommodation
 - Financial resources of the facility
 - Financial resources of the entity
 - Operations of the entity
 - Impact of accommodation on operation of facility including ability of other employees to perform and facility's ability to conduct business

Undue Hardship

Additional factors when faced with eliminating essential job function(s):

- Length of time unable to perform essential function(s)
- Is there work for the employee?
- Nature and frequency of essential functions
- Has employer temporarily suspended job function(s) for other employees?
- Can other employees or temps be hired to perform the function(s)?
- Can the function(s) be postponed?

Can an Employer Request Medical Documentation When an Employee Requests an Accommodation?

Documentation

- Key word: **REASONABLE**
- Employers may only request documentation when it is reasonable and only reasonable (minimum) documentation sufficient to:
 - 1 Confirm the condition (impediment/problem/healthcare)
 - 2 Confirm the condition is “related to, affected by, or arising out of P, CB, or RMC”
 - 3 Describe the adjustment or change needed due to the limitation

Five Times Requesting Documentation is Not Reasonable

The EEOC says there are five times when seeking documentation is NOT reasonable under the circumstances:

The limitation and accommodation are “obvious”

Pumping at work or nursing during work hours (with self confirmation)

The limitation and accommodation are already “known”

Predictable assessments

Employer’s own policies or practices would not seek supporting documentation from non-pregnant employees

Remember Before Asking for Documentation . . .

- EEOC emphasizes that confirmation can be accomplished through simple statement and does not need medical diagnosis
- Asking for medical information/documentation beyond what is appropriate under PWFA could also violate the ADA's limitations on disability-related inquiries/medical exams
- Final regulations add that it is not reasonable to require documentation regarding nursing at work as accommodation

Remember Before Asking for Documentation . . .

- Final regulations add that employers may NOT require supporting documentation on a specific form (i.e., if the HCP's form or note provides what is necessary no additional form can be required)
- Employer may require documentation from HCP but the final regs say the employer cannot require that the HCP submitting the documentation be treating the condition
- EEOC encourages employers who are asking for supporting documentation when permitted “to consider best practice of granting interim reasonable accommodation” when employee says it will be provided at later

Leave as an Accommodation

Leave as an Accommodation

- Under the PWFA, leave may be a reasonable accommodation
- Even if the covered entity does not offer leave as an employee benefit, if the employee is not eligible for leave under the employer's policy, or the employee has exhausted their leave
- May need to prorate the production standard to account for the reduced amount of time the employee worked

Leave as an Accommodation

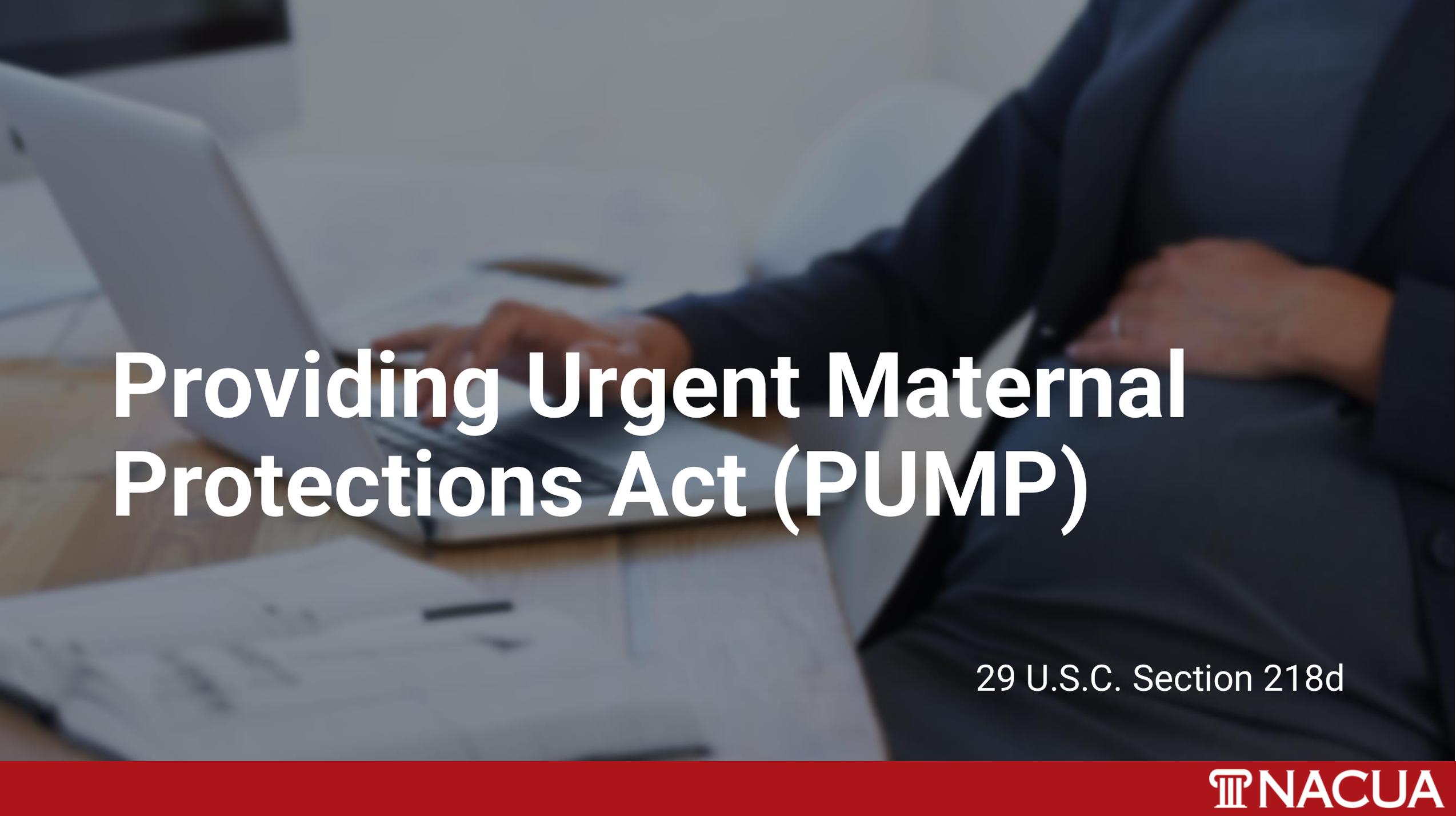
- Similarly, covered entities making reasonable accommodations must ensure that their ordinary workplace policies or practices, including attendance policies, productivity quotas, and requirements for mandatory overtime, do not operate to penalize qualified employees for utilizing PWFA accommodations
- Accommodation can allow employee to make up the time at a different time during the day so long as this would not make the accommodation ineffective

Leave as an Accommodation

How to handle leave when there is an undue hardship?

- The employer can provide six weeks of leave absent undue hardship but the eight weeks that the employee is seeking would cause undue hardship, the employer must provide the reasonable accommodation up to the point of undue hardship
- Provide the six weeks, then consider whether there are other reasonable accommodations it could provide for the remaining two weeks that would not cause an undue hardship





Providing Urgent Maternal Protections Act (PUMP)

29 U.S.C. Section 218d

The PUMP Act

On December 29, 2022, the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) became law, extending right to pump protections and allowing for additional remedies for violations.

- Amends the Fair Labor Standards Act to provide nursing employees with reasonable break times and private spaces in which to pump breast milk.
- Covers all employees, exempt and non-exempt. Expands on coverage previously available only to overtime eligible, hourly employees.
- Coverage for up to one year after the child's birth.
- Remedies available as of April 28, 2023.
- Requires an accommodation even though lactation is not a disabling condition.

Why is This a Workplace Issue?

- The American Academy of Pediatrics recommends that children be exclusively breastfed until they are 6 months old and supports continued breastfeeding until age 2.
- According to the Centers for Disease Control only 1 in 4 infants is exclusively breastfed until they are 6 months old.
- Working mothers cite, among other factors that limit their ability to breastfeed, workplaces that are not conducive to feeding their children on-site or pumping and storing breastmilk.
- Public health agencies including the Centers for Disease Control, the National Institutes of Health, the Surgeon General are engaged in efforts to increase rates of breastfeeding, including advocating for workplace policies that support breastfeeding.

Eligible Employees

Covers all employees, exempt and non-exempt, with narrow exceptions for certain industries, including airlines and railroads.

Employees are entitled to protection under the PUMP Act if they work for an employer who is a covered enterprise **OR** if the employee engages in interstate commerce.

Covered Employers

An employer is considered an enterprise covered by the FLSA if the employer is:



Engaged in interstate commerce, has at least two employees, and does at least \$500,000 a year in business

OR



Engaged in the operation of a hospital, residential medical or nursing care facility, schools, preschools or a public agency

Covered Employees

Individual employees may be protected by the PUMP Act even if the employer is not a covered enterprise under the FLSA.

- An employee is covered under the Pump Act regardless of employer status under the FLSA if the employee is engaged in interstate commerce.
- Broad definition of interstate commerce includes making out-of-state phone calls, receiving or sending interstate mail or electronic communications, ordering or receiving goods from out-of-state suppliers, handling credit card transactions, and performing accounting or bookkeeping for such activities.
- Domestic service workers, such as housekeepers, full-time babysitters, and cooks, are normally covered by the law.

Reasonable Break Time

- The PUMP Act requires employers to provide nursing employees:
- Reasonable break time
- Each time such employee has a need to express milk
- For one year after the child's birth
- The frequency of breaks needed as well as the duration of each break, will likely vary.



What is a Reasonable Break Time?



The U.S. Department of Labor provides the following examples:

- Irina, a shift manager at a fast-food restaurant, takes four 25-minute pump breaks each day when she first returns to work after the birth of her child.
- Leslie, a department store delivery driver with a nine-month old baby, needs two 30-minute pump breaks each day she works.

Practice Pointer: Engage in an interactive dialogue with the employee to determine frequency and duration of breaks, but be flexible, as needs may change.

Is Break Time Paid?

- As with other breaks under the FLSA, the nursing employee must be completely relieved from duty, or the time spent pumping must be counted as hours worked for the purposes of minimum wage and overtime requirements.
- If an employer already provides paid break time and if an employee chooses to use that time to pump, they must be compensated in the same way that other employees are compensated for break time.
- An employer must also pay for pump breaks if required by Federal or State law or municipal ordinance.

Space Requirements

Employer must provide a **private** space **other than a bathroom** an employee to pump.

- **NOT** a Bathroom!
- Space must be private – employee must be able to lock the door or display a sign that says the room is in use.
- Consider whether hoteling or shared office spaces provide sufficient privacy. Consider work schedules and accessibility of the space to others.
- Space must be free from intrusion by coworkers and the public.
- Remote employees must be free from observation by any employer-provided or required video system, including computer camera, security camera, or web conferencing platform such as Zoom or Teams.

Practice Pointer: Employer not required to provide a permanent dedicated space for nursing, but having a dedicated space may prove more effective for both the employer and the employee.



Undue Hardship Exemption

An employer that employs fewer than 50 employees is not required to provide break time and space if doing so would impose undue hardship.

- The employer must demonstrate that compliance requires significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.
- All employees who work for the employer, regardless of worksite, are counted.

Enforcement

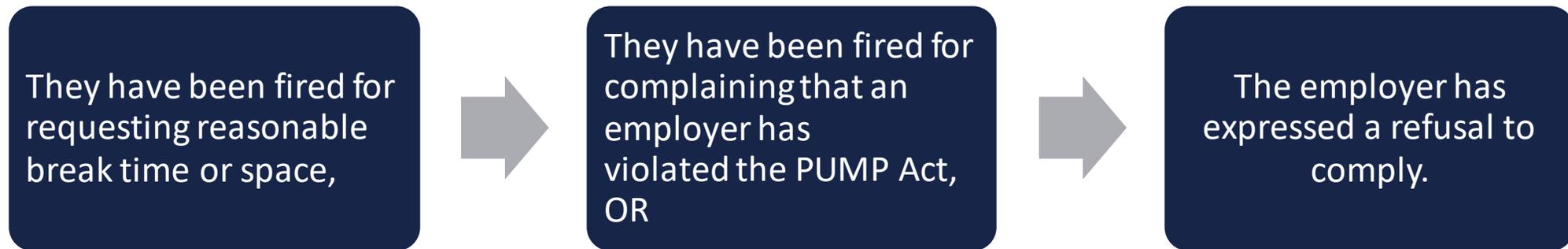
An employee who believes their rights under the PUMP Act were violated can file a complaint with the Department of Labor Wage and Hour Division.

- The complaint must be filed with the Wage and Hour Division within two years of the alleged violation.
- Special notification procedures may apply to filing a private action where an employer has failed to provide an employee with an appropriate space to pump.

Notification Of Violation

Before an employee can file a private suit regarding an employer's failure to provide a space to pump, the employee must notify the employer of the failure and allow 10 days for the employer to come into compliance.

The employee is not required to provide this notice, if:



Retaliation Is Prohibited

- It is a violation of the FLSA to “discharge or in any other manner discriminate against” any employee because they asserted their pump at work rights or cooperated in an investigation regarding a potential PUMP Act violation.
- Employees are protected regardless of whether the complaint is made orally or in writing.
- Most courts have ruled that internal complaints to an employer are also protected under the FLSA's prohibition on retaliation.

Possible Penalties

Employers may face legal and equitable penalties for violating the PUMP Act.

- Remedies provision took effect on April 28, 2023
- Remedies for violations of the reasonable break time and space requirements may include employment, reinstatement, promotion, and the payment of wages lost and an equal amount as liquidated damages, compensatory damages, and make-whole relief, such as economic losses that resulted from violations, and punitive damages where appropriate.
- These legal and equitable remedies are already available for violations of the anti-retaliation provision.

PWFA – Lactation and Pumping Accommodations

- In addition to the PUMP Act, the PWFA requires employers to provide further accommodations related to lactation and pumping. This includes:
 - Breaks, a space for lactation, and other related modifications
 - Ensuring that the area for lactation is in reasonable proximity to the employee's usual work area; that it is a place other than a bathroom; that it is shielded from view and free from intrusion; that it is regularly cleaned; that it has electricity, appropriate seating, and a surface sufficient to place a breast pump; and that it is in reasonable proximity to a sink, running water, and a refrigerator for storing milk



Examples from the PWFA Final Regulations

42 U.S.C. Section 2000gg



Qualified Employee

Lydia is a delivery driver and routinely moves packages over 30 pounds. Two months into her pregnancy her doctor tells her that she should not lift more than 30 pounds. She tells her supervisor. The employer is unable to provide Lydia with assistance in lifting packages, and Lydia requests placement in the employer's light duty program, which is used for drivers who have on-the-job injuries.



Tamara's position at a retail establishment involves working as a cashier and folding and putting away clothing. In her final trimester of pregnancy, Tamara develops carpal tunnel syndrome that makes gripping objects and buttoning clothing difficult. Tamara seeks the temporary suspension of the essential functions of folding and putting away clothing. The employer provides the accommodation and temporarily assigns Tamara to greeting and assisting customers, tasks that cashiers are normally assigned to on a rotating basis. When she returns to work after she gives birth, Tamara continues to experience carpal tunnel symptoms, which her doctor believes will cease in approximately 16 weeks.

Qualified Employee



Qualified Employee

Nisha, a nurse assistant working in a large elder care facility, is advised in the fourth month of her pregnancy to stop lifting more than 25 pounds for the remainder of the pregnancy. One of the essential functions of the job is to assist patients in dressing, bathing, and moving from and to their beds, tasks that typically require lifting more than 25 pounds. Nisha sends an email to human resources asking that she not be required to lift more than 25 pounds for the remainder of her pregnancy and requesting a place in the established light duty program under which employees who are hurt on the job take on different duties while coworkers take on their temporarily suspended duties.



Qualified Employee

Tallah, a newly hired cashier at a small bookstore, has a miscarriage in the third month of pregnancy and asks a supervisor for 10 days of leave to recover. As a new employee, Tallah has only earned 2 days of paid leave, she is not covered by the FMLA, and the employer does not have a company policy regarding the provision of unpaid leave.

Qualified Employee

Raim, a social worker, is pregnant. As her third trimester starts, she is feeling more fatigue and needs more rest. She asks her supervisor if she can telework and see clients virtually so she can lie down and take rest breaks between client appointments.



Reasonable Accommodation Example

Brooke, a research assistant who is in her first trimester of pregnancy, asks the lead researcher in the laboratory for a temporary workspace that would allow her to work in a well-ventilated area because her work involves hazardous chemicals that her health care provider has told her to avoid. There are several research projects she can work on that do not involve exposure to hazardous chemicals.



Failure to Provide Equal Employment Opportunity

Yasmin's job requires her to travel to meet with clients. Because of her pregnancy, she is not able to travel for three months. She asks that she be allowed to conduct her client meetings via video conferencing. Although this accommodation would allow her to perform her essential job functions and would not impose an undue hardship, her employer reassigns her to smaller, local accounts.



Failure to Provide Equal Employment Opportunity



Emily is a candidate for a police officer position. The application process takes place over several months and has multiple steps, one of which is a physical agility test. By the time it is Emily's turn to take the test, she is 7 months pregnant. To avoid risk to her health and the health of her pregnancy, Emily asks that the test be postponed and that her application be kept active so that once she has recovered from childbirth, she can resume the application process and not have to re-apply.

Forced Accommodation

Kia, a restaurant server, is pregnant. She asks for additional breaks during her shifts as her pregnancy progresses because she feels tired, and her feet are swelling. Her employer, without engaging in the interactive process with Kia, directs Kia to take host shifts for the remainder of her pregnancy, because it allows her to sit for long periods.



Interim Reasonable Accommodations

Alicia is pregnant and works in a fulfillment center. She regularly moves boxes that weigh 15 to 20 lbs. On her Saturday shift, she informs her supervisor, Michelle, that she is pregnant and that she is worried about lifting these packages. Michelle recognizes that Alicia is requesting a reasonable accommodation. While Michelle tells Alicia that she needs to wait until Monday to consult with human resources on the next steps, Michelle also immediately offers a cart to move boxes and assigns her to a line that has lighter packages.

On Monday, Michelle tells Alicia that she will be provided with a hoist to help Alicia lift packages, but it will take a few days before it is installed. In the meantime, Alicia can continue to use the cart and work the lighter line. Once the hoist arrives, Alicia is able to use it while working on her usual line.





Nour is pregnant, and she drives a delivery van. Her employer uses vans that do not have air conditioning. It is summer and the temperature is over 100 degrees. Nour tells her supervisor she is pregnant and needs a change at work because of the risk to her health and the health of her pregnancy because of the excessive heat. Her supervisor orders equipment that will help Nour, such as a personal cooling vest or neck fan. While waiting for the equipment to be delivered, the employer does not have other possible work that Nour can do.

Interim Reasonable Accommodations

Leave as an Accommodation

Hanh works in a call center that has a "no-fault" attendance policy where employees accrue penalty points for all absences and late arrivals, regardless of the reason for the lateness or absence. The policy allows for discipline or termination when an employee accrues enough points within a certain time period. Hanh gave birth and has had some complications for which she occasionally needs time off, and she also needs to attend medical appointments. Employer granted accommodation of being able to arrive up to one hour late on certain days. However, she accrues penalty points under the no-fault attendance policy.

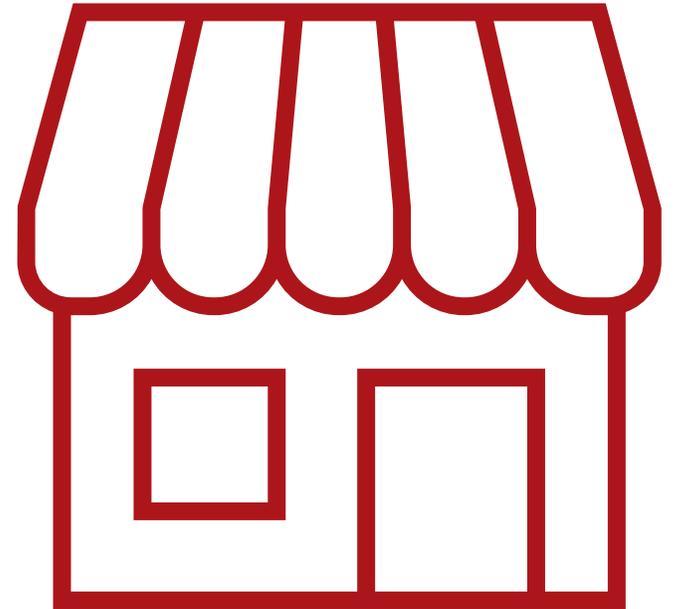


Predictable Assessments

Jazmin, a pregnant teacher who typically is only able to use the bathroom when her class is at lunch, requests additional bathroom breaks during her sixth month of pregnancy. Jazmin's need for additional bathroom breaks is a physical or mental condition related to, affected by, or arising out of pregnancy.

Undue Hardship?

Patricia, a convenience store clerk, requests that she be allowed to switch from working full-time to part-time work for the last 3 months of her pregnancy due to extreme fatigue. The store assigns two clerks per shift. If Patricia's hours are reduced, the other clerk's workload will increase significantly beyond his ability to handle his responsibilities. The store determines that such an arrangement will result in inadequate coverage to serve customers in a timely manner, keep the shelves stocked, and maintain store security. It also would be infeasible for the store to hire a temporary worker on short notice at this time.



Undue Hardship?



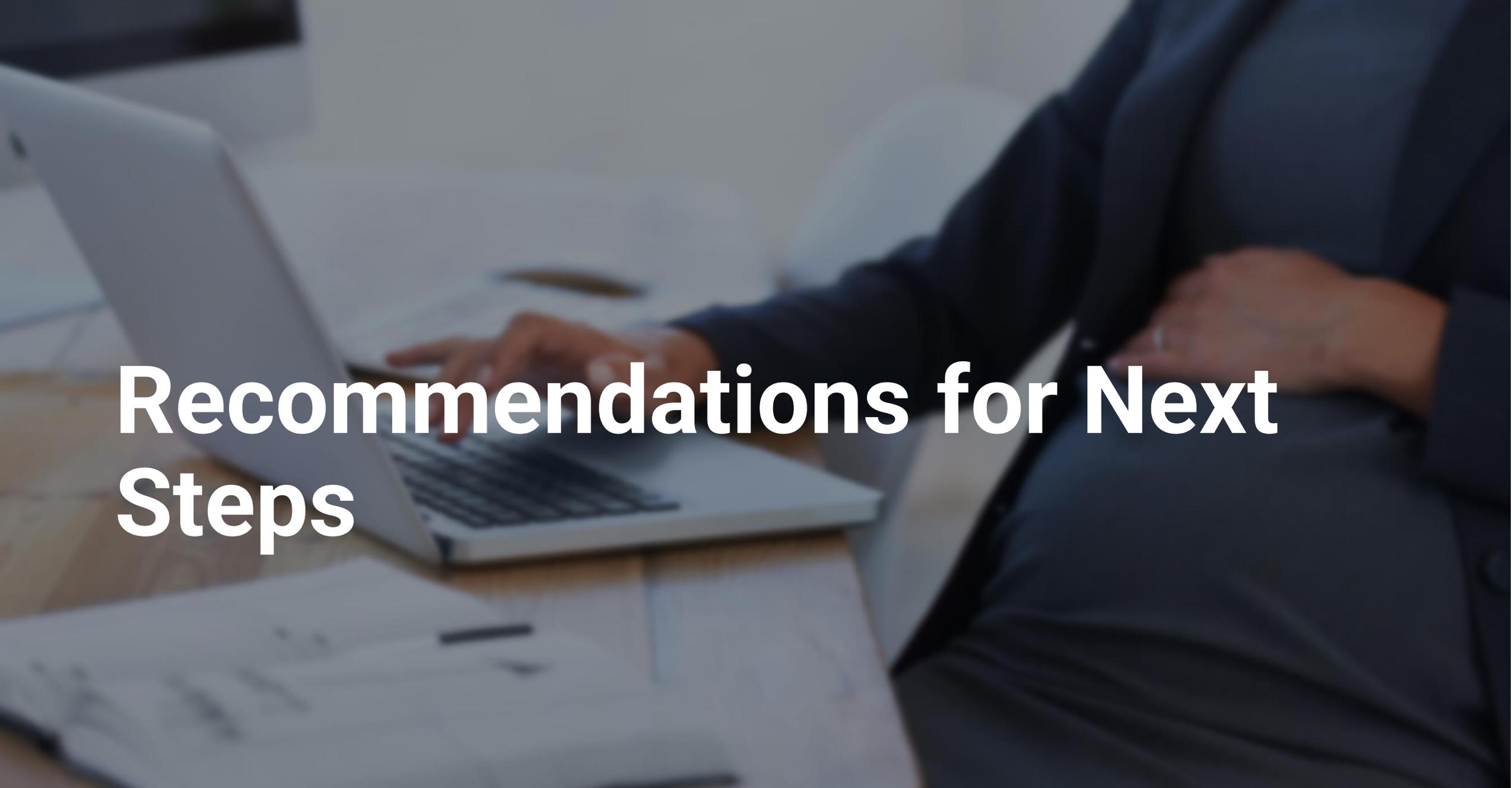
Shirin, a dental hygienist who is undergoing IVF treatments, needs to attend medical appointments for the IVF treatment near her house every other day and is fatigued. She asks her supervisor if the essential function of seeing patients can be temporarily suspended, so that she does not see patients three days a week and instead can work from home on those days assisting with billing and insurance claims, work for which she is qualified.

Employee Preference

- Leah asks for telework due to morning sickness. Through the interactive process, it is determined that either telework or a later schedule combined with an hour rest break in the afternoon would allow Leah to perform the essential functions of her job without imposing an undue hardship.
- Although Leah prefers telework, the employer would rather Leah be in the office.

Additional Considerations

Beryl is a quality control inspector at a labware manufacturing plant. She is in the early stage of pregnancy, and Beryl's employer does not know that she is pregnant. In the middle of her shift, Beryl suddenly experiences cramping and bleeding. She tells her supervisor that she thinks she is having a miscarriage and needs to leave. The next afternoon, Beryl's partner calls the supervisor and explains that Beryl will be resting at home for the next 24 hours. Following time at home, Beryl returns to the workplace and follows up with her supervisor regarding her emergency departure.



Recommendations for Next Steps

Next Steps

PWFA

- Review your policies and procedures
- Carefully evaluate your forms
- Train your HR team, managers, first-line supervisors, and others
- Document interactions and related discussions



Next Steps



PUMP Act

- Provide training to human resources and supervisors, and to those who administer requests for accommodation
- Communicate with employees to ensure that breaks and pumping space are working
- Review or update policies regarding break time
- Determine and designate appropriate spaces for lactating employees
- Be aware of any state or local laws that may also protect lactating employees



Questions?

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