

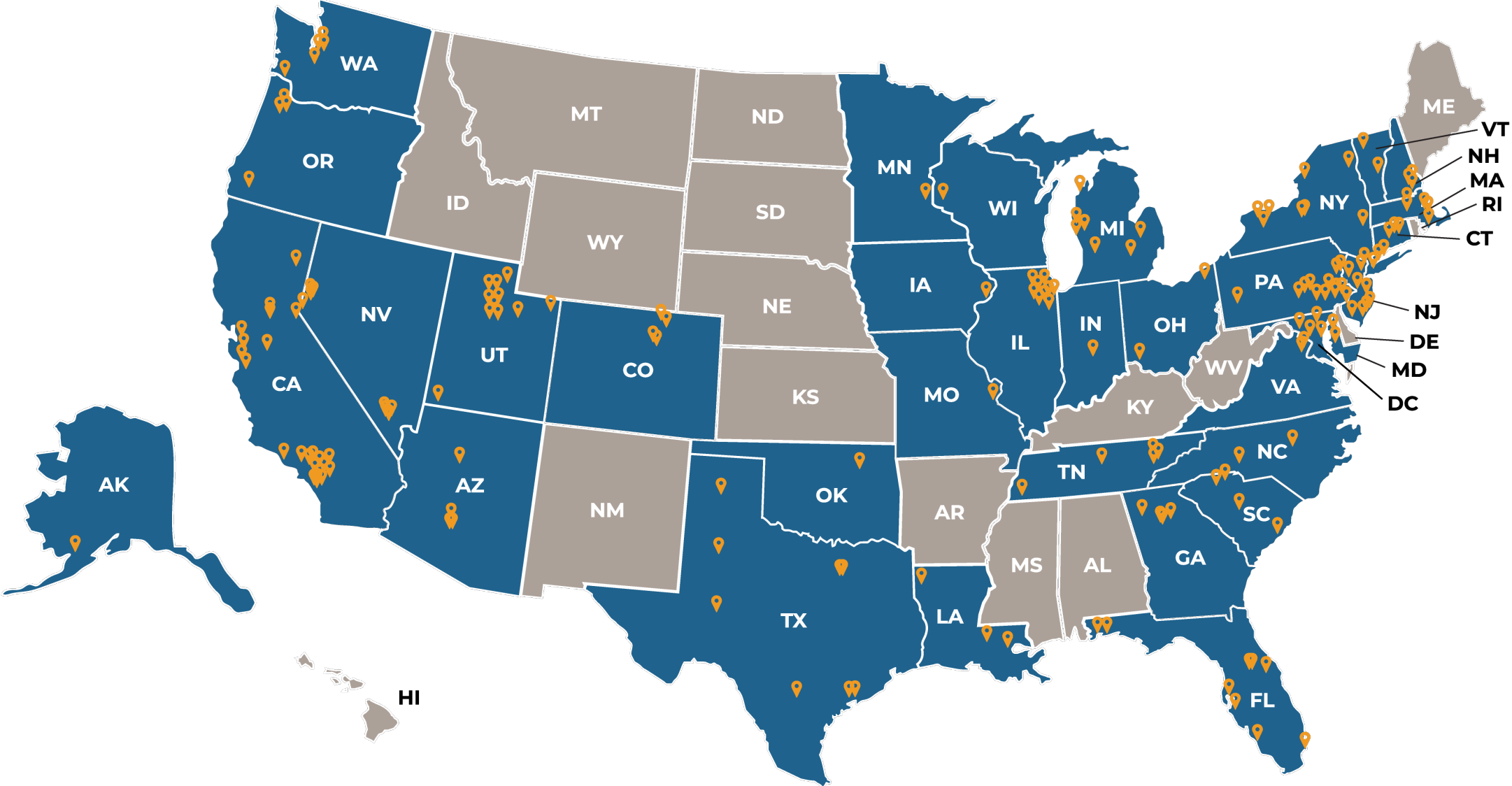
A background image showing a man and a woman smiling and looking at each other. The image is overlaid with a semi-transparent teal and blue geometric pattern of overlapping triangles.

Welcome to Our Webinar Series:
What Maryland Employers Need to Know to
Prepare for the Paid Family and Medical Leave Law

Doug Desmarais, Esq. | *Smith & Downey*

April 18, 2023

Welcome to clients & friends of our Alera Mid-Atlantic Region Partner Firms!



During the Webinar if You
Have Any Questions, Please
Feel Free to:

- Enter questions via the “Chat” feature in the Zoom meeting

Have Questions?

Reminders

Complete our 2 -minute post webinar [SURVEY](#). All completed surveys will be entered to win a \$100 Goldbelly Gift Card!



Webinars

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April 20th, 2 PM –3 PM EST

[The Mindful Workplace: Addressing Employees' Mental Health](#)

May 18th, 2 PM –3 PM EST

[Untangling the HR Tech Market –The Disruption Never Stops](#)

May 24th, 2 PM –3 PM EST

[Quarterly Compliance Update](#)

June 6th, 2 PM –3 PM EST

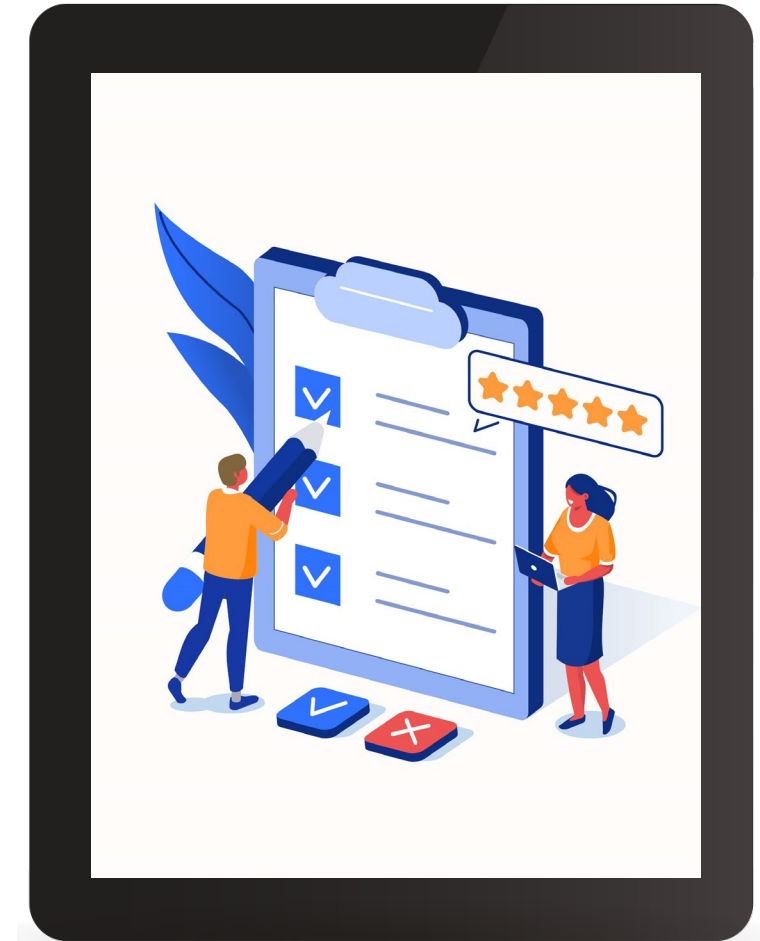
Upcoming Events

2023 Mid Atlantic Benchmarking Survey

If you are a Mid Atlantic employer with 50 or more employees, then you are invited to participate in the 2023 Mid Atlantic Benchmarking Survey

Our survey provides companies with comparable benchmarking data for:

- Medical Plans
- Dental, Life, and Disability Benefits
- Innovative Benefits & Strategies
- Wellness & Vision
- Other Specialty Benefits
- Click [Here for More Information!](#)



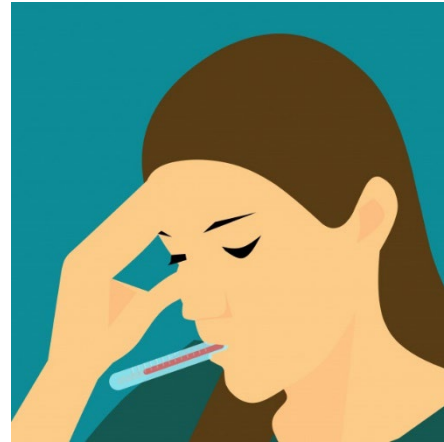
Welcome

Doug Desmarais, Esq., *Smith & Downey*

Maryland Time to Care Act:

*****MAJOR UPDATE*****

April 18, 2023



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Your Presenter

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Note that this presentation is intended as a general discussion of the law and is not intended as legal advice for any particular situation.

Overview

- Requires Maryland employers to provide paid family and medical leave (FML) to eligible employees for covered reasons
- Maryland joins nine states and the District of Columbia with paid FML laws
- Act establishes a Fund into which employers and employees make contributions, and from which the state pays for benefits

How did we get here?

- March 31, 2022 - Senate Bill 275 (the Act) passed the legislature and was submitted to the governor
- April 8, 2022 - Governor Hogan vetoed the bill
- April 9, 2022 - Legislators in the Maryland General Assembly voted to override the veto and ultimately passed the Act
- June 1, 2022 – Initial Effective Date of the Act.

Senate Bill 828

- Delays the start date for employer and employee contributions to **October 1, 2024**.
- Delays the start date for benefits payments to covered employees to **January 1, 2026**.

Senate Bill 828 (Continued)

- The total rate of contribution, i.e., the percent of wages up to the Social Security wage base (currently \$160,200) to be split 50/50 percent, will be announced by the Maryland DOL by **October 1, 2023**.
- Cannot exceed **1.2% percent** of an employee's covered wages.
- Employees cannot be required to exhaust all employer-paid leave.
- Employees and employers may voluntarily agree to use employer-paid leave to allow employees to receive full wages.

Who is a covered employer?

- Act applies to all public and private employers with 1+ employees, including private schools
- May be eligible for an exemption under the Act if the employer provides eligible employees with benefits and/or insurance that meets/exceeds requirements of Act
- Must submit a request to the Maryland DOL to be approved for exemption

How are Benefits Funded?

- The Act establishes the Maryland Family and Medical Leave Insurance Fund (the “Fund”)
- Fund is administered by the Maryland Secretary of Labor. DOL will adopt regulations for the Fund by [July 1, 2024](#).
- Both employers (with 15+ employees) and employees are required to contribute to the Fund
- Employee contributions made through payroll deductions
- **[Contributions begin on October 1, 2024](#)**



Who controls the Fund?

- The State Treasurer is custodian of the Fund and will manage the Fund in accordance with MD DOL regulations
- **The Fund will consist of:**
 - Employee Contributions
 - Self-Employed Individual Contributions
 - Employer Contributions
 - Money paid for reimbursing benefits paid in error
 - Interest earned on money in the Fund
 - Money received by the Fund from any other source



When do Benefits Begin?

- **January 1, 2026** – eligible employees may begin taking benefits
- Benefits are paid directly by the State
- Employees are paid partial wage replacement based on a range of \$50 to \$1,000 per week (may increase over time to account for inflation)
- Pay scale varies based on income, with lower-income workers receiving the highest portion of their income, up to 90%.



How much do employers have to contribute?

- The total contribution rate is capped at 1.2% of an employee's wages, up to and including the Social Security wage base (currently \$160,200).
- The total contribution rate will be adjusted annually by the Secretary of Labor,
- The contribution will be **split evenly, 50-50**, between the employer and the employee.

What if we want to be generous?

- Employers may choose to pay a portion of an employee's required contributions
- It is unclear whether an employer can elect to pay a portion of the contribution for some employees but not others



Will contribution rates increase over time?

- Likely!
- Secretary of Labor will make **annual recommendations** regarding the appropriate total rate of contribution and the appropriate cost-sharing formula between employers and employees

Who is an Eligible Employee?

- Full-time and Part-time employees are eligible
- Employees are eligible if they worked at least **680 hours** in the 12-month period immediately preceding the date the leave begins
- Example – FT employee working 40 hours/week is eligible after approximately 17 weeks



Are part-time employees covered?

- Yes!
- 680 hour threshold means that many part-time employees will qualify
- For example, an employee who works 14 hours per week will qualify for benefits within one year of part-time employment



What are Qualifying Reasons to Use Leave?

- **Parental Leave** – Care for a newborn child or child newly-placed for adoption, foster care, or kinship care, during the first year after child's birth, adoption, or placement
- **Employee's Own Serious Health Condition** – Attend to a serious health condition that results in the employee being unable to perform the functions of their position
- **Family Member's Serious Health Condition**

Qualifying Reasons, Cont.

- **Next of Kin Service Members** – Care for a service member with a serious health condition resulting from military service who is the employee’s “next of kin”
- **Military Exigencies** – Attend to a qualifying exigency arising out of the deployment of a service member who is a family member of the covered employee



What is a “Qualifying Exigency”?

- **The employee is a family member of a “service member” and needs leave:**
 - (1) Because the service member received notice of deployment within 7 days before the deployment is to begin
 - (2) To attend military events and related activities related to the active duty of the service member
 - (3) To arrange, provide, or attend child care or school activities, only when the service member is on active duty call or active duty status



Qualifying Exigency, Cont.

- **The employee is a family member of a “service member” and needs leave...**
- (4) To make financial and legal arrangements for the service member’s absence, or because of the absence
- (5) To attend to counseling that (a) is needed due to the active duty or call to active duty status of the service member and (b) is provided by an individual who is not a licensed health care provider
- (6) To spend up to 15 calendar days with a service member who is on short-term temporary rest and recuperation leave during the period of deployment

“Qualifying Exigency,” Cont.

- **The employee is a family member of a “service member” and needs leave...**
- (7) To attend post-deployment activities for a period of 90 days immediately following termination of active status
- (8) To attend to matters related to the death of the service member while on active duty status
- (9) To arrange for or provide alternative care for a parent of the service member when the parent is incapable of self-care and the covered active duty or call to active duty necessitates a change
- (10) Because of any other issues that arise out of active duty or a call to active duty that an employer and covered employee agree should be covered

What is a “Serious Health Condition”?

- An illness, injury, impairment, or a physical or mental condition that involves:
 - (1) Inpatient care – hospital, hospice, residential health care facility
 - (2) continued treatment by a licensed health care provider or
 - (3) continued treatment or supervision at home by a licensed health care provider (LHCP) or other competent individual under the supervision of LHCP
- Includes conditions that continue over an extended period of time and require intermittent treatment

“Treatment” includes...

- ✓ Exams or testing – determine extent of the condition
- ✓ Ongoing or periodic evaluations
- ✓ Actual treatment



Who is a “family member”?

- **Child**

- Biological
- Adopted
- Foster
- Stepchild
- Child for whom the employee has legal/physical custody or guardianship
- Child for whom the employee stands in “loco parentis”
- Ward of the employee or the employee’s spouse

- **Parent – of the Employee or the Employee’s Spouse (i.e., “In-Laws”)**

- Biological
- Adoptive
- Foster
- Stepparent
- Legal guardian
- Individual who acted as a parent or stood in “loco parentis” to the employee or employee’s spouse when they were a minor

Family Members, Cont.

- **Spouse and Domestic Partner**
- **Grandparent or Grandchild**
 - Biological
 - Adopted
 - Foster
 - Step-Grandparent/Child
- **Sibling**
 - Biological
 - Adopted
 - Foster
 - Step-Sibling



How Much Leave is Available?

- Employees can generally take up to **12 weeks** of Paid Family Medical Leave (PFML) per year
- Employees may take an **additional 12 weeks (i.e., up to 24 weeks/year)** if they use parental leave and need additional time for their own serious health condition, **or vice versa**
- Leave runs concurrently with any federal FMLA



Can leave be taken on an intermittent basis?

- **Yes!**
- Employees must:
 - make a “reasonable effort” to schedule leave in a manner that does not unduly disrupt operations
 - Provide employer with reasonable and practicable prior notice of the reason for which intermittent leave is necessary
 - Take intermittent leave in increments of 4+ hours

Do employees receive other benefits while on leave?

- **Yes!**
- Employers must provide health benefits in the same manner as they do for federal FMLA



How does this leave interact with our other paid leave programs?

- **Law is “gray” on this area – look to regulations**
- Employers may already have certain paid leave programs in place – e.g., short-term disability, paid parental leave, Maryland Healthy Working Families Act
- Employees must “exhaust all employer-provided leave” that is available before receiving these paid Family Medical Leave benefits
- But this section is not to be construed to reduce weeks of leave for which benefits may be paid

Is Leave Job-Protected?

- **Yes!**
- Employers required to provide job protection and “restore the covered individual to an equivalent position of employment,” upon return from leave.



Are there any exceptions to job protection?

- Employees may be fired for “Cause” while on leave
- Employer may deny comparable restoration if (1) the denial is necessary to prevent *substantial and grievous economic injury* to the employer; (2) the employer notifies the individual; and (3) if the employee is already on leave, the employee elects not to return after receiving such notice

Do employees have to provide advance notice of leave?

- If need for leave is foreseeable: employer can require the employee provide written notice at least 30 days before taking the leave
- If the need for leave is not foreseeable, the employer can require:
 - Notice be provided as soon as practicable
 - Employees must comply with employer's regular requirements for requesting or reporting other leave

Do we have to provide employees' notice of the law?

- Employers must inform employees of their rights under the Act in writing upon hiring **and each year following**
- When employee requests Family Medical leave or when employer knows that employee's leave may be for a Family Medical reason, employer must notify the employee of eligibility **within five business days**
- DOL will develop standard notices

How Will we Know if an Employee Receives Benefits?

- Employees submit applications for benefits directly to the State
- The State is required to notify employers within 5 business days after an employee files a claim
- The State may request additional information from employer to confirm employee eligibility



How does an employee apply for benefits?

- Employees completes application and provides certification for a claim
- Certification for serious health condition must include:
 - Date condition began
 - Probable duration
 - Appropriate facts within knowledge of licensed health care provider
 - If for family member – statement that employee needs to care for family member and estimate of time required
 - If for employee's own condition – statement employee unable to perform essential functions of the position
 - For intermittent leave – expected duration

...But do we really have to comply?

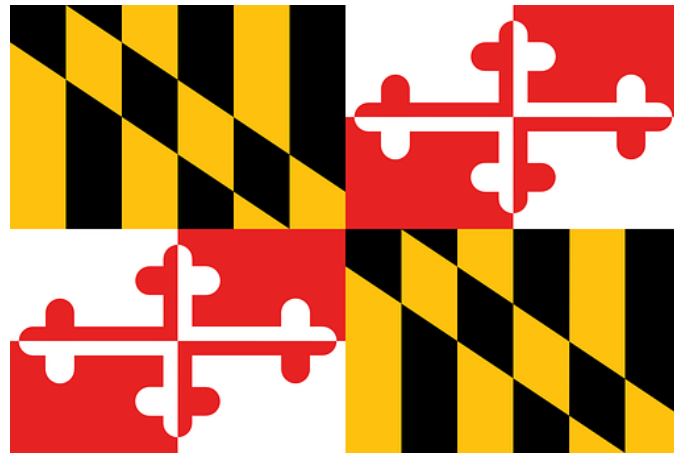
- **Employees cannot waive rights under the Act.** Any agreement to waive benefits is “null and void.”
- **Employer Policies** – May provide for greater benefits, but not fewer
- **Collective Bargaining Agreements** – May provide for greater benefits, but not fewer

Where can we find more detailed rules?

- Regulations are being developed by the DOL
- These regulations “shall” be consistent with the federal FMLA regulations and relevant state laws “to the extent they do not conflict” with the Act

Where can we find application forms, etc.?

- Maryland Department of Labor is tasked with establishing procedures and forms for filing claims for benefits
- Forms should eventually be available on the MD DOL website:
<https://www.dllr.state.md.us/>



How will the Act be Enforced?

- MD Secretary of Labor can receive complaints, conduct investigations, & bring lawsuits for non-compliance
- Penalties for failure to contribute include: (1) payment of the amount in contributions owed plus interest; (2) a penalty of no more than twice the amount owed; and (3) an audit
- Civil penalties may also be sought for general non-compliance - \$1,000 per employee



Can employees sue?

- Yes – But must file complaint with MD DOL first and receive an Order
- Employee may bring a lawsuit within 3 years to enforce the order
- Prevailing employee may receive up to: (1) 3x value of lost wages and damages; (2) punitive damages; (3) attorneys' fees; and (4) injunctive relief



What's Next? Could my local county/city enact a similar law?

- Not after June 1st!
- Act preempts the authority of a local jurisdiction in MD to enact a local paid family and medical leave insurance program

Recap – Important Dates

- **June 1, 2022** – Effective Date
- **June 1, 2023** – Effective Date of SB 828
- **July 1, 2023** - DOL to set rates of contribution and regulations
- **October 1, 2024** – Contributions Begin
- **January 1, 2026** – Benefits Begin

Pregnant Workers Fairness Act (“PWFA”)

What is the Pregnant Workers Fairness Act?

1. The Pregnant Workers Fairness Act (PWFA) is a new law that requires covered employers to provide “reasonable accommodations” to a worker’s known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an “undue hardship.”
2. The PWFA applies only to accommodations. Existing laws that the EEOC enforces make it illegal to fire or otherwise discriminate against workers on the basis of pregnancy, childbirth, or related medical conditions.
3. The PWFA does not replace federal, state, or local laws that are **more protective** of workers affected by pregnancy, childbirth, or related medical conditions. More than 30 states and cities have laws that provide accommodations for pregnant workers.

PWFA (Continued)

When does the PWFA go into effect, and will the public have input on any regulations?

- The PWFA goes into effect on June 27, 2023. The EEOC is required to issue regulations to carry out the law. The EEOC will issue a proposed version of the PWFA regulations so the public can give their input and offer comments before the regulations become final.

PWFA (Continued)

What else does the PWFA prohibit? Employers cannot:

1. Require an employee to accept an accommodation without a discussion about the accommodation between the worker and the employer;
2. Deny a job or other employment opportunities to a qualified employee or applicant based on the person's need for a reasonable accommodation;
3. Require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working;
4. Retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
5. Interfere with any individual's rights under the PWFA.

PWFA (Continued)

As with the case of the ADA, employers are required to provide reasonable accommodations unless they would cause an “undue hardship” on the employer’s operations. An “undue hardship” is significant difficulty or expense for the employer.

PWFA (Continued)

What are some examples of reasonable accommodations for pregnant workers?

- the ability to sit or drink water;
- receive closer parking;
- have flexible hours;
- receive appropriately sized uniforms and safety apparel;
- receive additional break time to use the bathroom, eat, and rest;
- take leave or time off to recover from childbirth; and
- be excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy.

PWFA (Continued)

Who does the PWFA protect?

The PWFA protects employees and applicants of “covered employers” who have known limitations related to pregnancy, childbirth, or related medical conditions.

“Covered employers” include private and public sector employers with at least 15 employees, Congress, Federal agencies, employment agencies, and labor organizations.

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

- Under the Fair Labor Standards Act (FLSA), most nursing employees have the right to reasonable break time and a place, other than a bathroom, that is shielded from view to express breast milk while at work. This right is available for up to one year after the child’s birth.

Examples of PUMP Act Breaks

Examples

- Julia cleans guest rooms at hotels on weekends. Julia is entitled to break time and space under the FLSA for one year after the birth of a child.
- Sam is a registered nurse who is exempt from receiving overtime pay under the FLSA. Beginning on December 29, 2022, Sam is entitled to break time and space for one year after the birth of a child.
- Irina is the shift manager at a fast-food restaurant with several locations and meets all requirements to be exempt from overtime pay requirements under the FLSA. When Irina returns to work after the birth of her child in March of 2023, in order to comply with the law, her employer provides an office to take four breaks a day of 25 minutes each to pump breast milk for the nursing child.

PUMP ACT: Covered Employees

- As of December 29, 2022, nearly all FLSA-covered employees have the right to take needed time and to access an appropriate space to express breast milk for a nursing child for up to one year after the child's birth.
- Certain employees of airlines, railroads, and motorcoach carriers are exempt from nursing employee protections under the FLSA. Employees who are exempted may be entitled to break and/or space protections under State or local laws.
- Employers with fewer than 50 employees are not subject to the FLSA break time and space requirements if compliance with the provision would impose an undue hardship. Whether compliance would be an undue hardship is determined by looking at the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, and structure of the employer's business. All employees who work for the covered employer, regardless of work site, are counted when determining whether this exemption may apply.

Private Space to Pump Breast Milk

- Covered employees must be provided with “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.” Under the FLSA, a bathroom, even if private, **is not a permissible location** for the employer to provide for pumping breast milk.
- The location provided must be functional as a space for expressing breast milk. If the space is not dedicated to the nursing employee’s use, it must be available when needed by the employee in order to meet the statutory requirement. A space temporarily created or converted into a space for expressing breast milk or made available when needed by the nursing employee is sufficient provided that the space is shielded from view and free from any intrusion from co-workers and the public.
- Workers who telework must also be free from observation by any employer-provided or required video system, including computer camera, security camera, or web conferencing platform.

Break Time to Pump Breast Milk

- Most employees have the right to take reasonable break time to express breast milk for their nursing child. For **one year after the child's birth**, covered employees may take reasonable break time **“each time such employee has need to express the milk.”** An employer may not deny a covered employee a needed break to pump.
- The frequency and duration of breaks needed to express milk will likely vary depending on factors related to the nursing employee and the child.
- Factors such as the location of the space and the steps reasonably necessary to express breast milk, such as pump setup, can also affect the duration of time an employee will need to express milk.
- Employees who telework are eligible to take pump breaks under the FLSA on the same basis as other employees.

PUMP Act: Compensation

Under the FLSA, when an employee is using break time at work to express breast milk they either:

- Must be completely relieved from duty; or
- Must be paid for the break time.
- Further, when employers provide paid breaks, an employee who uses such break time to pump breast milk must be compensated in the same way that other employees are compensated for break time.

PUMP Act: Remedies for Violations

Beginning April 28, 2023, an employer who violates an employee's right to reasonable break time and space to pump breast milk will be liable for appropriate legal or equitable remedies under the FLSA. Remedies may include employment, reinstatement, promotion, and the payment of wages lost and an additional 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 remedies are available regardless of whether the employee has also experienced retaliation.

PUMP Act Remedies (Cont.)

An employee may file a complaint with the Wage and Hour Division or may file a private cause of action seeking appropriate remedies. Special procedures may apply to filing a private action where an employer has failed to provide an employee with an appropriate space to pump. Special procedures **do not apply** before an employee or other party can file a complaint with the Wage and Hour Division or when an employee brings a private suit to enforce the reasonable break time requirement.

The NLRB is Coming . . .

- Non-disparagement and confidentiality provisions have been declared unlawful for non-managerial employees. Employers should review separation agreement templates, and audit existing agreement, to assess possible adjustments.

QUESTIONS?



THANK YOU!

A background image showing two people, a woman and a man, looking at a laptop screen. The image is overlaid with a teal and blue geometric pattern of overlapping triangles.

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