Client Alert: New Year, New Protections for Pregnant and Lactating Employees, Restrictions on Pre-Dispute Non-Disclosure and Non-Disparagement Provisions

BY TRACY THOMAS BOLAND • JANUARY 9, 2023

Signed into law last month were three federal statutes impacting millions of U.S. workers: the Speak Out Act, the Pregnant Workers Fairness Act, and the Providing Urgent Maternal Protections for Nursing Mothers Act.

SPEAK OUT ACT

On December 7, 2022, President Biden signed into law the Speak Out Act. The Act prohibits the enforcement of pre-dispute non-disparagement and non-disclosure provisions regarding sexual assault and sexual harassment claims filed after December 7, 2022.

As defined in the Act, sexual assault disputes include any disputes that involve "nonconsensual sexual act[s] or sexual contact as such terms are defined [under relevant Federal], or similar applicable Tribal, or State law, including when the victim lacks capacity to consent." Sexual harassment disputes are defined as any disputes "relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal or State law." The Act defines non-disparagement clauses as provisions "in a contract or agreement that require[ ] 1 or more parties to the contract or agreement not to make a negative statement about another party that relates to the contract, agreement, claim, or case;" non-disclosure clauses are defined as provisions that require parties to a contract or agreement "not to disclose or discuss conduct, the existence of a settlement involving conduct, or information covered by the terms and conditions of the contract or agreement."

The Act does not restrict the use of such provisions in settlement agreements, though a number of states (including Maine, Vermont, New York and California) limit or prohibit the inclusion of such provisions in settlement agreements. Where relevant state law provides protections at least equal to those provided under the Act, the state law governs. Moreover, employers may still use non-disclosure provisions to protect trade secrets or proprietary information. Finally, the Act does not provide for any statutory penalties, with the only punitive measure being the unenforceability of the prohibited provision.

PREGNANT WORKERS FAIRNESS ACT

Included in the $1.7 trillion omnibus spending bill that was signed into law on December 29, 2022, the federal Pregnant Workers Fairness Act (PWFA) will require most employers to provide reasonable accommodations to applicants and employees who are pregnant, recently gave birth, or who are experiencing medical conditions related to pregnancy or childbirth. By its terms, the PWFA goes into effect on June 27, 2023, and applies to employers with 15 or more

employees. The PWFA directs the Equal Employment Opportunity Commission (EEOC) to issue implementing regulations by June 27, 2024, so more guidance about this law will be coming in the future.

Under the PWFA, employers are required to make reasonable accommodations to "the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee" unless the employer can demonstrate that the accommodation would impose an undue hardship. A "qualified employee" within the meaning of the PWFA is an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of a job. In contrast to the Americans with Disabilities Act (ADA), the PWFA expressly provides that an employee may still be "qualified" even if they are temporarily unable to perform an essential function of their position due to pregnancy, childbirth, or related conditions. Put another way, employees need not meet the definition of "disabled" under the ADA to be eligible for accommodations under this new law.

The PWFA bars employers from requiring a qualified employee to take paid or unpaid leave "if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee." Employers may not retaliate, that is they may not take an adverse action in the terms, conditions, or privileges of employment, because an employee has requested or used a reasonable accommodation related to pregnancy, childbirth, or related medical conditions.

Many states, including Massachusetts (with a statute by the same name), already have laws that provide similar protections to pregnant workers. To the extent that states and political subdivisions have laws that provide benefits and protections that exceed those provided by the PWFA, the state laws will govern.

PROVIDING URGENT MATERNAL PROTECTIONS FOR NURSING MOTHERS ACT

As part of the omnibus spending bill, the Providing Urgent Maternal Protections for Nursing Mothers Act (the PUMP Act) was also signed into law. While the Affordable Care Act and amendments to the Fair Labor Standards Act (FLSA), as well as some state laws like Massachusetts' Pregnant Workers Fairness Act, included lactation protections for hourly employees, the PUMP Act further amends the FLSA to expand those protections to salaried employees. Pursuant to the PUMP Act, employers are required to provide employees with reasonable breaks to express breastmilk for a one-year period and make available appropriate space to do so. If an employee is not completely relieved of all work duties during such breaks (if, for example, they're answering emails), such time must be considered hours worked.

Employees may file suit for violations of the PUMP Act beginning in April 2023. Prior to making a claim against an employer for failing to provide breaks or appropriate space, the employer must be provided with notice and a ten-day period to cure. The PUMP Act includes a "small employer" hardship exemption for businesses with less than 50 employees that demonstrate that compliance would cause undue hardship or expense. Airlines are entirely exempted from the PUMP Act, and there is a three-year implementation horizon for long-distance motor coach drivers and some railroad employees.

PRACTICE TIPS

Consistent with the Speak Out Act, employers should review agreements—including employment agreements, confidentiality agreements, and non-competes—and understand that the general non-disclosure and non-disparagement provisions in those agreements will not be enforceable against employees who have sexual misconduct claims that arise after they signed those agreements. Employers should revise blanket non-disclosure and non-disparagement provisions to specifically exclude future sexual misconduct claims. When resolving sexual misconduct claims, employers can continue to include non-disparagement and non-disclosure language in settlement agreements, so long as those provisions only apply to the settled claim, and not future claims.

While many jurisdictions already require employers to provide accommodations for pregnant and lactating employees, all employers should review policies and practices to ensure compliance with the PWFA and the PUMP Act, as well as state and local law. Employers should stay tuned for the release of PWFA implementing regulations, as well as expected guidance from the EEOC and the Department of Labor.

This alert aims to provide an overview of the Speak Out Act, the Pregnant Workers Fairness Act, and the Providing Urgent Maternal Protections for Nursing Mothers Act. Employers with questions about how to comply with these laws should consult their Bowditch attorney. We will continue to update you as implementation dates of the laws not yet in effect draw closer.

