



## WHAT TO EXPECT WHEN YOUR EMPLOYEE IS EXPECTING

*Several federal, New York State, and New York City laws apply to the periods before, during and after childbirth, adoption, and fostering of a child, and provide, among other things, protections against discrimination, reasonable accommodations, and paid and unpaid leave for employees. This outline summarizes basic provisions of federal, New York State and New York City laws applicable to certain employers (depending on their size, based on the number of employees). Frequently, more than one law may apply to a specific situation, and we recommend you consider applicable law at the city, state, and federal levels. This outline is not meant to be a complete list of all statutes that might be applicable to your organization, nor is it a complete summary of all of the provisions of each law. **The information in this outline does not constitute legal advice. Note that employment law changes constantly; it is therefore important to consult an employment lawyer to address your specific questions.***

### User Guide

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## ***I. While an Employee is Pregnant***

*A comprehensive and complex body of law protects pregnant employees at the New York City, New York State, and federal levels. Generally speaking, a pregnant employee should be allowed to continue working for as long as she is medically able. Applicable law protects an employee's ability to take paid and unpaid leave and/or temporary disability due to conditions related to pregnancy, to receive reasonable accommodations to perform a job's essential functions, and to work free of discrimination on the basis of pregnancy and familial status.*

### 1. Federal Law

#### **A. Unpaid Leave**

- (a) Family and Medical Leave Act (FMLA)**, which is enforced by the U.S. Department of Labor, provides eligible employees with up to 12 weeks of unpaid leave per year, during which time the employee's group health benefits must be maintained.<sup>1</sup>
- Leave may be taken in small blocks or as a reduced schedule.
  - **Which employees are eligible?**
    - Among others, an employee with a serious health condition that prevents the employee from performing essential job functions, *including incapacity due to pregnancy (including prenatal medical appointments, incapacity due to morning sickness and medically required bedrest).*<sup>2</sup>
    - Employee must have worked (1) at least 12 months, (2) at least 1,250 hours over past 12 months and (3) at a site where there are at least 50 employees within 75 miles.
  - **Does the FMLA apply to my organization?**
    - Applies to employers with 50 or more employees in the current or prior year.

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<sup>1</sup> FMLA provides 26 weeks of leave during a single 12-month period to care for a family member with a qualifying health condition connected to the family member's current or past military service.

<sup>2</sup> In addition, employers must provide an eligible employee with FMLA leave for any of the following reasons: (1) the birth and care of the newborn child of an employee within one year of birth; (2) the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement; (3) to care for an immediate family member (spouse, child or parent) with a serious health condition; or (4) any qualifying exigency arising out of the fact that the employee's spouse, child or parent is a military member on covered active duty.

- **Is there an undue hardship exception for employers?**
  - No.
- **Notice Requirements**
  - Employers are subject to several notice requirements, including posting on its premises a notice explaining the FMLA's provisions and providing information on procedures for filing complaints or violations of the FMLA.
- **Job Protection**
  - Upon return from FMLA leave, employees have the right to be reinstated to their position or an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.
- **Retaliation is prohibited:** Employers cannot retaliate against employees for requesting or using leave.
- **Interaction with Paid Leave:** Employer may allow or require employees to use accrued paid leave to run concurrently with FMLA leave.
- **More information:**
  - Primary law: [https://www.dol.gov/whd/fmla/applicable\\_laws.htm](https://www.dol.gov/whd/fmla/applicable_laws.htm)
  - DOL website: <https://www.dol.gov/general/topic/benefits-leave/fmla#lawregs>

## **B. Reasonable Accommodations**

(a) **Americans with Disabilities Act (ADA)**, which is enforced by the U.S. Equal Employment Opportunity Commission (EEOC), requires *reasonable accommodations* for employees with disabilities. Although pregnancy itself is not considered a disability, impairments from pregnancy (such as gestational diabetes or preeclampsia) and conditions resulting from the interaction of pregnancy and an underlying disability may constitute disabilities.

- **What is a *reasonable accommodation*?**
  - A change in the workplace or in the way things are customarily done that enables an individual with a disability to apply for a job, perform a job's essential functions or enjoy equal benefits of employment. Examples include allowing more frequent breaks, altering how job functions are performed, providing temporary assignment to a light duty position, or allowing an employee on bedrest to telework.
- **Does the ADA apply to my organization?**

- Applies to employers with 15 or more employees in the current or prior year.
- **Is there an undue hardship exception for employers?**
  - Yes, an accommodation requiring significant difficulty or expense in light of the nature of the accommodation and employer may be deemed an undue hardship.
- **Primary law:** <https://www.ada.gov/pubs/adastatute08.htm>

### C. Anti-discrimination laws

(a) **ADA** (see section I.1.B.(a) above): Employer may not discriminate against an individual whose pregnancy-related impairment constitutes a disability under the ADA.

(b) **Pregnancy Discrimination Act (PDA)**, which is enforced by the EEOC, requires employers to treat women affected by pregnancy, childbirth or related medical conditions (including the need to breastfeed) in the same manner as other applicants or employees who are similar in their ability or inability to work.

- **What is the scope of the PDA?**
  - Covers all aspects of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, such as leave and health insurance, and any other term or condition of employment.
  - Employees are protected from discrimination based on current pregnancy, past pregnancy, and potential pregnancy.
  - PDA does not require reasonable accommodations, but an employer must provide the same benefits of employment to women affected by pregnancy, childbirth, or related medical conditions that it provides to other persons who are similar in their ability or inability to work.
- **Does the PDA apply to my organization?**
  - Applies to employers with 15 or more employees in the current or prior year.
- **Primary law:** <https://www.eeoc.gov/laws/statutes/pregnancy.cfm>

## 2. New York State Law

### A. Temporary Disability Insurance (TDI)

(a) **New York Disability Benefits Law (NYDBL)**, which is enforced by the NYS Workers' Compensation Board, provides partial wage replacement through disability benefits when an employee is unable to work due to an

off-the-job illness or injury (*i.e.*, not covered by workers' compensation). Pregnancy-related conditions are included in the definition of disability for TDI.

- Employee is required to submit a medical report completed by a doctor or certified nurse midwife stating that her disability is due to pregnancy. If the disability starts more than four weeks before the anticipated birth date, the medical report should describe the specific pregnancy complication, rather than a general prognosis.
- **What are disability benefits and how are they paid for?**
  - They are cash payments equal to 50% of employee's average weekly wage, up to \$170 per week, paid for a maximum of 26 weeks during 52 consecutive weeks.
  - Coverage for disability benefits can be obtained by an employer through a disability benefits insurance carrier that is authorized by NYS Workers' Compensation Board.
  - Employer *may*, but is not required, to collect contributions from employees to offset the cost of TDI. Employee's contribution is 0.5% of his/her wages, up to \$0.60 per week.
- **Does the NYDBL apply to my organization?**
  - Not-for-profit organizations are required to obtain disability benefits insurance if they employ one or more employees.
- **Is there an undue hardship exception for employers?**
  - No.
- **Notice Requirements**
  - Employers are subject to several notice requirements, including requirement to post on its premises a form stating that provisions have been made for payment of disability benefits to all eligible employees.
- **Does NYDBL provide job protection?**
  - No.
- **Primary Law:**  
<http://www.wcb.ny.gov/content/main/wclaws/newlaws.jsp>

## **B. Reasonable Accommodations**

- (a) **New York Human Rights Law (NYHRL)**, which is enforced by the NYS Division of Human Rights, requires employers to provide reasonable accommodations of an employee's "pregnancy-related conditions."
- Any medically-advised restrictions or needs related to pregnancy trigger the need to accommodate; a pregnancy-related condition is considered a temporary disability under the NYHRL.

- *Reasonable accommodations* are actions taken to permit an employee with a pregnancy-related condition to perform the activities involved in the job in a reasonable manner, and may include reassignment to an available position, available light duty or modified or adjusted work schedules for needs such as doctor visits, frequent restroom breaks, or shorter shift assignments.
  - New York courts applying the NYHRL have held that employers are required to provide the same benefits and accommodations to employees affected by pregnancy as they provide in other instances of temporary disability.
- **Does the NYDBL apply to my organization?**
  - Applies to employers with four or more employees.
- **Is there an undue hardship exception for employers?**
  - Yes, an accommodation requiring significant difficulty or expense in light of the nature of the accommodation and employer may be deemed an undue hardship.
- **Primary law:** <https://dhr.ny.gov/law>

### C. Anti-discrimination

- (a) **New York Human Rights Law (NYHRL)** (see section I.2.B.(a) above): Prohibits employment discrimination on the basis of sex, which includes pregnancy discrimination.
- Additionally prohibits discrimination on the basis of *familial status*, which includes any person who is pregnant or has a child or is in the process of securing legal custody of a child.

## 3. New York City Law

### A. Paid Leave

- (a) **New York City Earned Safe and Sick Time Act (ESSTA)**, which is enforced by the NYC Department of Consumer Affairs, provides paid time off for (1) illnesses or health care visits of employees and their family members (child, parent, spouse, domestic partner, parent-in-law, grandparent, grandchild, sibling, child of spouse or domestic partner, any other blood relative of the employee and any other individual whose close association with the employee is the *equivalent of a family relationship*), and (2) absences from work (referred to as “safe time”) resulting from an employee or a family member of the employee being the victim of family offense matters, sexual offenses, stalking, or human trafficking.

- Full-time employees receive up to 40 hours of sick and/or safe time per year.
  - Employers who already provide paid leave that meets or exceeds ESSTA requirements are not required to provide additional sick leave.
- **Which employees are eligible?**
  - Employees working at least 80 hours per calendar year.
  - Doctor’s note is only required for absences of more than three consecutive days and is only to verify medical need for absence, not to state medical condition.
- **Does the ESSTA apply to my organization?**
  - Employers with five or more employees must provide paid sick leave. Employers with fewer than five employees must provide unpaid sick leave.
- **Is there an undue hardship exception for employers?**
  - No.
- **Notice requirement:** In addition to the requirement to provide notice of employees’ rights to sick leave, employers must provide notice to employees of “safe time” rights before June 4, 2018.
- **Retaliation is prohibited:** Employers cannot retaliate against employees for requesting or using sick leave.
- **Primary law:** <https://laws.council.nyc.gov/legislation/int-1313-2016/>

**B. Reasonable Accommodations**

(a) **New York City Human Rights Law (NYCHRL)**, which is enforced by the NYC Commission on Human Rights, requires employers to provide reasonable accommodations for an employee’s pregnancy or childbirth (*regardless of whether the employee has a pregnancy-related medical condition*) or related medical condition to allow the employee to perform the essential requisites of the job.

- **Cooperative Dialogue with Employee**
  - Employers have an *affirmative obligation* to initiate a cooperative dialogue with an employee if the employer:
    - (1) learns that an employee requires a reasonable accommodation due to pregnancy, childbirth, or a related medical condition or
    - (2) knows that an employee’s work performance has been affected or the employee may face an adverse employment action and the employer has a reasonable basis to believe the issue is related to pregnancy, childbirth, or a related medical condition.

- Employers must engage in cooperative dialogue with the employee to understand the need for an employee’s request for an accommodation and the ways in which the request can be accommodated.
- Employers must formally conclude the cooperative dialogue by notifying the employee in writing of its determination.
- **Does the NYDBL apply to my organization?**
  - Applies to employers with four or more employees.
- **Is there an undue hardship exception for employers?**
  - Yes, an undue hardship is determined in light of the nature of the accommodation and employer.
- **Notice Requirements**
  - Employers must provide a notice of rights to all new employees and post notice on its premises in an area accessible to employees.
- **Primary law:** <https://www1.nyc.gov/site/cchr/law/text-of-the-law.page>

### C. Anti-Discrimination

- (a) **New York City Human Rights Law (NYCHRL)** (see section I.3.B.(a) above): Prohibits unlawful discrimination in employment on the basis of pregnancy or perceived pregnancy through its prohibitions on gender discrimination.

## II. *Childbirth and Recuperation*

*Many of the same New York City, New York State, and federal laws that protect pregnant employees also afford birthmothers and, in some cases, their spouses, rights during childbirth, and recuperation from childbirth. These relate to the ability to take paid and unpaid leave and/or temporary disability following childbirth, reasonable accommodations during the recovery process and, at the federal level, the right to be treated in the same manner as other applicants or employees who are similar in their ability or inability to work.*

### 1. Federal Law

#### A. Unpaid Leave

- (a) **Family and Medical Leave Act (FMLA)** (see section I.1.A.(a) above).

- **Which employees are eligible?**
  - Among others, birthmothers following the birth of the employee’s newborn child and the birthmother’s spouse in the

event the birthmother is incapacitated due to childbirth and requires care.

**B. Anti-Discrimination**

(a) **PDA** (see section I.1.C.(b) above): Requires employers to treat women affected by childbirth in the same manner as other applicants or employees who are similar in their ability or inability to work.

2. New York State Law

**A. Temporary Disability Insurance (TDI)**

(a) **New York Disability Benefits Law (NYDBL)** (see section I.2.A.(a) above).

• **Which employees are eligible?**

- Medical recovery from childbirth is included in the definition of disability for purposes of TDI; only the birth mother is eligible for disability leave for the period immediately after the birth of a child.
- Employee is required to submit a medical report completed by a doctor or certified nurse midwife stating that her disability is due to childbirth. If the disability lasts more than four to six weeks after the actual birth date, the medical report should describe specific complications, rather than a general prognosis.

**B. Reasonable Accommodations**

(a) **New York Human Rights Law (NYHRL)** (see section I.2.B.(a) above): Requires employers to provide reasonable accommodations for an employee's childbirth recovery, as may be medically advised, absent an undue hardship on the employer.

3. New York City Law

**A. Paid Leave**

(a) **New York City Earned Safe and Sick Time Act (ESSTA)** (see section I.3.A.(a) above).

**B. Reasonable Accommodations**

(a) **New York City Human Rights Law (NYCHRL)** (see section I.3.B.(a) above): Requires employers to provide reasonable accommodations for an

employee's childbirth or a medical condition related to childbirth, which may include temporary unpaid leave, absent an undue hardship on the employer.

### **III. Bonding Time Following Childbirth, Adoption, or Foster Placement**

*Both birthmothers and their partners benefit from New York State and federal laws that provide parents with protected time after childbirth to care for and bond with a newborn child. The newest addition, taking effect January 1, 2018 – New York State Paid Family Leave – provides New Yorkers with a broad array of protections, including partially paid leave, job protection, and a prohibition against retaliation for requesting or using leave.*

#### 1. Federal Law

##### **A. Unpaid Leave**

**(a) Family and Medical Leave Act (FMLA)** (see section I.1.A.(a) above).

- **Which employees are eligible?**

- Among others, employees (male or female) requiring leave for the birth and care of a newborn child or for placement with the employee of a child for adoption or foster care.

- An employee's aggregate FMLA leave may not exceed 12 weeks per year.

##### **B. Anti-Discrimination**

**(a) PDA** (see section I.1.C.(b) above).

#### 2. New York State Law

##### **A. Paid Leave**

**(a) NYS Paid Family Leave (PFL):** Beginning January 1, 2018, provides paid leave to employee to bond with a new child (8 weeks in 2018, increasing to 10 weeks in 2019-20 and 12 weeks in and after 2021) and continuation of health insurance while out on leave.<sup>3</sup>

- A parent may take paid family leave during the first 12 months following the birth, adoption, or fostering of a child.

- Paid family leave begins *after* the birth and is not available for prenatal conditions.

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<sup>3</sup> PFL is also available to employees to care for a close relative (child, parent, spouse, domestic partner, parent-in-law, grandparent or grandchild) with a serious health condition or assist with family situations arising when a spouse, domestic partner, child or parents is deployed abroad on active military service. Does not include employee's own serious health condition.

- **Which employees are eligible?**
  - Full-time employees after working 26 consecutive weeks.
  - Part-time employees (working fewer than 20 hours per week) after working 175 days; must be allowed to opt out of payroll deductions if not anticipated to be eligible.
- **What amount is paid and how is it paid for?**
  - For 2018, lower of 50% of (1) employee's average weekly wage and (2) state average weekly wage for up to 8 weeks (capped at \$652.96).
  - 2021 and after: 67% of lower of actual or state average weekly wage.
  - Payments are funded through payroll deductions. For 2018, payroll contribution is 0.126% of an employee's weekly wage and is capped at an annual maximum of \$85.56.
- **Does PFL apply to my organization?**
  - Applies to employers with one or more employees at least 30 days per year.
- **Is there an undue hardship exception for employers?**
  - No.
- **Job Protection:** Employers must return an employee to the same or a comparable job held prior to taking leave.
- **Retaliation is prohibited:** Employers cannot retaliate against employees for requesting or using leave.
- **How does PFL interact with other types of leave?**
  - **FMLA:** If an employee has an event that qualifies for leave under both FMLA and PFL, the leaves run concurrently only if the employer notifies the employee that the leave qualifies for both FMLA and PFL and that it will be designated as such.
  - **Short-term Disability:** Employees cannot collect disability benefits and PFL benefits at the same time, but a birthmother may take PFL after disability leave. The total combined PFL and disability leave in any 52 week period may not exceed 26 weeks.
  - **Maternity / Paternity Leave:** It is up to the employer to determine how PFL works with its other leave policies.
- **More Information:** <https://www.ny.gov/programs/new-york-state-paid-family-leave>

#### ***IV. Employees Returning to Work Following the Birth, Adoption, or Foster Placement of a Child***

*Employers are required to provide birthmothers and caregivers with certain protections after their return to workplace. Among them, a birthmother is granted reasonable break time and accommodations to pump (i.e., express breast milk) at the New York City, New York State, and federal levels. In addition, the law has begun to address post-partum depression – courts have found that it qualifies as a disability under the ADA – and various laws are in place to prohibit discrimination on the basis of familial status or status as a caregiver.*

##### **1. Federal Law**

###### **A. Pumping at the Workplace**

###### **(a) Section 4207 of the Patient Protection and Affordable Care Act (ACA)**

requires employers to provide reasonable break time and a private place for employees who are breastfeeding to pump in the workplace until the child's first birthday.

- Employers must provide a private place, other than a bathroom, that is shielded from view and free from intrusion.
- Employers are not required to pay employees for any work time spent for this purpose.
- **Does ACA apply to my organization?**
  - Applies to employers with 50 or more employees.
- **Is there an undue hardship exception for employers?**
  - Yes, an undue hardship is determined by weighing the “significant difficulty or expense” of providing breaks against the “size, financial resources, nature or structure” of the employer.
- **Primary law:** <https://www.congress.gov/111/plaws/publ148/PLAW-111publ148.pdf>

**(b) Pregnancy Discrimination Act (PDA)** (see section I.1.C.(b) above): prohibits discrimination against nursing mothers.

###### **B. Post-Partum Depression**

**(a) ADA** (see section I.1.B.(a) above): Courts have found that post-partum depression can be a disability under the ADA.

2. New York State Law

**A. Pumping at the Workplace**

(a) **NY Labor Law** (1) prohibits employers from discriminating against employees who express breast milk in the workplace and (2) requires that they provide reasonable unpaid break time, or allow employees to use paid break or meal time, to express breast milk for their nursing children, for up to three years following the child's birth.

- Employer must make reasonable efforts to provide a private area in close proximity to the employee's work station.
- Employees must be given at least 20 minutes for each break.
- **Does the Labor Law apply to my organization?**
  - Applies to all employers in New York State.
- **Is there an undue hardship exception for employers?**
  - No.
- **Primary Law:**  
<https://www.labor.ny.gov/workerprotection/laborstandards/pdfs/guidelineexpressionofbreastmilkfinal.pdf>

**B. Anti-discrimination**

(a) **New York Human Rights Law (NYHRL)** (see section I.2.B.(a) above): Prohibits discrimination on the basis of familial status, which includes any person who has a child.

3. New York City Law

**A. Nursing at the Workplace**

(a) **New York City Human Rights Law (NYCHRL)** (see section I.3.B.(a) above): Lactation constitutes a medical condition related to childbirth and must be accommodated absent an undue hardship on the employer.

**B. Childcare**

(a) **New York City Earned Safe and Sick Time Act (ESSTA)** (see section II.3.A.(a) above): Provides sick time (which is paid if employer has five or more employees) for employees who must care for a sick child or a child whose school or child care provider is closed due to a public health emergency.

### **C. Anti-discrimination**

- (a) New York City Human Rights Law (NYCHRL)** (see section I.3.B.(a) above): Prohibits discrimination against a person because of his or her status as a “caregiver” (person who provides direct and ongoing care for a minor child or care recipient).

*This alert is meant to provide general information only, not legal advice. If you have any questions about this alert please contact Judith Moldover at (212) 219-1800 ext. 250 or visit our website at [www.lawyersalliance.org](http://www.lawyersalliance.org) for further information.*

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