

TCAA SUMMER CONFERENCE 2023

**MELISSA CRANFORD
AND ROBERTA “ROBIN”
CROSS**



MESSER * FORT * McDONALD

THE MUNICIPAL LAW FIRM

FRISCO | DALLAS | AUSTIN | ABILENE





DON'T LET BUMPS LEAD TO BLUNDERS

**PREGNANT WORKERS' FAIRNESS ACT (PWFA) AND
THE PROVIDING URGENT MATERNAL PROTECTIONS
FOR NURSING MOTHERS ACT ("PUMP ACT")**

**PREGNANT WORKERS FAIRNESS
ACT (PWFA)**

**H.R. 2617-1626, 117th Cong.
§ 103(1)**

**PROVIDING URGENT MATERNAL
PROTECTIONS FOR NURSING
MOTHERS ACT
(PUMP)**

**P.L 117-328, AMENDING
FLSA § 18D**





ASKING
TO USE A STOOL
DURING A LONG
SHIFT CAN GET YOU
FIRED...

IF YOU'RE A PREGNANT WORKER.

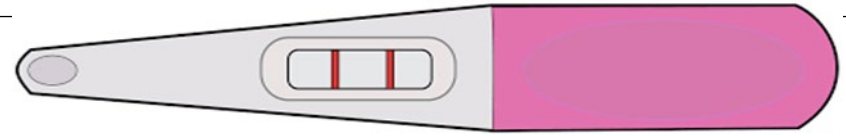
**NATIONAL
WOMEN'S
LAW CENTER**
EMPOWERING WOMEN

MAJOR CHANGES

Expands existing federal law (the PDA & ADA) to accommodate pregnant employees in at least **THREE** ways:



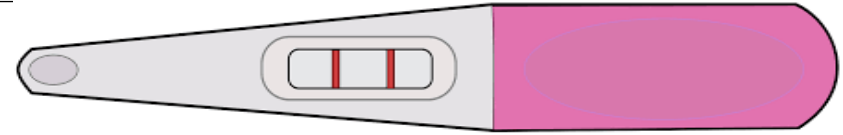
MAJOR CHANGE #1



PRE-PWFA - EMPLOYERS ONLY REQUIRED TO ACCOMMODATE PREGNANT EMPLOYEES' **IF** THEIR MEDICAL RESTRICTIONS MADE THEM **"DISABLED"** AS DEFINED BY THE ADA

PWFA: EMPLOYERS MUST MAKE **REASONABLE ACCOMMODATIONS FOR PREGNANCY-RELATED MEDICAL CONDITIONS W/O A "DISABILITY"** – IF ACCOMMODATIONS ARE NOT AN **"UNDUE HARDSHIP"**

MAJOR CHANGE #2

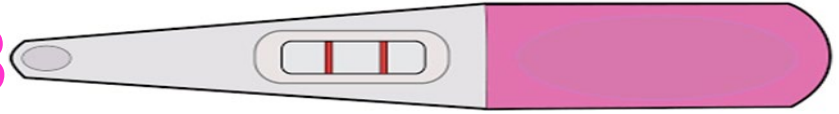


PRE-PWFA – PREGNANT EMPLOYEES MUST BE ABLE TO PERFORM THE ESSENTIAL FUNCTIONS OF THEIR JOBS, WITH OR WITHOUT ACCOMMODATIONS UNDER THE ADA

PWFA - PREGNANT EMPLOYEES MUST BE PROVIDED WITH REASONABLE ACCOMMODATIONS **EVEN IF THEY CANNOT PERFORM ALL ESSENTIAL FUNCTIONS** OF THE JOB, SO LONG AS THEIR INABILITY TO PERFORM THOSE ESSENTIAL FUNCTIONS IS TEMPORARY.



MAJOR CHANGE #3



PRE-PWFA - EMPLOYERS NOT REQUIRED TO PROVIDE ACCOMMODATION OF EMPLOYEE'S CHOICE, BUT MAY IMPLEMENT ALTERNATIVE ACCOMMODATIONS AFTER ENGAGING IN THE INTERACTIVE PROCESS.

PWFA: MAKES **LEAVE FOR PREGNANCY-RELATED RESTRICTIONS A "LAST RESORT" ACCOMMODATION,** *UNLESS THE EMPLOYEE REQUESTS IT.*

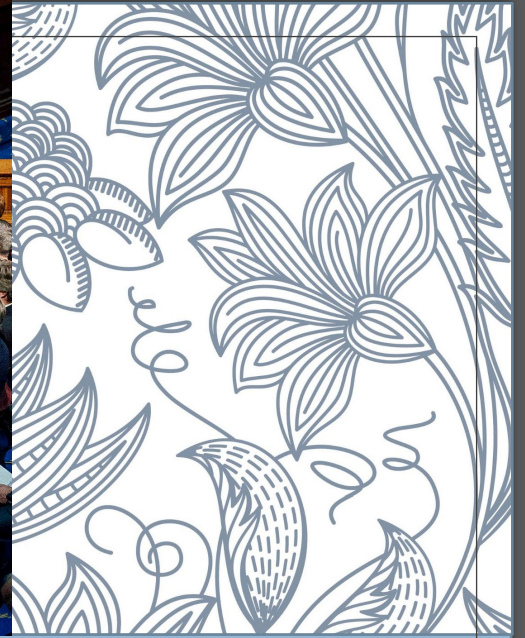
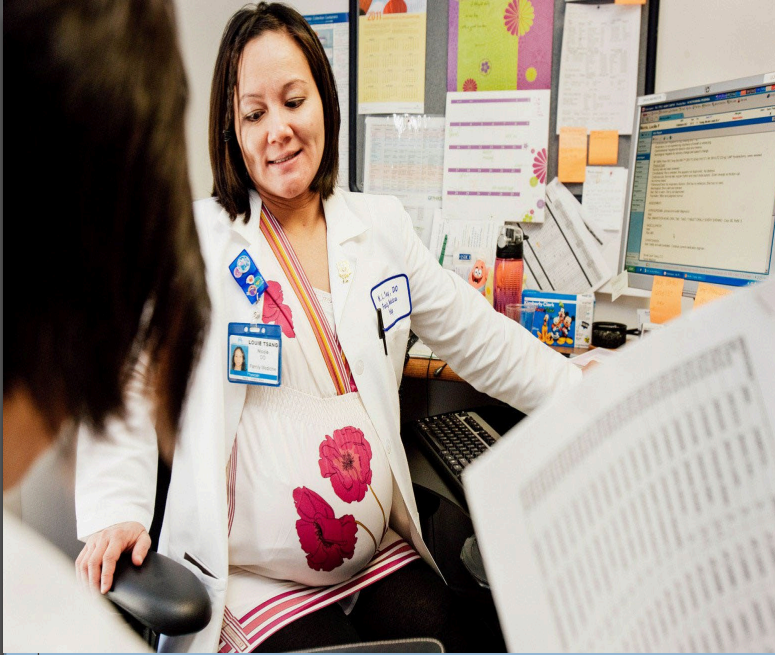


PWFA HAS A LENGTHY HISTORY:

INTRODUCED MAY 2012 - PASSED THE HOUSE MAY 4, 2021
STALLED IN SENATE UNTIL DECEMBER 2022; PASSED AS AMENDMENT TO
CONSOLIDATED APPROPRIATIONS ACT
SIGNED INTO LAW DECEMBER 29, 2022

EFFECTIVE JUNE 27, 2023

EEOC REGS EXPECTED DECEMBER 27, 2023



PWFA

Fills the Gap left by Pregnancy Discrimination Act
To provide reasonable accommodation for “the known limitations related to pregnancy, childbirth and related medical conditions of a qualified employee.”

APPLIES TO:

ALL EMPLOYERS WITH 15 OR MORE EMPLOYEES

COVERED EMPLOYEES INCLUDES EMPLOYEES & APPLICANTS

PROTECTIONS EXTEND TO “QUALIFIED EMPLOYEES”

PWFA



DOES "PREGNANT" MEAN "PREGNANT"?

PWFA:

- "known limitation" means
- "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions"





- the employee or employee's representative has communicated the condition to the employer;
- whether or not such condition meets the ADA definition of disability

"QUALIFIED EMPLOYEES"

Employee, who with or without reasonable accommodation, can perform their position's essential functions, **except** they are considered qualified if

- ❑ any inability to perform an essential function is **temporary**
- ❑ the essential function could be performed in the **near future**; and
- ❑ the inability to perform the essential function **can be reasonably accommodated.**



REASONABLE ACCOMMODATIONS:

- ability to sit;
- ability to drink water;
- access to closer parking;
- flexibility in work hours;
- provision of “appropriately sized uniforms and safety apparel”

<https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act>



REASONABLE ACCOMMODATIONS (cont.):

- Additional breaks - to eat and/or rest/use bathroom
- Extra leave/time off to recover from childbirth; and
- Ability to be excused from strenuous activities and/or activities involving exposure to hazardous compounds

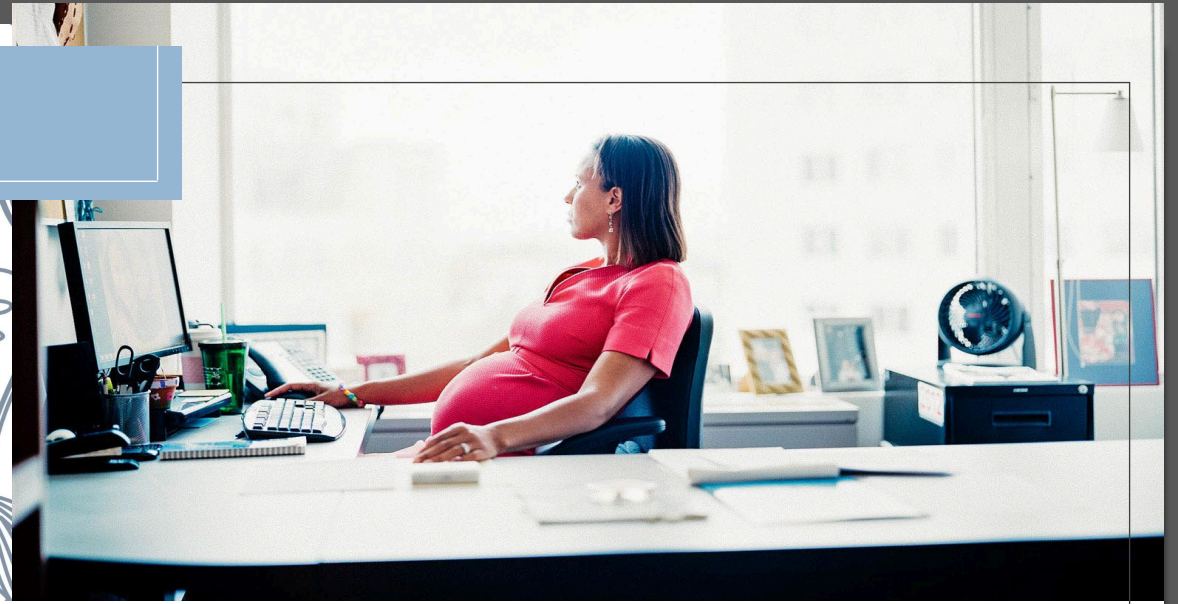




SUGGESTIONS FROM THE ADA:

- part-time/modify work schedules
- temporary reassign to a vacant position
- modify equipment or devices
- appropriate adjust or modify examinations
- modify training or application of policies





What should Employers Do (cont.)?

- Engage in & document “Good Faith” interaction; don’t assume, but *ask* about accommodations
- Offer *some* reasonable accommodation (Employer can avoid damages if can show it engaged in “good faith efforts”)



What should Employers Do? (cont.)

- What does “an equally effective opportunity” look like for certain positions?
- “Light duty” for First Responders
- *United Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991)



Review & update accommodation policies to ensure PWFA compliance

Is there any future for “no light duty policy?”

Effect of accommodations for pregnant employees on disability accommodations or workers' comp



Regulatory Guidance

The EEOC will issue regulations, including the provision of “examples of reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions,” by **December**

27, 2023

SUMMARY OF CHANGES UNDER THE PWFA

Pregnancy-related medical restrictions don't have to be disability to trigger duty to accommodate

Leave is accommodation of last resort (except to the extent the employee herself prefers leave)

Even if employee cannot perform essential functions of their jobs IF

Temporary &

can perform essential job function(s) in "the near future"

Remedies

- ❑ Borrows “powers, remedies, and procedures” from Title VII for private employers
- ❑ Employees may bring a private right of action after exhausting all administrative remedies
- ❑ EEOC/FEPA have the same investigatory & enforcement powers under PWFA as under Title VII





PUMP For Nursing Mothers Act



Law requiring Employer to provide lactation break time & space to previously uncovered workers went into effect on **December 29, 2022**

PUMP ACT

- Expanded enforcement provision, includes right to file suit for monetary damages, went into effect on **April 28, 2023**.
- Includes anti-retaliation provisions
- Employees may bring a private right of action after exhausting all administrative remedies





Amends Employer obligations under the **Fair Labor Standards Act (“FLSA”)** by:

- ❑ Requires employers provide reasonable break time & private location to **EXEMPT** employees to express breast milk for **one year** following the birth of a child.
- ❑ Private location = not a bathroom/ shielded from view & free from intrusions.
- ❑ Exempt employees are not “docked” for breaks



DOL GUIDANCE

[WHD Fact Sheet #73, FLSA Protections for Employees to Pump at Work](#)

[FLSA Protections to Pump at Work Frequently Asked Questions \(FAQs\)](#)


Most Recent (May 17, 2023)

<https://www.dol.gov/sites/dolgov/files/WHD/fab/2023-2.pdf>



EMPLOYEE BREAK GUIDANCE

- **Ad Hoc** - frequency, duration, and timing of breaks
- Even agreed schedule must be **Flexible**
- Avoid rigid adherence to scheduled times/break duration

- 
- ❑ **Currently FLSA doesn't require paid breaks:** Non-exempt employees are not entitled to pay if completely relieved from duty during pumping breaks.
 - ❑ DOL guidance: “[s]hort breaks, usually 20 minutes or less, *provided by the employer* must be counted as hours worked.” [Emphasis added]
 - ❑ BUT if non-exempt employee performs **any** work while pumping - e.g., taking a work-related phone call - employee must be paid for the break time.



**PUMPING IN
PROGRESS**

**Please
Do NOT
Disturb**

**THIS MAMA BRINGS
♥ HOME THE ♥
BACON & THE MILK**

www.exclusivepumping.com

PRIVATE SPACE & POSTING

- Guidance recommends lock & privacy signage
- “Functional” space for pumping: seating, a place for pump
- Suggests sink & electric outlet
- Recommends refrigerators or permissible coolers
- <https://www.dol.gov/agencies/whd/posters/flsa> Update Poster



MESSER * FORT * McDONALD

THE MUNICIPAL LAW FIRM

FRISCO | DALLAS | AUSTIN | ABILENE



QUESTIONS?

**MELISSA H. CRANFORD
PARTNER**

6371 Preston Rd • Ste 200 • Frisco, TX 75034 • Phone: 972.668.6400

Fax: 972.668.6414 • Toll Free: 855.668.6400

Melissa@txmunicipallaw.com • www.txmunicipallaw.com