

# Top W&H Developments For Women In The Workforce In 2021

By **Daniela Porat**

Law360 (December 15, 2021, 6:41 PM EST) -- The pandemic shattered women's economic security, but a slew of "aggressive" pay transparency laws and federal and local efforts to address the unique needs of pregnant workers augur progress for women in the workforce, attorneys say.



Rep. Ayanna Pressley, D-Mass., along with Sen. Tammy Duckworth, D-Ill., introduced a bill to provide research funding and paid time off for workers dealing with miscarriages or failed assisted reproductive technology procedures, among other things (AP Photo/Jose Luis Magana)

Laws requiring employers to disclose wage ranges and entitle women to break time to nurse will "help ensure that we can rebuild the workforce in a more equitable way," said Melinda Koster, a partner at worker-side firm Sanford Heisler Sharp LLP.

Here, Law360 explores wage and hour advancements for women in 2021 and what they mean for gender equality in the year to come.

## **Pay No Longer A Secret**

Equal pay legislation in 2021 focused on greater transparency and requiring employers to affirmatively spell out their workers' pay.

"All of these laws are quite exciting because transparency is one of the most critical issues and the lack of transparency is a massive driver for pay discrimination," Koster said. "It also prevents clients from coming forward and pursuing claims."

The fact that states are "becoming more aggressive about disclosure of wages" is a "big development in the equal pay space this year," said Breanne Martell, a shareholder at management-side firm Littler Mendelson PC in Seattle.

Martell pointed to Illinois as a standout example of this trend. The state's amendments to its equal pay law require employers to file information with the state to certify that the average pay for female and minority employees is not persistently lower than for non-minority and male employees.

"This is one of those states taking the more active step of requiring [employers] to externally disclose information that will make pay equity, I think, a higher priority than it already is," Martell

said.

Colorado stirred controversy this year after implementing a law mandating employers to include salary and benefits information in job postings, a **potential headache** for employers outside the state who may hire a remote worker in Colorado.

Whether these laws will make a meaningful dent in addressing persistent gender-based pay inequity remains to be seen.

For example, not many equal pay laws focus on discrimination around promotions and career development, which can feed into the gender pay gap, Martell said.

Greater pay transparency is not a panacea for pay disparities, said Rebecca Pontikes, a worker-side attorney for Pontikes Law LLC.

"That's very important, but I also think that it has been overstated as a remedy for pay inequity," she said. "Transparency will never solve pay inequity because there's too much of a power differential between employees and their employers."

### **Time, Privacy To Nurse**

In October the U.S. House of Representatives passed the Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act, which seeks to expand lactation accommodations and protections.

"If you want to be quite frank, access to all sorts of reproductive health care in my opinion is an employment issue," Pontikes said, "Because if you can't control your pregnancy, you can't work. Women have known that for centuries."

The 2010 Break Time for Nursing Mothers law afforded workers unpaid lactation breaks and a private space to express milk, but its placement in the overtime section of the Fair Labor Standards Act meant only nonexempt employees are covered.

The PUMP Act **untethers the nursing break provisions** from the overtime section of the FLSA, expanding coverage to 9 million workers who are currently not entitled to these breaks. Another essential fix is giving nursing mothers the recourse for their claims to hold up in court by providing workers with the same remedies outlined under the FLSA anti-retaliation provision.

"By increasing those remedies, the act also ensures that the legislation finally has teeth," Koster said.

The act also makes it clear that these breaks are unpaid only if the worker is fully relieved of duties — an important clarification considering advancements in pumping technology, said Kellie Tabor, a shareholder for management-side firm Littler Mendelson PC in Charlotte, North Carolina.

"There are breast pumps that you could just put within your bra and you could walk around and be pumping and nobody would know," she said. "The vast majority of people, they're going to have the ability to be paid for their time that they're spending pumping."

Employers seeking to **develop nursing break policies** should include women in the decision-making process who have familiarity with what it's like to pump in the workplace, Tabor said.

And any nursing break policy should leave room for an individualized assessment of a nursing mother's unique needs, she said.

"To say we've got to provide you a reasonable amount of time each time that you need to express milk, well, what's reasonable can totally depend on the employee," she said. "Twenty minutes every three hours, that might be fine for some people, but that might be hard for somebody else."

### **Leave For Pregnancy Loss**

New Zealand spurred a trend in the United States after it approved in March paid leave following a

miscarriage or stillbirth.

Similar proposals have popped up across the country. Washington, D.C, Pittsburgh and Portland, Oregon, have all implemented laws providing bereavement leave for city employees who have experienced pregnancy loss.

In July, Rep. Ayanna Pressley, D-Mass., and Sen. Tammy Duckworth, D-Ill., introduced a bill to marshal research funding and provide paid time off for workers dealing with miscarriages or failed assisted reproductive technology procedures, for example.

Pittsburgh's law provides for three days of paid bereavement leave in the event a city employee or their partner suffer a pregnancy loss, which includes stillbirth, abortion, miscarriage, failed in vitro fertilization procedure and surrogacy loss.

Oftentimes, it's local governments at the vanguard of employment law, but the federal legislation is "really groundbreaking," Koster said.

"The bill reflects a very broad and inclusive definition of what it means to experience pregnancy loss because the paid leave offered would also apply to failed adoption matches and failed surrogacy arrangements," she said.

In many instances, someone who experiences a miscarriage, still birth, or termination of pregnancy will be covered by medical leave laws, Tabor said.

"Recognizing in the bereavement context is pretty huge that not only is this a medical event for the woman," she said. "But this is a real loss, sometimes in more instances harder than the loss of a family member that would traditionally be covered under bereavement leave."

These pregnancy loss laws are also only one part of a much larger framework needed to support women in the workforce, Koster said.

"Ultimately, we need nationwide protections that go even farther," she said. "I hope that the passage of bereavement laws will spark a broader conversation and spur lawmakers to also take the bigger and bolder step of passing more comprehensive legislation to provide employees with paid family leave and paid sick leave."

--Editing by Roy LeBlanc.