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The Pregnant Workers Fairness Act: Beyond the Basics

Center for WorkLife Law and ACLU in partnership with NELA

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Agenda

- What conditions are entitled to accommodations?
- What accommodations are available?
- Practical considerations in securing accommodations
- Navigating the interactive process to achieve the best outcome
- Responding to retaliation
- Q&A

What conditions are entitled to accommodation?

“Pregnancy, Childbirth, or Related Medical Conditions”

Established term taken from the PDA context and broadly defined:

- Current, past, and potential pregnancies
- Childbirth and labor
- Symptoms of pregnancy/childbirth
- Complications of pregnancy/childbirth
- Preexisting conditions exacerbated by pregnancy/childbirth
- Pregnancy termination (miscarriage, stillbirth, abortion)
- Lactation and Related Conditions
- Infertility and fertility treatment
- Use of birth control
- Menstrual cycles and changes in hormone levels

Pregnancy-related “limitations” entitled to accommodation

- An impediment or problem
  - No particular level of severity required.
  - Limitation may be “modest, minor, or episodic”
- A need or a problem related to maintaining the employee’s health or the health of their pregnancy, including avoiding increased risk and pain
- Seeking healthcare

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What accommodations are available?

"Reasonable Accommodation"

- Changes to the application process; work environment; or when, where, or how work gets done to allow the pregnant employee to do their job on equal footing
  - Remember: Includes changes to protect employee and pregnancy health
- Same meaning as under the ADA, with a few key differences:
  - Temporary suspension of one or more essential functions
  - Proposed regs elevate leave for childbirth
  - Proposed regs incorporate examples of accommodations recognized by the EEOC in ADA context, but not explicitly included in the ADA regulations

Accommodation Examples

- Extra breaks for rest, snacks, water, and restroom use
- Uniform changes
- Changes to job duties, work location, or other modifications needed to reduce or avoid bending, lifting, climbing, walking, and/or standing
    - e.g. permission to sit on a chair, or moving workstation closer to the bathroom
- Change in job duties, temporary reassignment, or alternate work location to avoid exposure to toxins, viruses, physically demanding work, excessive heat
- Reserved parking spaces

Accommodation Examples Con't

- Schedule changes or excusal from absence and tardiness control policies for late arrivals due to pregnancy illness or fatigue, to avoid long work hours, or to be temporarily excused from night shifts
- Time off for regular prenatal care appointments, fertility treatment, and/or pregnancy loss or abortion
- Leave prior to childbirth, and after birth for physical recovery (often 6-8 weeks)
- Break time and private space to express breast milk or other modifications for lactation and related complications

Accommodation Examples Con't

Pregnancy, Childbirth, and Related Medical Conditions:
Common Workplace Limitations and Reasonable Accommodations Explained

Working during pregnancy is generally safe.[1] Many pregnant and postpartum employees need work accommodations, whether because of risks posed by their particular job duties, because of medically-complicated pregnancies, or simply because of the normal physical changes that occur during pregnancy. Employees may also have work limitations resulting from related medical conditions like lactation, abortion, miscarriage, pregnancy loss, fertility treatment, and menstruation. This guide provides an overview of these workplace needs for non-medical professionals. It may be particularly useful to lawyers and HR professionals.

Contents

Questions? For information about the laws that give rights to employees who need accommodations for pregnancy and related conditions, contact the Center for WorkLife Law at 415-565-4640 or info@worklifelaw.org.

Temporary Suspension of Essential Functions

- Definition of essential functions from the ADA: “the fundamental job duties of the employment position the individual … holds or desires,” excluding “the marginal functions of the position.” 29 CFR 1630.2(n)
- Central to PWFA: Temporary inability to perform essential functions is not disqualifying
- Major Departure from ADA’s definition of “qualified employee”!

Temporary suspension of Essential Functions (cont'd)

Under PWFA, an employee is still qualified even if they can't perform essential function(s) if:

1. Inability to perform essential function(s) is for a temporary period
    - EEOC: not permanent
2. Essential function(s) could be performed in the "near future"
    - EEOC: "near future" = 40 weeks; clock starts again after childbirth
3. Inability to perform the essential function(s) can be reasonably accommodated
    - EEOC: temporary suspension of the function, reassignment, co-worker assistance

Leave as a Reasonable Accommodation

- Access to job-protected time off is an important legislative goal
  - Includes full-time leave, intermittent time off, part-time schedules
- Unpaid job-protected leave and using accrued paid leave are reasonable accommodations
  - childbirth
  - medical appointments
  - pregnancy-related illness
  - recovery from pregnancy termination or loss
- EEOC: Employer concerns about length, frequency, or unpredictable nature of requested leave are questions of undue hardship

Acceptable Duration for Time Off?

Guidance is understandably scarce, given situation-specific undue hardship inquiry, but proposed regs give some indication:

- Example 1: employee needs 6-8 weeks off to recover from childbirth; employer must provide the leave, absent undue hardship
- Example 2: employer must adjust employee's performance quota to account for a 4-month leave
- Example 3: employee entitled to 10 days off to recover from a miscarriage, despite being a new employee not eligible for FMLA

Lessons from the ADA re: Leave as Accommodation

1. Seek evidence of no undue hardship in employer's handbook: many provide unpaid personal leaves of 6 months or a year, at the employer's discretion
2. Advise clients to request a finite amount of time by providing a probable end date, even if they have to go back and modify it later

Practical Considerations re: Leave and Time Off

- Typically unpaid, making it often inaccessible
  - Several states provide temporary disability insurance or paid family and medical leave: CA, CO, CT, D.C., DE, MA, MD, ME, MN NJ, NY, OR, RI, WA.
  - Many jurisdictions have paid sick days
  - Some employees have private short term disability plans
- EEOC: same as ADA, PWFA does not require continuation of health insurance, unless offered to employees in a similar leave status

Remote Work as a Reasonable Accommodation

- Proposed regs include "telework" as an example of accommodation for: a period of bed rest, a mobility impairment, nausea and vomiting, and significant fatigue
- Also consider remote work for: mental health issues; concerns about exposure to covid in crowded workplaces; and challenges pumping milk while away from an infant
- When full-time telework isn't possible, consider part-time telework or suspension of job duties that require in-person attendance

Accommodations for Breast/Chestfeeding and Lactation

- Primary accommodation is break time and private space for pumping milk
  - Use PWFA to supplement the PUMP Act
- Other accommodations may be needed, too
  - Avoiding exposure to toxins
  - Uniform changes
  - Time off for lactation-related appointments
  - Work from home for direct nursing

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Practical Considerations in Securing Accommodations

Practical Considerations in Securing Accommodations

- "Good faith" affirmative defense
- Making "known" your client's "limitation"
- Interactive process stumbling blocks
  - Likely employer confusion about PWFA (v. ADA, FMLA, state/local statutes)
  - Unreasonable requests for medical certification
  - Resistance from employers and co-workers

"Good faith" affirmative defense (42 U.S.C. § 2000gg-2(g))

- As in ADA failure-to-accommodate context, limits damages
- Employer bears burden of proving
- Not defined by Congress or EEOC
- No hard and fast rules from ADA context, but generally must show:
  - Effort to accommodate more than "lip service"
  - Meaningful interactive process
  - No undue delay

How do you assure that your client's pregnancy-related limitation is “known” to the employer?

- “Known” = employee/applicant/representative has communicated:
  - The limitation
  - Need for modification
- No “magic words” required
- Oral communication sufficient
  - Employer cannot require communication be put in writing

Making Limitation "Known" – Practitioner Takeaways

- Assure clarity of communication
  - Limitation is due to pregnancy, childbirth, or related medical conditions
  - Make initial accommodation proposal, if possible
- Make record
  - Even if initial communication is oral, or made by representative, follow up in writing – preferably by email (date & time) and cc: HR
  - If client takes notes, take picture of notes and email to self

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Navigating the Interactive Process in Achieving the Best Outcome

Undue Hardship – Defined

"Undue hardship means . . . significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (j)(2) of this section." (Proposed 29 C.F.R. § 1636.3(j))

- Proposed Section 1636.3(j)(2):
  - (i) Nature and net cost of accommodation;
  - (ii) Overall financial resources of the facility, number of employees at the facility, and effect on expenses and resources;
  - (iii) Overall financial resources of the employer, overall size of the business, and number, type and location of its facilities;
  - (iv) Employer's type of operation; and
  - (v) Impact of accommodation upon operation of the facility, including impact on other workers' performance of duties and facility's ability to conduct business.

"Predictable Assessments" That Virtually Always *Will Not* Impose Undue Hardship

1) Allowing employee to carry water and drink as needed;
2) Allowing additional restroom breaks;
3) Allowing employee to sit or stand as needed; and
4) Allowing breaks to eat and drink, as needed.

Proposed 29 C.F.R. 1636.3(j)(4).

Interactive Process - Defined

"[A]n informal, interactive process . . . . This process should *identify the known limitation* and *the change or adjustment at work that is needed*, if either of these are not clear from the [initial communication], and potential reasonable accommodations. There are *no rigid steps* that must be followed."

Proposed 29 C.F.R. § 1636.3(k)). (Emphasis added.)

Interactive Process (cont'd)

- **Can be so obvious or *de minimis* that one conversation will suffice**
  - e.g., "Predictable assessments"
  - Proposed regulations urge simplicity, flexibility, temporal urgency
- **If more involved discussion required, "step by step process"**
  - Analyzing job at issue, including its essential functions
  - Identifying specific accommodation sought
  - Identifying potential accommodations and the preferences of the employee
  - If proposed modification impedes essential job function, could essential function be suspended?

Interactive Process – Practitioner Takeaways

- Remember variety of "reasonable accommodations"
- Come prepared with multiple proposals (or targeted questions to elicit info)
- Come prepared with ideas for interim accommodations
- Emphasize – it's temporary! Emphasize – this isn't the ADA!
- Keep a record of each step in process (remember – likely good faith defense)

Choosing Among Accommodations

If more than one effective accommodation is identified, the employer retains ultimate discretion to choose which one is offered – though the worker's preference should be given primary consideration.

- Three guardrails:
  - Employer can't force employee to accept an accommodation not reached through interactive process
  - Employer can't force employee to take leave if they didn't request it, and if another reasonable accommodation can be provided
  - The accommodation must provide the employee with "equal employment opportunity"
    - Client will be best source of defining what this means, and proper comparators

Request for Medical Certification – *When* is it Permissible

- Employer not required to ask for it, and can only ask for certification when it's "reasonable under the circumstances"
- Circumstances where asking for certification is not "reasonable"
  - Need for accommodation is "obvious" (e.g., new uniform, avoiding heavy lifting)
  - Employee already provided sufficient information to substantiate
  - "Predictable assessment"
  - Lactation or pumping – self-attestation is sufficient

Requests for Medical Certification – *What* is Permissible

- Extent and type of certification also must be "reasonable," i.e., sufficient to:
  - Describe or confirm physical or mental condition
  - Confirm "related to, affected by, or aris[es] out of pregnancy, childbirth, or related medical conditions"
  - Confirm change or adjustment at work needed
- Wide range of providers acceptable, not just MDs (e.g., doulas, midwives, PTs, therapists)

Navigating Delays in Interactive Process – Practitioner Takeaways

- Emphasize cooperation, but where necessary, educate about consequences
  - "Unnecessary delay" can constitute denial of accommodation
  - Repeated "unreasonable" requests for documentation can constitute retaliation or coercion
  - Have we mentioned – this is not the ADA?
- Emphasize provision of interim accommodation
  - Consequences for worker can be severe – health, income
  - Consequences for employer liability if delay + no interim accommodations
- As always – keep a record

Good Faith Defense – Practitioner Takeaways

Avoid your client being the cause of interactive process breakdown

- Show worker's active participation in interactive process (e.g., specificity about limitation, specificity about activities *not* limited, proposed accommodations)
- Provide requested certifications promptly
  - If unreasonable, make record why

Where employer could have done more, assure clear record

- Ask for full explanations of stated reasons for denials, especially those going to "undue hardship" (e.g., "it's too expensive")
- Where employer's stated reasons run counter to statute (e.g., "you can't do an essential function"), say so

Resistance from employers and co-workers

- More accommodation requests = more opportunity to activate bias toward pregnant and lactating workers
  - "Special treatment"
  - Minimization of worker's needs
  - Religious/moral beliefs

Resistance from Employers & Co-Workers – Practitioner Takeaways

- Prepare your client
  - Identify allies
  - Clear messaging ("I'm just doing what I need to do to stay healthy," "I'm just asking for what the law says I'm supposed to get," "We all deserve to be healthy and safe at work")
  - Keep records for potential future claims (harassment, interference, retaliation)

- If litigation becomes necessary, consider social science expert

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Retaliation and Interference

Who is Protected from Retaliation and Interference?

- Section 2000gg-1(5) makes it unlawful for a covered entity to "take adverse action . . . against **a qualified employee** on account of the employee requesting or using a reasonable accommodation . . . ."
- Section 2000gg-2(f)(1) prohibits retaliation "against **any employee** because such employee has opposed any act or practice made unlawful by this chapter or because such employee made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the PWFA]."
- Section 2000gg-2(f)(2) prohibits coercion, intimidation, threats, and interference "with **any individual** in the exercise or enjoyment of, or on account of such individual having exercised or enjoyed, or on account of such individual having aided or encouraged any other individual in the exercise or enjoyment of, any right [under the PWFA]."

Examples of Retaliation

- Penalizing employees for requesting a reasonable accommodation
- Penalizing employees for taking a reasonable accommodation
- Penalizing employees for appealing the denial of a reasonable accommodation
- Unreasonable requests for documentation
- Intentional disclosure of medical information

Examples of Coercion

- Coercing an individual to relinquish or forgo an accommodation
- Intimidating an applicant from requesting an accommodation
- Issuing a policy that purports to limit an employee's PWFA rights (e.g., a fixed leave policy that states "no exceptions will be made for any reason")
- Stating that a negative job reference will be given if a former employee files suit
- Subjecting an employee to discipline, demotion, or termination because they assisted a coworker in requesting an accommodation

Responding to Retaliation and Interference

- Advise employees to keep contemporaneous documentation of their job performance (pre- and post-request), communication of the known limitation to the employer, the request and interactive process, and any potentially retaliatory actions
- Identify potential witnesses and, if possible, obtain statements
- Warn employees about recording, obtaining documents
- Making a complaint – to whom, by whom, how, what, and when
- Proving a claim – engaged in a protected activity, causation, damages (mitigation)

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I. INTRODUCTION

In 2022, Congress passed the first federal statute protecting the employment rights of pregnant workers in nearly 45 years: the Pregnant Workers Fairness Act (PWFA). Prior to the PWFA, employers in many parts of the United States had only limited obligations to provide reasonable accommodations to employees affected by pregnancy, childbirth, and related medical conditions. The lack of express statutory protections for these employees put them in the unconscionable bind of having to choose between their jobs and their health, including the health of their pregnancies.

The PWFA remedies this significant gap in federal law. This paper builds on the PWFA overview provided in the March 14, 2023 NELA-Center for WorkLife Law-ACLU presentation, "An Introduction to the Pregnant Workers Fairness Act," available at https://www.nela.org/programs-events/series-pwfa-pump/, and provides practitioners with additional background about the PWFA and other federal protections for workers affected by pregnancy, as well as more detailed information about the steps needed to achieve the accommodations clients need and – when litigation is necessary – to obtain positive results. The paper also discusses the proposed implementing regulations issued by the U.S. Equal Employment Opportunity Commission (EEOC) ("Proposed Regulations"), as well as the EEOC's Proposed Interpretive Guidance concerning the statute, which are due to be finalized by the end of the year.

II. LEGISLATIVE PRECURSORS TO THE PREGNANT WORKERS FAIRNESS ACT (PWFA)

A. The Pregnancy Discrimination Act (PDA)

Understanding the origin of the PWFA requires going back to (at least) the 1970s, when a series of U.S. Supreme Court cases prompted the creation and passage of the Pregnancy Discrimination Act (PDA).[1] In the 1974 case of *Geduldig v. Aiello*, the Court held that excluding pregnancy from a list of compensable disabilities covered by state disability insurance was not a sex-based classification that would trigger a heightened level of scrutiny under the Equal Protection Clause.[2] In the 1976 case of *General Electric Co. v. Gilbert*, the Court similarly found that an employer's disability plan which denied benefits for disabilities arising from pregnancy was not in itself sex-based discrimination under Title VII.[3] These cases ignored the obvious – that because it is primarily women that become pregnant, discriminating against pregnant persons is sex discrimination. This paper refers to pregnant persons and pregnant employees throughout, in recognition that not all persons who can become pregnant (including trans men and non-binary persons) identify as women.

In 1978, Congress rejected the narrow view of "sex discrimination" espoused in the *Geduldig* and *Gilbert* cases and enacted the PDA. The PDA explicitly broadened Title VII to

[1] Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat 2076 (codified as amended in 42 U.S.C. § 2000e(k)).
[2] *Geduldig v. Aiello*, 417 U.S., 484, 495-97 (1974).
[3] *General Elec. Co. v. Gilbert*, 429 U.S. 125, 135 (1976).

include pregnancy discrimination as a type of sex discrimination, making it unlawful for an employer to take adverse action against an individual "because of . . . pregnancy, childbirth, or related medical conditions." The PDA also directed that workers affected by pregnancy and related conditions be treated "the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ."[4] Accordingly, the PDA only required employers to make reasonable accommodations for pregnant employees to the same extent that they made such accommodations for those "similar in their ability or inability to work."[5]

B. The Americans with Disabilities Act (ADA)

In 1990, Congress enacted the Americans with Disabilities Act (ADA), which not only prohibited discrimination against persons with disabilities, but also created an affirmative obligation for employers to provide reasonable accommodations to such individuals. Unlike the PDA, the ADA does not tether the right of accommodation to the employer's treatment of workers who do not have disabilities. While certain pregnancy-related complications may rise to the level of qualifying for ADA accommodation – particularly under the broadened definition of "disability" under the 2008 ADA Amendments Act (ADAAA) – pregnancy, in and of itself, does not meet that threshold. Thus, many pregnancy-related conditions fall short of the level of impairment needed for employees to establish an entitlement to reasonable accommodation under the ADA.

C. The Family and Medical Leave Act (FMLA)

In 1993, Congress passed the Family and Medical Leave Act (FMLA), requiring covered employers to provide up to 12 weeks of intermittent or continuous job-protected unpaid leave for prenatal care and pregnancy-related incapacity and to care for a new child or receive treatment for a serious illness. While the FMLA was instrumental in allowing new parents to take job-protected leave for recovery from childbirth and baby bonding, and for pregnant employees to take time off for medical visits or pregnancy symptoms like "morning sickness," the reach of the statute has been limited. The statute applies only to employers of 50 or more employees and protects only those employees who have worked full-time for one year – eligibility requirements that exclude nearly half of all workers.[6] Moreover, the FMLA is of no help to the many pregnant employees who need accommodations other than unpaid leave, such as modified job duties,

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[4] 42 U.S.C. § 2000e(k).

[5] *See, e.g.*, Joanna Grossman and Gillian Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 Yale J.L. & Feminism 15 (2009) (surveying the shortcomings inherent in the PDA's provision of only a comparative right to accommodation); A BETTER BALANCE, WINNING THE PREGNANT WORKERS FAIRNESS ACT 8-10 (2023), https://www.abetterbalance.org/wp-content/uploads/2023/05/ABB-Winning-PFWA-RD7-2.pdf (observing an inherent limitation in the PDA's "similar in their ability or inability to work" standard as "in workplaces where all workers are treated poorly—workplaces where women of color predominate—a comparative standard is little help to pregnant workers in need of accommodation. After all, if a pregnant warehouse worker's non-pregnant co-worker were refused accommodations, the PDA would give her no right to one either.").

[6] Eileen Appelbaum & Julie Yixia Cai, *It Is Time for the FMLA to Fulfill the Promise of Inclusive and Paid Leave*, Center for Economic and Policy Research (Feb. 4, 2021), available at https://cepr.net/report/it-is-time-for-the-fmla-to-fulfill-the-promise-of-inclusive-and-paid-leave/.

changed work location, the ability to sit during a shift or take more breaks, increased access to food and water, or a new uniform to fit their changing body.

D. State and Federal Law Precursors to the PWFA

In 2012, U.S. Representative Jerrold Nadler (D-NY) introduced the first version of the PWFA in the House of Representatives. That bill – and subsequent versions that were introduced in every Congress over the next decade – died in committee. As these efforts to enact a federal PWFA repeatedly stalled, many state and local governments around the nation took action. By the time PWFA was enacted in 2022, 30 states and municipalities – including many "red" jurisdictions, and often with unanimous votes – had passed measures requiring at least some employers to provide reasonable accommodations for pregnancy, regardless of the accommodations offered to other workers.[7]

E. *Young v. United Parcel Service, Inc.*

In 2015, the U.S. Supreme Court decided *Young v. United Parcel Service, Inc.* The plaintiff in this case, Peggy Young, became pregnant while she was working as a delivery driver for UPS. Based on the advice of her doctor, she requested a light duty assignment that would allow her to avoid lifting over 20 pounds.[8] Even though UPS had a "light duty" program through which it gave modified job assignments to other categories of drivers, including employees who had been injured on the job, UPS refused to provide Ms. Young a similar accommodation. Ms. Young was instead forced to take an unpaid leave of absence, during which time she lost her medical coverage.

The legal question presented in *Young* concerned the interpretation of the PDA's provision that workers "affected by pregnancy, childbirth, or related medical conditions shall be treated the same . . . as other persons not so affected but similar in their ability or inability to work."[9] Ms. Young argued that, under this provision, so long as an employer accommodated *any* non-pregnant workers, it had to accommodate pregnant workers, too.[10] UPS criticized this position as extending "most-favored-nation" status to pregnant employees – entitling them to the *best* treatment accorded to others with similar limitations – and instead contended that Congress had added the second section of the PDA only to further define the kinds of discrimination barred by the statute.[11]

Ultimately, the Court rejected both approaches, and instead fashioned a "middle ground" test. Implementing a modified *McDonnell Douglas* burden-shifting analysis to prove intentional discrimination, the Court ruled that an employer that accommodates similarly-situated non-pregnant employees but not pregnant employees violates the PDA if it cannot put forward a legitimate, non-discriminatory reason for disfavoring pregnancy that is "sufficiently strong" to

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[7] A Better Balance, "State Pregnant Workers Fairness Laws," available at https://www.abetterbalance.org/resources/pregnant-worker-fairness-legislative-successes/ (last updated Sept. 29, 2023).
[8] *Young v. United Parcel Service, Inc*., 575 U.S. 206, 211-12 (2015).
[9] *Id.* at 206.
[10] *Id.* at 207-08.
[11] *Id*. at 222.

justify the resulting burden on pregnant workers.[12] The Court further held that a plaintiff could "create a genuine issue of material fact as to whether a significant burden [on pregnant workers] exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."[13]

The ruling's "middle ground" approach, however, did not provide litigants, employers, or the courts with much clarity as to what kinds of differences in treatment would constitute illegal discrimination and which kinds would not; the same kinds of pre-*Young* disputes over which non-pregnant workers are sufficiently "similar" to pregnant people continued to be decided in favor of employers, and against workers claiming PDA violations. An analysis of relevant PDA cases four years after *Young* found that over two-thirds of courts ruled against workers claiming a failure to accommodate pregnancy.[14]

F. Passage of the PWFA and Subsequent EEOC Action

The gaps in coverage left by the PDA (as interpreted in *Young*), the ADA, and the FMLA became impossible to ignore during the COVID-19 pandemic. Public health matters were at the forefront of the nation's consciousness, and pregnant workers were especially at risk of complications from the virus.[15] Moreover, with employers in a majority of states already bound by a state analogue of the PWFA, opposition from the business community began to quiet – culminating in the U.S. Chamber of Commerce throwing its support behind the federal legislation.[16] In recognition of the adverse health consequences faced by pregnant workers who were denied needed accommodations, the U.S. Conference of Catholic Bishops and other faith-based groups also joined the chorus.[17] Pregnant workers also came forward to tell their stories of how the PDA continued to be woefully incomplete in its protection for people needing accommodation.[18] With this exceptionally broad coalition generating wide bipartisan support in Congress, on December 29, 2022, the PWFA was signed into law[19] and went into effect on June 27, 2023.[20]

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[12] *Id.* at 229.
[13] *Id.* at 229-30.
[14] A BETTER BALANCE, LONG OVERDUE 9-13 (2021), https://www.abetterbalance.org/wp-content/uploads/2021/06/Long-Overdue-June-2021-Update-Final-1.pdf.
[15] Roni Caryn Rabin, "Pregnant Women Face Increased Risks From Covid-19," *The New York Times* (Oct. 21, 2021), https://www.nytimes.com/2020/11/02/health/Covid-pregnancy-health-risks.html.
[16] Catherine Dunn, "How a Law to Protect Pregnant Workers United the Chamber of Commerce and the ACLU," *Barrons* (Oct. 14, 2023), https://www.barrons.com/articles/pregnant-workers-fairness-act-how-it-passed-6dddab7d.
[17] Erika Bachiochi, Reva Siegel, Daniel Williams & Mary Ziegler, "We Disagree About Abortion But with One Voice Support This Urgently-Needed Law," *CNN.com* (Dec. 14, 2022), https://www.cnn.com/2022/12/14/opinions/abortion-pregnant-workers-fairness-act-discrimination-bachiochi-siegel-williams-ziegler/index.html.
[18] WINNING THE PREGNANT WORKERS FAIRNESS ACT, *supra* n.5, 39-53.
[19] *See generally id.* at 117.
[20] U.S. Equal Employment Opportunity Commission, *What You Should Know About the Pregnant Workers Fairness Act*, https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act.

As directed by the statute, the EEOC proposed implementing regulations.[21] The 60-day public comment period closed on October 10, 2023, and the final regulations are expected to be issued at the end of the calendar year.

IV. AN OVERVIEW OF THE PWFA

The PWFA identifies five principal unlawful practices[22]:

(1) Not providing "reasonable accommodations" for the "known limitations" of a "qualified employee"[23] related to "pregnancy, childbirth, and related medical conditions" unless to do so would cause the employer an "undue hardship."

(2) Requiring an employee to accept an accommodation other than an accommodation "arrived at through the interactive process."

(3) Denying employment opportunities to an employee because of that person's need for accommodation of their known limitations.

(4) Forcing an employee to take leave if they do not want to and there is a reasonable accommodation that will allow them to continue to work.

(5) Taking adverse against an employee who sought or used a reasonable accommodation for a known limitation due to pregnancy, childbirth, or related medical condition.

Additionally, the PWFA prohibits retaliation because an individual has opposed violations of the PWFA – or has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing" under the PWFA – and further, prohibits coercion, intimidation, threats, or interference with any individual based on their exercising, or seeking to exercise, their PWFA rights.[24]

The PWFA applies to private and public sector employers with 15 or more employees, Congress, federal agencies, employment agencies, and labor organizations. It does not preempt state or local statutes, or other federal statutes, that "provide[ ] greater or equal protection."[25]

The PWFA was modeled in part upon the ADA, and the concepts of "reasonable accommodations," "interactive process," and "undue hardship" are borrowed directly from the ADA.[26] Given this legislative history of the PWFA and the use of ADA terms, courts will likely

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[21] 88 Fed. Reg. 54714 (proposed Aug. 11, 2023) (to be codified at 29 C.F.R. § 1636).
[22] 42 U.S.C. § 2000gg-1.
[23] An "employee" is defined as encompassing both employees and applicants. *Id.* § 2000gg(3).
[24] *Id.* § 2000gg-2(f).
[25] *Id.* § 2000gg-5(1)(1).
[26] For example, the legislative history notes how the PWFA, like the ADA, covers private sector employers with 15 or more employees and public sector employees (H.R. Rep. No. 177-21, pt. 1 (2022) at 26); uses the term "reasonable accommodation" as defined under the ADA throughout the bill's text (*Id.* at 28); mirrors the ADA's

look to the ADA case law to decide PWFA cases involving questions about whether certain accommodations are "reasonable," what constitutes a "good faith interactive process," and whether a hardship is "undue." As explained below, there are some key differences between the PWFA and the ADA, including that known limitations under the PWFA do not have to meet the ADA's definition of disability, and employees can be considered qualified for accommodation under the PWFA even if they cannot perform the essential functions of their jobs, so long as they will be able to do the essential functions in the near future and their inability can be reasonably accommodated.

Relatedly, because the PWFA was expressly enacted to broaden the protections available to workers under the PDA, and because it imports the PDA's foundational language protecting people "affected by pregnancy, childbirth, and related medical conditions," PDA caselaw also will provide useful authority, particularly with respect to the scope of that definition.

The key PWFA terms and provisions are discussed below.[27]

A. Known Limitation

As is clear from the legislative history, the PWFA aims to go beyond the scope of the ADA to provide pregnant employees with protections that they would not have otherwise qualified for under the ADA.[28] Entitling employees to a reasonable accommodation based on having a "limitation" – rather than a disability – is one aspect of this broader coverage.

The PWFA defines a "known limitation" as "a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee's representative has communicated to the employer whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990."[29] The PWFA Proposed Regulations explain the two key parts of this definition.

1. *Known*

"Known" means that the employee or applicant has communicated the limitation to the employer.[30] This means that employees seeking accommodations for pregnancy or related

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analysis of "undue hardship" (*Id.* at 29); and explicitly references the "interactive process" that has been used by the ADA (*Id.* at 30).

[27] As noted throughout the discussion here, the EEOC's Proposed Regulations and proposed Interpretive Guidance provide much of the "meat" on the "bones" of the PWFA's provisions. The EEOC's proposals, while admirably comprehensive, are not yet final, and the Center for WorkLife Law and the ACLU both submitted extensive publicly-available comments suggesting a range of clarifications and modifications to those drafts. As noted above, the EEOC's final regulations and interpretive guidance are due to be issued by the end of 2023; the Center for WorkLife Law and the ACLU will host a webinar in spring 2024 to provide an overview of those final rules.

[28] *See* H.R. Rep. No. 177-21, pt. 1 (2022) at 21 ("It is abundantly clear that the ADA, as amended by the ADAAA, does not provide a sufficient avenue for receiving reasonable accommodations that would allow a worker to continue to earn a living while maintaining a healthy pregnancy.").

[29] 42 U.S.C. § 2000gg(4).

[30] 88 Fed. Reg. 54767.

medical conditions will first need to disclose to their employer that they are pregnant or have a condition related to pregnancy. If the employee wants to keep such information private and not disclose their condition to their employer (such as in the case of early pregnancy, or especially sensitive circumstances such as miscarriage, abortion, fertility treatments, and so on), they may need to rely a different law to obtain accommodation (e.g., the ADA, state and local leave laws). If the employee discloses medical information to the employer, the ADA requires employers to keep employees' medical information confidential even if it does not relate to disability.[31] The Proposed Regulations further state that an employer's intentional disclosure of an employee's medical information could constitute illegal retaliation under the PWFA.[32]

The EEOC's Proposed Interpretative Guidance accompanying its proposed PWFA regulations specifically directs that an individual need not use "magic words" or legalese to put their employer on notice of their need for reasonable accommodation (*e.g.*, "I need a reasonable accommodation of my pregnancy-related limitation."). Indeed, many of the illustrative examples in the Proposed Interpretive Guidance reflect the real-world circumstances in which a worker may notify their employer of a pregnancy-related need for accommodation (*e.g.*, "I'm having trouble getting to work at my scheduled starting time because of morning sickness." 88 Fed. Reg. at 54775, Ex. 1636.3 #1; "An employee tells a human resources specialist that they are worried about continuing to lift heavy boxes because they are concerned that it will harm their pregnancy." *Id.* #3.). Rather, all that is required is a communication that the worker (1) has a limitation related to pregnancy or childbirth, and (2) needs an adjustment or change at work.[33] The Proposed Regulations also make clear that an oral communication is sufficient to place the employer on notice, and that the employer "may not require that the communication be in writing, in any specific format, or on any particular form in order to be considered 'communicated to the employer.'"[34] Finally, the Proposed Regulations permit the employer to be placed on notice by a representative of the affected individual – including a "family member, friend, health care provider, or other representative."[35]

Power imbalances of many kinds can impede workers' knowledge of their right to accommodation, make workers reluctant to assert it, or both. This can be particularly true for low-wage workers, teenagers, immigrants, and people with limited English language proficiency. Even if a client has conveyed sufficient information to the employer to know that they have a pregnancy-related limitation that requires an adjustment or change at work, erring on the side of explicitness is the best protection against an employer's later defense that it was not aware of the pregnancy or "related medical condition," the limitation(s) posed, and/or the need for accommodation.

2. *Limitation*

The second key part of the definition is the word "limitation." The Proposed Regulations state that the physical or mental condition posing an "impediment or problem … may be modest,

[31] 29 C.F.R. § 1630.14(b) & (c); *see also* Preamble to Proposed Regulations, 88 Fed. Reg. 54738.
[32] Preamble to Proposed Regulations, 88 Fed. Reg. 54738.
[33] Proposed Regulations, 88 Fed. Reg. 54767 (to be codified at 29 C.F.R. § 1636.3(d)(3)).
[34] *Id.* at 54767 (to be codified at 29 C.F.R. § 1636.3(d)(1) & (2)).
[35] *Id.* at 54767 (to be codified at 29 C.F.R. § 1636.3(c)).

minor and/or episodic" or may be related to the fact that the employee needs health care related to pregnancy, such as needing to attend an appointment.[36] Further, limitations under the PWFA include needs or problems related to maintaining the employee's health or the health of their pregnancy, including avoiding increased risks and pain. Examples of limitations include being unable to stand or walk for more than 10 minutes at a time due to swollen feet; inability to perform a particular job task that exacerbates pelvic or back pain; being unable to commute due to morning sickness; being unable to work overtime due to fatigue; needing to avoid job duties that involve exposure to risky toxins like smoke or pesticides; needing to take more frequent breaks to rest or eat; needing to work remotely to avoid risks associated with viral exposure in a crowded workspace.

The breadth of the "limitation" category reflects the PWFA's central ethos: that each individual worker may require different accommodations based on their individual situations. Indeed, the legislative history confirms that "[t]he general principle informing the proposed rule's definition is that the physical or mental condition (the limitation) required to trigger the obligation to provide a reasonable accommodation under the PWFA does not require a specific level of severity."[37] The Preamble to the Proposed Regulations goes on to note that "[t]he lack of a level of severity is also necessary given the need the statute seeks to fill."[38] In considering what constitutes a limitation (and what is a reasonable accommodation), practitioners should keep top of mind the PWFA's dual purposes of continued employment *and* promoting maternal and child health.[39] While the lack of severity is critical to effectuate the purpose of the PWFA, it may lead to disputes with employers who are accustomed to the ADA framework and will claim that limitations that are preventative and/or minor do not warrant accommodation. It will be important for plaintiffs' attorneys, when necessary, to educate employers on this significant departure from ADA jurisprudence in the PWFA context.

B. Related to Pregnancy, Childbirth, and Related Medical Conditions

The term "pregnancy, childbirth, or related medical conditions" is taken from the PDA. It has been interpreted broadly by the EEOC and courts, as set forth in the Proposed Regulations,[40] to include:

- Current, past, and potential pregnancies
- Childbirth and labor
- Symptoms of pregnancy/childbirth (e.g., fatigue; nausea and vomiting; back and pelvic pain; increased thirst, swelling of the legs, ankles, feet, or fingers; frequent urination; loss of balance; etc.)
- Complications of pregnancy/childbirth (e.g., gestational diabetes; preeclampsia; lumbar lordosis; anemia; chronic migraines; dehydration; ectopic pregnancy; preterm

[36] *Id*. at 54767 (to be codified at 29 C.F.R. § 1636.3(a)(2)).
[37] Preamble to Proposed Regulations, 88 Fed. Reg. 54720.
[38] *Id.*
[39] H.R. Rep. No. 117-27, at 22-24 (2021), available at https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf.
[40] 88 Fed. Reg. 54767 (to be codified at 29 C.F.R. § 1636.3(b)).

labor; nerve injuries; cesarean wound infection; antenatal or postpartum depression/anxiety/psychosis, etc.)
- Preexisting conditions that were exacerbated by pregnancy/childbirth (depression, carpal tunnel syndrome, diabetes, high blood pressure)
- Pregnancy termination (miscarriage, stillbirth, abortion)
    - The EEOC received thousands of comments on its Proposed Regulations opposing the inclusion of abortion, however courts consistently have found that the PDA's protections encompass the right to be free from discrimination on the basis of contemplating or obtaining abortion care.[41]
- Lactation and related conditions (e.g., break time and space for expressing milk; low milk supply, engorgement; plugged ducts, mastitis, fungal infections, etc.)
- Infertility and fertility treatment
- Use of birth control
- Menstrual cycles and changes in hormone levels. (WorkLife Law and the ACLU believe that perimenopause and menopause are similarly related medical conditions and have asked the EEOC to explicitly identify them in its final guidance.)[42]

This list is illustrative and not exhaustive. As the EEOC notes in the Proposed Interpretive Guidance, "an employee or applicant does not have to specify a condition on the EEOC's regulatory "list" of conditions or use medical terms to describe a condition in order to be eligible for a reasonable accommodation."[43]

C. Reasonable Accommodation

Under the PWFA, "reasonable accommodation" has the meaning as under the ADA, and thus can be generally understood as changes to the application process, the work environment, or when, where, or how work gets done.[44] However, in its Proposed Regulations, the EEOC has identified five ways in which the PWFA definition differs from the ADA definition.[45] Perhaps most significantly, because the PWFA provides for reasonable accommodations when a worker temporarily cannot perform one or more essential functions of a position but could do so in the near future, the EEOC has recognized that temporary suspension of one or more essential functions may be a reasonable accommodation under the PWFA.[46] (For further discussion on temporary suspension of essential functions, see Section 6 on "Qualified Employee," below.) Further, the agency's Proposed Regulations incorporates certain examples of accommodations long recognized by the EEOC as reasonable accommodations for individuals with disabilities, but which were not explicitly included in the formal ADA regulations.[47]

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[41] 88 Fed. Reg. 54774 & n.11.
[42] Joint comment to EEOC on proposed PWFA regulations from law professors Marcy L. Karin, Deborah A. Widiss, *et al.* regarding menstruation, perimenopause, and menopause, available at https://www.dropbox.com/scl/fi/hmdi1ah93c4czsxkx40ci/Menstruation-PWFA-comment-final.pdf?rlkey=rswa1udnho15zgqtiy257jfbg&dl=0.
[43] 88 Fed. Reg. 54721.
[44] *What You Should Know About the Pregnant Workers Fairness Act*, *supra* n.20, Q5.
[45] 88 Fed. Reg. 54768, 54779.
[46] *Id.*
[47] *Id.*

Reasonable accommodations for pregnancy are to be tailored to the individual employee's limitations and needs, and typically change throughout pregnancy and following childbirth. For example, early in their pregnancy, they may have "morning sickness" that requires a temporary change in their work hours; later in their pregnancy, they may develop a complication that necessitates a temporary transfer to another position that will permit them to work from home.

As for what accommodations might arise in the context of pregnancy, childbirth, and related medical conditions, the PWFA Proposed Regulations enumerate several examples of accommodations that have "long recognized by the EEOC as reasonable accommodations": frequent breaks, sitting/standing, schedule changes, part-time work, paid and unpaid leave, telework, reserved parking, light duty, accessibility modifications, job restructuring, temporary suspending one or more essential functions, acquiring or modifying equipment, uniforms, or devices, and adjusting or modifying examinations or policies.[48] Examples of effective accommodations for a range of conditions are available from the Center for WorkLife Law.[49]

The PWFA makes it an unlawful employment practice for an employer to require an employee to accept an accommodation other than a reasonable accommodation arrived at through an interactive process.[50] Like the ADA, this does not mean that the employee is necessarily entitled to their preferred accommodation; they are entitled only to an effective accommodation that will allow them to work safely and comfortably. When an employer is choosing among reasonable accommodations, it should give primary consideration to the employee's preference and ensure that the accommodation provides the employee with an equal employment opportunity.[51] The PWFA also prohibits employers from requiring an employee to take paid or unpaid leave that they did not request if another reasonable accommodation can be provided that will allow them to continue to work.[52]

1. *Leave as a Reasonable Accommodation*

Ensuring employees have access to job-protected time off for childbirth and other pregnancy-related reasons is an important legislative goal of PWFA.[53] The EEOC's Proposed Regulations note that unpaid job-protected leave and accrued paid leave are reasonable accommodations, and the regulations highlight leave for childbirth recovery and time off for medical appointments, as well as intermittent leave for pregnancy-related illness and leave to recover from pregnancy termination or loss, as examples.[54] The Proposed Regulations also note

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[48] Proposed Interpretive Guidance, 88 Fed. Reg. 54781-82.
[49] Center for WorkLife Law, *Pregnancy, Childbirth, and Related Medical Conditions: Common Workplace Limitations and Reasonable Accommodations Explained*, https://pregnantatwork.org/wp-content/uploads/Workable-Accommodation-Ideas.pdf; *See also* AskJAN, *Pregnancy Accommodation Ideas*, https://askjan.org/disabilities/Pregnancy.cfm.
[50] 42 U.S.C. § 2000gg-1(2).
[51] Preamble to Proposed Regulations, 88 Fed. Reg. 54739-40.
[52] 42 U.S.C. § 2000gg-1(4).
[53] The legislative history repeatedly indicates that PWFA protections were needed because pregnant workers were being fired for taking leave or were exhausting their leave allotments during pregnancy and having none left to recover from childbirth. *See* H.R. Rep. No. 117-27 (2021), https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf.
[54] 88 Fed. Reg. 54768.

that, like under the ADA, employee health benefits must be continued to the same extent as are the benefits of other employees on a similar leave status. According to the EEOC, a covered entity's concerns about the length, frequency, or unpredictable nature of requested leave are questions of undue hardship.[55]

Guidance in the Proposed Regulations on duration of leave is scarce. This makes sense, given that the length of a requested leave is a situation-specific factual inquiry of reasonableness and undue hardship. However, several examples provided by the EEOC give some indication. One example discusses an employee who needs 6 to 8 weeks off to recover from childbirth, concluding that the employer must provide the leave, absent undue hardship.[56] In its discussion on adjusting production quotas to account for leaves of absence, the EEOC refers to an employee who was on leave for 4 months.[57] Finally, the EEOC describes a hypothetical employee who is entitled to 10 days of time off to recover from a miscarriage, despite being a new employees who is not covered by the FMLA.[58]

There are also lessons from the ADA context that could be useful in the context of PWFA leaves. First, courts have long been resistant to finding fault with employers who deny requests for indefinite leave. The length of a leave is perhaps the most important factor in determining whether requested leave would impose undue hardship. It is also a factor that is often within the employee's control. Therefore, a best practice is to advise clients to request a finite amount of time by providing a probable end date, even if they have to go back and modify it later.

Second, courts are more likely to find that employers are required to provide leave of a longer duration when it can be tied to an employer's own internal policy.[59] It can be helpful to check if the employer's handbook provides personal leaves (including sabbaticals) – many handbooks and internal policies provide unpaid personal leaves of 6 months or a year, at the employer's discretion. If an employee asks for a PWFA leave that is shorter than the maximum provided by such a policy, that may persuade a court that the length of leave sought is reasonable.[60]

Practitioners should also keep in mind practical considerations for clients who need leave. For starters, leave is typically unpaid, making it often inaccessible to the lowest paid workers. Keep in mind, several states provide temporary disability insurance or paid medical leave when an employee is unable to work during pregnancy; some employees have private short term disability plans; and some states provide paid leave following childbirth. There are state-run programs in: California, Colorado, Connecticut, the District of Columbia, Delaware,

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[55] *Id.*
[56] Example 1636.3 #23/Unpaid Leave for Recovery from Childbirth, 88 Fed. Reg. 54732.
[57] 88 Fed. Reg. 54780.
[58] Example 1636.3 #21/Unpaid Leave, 88 Fed. Reg. 54731.
[59] *See* 2 Employee and Union Member Guide to Labor Law (Nov. 2021) § 7:66, n.14 (collecting cases finding months-long leaves to be reasonable).
[60] *See King v. Steward Trumbull Memorial Hospital*, 30 F.4th 551 (6th Cir. 2022) (employee asked for 5 weeks of leave; employer had non-FMLA leave policy that provided for leave up to one year; court found the 5 weeks to be reasonable as well within the employer's policy).

Massachusetts, Maryland, Maine, Minnesota, New Jersey, New York, Oregon, Rhode Island, and Washington.[61] Many states and local jurisdictions also provide paid sick days.[62]

Unlike leave taken under the FMLA, the PWFA Proposed Regulations do not require the employer to continue employer-provided health insurance during periods of leave, unless the employer offers such continued benefits to employees on a similar leave status. While WorkLife Law and partners have urged the EEOC to require continued health insurance that can be provided without undue hardship, given the critical nature of health insurance benefits for pregnant people, practitioners must be prepared to engage in the comparative analysis identified by the EEOC in the Proposed Regulations, which has applied been also in the ADA context. In advocating for clients who will desperately need to maintain their health insurance during a PWFA leave, the focus should be on demonstrating that employees on similar leave statuses are provided continued health benefits. One obvious comparator is employees on FMLA leave.

2. *Remote Work*

In its Proposed Regulations, the EEOC identifies "telework" as an example of reasonable accommodation,[63] and notes in the Proposed Interpretive Guidance that a remote work accommodation may be needed for a period of bed rest, a mobility impairment, nausea and vomiting, and significant fatigue. On WorkLife Law's free legal helpline, attorneys have also urged remote work when employees have mental health issues, concerns about exposure to COVID in crowded workplaces, and challenges pumping milk while away from their baby.

In the ADA context, some courts have found attendance to be an essential function.[64] However, it is important to focus on the functions of the job, not on how or where they are achieved. Further, unlike in the ADA context, essential functions can be temporarily suspended in the PWFA context. While it is of course true that some jobs cannot be performed remotely, we have learned in recent years that many can. Gathering evidence about how a position was performed remotely during the pandemic may prove useful. Further, even if full-time remote work is not possible, the employer must consider part-time remote work for those functions that can be performed remotely, or other accommodations like a temporary transfer to an alternate position or temporary suspension of duties that require in-person attendance.

3. *Accommodations for Breastfeeding, Chestfeeding, and Lactating Workers*

At the same time that PWFA was signed into law, President Biden also signed the PUMP Act,[65] which amended the Fair Labor Standards Act to require employers of all sizes to provide reasonable break time and private space for employees to pump breast milk in the first year of their infant's life, as well as a to make a robust private right of action available to aggrieved employees. To learn more about the PUMP Act, practitioners can consult the "Introduction to

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[61] A Better Balance, https://www.abetterbalance.org/resources/paid-family-leave-laws-chart/.
[62] A Better Balance, https://www.abetterbalance.org/paid-sick-time-laws/.
[63] 88 Fed. Reg. 54768.
[64] *See, e.g., Weber v. BNSF Railway Co.*, 989 F.3d 320 (5th Cir. 2021).
[65] 29 U.S.C. § 218d.

the PUMP Act" webinar from the Center for WorkLife Law and the ACLU, in partnership with NELA.[66]

Accommodations for lactating employees are also available under the PWFA, given that lactation and breastfeeding are recognized by the EEOC and courts as medical conditions related to pregnancy.[67] The PWFA incorporates the PUMP Act's provisions in defining what will constitute appropriate lactation accommodations.[68] The PWFA's protections can be used to supplement rights under the PUMP Act, for example, for employees who need to express milk beyond the first year of their child's life.

Additionally, the PWFA will aid those employees who may need accommodations for breastfeeding, chestfeeding, and lactation beyond break time and space. For example, they may need changes in job duties to avoid exposure to toxins that can contaminate breast milk (e.g., pesticides); uniform changes (e.g., not wearing a bullet proof vest that is tight across the chest and restricts milk production), time off for lactation-related medical appointments, or to work from home to directly nurse the infant when the employee is unable to express milk.[69] Additionally, some employees may wish to pump in a non-private space, often so that the employee can continue working (by choice), or due to claustrophobia. The PUMP Act requires private space be made available, but an employee who does not wish to use it cannot be required to do so, and may have a right to pump in a non-private space, so long as it does not impose an undue hardship.[70]

D. Undue Hardship

As in the ADA, the PWFA defines undue hardship as significant difficulty or expense incurred by the employer.[71] The factors to be considered in determining whether an accommodation would impose an undue hardship include: "(i) The nature and net cost of the accommodation . . . ; (ii) The overall financial resources of the facility . . . , the number of persons employed at such facility, and the effect on expenses and resources; (iii) The overall financial resources of the [employer], the overall size of the business . . . with respect to the number of its employees, and the number, type and location of its facilities; (iv) The type of

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[66] Available at https://www.nela.org/programs-events/series-pwfa-pump/.
[67] U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on Pregnancy Discrimination,* ("pregnancy, childbirth, or related medical conditions" includes lactation and breastfeeding), available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues; *see also, e.g., Hicks v. City of Tuscaloosa,* 870 F.3d 1253, 1259-60 (11th Cir. 2017) (finding lactation and breastfeeding covered under the PDA, and asserting that "[t]he PDA would be rendered a nullity if women were protected during a pregnancy but then could be readily terminated for breastfeeding—an important pregnancy-related physiological process") (internal citation and quotation omitted); *EEOC v. Houston Funding II, Ltd.,* 717 F.3d 425, 429-30 (5th Cir. 2013) ("[A]s both menstruation and lactation are aspects of female physiology that are affected by pregnancy, each seems readily to fit into a reasonable definition of 'pregnancy, childbirth, or related medical conditions'").
[68] 88 Fed. Reg. 54768 (to be codified at 29 C.F.R. § 1636.3(i)(4)).
[69] Center for WorkLife Law, *Pregnancy Accommodations Explained*, 10-12, https://pregnantatwork.org/wp-content/uploads/Workable-Accommodation-Ideas.pdf.
[70] Keep in mind that employers prohibiting employees from pumping in a non-private space (e.g., at their desk or in the lobby) may run afoul of the PDA's prohibition on lactation discrimination and/or PWFA's accommodation requirements and anti-retaliation provisions.
[71] 88 Fed. Reg. 54769 (to be codified at 29 C.F.R. § 1636.3(j)).

operation [of the employer]; and (v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business."[72]

One area in which the PWFA differs from the ADA is the enumeration in the Proposed Regulations of "predictable assessments" that "will virtually always be reasonable accommodations that do not impose an undue hardship." These "predictable assessments" include: "(1) allowing an employee to carry water and drink . . . ; (2) allowing an employee additional restroom breaks; (3) allowing an employee whose work requires standing to sit and whose work requires sitting to stand, and (4) allowing an employee breaks, as needed, to eat and drink."[73]

E. Interactive Process

Once the worker's pregnancy-related "limitation" is "known" to the employer (see Section 1, "Known Limitation," above), the process of identifying a mutually satisfactory accommodation begins. The PWFA incorporates the familiar requirement, established under the ADA, that the parties engage in an "interactive process" to identify appropriate accommodations.[74] Although an employer's failure to engage in the interactive process does not constitute an independent violation of the PWFA, the statute specifically identifies as an unlawful practice "requir[ing] a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process."[75]

1. *What does the interactive process consist of?*

The PWFA Proposed Regulations define the interactive process as "an informal, interactive process between the [employer] and the employee . . . seeking an accommodation under the PWFA. This process should identify the known limitation and the change or adjustment at work that is needed, if either of these are not clear from the request, and potential reasonable accommodations. There are no rigid steps that must be followed."[76]

The EEOC's Proposed Interpretive Guidance notes that in many instances, the needed accommodation is obvious or is so *de minimis* that the "interactive process" can be completed with little discussion.[77] For instance, the agency notes that if the sought-after accommodation is one of the itemized modifications designated in the Proposed Regulations as imposing

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[72] *Id.* (to be codified at 29 C.F.R. § 1636.3(j)(2)).
[73] 88 Fed. Reg. 54769 (to be codified at 29 C.F.R. §§ 1636.3(j)(4) & 1636.3(j)(4)(i)-(iv).
[74] 42 U.S.C. § 2000gg(7).
[75] *Id.* § 2000gg-1(2).
[76] 88 Fed. Reg. 54769 (to be codified at 29 C.F.R. § 1636.3(k)). The proposed Interpretive Guidance notes that this is a lower threshold than is demanded under the ADA, where the affected employee must identify the "precise limitations" posed by the disability as well as potential accommodations, whereas under the PWFA, so long as the "limitation" is known to the employer, then the interactive process can get underway. 88 Fed. Reg. 54786.
[77] 88 Fed. Reg. 54787.

"predictable assessments" that in most cases will not rise to the level of imposing an undue hardship, the interactive process will require little discussion.[78]

When more prolonged discussion is necessary, the Proposed Interpretive Guidance details a "step by step process" to guide employers and workers in conducting the interactive process, which includes analyzing the job at issue, including its essential functions; identifying the specific accommodation sought (e.g., avoiding repetitive heavy lifting, avoiding early morning work hours because of "morning sickness"); identifying potential accommodations (e.g., assistance with lifting or temporary reassignment of tasks requiring lifting to co-workers; modifying work hours to allow for later arrival); and the preferences of the employee.[79] The Interpretive Guidance further directs that if the proposed modification impedes performance of an essential job function, the parties should consider whether suspending that essential function is appropriate, given the temporary nature of the accommodation.[80]

If an employer is unable to provide the employee's requested accommodation or claims it would cause an undue hardship, the employer and employee should discuss what the employee needs and what the employer can provide in order to arrive at a reasonable accommodation that will allow the employee to continue to work safely and comfortably.[81] Again, an employer is not permitted to force an employee to accept an accommodation not arrived at through the interactive process, and is not permitted to force the worker to take leave if an appropriate accommodation is available that would not impose an undue hardship.[82]

2. *Delay in providing reasonable accommodations, and failure to provide interim accommodations*

One problematic fact pattern that often arises in ADA cases involves a delay between the employee making the request and receiving an accommodation. Since the PWFA has gone into effect, pregnant people have likewise experienced significant delays in obtaining urgently needed accommodations.[83] Often such delay results from the employer's onerous demands for medical

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[78] *Id.*

[79] Proposed Interpretive Guidance, 88 Fed. Reg. 54786-87.

[80] *Id.*

[81] For assistance in identifying appropriate accommodations, the Proposed Interpretive Guidance directs employers and employees to "outside resources such State or local entities, nonprofit organizations, or the Job Accommodation Network (JAN)." 88 Fed. Reg. 54787. *See also supra* n.49.

[82] 42 U.S.C. § 2000gg-1.

[83] The Center for WorkLife Law's free legal helpline has seen considerable delays, often stemming from employer confusion about how to conduct the interactive process. Many have resorted to their existing ADA processes to assess accommodations for pregnancy-related conditions, leading to lengthy delays and, frequently, to wrongful denials. Some employers have directed all pregnant employees to use online systems for requesting and documenting the need for accommodations. Others have required pregnant employees to fill out lengthy ADA forms and complete medical certifications about whether they can perform all of the many functions listed in their job descriptions, how much time they spend performing each function, and so forth. These demands have resulted in employees waiting for several weeks, with some employees waiting for more than two months, for their "ADA" forms to be "processed." The result of this "processing" is sometimes a request for more information, and sometimes a denial without explanation – and with no conversation about what the employer could provide. In the meantime, these pregnant people risk their health and the health of their pregnancies so they can earn a paycheck, or they forgo work and pay, with significant repercussions for their and their families' lives.

certification that go beyond what is necessary to confirm the need for accommodation and identify appropriate modifications.[84] These periods of delay can be extremely stressful and sometimes dangerous for employees – they may be putting their health or the health of their pregnancies at risk, or they may be losing pay if they cannot work without accommodation. The Proposed Regulations address this issue by stating that "unnecessary delay" in responding to a reasonable accommodation request may be deemed an unlawful failure to accommodate, "even if the [employer] eventually provides the reasonable accommodation."[85]

While neither the PWFA nor the Proposed Regulations specifically require an employer to provide an interim accommodation while the interactive process is taking place, the EEOC recognizes that, given the temporary nature of pregnancy, there is inherent urgency in identifying a reasonable accommodation – and where an employer delays unduly in doing so, failure to provide an interim measure may contribute to a liability finding.[86]

3. *Employer requests for supporting documentation*

The employer is not required to request documentation of the known limitation from the employee, and indeed, may request only supporting documentation that is reasonable under the circumstances.[87] The Proposed Regulations list examples of situations where requesting documentation is not reasonable under the circumstances, such as when the need for reasonable accommodation is obvious, when the employee already provided the employer with sufficient information to substantiate the known limitation, when the employee is pregnant and requests a "predictable assessment" accommodation, and when the employer seeks documentation beyond self-attestation for lactation or pumping.

Where it is "reasonable" for the employer to seek documentation, a reasonableness standard applies also to the type and extent of documentation that the employer may request. The Proposed Regulations define "reasonable documentation" as documentation sufficient to (1) "describe or confirm the physical or mental condition," (2) confirm that the condition "is related to, affected by, or aris[es] out of pregnancy, childbirth, or related medical conditions," and (3) confirm that "a change or adjustment at work is needed."[88] Laudably, the Proposed Regulations recognize a wide range of providers whose certification of a worker's limitation and needed accommodation will suffice, including doulas, midwives, physical therapists, lactation consultants, and mental health providers.[89]

For these reasons, the Center for WorkLife Law and the ACLU, among other groups, urged the EEOC in their comments on the Proposed Regulations to revise provisions regarding the interactive process, medical certification, and more to strengthen the employer's obligation to minimize delay and to incentivize employers to provide interim accommodations. *See* https://worklifelaw.org/wp-content/uploads/2023/10/WLL-Comment-to-PWFA-Proposed-Regulations.pdf.

[84] Again, this is a problem that has proven prevalent and pernicious since the PWFA went into effect in June 2023. The Center for WorkLife Law's comments to the EEOC identified numerous practices that have resulted in profound delays for workers needing accommodations.

[85] *Id.* at 54770 (to be codified at 29 C.F.R. § 1636.4(a)(1)).

[86] *Id.* (to be codified at 29 C.F.R. § 1636.4(a)(1)(vi)).

[87] *Id.* at 54769 (to be codified at 29 C.F.R. § 1636.3(l)).

[88] *Id.* at 54769 (to be codified at 29 C.F.R. § 1636.3(l)(2)).

[89] *Id*. (to be codified at 29 C.F.R. § 1636.3(l)(3)).

Since the PWFA has gone into effect, too many employers have been withholding accommodations while employees attempt to respond to their unreasonable medical certification requests. For example, often after employees request an accommodation by submitting adequate information in a letter written by their doctor, the employer instructs them that they must instead have their doctor fill out the employer's accommodation form that seeks the same and more information. Many employees have been required to have their doctors fill out lengthy ADA paperwork that seeks detailed information about their medical history and ability to perform the many essential functions listed in their job description. This kind of documentation, though typical under the ADA paperwork, goes far beyond what the EEOC has outlined as reasonable and is therefore not acceptable in the PWFA context.

Notably, if the employer's demand for documentation is not reasonable, the employer is precluded from citing the employee's failure to comply with it as a basis for denying reasonable accommodation.[90] In addition, an employer can violate the PWFA's retaliation provision by continuing to request unnecessary information or documentation.[91] Finally, the Proposed Interpretive Guidance states that employers can ask the employee to fill out a form but cannot ignore or close the initial request because the initial request has placed the employer on notice.[92] Practitioners should rely on these provisions to educate employers that onerous medical documentation requirements may constitute retaliation and lead to unnecessary delay (as discussed in the previous section), and that withholding accommodation based on such requirements may result in a failure-to-accommodate finding, even if an accommodation is ultimately provided.

We note that the Job Accommodation Network long has urged, in the context of ADA accommodations, that the workers themselves are typically the best source for documenting the nature of their limitation and the nature of their needed accommodations,[93] and the same holds true for pregnant people.

F. Qualified Employee

The PWFA applies to "qualified employees" but defines that term more expansively than the ADA in that it allows qualified employees, in certain circumstances, to receive accommodations even when they cannot perform the essential functions of the job. Under the ADA, employees who cannot perform the essential functions of the job, even with an accommodation, are not entitled to accommodation.[94] Under the PWFA, employees who are not able to perform the essential functions of the job can still be qualified and entitled to accommodation if the meet three conditions:

(a) any inability to perform an essential function is for a temporary period;
(b) the essential function could be performed in the near future; and

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[90] *Id.* at 54770 (to be codified at 29 C.F.R. § 1636.54(a)(3)).
[91] *Id*. at 54771 (to be codified at 29 C.F.R. § 1636.5(f)(1)(v)).
[92] 88 Fed. Reg. 54775.
[93] Job Accommodation Network, "Accommodation and Compliance: Interactive Process," available at https://askjan.org/topics/interactive.cfm ("The employee who requested the accommodation is often the best source of information about the disability and possible accommodations.").
[94] 42 U.S.C. § 12111(8).

(c) the inability to perform the essential function can be reasonably accommodated.[95]

According to the Congressional Report, "[t]his language was inserted into the PWFA to make clear that the temporary inability to perform essential functions due to pregnancy, childbirth, or related medical conditions does not render a worker 'unqualified.'"[96] The Proposed Regulations state that "temporary" means not permanent,[97] and "near future" generally means forty weeks – the typical gestational length of pregnancy – and the forty-week period restarts with any new accommodation requests following childbirth.[98]

The final prong of this subsection – whether the employee's inability to perform the essential function can be reasonably accommodated – may lead to disputes over what is "reasonable." The Proposed Regulations give a couple of examples, including: an employee who cannot be around dangerous chemicals being allowed to swap duties involving proximity to the chemicals with another employee; or providing a light duty assignment to an employee with a lifting restriction.

Note that with regard to leave, the Proposed Regulations are clear that in determining whether a person who needs leave is "qualified," the question is whether they will be able to perform the essential functions or can be excused from essential functions *when they return* from leave.[99]

G. Good Faith Affirmative Defense

As with the ADA, the PWFA provides employers with a "good faith" affirmative defense that limits compensatory and punitive damages if the employer can demonstrate that it made good faith efforts, in consultation with the employee, to identify and provide a reasonable accommodation that would not cause an undue hardship to the employer.[100] The employer bears the burden of proof for this defense, but if it can carry its burden, damages may not be awarded.[101]

While this safe harbor is meant to incentivize employers to meaningfully engage in the interactive process to identify a mutually acceptable accommodation, the reality is that some employers will adopt a "check the box" approach aimed at avoiding liability and minimizing damages. Accordingly, employees' counsel should be assiduous in assuring that their clients clearly make their need for accommodation "known," as required by the statute, and that they are

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[95] 42 U.S.C. § 2000gg-6.
[96] H.R. Rep. No. 177-21, pt. 1, at 27 (2022).
[97] 88 Fed. Reg. 54767 (to be codified at 29 C.F.R. § 1636.3(f)(2)(i)).
[98] *Id*. (to be codified at 29 C.F.R. § 1636.3(f)(2)(ii)).
[99] *Id.*
[100] 42 U.S.C. § 2000gg-2(g) ("[I]f an unlawful employment practice involves the provision of a reasonable accommodation pursuant to this chapter or regulations implementing this chapter, damages may not be awarded under section 1981a of this title if the covered entity demonstrates good faith efforts, in consultation with the employee with known limitations related to pregnancy, childbirth, or related medical conditions who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such employee with an equally effective opportunity and would not cause an undue hardship on the operation of the covered entity.").
[101] 88 Fed. Reg. 54772 (to be codified at 29 C.F.R. § 1636.5(g)).

active participants in the interactive process, such as by promptly responding to reasonable requests for information.

"Good faith efforts" are not defined in the statute or in the Proposed Regulations.[102] In the ADA context, courts have not identified any hard and fast rules as to what employer actions will satisfy the "good faith efforts" defense, though they have recognized that "more than 'lip service'" is required.[103] A wholesale failure to engage in the interactive process also will doom an employer's good faith defense.[104] Finally, an employer's failure to meaningfully engage in the interactive process and its injection of undue delay in that process both are inconsistent with a finding of "good faith."[105]

H. Retaliation and Interference Claims

Like the ADA, PWFA prohibits retaliation against an employee because that person has opposed acts or practices made unlawful by PWFA, or has initiated or participated in any investigation, proceeding, or hearing under PWFA, as well as interference with any individual in the exercise or enjoyment of rights under PWFA.[106] Examples of interference (also referred to "coercion" in the Proposed Regulations) include targeting an employee because the employee has requested a reasonable accommodation, requesting documentation that is not reasonable under the circumstances, or issuing a policy that limits employees' rights to invoke PWFA protections, such as stating that the employer will make "no exceptions" to a fixed leave policy.[107]

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[102] *Id.*; *see also* 42 U.S.C. § 2000gg-2(g).
[103] *Burnett v. Ocean Props., Ltd.*, 987 F.3d 57, 71 (1st Cir. 2021) (finding punitive damages award appropriate where employer merely had adopted ADA accommodation policy but failed to train supervisors in using it); *see also E.E.O.C. v. Federal Express Corp.*, 513 F.3d 360, 374 (4th Cir. 2008) ("the mere existence of an ADA compliance policy will not alone insulate an employer from punitive damages liability").
[104] *See*, *e.g.*, *Arnold C. v. USPS*, EEOC App. No. 0120093856 (Nov. 3, 2015) (employer's failure to discuss reassigning employee, even after employee identified two positions to which he proposed he could be transferred and his psychologist documented his need for reassignment, and its insistence that employee instead submit to fitness-for-duty examination, constituted failure to engage in interactive process and precluded good faith finding); *Complainant v. Homeland Security*, EEOC Appeal No. 0120132360 (July 9, 2015) (employer's failure to respond to at least eight emails from employee requesting accommodation constituted failure to engage in interactive process, defeating good faith defense).
[105] *See*, *e.g.*, *Joi J. v. Veterans Affairs*, EEOC Appeal No. 0120150921 (Mar. 3, 2017) (denying good faith defense where employer refused employee's proposal that she be reassigned because *employee* had failed to identify vacant positions, but employer had not conducted its own search; delayed three months after employee submitted requested medical documentation before denying accommodation; and could not articulate how employee's requested accommodation would impose undue hardship); *Federal Express Corp.*, 513 F.3d at 374-76 & n.11 (rejecting good faith defense to punitive damages where employer had ADA accommodation policy in place but managers were not trained in implementing it, higher managers took no action in response to deaf employee's numerous requests for ASL interpretation or closed captioning during training and safety meetings, employee's direct supervisor knew a counterpart at another facility supervised a deaf worker, but never contacted that person to discuss accommodation options, and employer was "dilatory" in communicating with employee).
[106] 88 Fed. Reg. 54719.
[107] *Id.* at 54793.

I. Remedies and Enforcement

The provisions of PWFA's remedies and enforcement section mirror those given to employees alleging discrimination under Title VII, the Congressional Accountability Act of 1955, Chapter 5 of Title 3 of the United Code, Section 717 of the Civil Rights Act of 1964, and the Government Employee Rights Act of 1991. Like these statutes, the PWFA provides that plaintiffs may receive equitable relief, back pay, reasonable attorney's fees, as well as compensatory and punitive damages.[108]

IV. ADDITIONAL CONSIDERATIONS FOR PRACTITIONERS REPRESENTING WORKERS

The passage of the PWFA marks an exciting new era for workers and worker advocates. For too long, employees who were pregnant, lactating, and experiencing other challenges related to pregnancy and childbirth were expected to suffer at the workplace, risking their health and the health of their pregnancy or the health of their newborn. However, the fact-specific, individualized nature of reasonable accommodations, the sheer variety of considerations addressed in the detailed Proposed Regulations, and the PWFA's being modeled on, but distinguished from, the ADA and PDA, mean that employees and the attorneys who represent them are likely to face some confusion among employers until the regulatory framework is settled and the case law begins to take shape.

While the PWFA is new, many of the considerations that practitioners should keep in mind when representing clients with PWFA issues are familiar. Attorneys who are helping advise employees navigate a reasonable accommodation under the PWFA, particularly when they are helping from behind the scenes, should counsel their clients to keep contemporaneous notes of their efforts, as well as the employer's response. One easy way clients can do this is by sending emails to themselves on a personal email account. If they take handwritten notes, they can document the date of the notes by taking a picture of the notes and, even better, emailing to photo to themselves. If a dispute later arises over whether the employer participated in a good faith interactive process, having time-stamped documentation of what happened from the employee's perspective can be very persuasive.

Although the PWFA takes a major step forward in relieving employees from many of the unnecessary burdens that employers often try to impose when employees seek accommodations (e.g., excessive documentation, undue delay), practitioners should ensure that their clients understand what obligations they do have under the PWFA. For example, clients must make their limitation "known" to the employer in order to qualify for the PWFA's protections, and they must also participate in good faith in the interactive process. Employees seeking PWFA accommodations should also understand that they do need to reciprocate if the employer is responding in a reasonable manner, for example, timely responding to a request for documentation that is reasonable under the circumstances, or accepting an accommodation other than their preferred accommodation if the alternative accommodation is effective and allows them to work safely.

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[108] *See* 42 U.S.C. § 2000gg-2.

Moreover, the significant expansion of protections for employees under the PWFA may stir up resistance and resentment within the workforce until norms around pregnancy and lactation accommodations experience a commensurate change. The statute will increase the frequency with which employees make reasonable accommodation requests (as it is intended to do), particularly given the comprehensive definition of "pregnancy, childbirth, and related medical conditions" contained in the Proposed Regulations. Supervisors and co-workers, however, may resent having to make accommodations for known limitations that they perceive as insignificant, or to which they may otherwise object. Practitioners who are guiding employees in the workforce might consider these dynamics when advising employees how to make their accommodation requests, and especially in the near-term, how to educate workplaces that might not yet be well-versed with the new statute. If and when employees seeking reasonable accommodation requests experience blowback in the workplace, practitioners might also expect to see more interference and retaliation cases.[109]

Finally, given that the PWFA only references "pregnant workers" in its name, practitioners may need to educate workers themselves that they also benefit from the statute's protections if they experience a "limitation" related to a wide range of other "pregnancy-related" conditions, including but not limited to seeking treatment for fertility or infertility, recovery from childbirth, and lactation, among many others.

V. CONCLUSION

The PWFA was a decade in the making, but the gaps in the federal statutory framework that it seeks to remedy go back many more years, and have wrought untold harms upon the health and economic security of countless people. The EEOC estimates that the PWFA will extend accommodation rights to more than one million pregnant persons annually who live in states without a pregnancy accommodation law on the books.[110] Given the statute's application to "related medical conditions" beyond pregnancy itself, that figure reflects only a fraction of the population who now enjoy long-overdue job protections under the PWFA. Given that those protections will be especially critical to people laboring in physically-demanding, low-wage jobs disproportionately held by Black and brown women, at greatest risk of pregnancy-related morbidity and mortality – such as retail, health care, and janitorial jobs – the PWFA is accurately considered a racial justice victory as well as a win for gender justice. As with any anti-discrimination law, violations will unquestionably occur – but the PWFA's clarity and breadth will go a very long way toward assuring that millions of workers affected by pregnancy, childbirth, and related medical conditions no longer will have to choose between their paychecks and their health.

[109] Relatedly, PWFA's rule of construction incorporating the application of Section 702 of Title VII, 42 U.S.C. § 2000gg-5(b) (citing 42 U.S.C. § 2000e-1(a)), which permits religious employers to favor co-religionists, may necessitate intervention to remind employers that that provision does not absolve them of engaging in the interactive process to identify alternative reasonable accommodations for workers who do not share the employer's faith.
[110] Preamble to Proposed Regulations, 88 Fed. Reg. 54757-58, Tables 3-5.

Jones v. Qual-Mart Corporation

Statement of Harm

1. I worked for Respondent Qual-Mart Corporation ("Respondent") at its retail store at 1234 Main Street in Scarsdale, NY, from April 2020 until my discharge in November 2023 due to my pregnancy and/or disability, and in retaliation for my seeking an accommodation for my disability and/or my known limitations related to, affected by, and/or arising out of pregnancy.

2. I began working for Respondent on April 7, 2020 as a Customer Service Associate. In my position, I was responsible for performing cashier duties, which included standing for long periods of time while checking out customers, answering customer questions about locating merchandise and processing returns and exchanges, and assisting sales associates across the store as needed. I also was responsible for certain shopping cart and janitorial duties, including retrieving shopping carts from the parking lot, operating equipment to move carts from the parking lot to inside the store, and cleaning restrooms, the sales floor, and the store parking lot as needed.

3. Throughout my employment, I worked a 6:00 a.m. to 3:00 p.m. shift, with a 30-minute lunch break and two 15-minute breaks.

Respondent's Attendance Policy and Punitive "Point" System, and Related Policies

4. From the start of my employment through the date of my discharge, Respondent maintained a policy entitled, "Attendance Management Policy" (the "Attendance Policy").

5. [describe terms of policy, including increments of points assigned for each period of absence; point thresholds for discipline; adverse consequences attached to written warnings; exceptions to the Attendance Policy for particular absences, including as an accommodation of disability; and failure to expressly list pregnancy as a reason for excused absence]

6. [describe policies in Employee Handbook that only reference accommodation of disability, not pregnancy, childbirth, or related medical conditions – including pregnancy-related disabilities]

7. I do not recall ever being told that employees were entitled to accommodations based on pregnancy, childbirth, or related medical conditions. I also do not recall ever being told what Respondent considered to be pregnancy discrimination, or otherwise being informed about my right to accommodation as an employee affected by pregnancy, childbirth, or related medical conditions.

Respondent's Failure to Accommodate My Known Limitations Related to, Affected by, and/or Arising Out of Pregnancy

8. In January 2023, I learned that I was pregnant with my first child. Throughout my first trimester of pregnancy, I experienced persistent "morning sickness" that sometimes caused me to be late for work. In my first month of pregnancy, I was late for work 8 times, accruing 2 points. When in February 2023, my manager, Darrell Smith ("Smith"), criticized my attendance record, I told him, "I'm having trouble getting to work on time because of my morning sickness." I also told Smith that the fumes of the chemicals used to perform my cleaning duties triggered my nausea.

9. Additionally, I told Smith I was worried about being exposed to such chemicals while pregnant.

10. Smith told me that he was sorry I was having a "difficult time," but that if I "[couldn't] do [my] job, [I] should stay home."

11. My difficulty with nausea continued, and by the end of my first trimester, I had accrued 5.5 points and received a Written Warning. A few weeks after reaching that threshold, I applied

for a promotion to Crew Leader, a job that comes with a $1.00/hour raise, but my application was rejected because I had a Written Warning on file.

12. My morning sickness subsided when I reached the midway point in my pregnancy, at roughly 20 weeks. I still was concerned, however, about the exposure to cleaning chemicals when it was my turn to clean the restrooms and sales areas, which occurred twice a week.

13. I also started to need to use the restroom more frequently during my shift, especially due to drinking more water, at my doctor's suggestion.

14. Finally, I experienced severe lower back pain due to prolonged standing and repetitive lifting when performing cashier duties, which comprises roughly 80 percent of my job duties.

15. In or around May 25, 2023, I again told Smith that I thought it "couldn't be good for my baby" to be exposed to the cleaning materials.

16. I also told Smith that "it would be easier for me" if, when assigned to cashier duties, I were allowed to leave my register for bathroom breaks outside of regular break periods. I proposed that I take on more cart-retrieval duties and spend more of my shift assisting sales associates, because it was easier to take bathroom breaks while doing those tasks.

17. I also asked if I could use a stool I had seen in the breakroom so that I could sit during my cashier shifts.

18. Finally, I asked Smith if I could be assigned to the cash register closest to the restroom, so that I could take bathroom breaks as short as 5 minutes; my usual register assignment was at the far end of the store, requiring as long as 15 minutes to get to and from the restroom, particularly because I was moving more slowly due to my advancing pregnancy.

19. Smith told me that he was frustrated with my requests for "special treatment," and that "the job is the job," and I "[couldn't] just pick and choose what [I] want to do."

20. A floor supervisor, Jeannette Brown ("Brown"), overheard my conversation with Smith, and told me that I could apply for the proposed changes to be made to my job. This was the first time that I ever had been informed that pregnancy-related accommodations were available to me.

21. Brown told me that I needed to fill out Qual-Mart's "ADA form," as well as have my doctor fill out a 3-page questionnaire about my health and abilities.

22. I submitted the ADA form the following day, on May 26, and 2 days later, on May 28, my doctor confirmed that she had emailed the questionnaire to Qual-Mart's third-party administrator designated to assess accommodation requests.

23. Thereafter, I asked my store managers and Qual-Mart's corporate HR department every few days if my requests had been approved and was told that they were "still being evaluated." They also told me that the only alternative to continuing to work without the modifications I had requested was to take an unpaid leave of absence. Because I could not afford to do so, I continued working at full capacity.

24. As a result, over the next 3 months, between late May and late August, I also incurred 2 more points due to my taking bathroom breaks outside of my normal break times. This put my point accrual at 7.5 points – within just half a point of discharge.

25. Additionally, my back pain worsened, so that I had pain not only when standing but whenever I walked or performed any physical movements.

26. Finally, when I was 33 weeks pregnant, my requests were granted. I was excused from cleaning duties, was reassigned to more cart collection and associate assistance duties so as to limit my hours working as a cashier, was reassigned to a register closer to the restroom, and was provided with a stool to sit on while working as a cashier.

27. After just one week of these accommodations, however, I gave birth prematurely, on September 2, 2023. My baby was born at just 34 weeks old.

28. I took Family and Medical Leave Act leave for 8 weeks, returning to work on October 30. Although I was physically recovered from childbirth, I was experiencing severe post-partum depression, sometimes feeling so fatigued and unwell that I could not get out of bed.

29. On November 9, 2023, my mother – who lives with me – called the store to tell my supervisor, Smith, that I was unable to come to work because I was having "one of [my] spells that [I'd] been having since the baby came home from the hospital." Smith did not ask my mother any questions about my condition, and thanked her for calling.

30. When I arrived for my shift the following day, Smith told me that my absence was unexcused, resulting in an additional attendance "point," thereby putting me over the 8-point threshold for discharge.

31. I told Smith that I had been too depressed to come to work, and that I was going to start seeing a doctor to address my condition. I also asked about applying for another accommodation as a way of excusing my absence. Smith said that "it [was] too late for that," and that I could not seek an accommodation "after the fact." He also told me that "we all have to work sometimes when we don't want to."

Causes of Action

32. Respondent discriminated against me in violation of the Pregnant Workers Fairness Act ("PWFA"). Specifically, Respondent:

a. Failed to reasonably accommodate my known limitation related to, affected by, and/or arising out of pregnancy (morning sickness), such as by temporarily modifying my schedule or excusing my absences caused by morning sickness;

b. Failed to reasonably accommodate my known limitation related to, affected by, and/or arising out of pregnancy (desire to avoid exposure to chemicals that exacerbated my morning sickness and posed potential harm to my developing fetus), such as by temporarily excusing me from performing cleaning duties;

c. Failed to reasonably accommodate my known limitation related to, affected by, and/or arising out of pregnancy (need to take more restroom breaks), such as by temporarily permitting me to take breaks outside of scheduled break time, reassigning me to more cart retrieval and associate assistance duties, and/or moving me to a cash register located closer to the restroom;

d. Failed to reasonably accommodate my known limitation related to, affected by, and/or arising out of pregnancy (back pain), such as by temporarily changing my job duties and allowing me to use a stool to sit on when performing job duties requiring prolonged standing;

e. Failed to reasonably accommodate my known limitation related to, affected by, and/or arising out of pregnancy (post-partum depression), such as by excusing my intermittent absences caused by my depression;

f. Imposed an unnecessary delay in responding to my reasonable accommodation request by failing to grant my accommodations or provide an interim accommodation (other than unpaid leave) for 6 months after I made my

limitations and need for accommodation known to my manager and for 3 months after I submitted formal "ADA" paperwork and medical certification; and

g. Took adverse actions in terms, conditions, or privileges of employment for requesting and/or using reasonable accommodations.

33. Respondent also discriminated against me in violation of the Americans with Disabilities Act, as amended ("ADA"), by failing to reasonably accommodate my disability (post-partum depression).

34. At all relevant times, I was a "qualified employee" within the meaning of the PWFA and the ADA because I could perform the essential functions of my employment position with or without accommodation. To the extent it may be determined that I could not perform an essential function(s) of my employment position, I still was a "qualified employee" within the meaning of the PWFA because such inability was temporary, I would have been able to perform those essential functions in the near future, and my temporary inability to perform such functions could be reasonably accommodated.

35. None of the accommodations I needed or sought imposed an undue hardship on Respondent.

36. Respondent also discriminated against me in violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 and the Pregnancy Discrimination Act ("PDA"). Specifically, Respondent:

a. Failed to accommodate my pregnancy-related limitations on the same terms as limitations of employees not so affected who are similar in their ability or inability to work; and

b. Penalized me for my pregnancy-related absences while not penalizing the absences of employees not so affected who are similar in their ability or inability to work.

37. Upon information and belief, Respondent engaged and continues to engage in a pattern or practice of discrimination against me and similarly-situated employees who are affected by pregnancy, childbirth, and related medical conditions, in violation of the PWFA by failing to accommodate qualified employees' known limitations related to pregnancy, childbirth, or related medical conditions.

38. Upon information and belief, Respondent engaged and continues to engage in a pattern or practice of discrimination against me and similarly-situated employees who are affected by pregnancy, childbirth, and related medical conditions, in violation of the PDA. Specifically, Respondent:

a. Maintains an accommodation policy that fails to accommodate employees with pregnancy-related limitations on the same terms as employees not so affected who are similar in their ability or inability to work; and
b. Maintains an attendance policy that penalizes pregnancy-related absences while not penalizing the absences of employees not so affected who are similar in their ability or inability to work.

39. Upon information and belief, Respondent's accommodation policy had and continues to have a disparate impact on employees like me and similarly-situated employees who are affected by pregnancy, childbirth, and related medical conditions, in violation of the PDA. Specifically, Respondent:

a. Maintains an accommodation policy that, to the extent it is deemed neutral on its face, disproportionately fails to accommodate employees with pregnancy-related limitations as compared to employees not so affected who are similar in their ability or inability to work and cannot be justified by business necessity; and

b. Maintains an attendance policy that, to the extent it is deemed neutral on its face, disproportionately penalizes pregnancy-related absences while not penalizing the absences of employees not so affected who are similar in their ability or inability to work and cannot be justified by business necessity.

40. As a result of Respondent's unlawful discrimination, I have suffered significant monetary loss, including loss of earnings and other benefits.

41. As a result of Respondent's unlawful discrimination, I have suffered emotional pain, suffering, and other nonpecuniary losses.

42. Respondent's unlawful discrimination was taken either with malice or with reckless indifference to my rights under the law.

THE PREGNANT WORKERS FAIRNESS ACT – BEYOND THE BASICS
December 12, 2023

Fact Pattern for Sample EEOC Charge

Monique Jones is a Customer Service Associate at Qual-Mart, a large retailer. Monique's schedule is 6:00 a.m. to 3:00 p.m., with a 30-minute lunch break and two 15-minute breaks. The essential functions of her job include:

- Cashier duties, which include standing for long periods of time while checking out customers, answering customer questions about locating merchandise and processing returns and exchanges, and assisting sales associates across the store as needed
- Cart and janitorial duties, including gathering shopping carts from the parking lot, operating equipment to move carts from the parking lot to inside the store, and cleaning restrooms, sales floor, and parking lot as needed

No fault attendance policy

Qual-Mart maintains a "no fault" attendance policy which penalizes all absences according to the same "point"-based system. The policy grants a 5-minute grace period at the start of a shift or after breaks, after which the associate accrues "points" or fractions of points and escalating levels of discipline (warning, written warning, final warning); after an associate reaches a "written warning," at 5.5 points, they are ineligible for promotions or transfers, and at 8 points, they are fired. Points remain on an associate's record for 12 months. Under the policy, a few enumerated categories of absence are deemed eligible for excused absence, including jury duty, bereavement leave, vacation, accommodation of ADA-qualifying disability, and FMLA leave. Pregnancy is not specifically enumerated as triggering excused absence.

Qual-Mart also maintains an Employee Handbook. The Handbook contains an "Equal Employment Opportunity Policy" ("EEO Policy") that, under "Disability Discrimination," explains that a failure to accommodate disability is a form of discrimination. The section entitled "Pregnancy Discrimination" does not mention a right to accommodation, and only states that workers are protected from adverse employment actions based on pregnancy. The Employee Handbook also has a section called "ADA Accommodations Process" that does not identify pregnancy, childbirth, or related medical conditions – including pregnancy-related disabilities – as qualifying for accommodation. Aside from the EEO Policy, the only other mention of pregnancy is in the Employee Handbook in a section concerning entitlement to short-term disability benefits, for which an employee must be absent for 7 or more consecutive days to be eligible.

Absences related to "morning sickness" and exposure to cleaning substances

Beginning in her first trimester of pregnancy, Monique experiences persistent morning sickness. Although most severe in the early morning hours, she feels nauseous and sometimes vomits during the day. In her first month of pregnancy alone, Monique is late for work 8 times,

accruing 2 points. When her manager, Darrell Smith, criticizes her attendance, Monique tells him, "I'm having trouble getting to work on time because of my morning sickness." She also tells Darrell that the fumes of the chemicals used to perform her cleaning duties trigger her nausea, and that she also is worried about being exposed to such chemicals while pregnant. Darrell tells Monique that he's sorry she's having a difficult time, but that if she can't do her job, she should stay home.

Monique's difficulty with nausea continues, and by the end of her first trimester, she has accrued 5.5 points and received a written warning. A few weeks after reaching that threshold, Monique applies for a promotion to Crew Leader, a job that comes with a $1.00/hour raise, but her application is rejected because she has a written warning on file.

Difficulty performing certain job duties

Monique's morning sickness subsides when she reaches the midway point in her pregnancy, at roughly 20 weeks. She still is concerned about the exposure to cleaning chemicals when it is her turn to clean the restrooms and sales areas, which occurs twice a week. She also starts to need to use the restroom more frequently during her shift, especially due to drinking more water, at her doctor's suggestion. Finally, Monique experiences severe lower back pain due to prolonged standing and repetitive lifting when performing cashier duties, which comprises roughly 80 percent of her job duties.

Monique tells Darrell that she thinks it "can't be good for [her] baby" to be exposed to the cleaning materials. She also tells him that "it would be easier" for her if, when assigned to cashier duties, she were allowed to leave her register for bathroom breaks outside of regular break periods. Monique proposes that she take on more cart-retrieval duties and spend more of her shift assisting other sales associates, because it is easier to take bathroom breaks while doing those tasks. She also asks if she could use a stool she's seen in the breakroom to sit on during her cashier shifts, and could be assigned to the register closest to the restroom, so that she could take bathroom breaks in as little as 5 minutes; her usual register assignment is at the far end of the store, requiring as long as 15 minutes to get to and from the restroom, particularly now that she is moving more slowly due to her pregnancy. Darrell tells Monique that he's frustrated with her requests for "special treatment," and that "the job is the job" – she "can't just pick and choose what she wants to do."

A floor supervisor, Jeannette, overhears Monique's requests, and tells her that she can apply for these changes to be made to her job, but she needs to fill out Qual-Mart's "ADA form," as well have her doctor fill out a 3-page questionnaire about her health and abilities. Monique submits the ADA form the following day, and 2 days later, her doctor confirms that she has emailed the questionnaire to Qual-Mart's designated third-party administrator. Monique asks her store managers and Qual-Mart's HR department every few days if her request has been approved, but they tell her that it's "still being evaluated." They also tell her that the only alternative to continuing to work without the modifications she has requested is to take an unpaid leave of absence. Because Monique cannot afford to do so, she continues working.

As a result, over the next three months, Monique's back pain becomes so severe she has pain not just when standing but when performing any physical movements. She also incurs 2 more points due to her taking bathroom breaks outside of her normal break times. This puts her at 7.5 points – within just half a point of termination.

Finally, when she is 33 weeks pregnant, Monique's requests are granted. She is excused from cleaning duties, is able to work just a few hours a day as a cashier at the register closest to the bathroom, and is provided with a stool while working the cash register.

Post-partum depression, and termination of employment

Monique gives birth prematurely, at 34 weeks. Because she has worked at Qual-Mart for more than a year, she takes FMLA leave to recover from childbirth, and returns to work 8 weeks later. Perhaps because of her preterm birth, Monique's baby experiences a variety of breathing problems, and is persistently underweight. While she is able to avoid needing time off to take her baby for doctor's visits because her mother provides full-time childcare, Monique becomes severely depressed, sometimes feeling so fatigued and dark that she cannot get out of bed. When one of these episodes occurs on a workday, Monique's mother calls the store and tells Darrell that Monique is unable to come to work because she is having "one of her spells that she's been having since the baby came home from the hospital." Darrell thanks her for calling. When Monique arrives for her shift the following day, Darrell tells her that her unexcused absence has triggered an additional attendance "point," thereby putting her over the 8-point threshold for discharge.

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Pregnancy, Childbirth, and Related Medical Conditions: Common Workplace Limitations and Reasonable Accommodations Explained

Working during pregnancy is generally safe.[1] Many pregnant and postpartum employees need work accommodations, whether because of risks posed by their particular job duties, because of medically-complicated pregnancies, or simply because of the normal physical changes that occur during pregnancy. Employees may also have work limitations resulting from related medical conditions like lactation, abortion, miscarriage, pregnancy loss, fertility treatment, and menstruation. This guide provides an overview of these workplace needs for non-medical professionals. It may be particularly useful to lawyers and HR professionals.

Contents

Questions? For information about the laws that give rights to employees who need accommodations for pregnancy and related conditions, contact the Center for WorkLife Law at 415-565-4640 or info@worklifelaw.org.

[1] Am. Coll. of Obstetricians and Gynecologists, No. 733, *Employment Considerations During Pregnancy and the Postpartum Period*, *in* 131 Obstetrics & Gynecology 115-23 (2018), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/04/employment-considerations-during-pregnancy-and-the-postpartum-period.

Accommodations Employees May Need During a Typical Pregnancy

During pregnancy, people experience normal physical changes that impact numerous bodily systems. These differ from person to person, and may include pain in the back, abdomen, or thighs; swelling in limbs and joints; increased breast size and breast tenderness; nosebleeds; heartburn; dizziness or lightheadedness; fatigue; hemorrhoids; leg cramps or muscle spasms; nausea and vomiting; numb or tingling hands; increased need for urination and bladder control issues; and increased hunger and thirst.

Depending on the nature of their work, employees may require reasonable accommodations related to these normal physical changes. Common pregnancy accommodations include:

- Extra breaks for rest, snacks, water, and restroom use
- Uniform changes
- Changes to job duties, work location, or other modifications needed to reduce or avoid bending, lifting, climbing, walking, and/or standing (e.g. permission to sit on a chair, or moving work station closer to the bathroom)
- Ability to more frequently drink water and eat during the workday
- Schedule changes or excusal from absence and tardiness control policies ("attendance points")
- Time off for regular prenatal care appointments
- Leave prior to childbirth, and for 6-8 weeks after birth for physical recovery

Accommodations Employees May Need to Avoid Hazardous Work

Certain occupations expose employees to conditions that could be harmful to the health of a pregnant person or the health of their pregnancy. An individual pregnant person should be free to decide their personal risk tolerance in consultation with their healthcare provider. Accommodations may be needed to avoid hazardous duties.

Exposure to Toxins

Employment sectors at particular risk of potentially hazardous exposures during pregnancy include agriculture (pesticides), manufacturing (organic solvents and heavy metals), dry cleaning (solvents), custodial and cleaning services (organic solvents), beauty salons (solvents and phthalates), and health care (biologics and radiation).[2] Toxic exposures have been associated with infertility and miscarriage, obstetric outcomes such as preterm birth and low birth weight, neurodevelopmental outcomes

[2] Am. Coll. of Obstetricians and Gynecologists, No. 832, *Reducing Prenatal Exposure to Toxic Environmental Agents*, *in* 138 Obstetrics & Gynecology 40-54 (2021), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/07/reducing-prenatal-exposure-to-toxic-environmental-agents.

such as autism and attention deficit hyperactivity disorder, and adult and childhood cancer.[3]

Responsive accommodations may include change in job duties, switching to less hazardous alternative chemicals, use of personal protective equipment (note PPE may need to be adjusted to fit properly during pregnancy), temporary transfer to an alternate position, or leave when economically feasible (consider disability insurance benefits when leave is the only safe option).

For more information about specific workplace exposures that can be hazardous during pregnancy and breastfeeding, visit https://www.cdc.gov/niosh/topics/repro/specificexposures.html.

Physically Demanding Work

Everyday physical activities are appropriate for most pregnant people, however physically demanding work such as heavy lifting, excessive repetition, awkward postures, and prolonged periods of sitting or standing could increase chances of miscarriage, preterm birth, or injury during pregnancy, according to the National Institute for Occupational Safety and Health (NIOSH),[4] which publishes specific lifting recommendations for pregnant workers.[5] Positions that tend to be physically demanding include healthcare workers, manufacturing workers, construction crews, service workers, flight attendants, firefighters and first responders, childcare providers, and farm and greenhouse workers.

Responsive accommodations may include ability to sit or stand as needed (e.g. providing a chair, a sit-stand workstation, or additional rest breaks), mechanical assistance with lifting or hauling, modification or reassignment of job duties, assistance from co-workers, and temporary transfer to light duty or an alternate position.

Excessive Heat

Exposure to excessive heat at work could increase the risk of reproductive harms, including birth defects, according to the National Institutes for Occupational Safety and Health (NIOSH).[6] Pregnant people are more likely to get heat exhaustion, heat stroke, and dehydration sooner than nonpregnant people.[7] Workers most commonly exposed to heat include those who work outdoors and in buildings without climate control during

[3] Id.

[4] Nat'l Inst. for Occupational Safety and Health, *Physical Job Demands-Reproductive Health*, CDC.GOV, https://www.cdc.gov/niosh/topics/repro/physicaldemands.html.

[5] Leslie A. MacDonald et al., *Clinical Guidelines for Occupational Lifting in Pregnancy: Evidence Summary and Provisional Recommendations*, 209 Am. J. Obstetrics Gynecology 80 (2013), https://www.sciencedirect.com/science/article/abs/pii/S0002937813002421.

[6] Nat'l Inst. for Occupational Safety and Health, *Heat-Reproductive Health*, CDC.GOV, https://www.cdc.gov/niosh/topics/repro/heat.html.

[7] Id.

hot weather, cooks and dishwashers in commercial kitchens (e.g., restaurants), certain manufacturing workers, and firefighters.[8]

Responsive accommodations may include additional breaks to cool down or drink water, portable cooling devices (AC or fan), provision of shade, modification of job duties or productivity metrics, permission to drink water more frequently, and temporary transfer to an alternate position.

Long Working Hours and Overnight Shifts

Working long hours and working at night has been related to miscarriages and preterm birth, according to the National Institutes for Occupational Safety and Health (NIOSH).[9] Americans workers in a wide range of industries have long work hours. Healthcare workers, flight attendants and pilots, law enforcement workers, and workers in the service industry commonly work rotating or night shifts.

Responsive accommodations may include schedule modifications, modification of job duties, temporary excusal from overnight shifts, relief from mandatory overtime, temporary transfer to an alternate position, and reduced work hours or part-time status.

Risk of Falls

Falls are the leading cause of occupational injury among the general population. Pregnant people are at an increased risk of falls because of joint laxity and a shifting center of gravity, particularly later in pregnancy.[10] Falls can be caused by slippery floors, hurried pace, or carrying a child or object. They are therefore more likely to occur in occupations like food services, farmwork, and childcare.[11]

Responsive accommodations may include mechanical assistance with carrying objects (e.g., a wagon or cart), slower pace of work, modification of duties, assistance of co-workers, and temporary transfer to an alternate position.

Accommodations Employees May Need for Medical Complications Caused or Exacerbated by Pregnancy

Pregnant employees with medical conditions beyond pregnancy (e.g., gestational diabetes or perinatal depression) may need reasonable accommodations to meet the

[8] Id.

[9] Nat'l Inst. for Occupational Safety and Health, *Work Schedule-Reproductive Health*, CDC.GOV, https://www.cdc.gov/niosh/topics/repro/workschedule.html.

[10] Am. Coll. of Obstetricians and Gynecologists, No. 733, *Employment Considerations During Pregnancy and the Postpartum Period*, *in* 131 Obstetrics & Gynecology 115-23 (2018), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/04/employment-considerations-during-pregnancy-and-the-postpartum-period.

[11] H.M. Salihu et al., *Pregnancy in the workplace*, 62 Occupational Med. 88 (2012), https://academic.oup.com/occmed/article/62/2/88/1480061?login=false.

limitations of their medical condition. The following chart was taken from the Appendix of *A Sip of Cool Water: Pregnancy Accommodations after the ADA Amendments Act*.[12] It was prepared by with assistance from Drs. Marya Zlatnik and Megan Huchko of the Center for WorkLife Law's Pregnancy Accommodation Working Group.

Table of Medical Complications and Responsive Accommodations

Underlying Conditions	**Description**	**Reasonable accommodations**
Sub-chorionic hematoma, placental abrupion, placentia previa	Uterine or vaginal bleeding in pregnancy is a symptom usually caused by problems with placental attachment that can result in several pregnancy conditions that put women at risk for preterm delivery or miscarriage.	Time off for medical appointments; bedrest; move workstation close to restrooms.
Lumbar lordosis	Pregnant women experience back pain through a variety of mechanisms, including the sway-backed posture (lumbar lordosis) caused by a growing belly and the hormones of pregnancy loosening up the joints, muscle spasms and "Braxton-Hicks" contractions. Pregnancy may also exacerbate pre-existing back problems. Back pain, if severe, can interfere with major life activities (standing, reaching, lifting, or bending).	Use of a heating pad, sitting instead of standing, lifting assistance or limitations, using assistive equipment to lift, and modification of the duties of the job, such as temporary light duty
Deep vein thrombosis, pulmonary embolism, stroke	Pregnancy increases women's risk for blood clots, which can occur in the veins of the legs (deep vein thrombosis), lungs (pulmonary embolism) or brain (stroke).	Modification of work station, breaks for exercise.
Carpal Tunnel Syndrome	Tingling, pain, numbness and joint stiffness in hands and wrists is common in late pregnancy due to changes in fluid composition and increased amount of pressure on median nerve in wrist. Carpal tunnel syndrome is an impairment that is much more prevalent in pregnant women than the population generally.	Occasional breaks from manual tasks or typing and specialized programs that allow for dictation instead of typing

[12] Joan C. Williams, *A Sip of Cool Water: Pregnancy Accommodation after the ADA Amendments Act*, 32 Yale L. & Pol'y Rev. 97 (2015), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2276&context=faculty_scholarship.

Underlying Conditions	**Description**	**Reasonable accommodations**
Chronic migraines	A condition sometimes exacerbated by pregnancy that can be a disability when the headaches reach substantially limiting levels. Migraines can limit major life activities such as seeing, hearing, eating, sleeping, walking, learning, reading, concentrating, thinking, communicating, and working.	Changing lighting in the work area, limiting exposure to noise and fragrances, scheduling changes such as flexible schedules or telework (which may include a transfer to a position that provides this kind of flexibility)
Dependent edema	Swelling, especially of feet/ankles, is more common as pregnancy progresses, and becomes worse with standing. This is caused by an increase in the overall volume of fluid in the body, leading to a decrease in protein concentration or oncotic pressure within the circulatory system. This leads to fluid extravasation from blood vessels into the extravascular space.	Provide employee with stool or chair to sit on while working; more frequent rest breaks; modification of footwear requirements.
Dyspnea	Shortness of breath is common due to the partially compensated respiratory alkalosis of pregnancy. Pregnant woman breath more deeply to allow gas exchange for herself, the placenta, and the fetus. Breathing more deeply (increasing "minute ventilation") increases the pH of her blood (makes it a little more basic). Her kidneys partially compensate by putting more bicarbonate into her urine. This physiology is what makes daily life difficult for pregnant women.	Provide employee with stool or chair to sit on while working; more frequent rest breaks.
Fatigue	A feeling of tiredness or exhaustion or a need to rest because of lack of energy or strength.	Light duty to avoid strenuous activity, flexible or reduced hours, exemption from mandatory overtime

Underlying Conditions	Description	Reasonable accommodations
Gastroesophageal reflux (GERD)	Mild to severe heartburn is common in pregnancy, caused by hormones loosening muscle that is supposed to hold stomach contents down.	Allowing for breaks for food as needed; providing space for medications to be stored.
Gestational diabetes	This is a condition in which the placenta interferes with the body's normal metabolism of glucose. Women with gestational diabetes need to monitor their blood glucose two to six times/day, and some may need to take insulin or oral medication to control blood glucose levels. The resulting high blood glucose levels can cause placental dysfunction, increased fetal growth and post-natal metabolic abnormalities. Complications of uncontrolled gestational diabetes include fetal macrosomia, shoulder dystocia and increased need for cesarean section.	Permission to take more frequent bathroom breaks, to eat small snacks during work hours, a cot for lying down, and modified schedules
Hemorrhoids	Pregnancy can cause swelling of rectal veins due to hormonal changes, constipation (more common in pregnancy) and increased pelvic girth/pressure. Hemorrhoids can be painful or even bleed.	Allow women to avoid being in a seated position all day, or to use a special cushion.
Hyperemesis gravidarum	Pregnant women can have nausea and/or vomiting that limits their ability to work in certain settings/certain times of day. Severe nausea and vomiting in pregnancy can result in weight loss, dehydration, and/or electrolyte imbalance. It occurs most commonly in the first trimester but can extend throughout the entire pregnancy and all day long.	Permission to take more frequent bathroom breaks, to eat small snacks during work hours, a cot for lying down, and modified schedules.[13]

Underlying Conditions	**Description**	**Reasonable accommodations**
Hypertension, preeclampsia	Chronic or pregnancy-induced high blood pressure may endanger both the health of the mother and the fetus. Pregnancy outcomes range from poor fetal growth, fetal distress and intrauterine demise. The mother may experience damage to her kidneys, liver, heart and brain (seizure or stroke). Major life activities impacted include performing manual tasks, walking, standing, lifting, bending, and working.	Provide a stool or chair for employee to sit on while working; limit lifting and bending requirements; work from home while on bedrest, and leave.
Intrauterine Growth Restriction	Condition in which the fetus is not growing appropriately inside the uterus. There are multiple causes for this, including congenital anomalies, infection in pregnancy, placental attachment disorders, multiple gestation and maternal medical conditions. A related condition is low amniotic fluid or oligohydramnios. Complications include fetal distress, need for early delivery and increased need for cesarean section.	Bedrest; time off for medical appointments.
Intrauterine fetal growth restriction, oligohydramnios, risk of preterm labor, preeclampsia, gestational diabetes.	Symptoms common to multiple gestation (twins, triplets, quadruplets or more) put women at risk for many pregnancy complications. Women may go into labor or have an indicated early delivery and have an increased risk for cesarean section. Providers may recommend fetal monitoring in the third trimester.	(See sections pertaining to related conditions, *infra*.)
Perinatal depression	Includes both major and minor depressive disorders that occur during pregnancy or after giving birth. Symptoms include inability to sleep, loss of focus, feelings of helplessness, and thoughts of suicide. Depression may substantially limit major life activities (thinking, sleeping, concentrating, caring for oneself, and interacting with others).	Time off to attend therapeutic sessions; temporary transfer to a less distracting environment, telecommuting, and leave.

Underlying Conditions	**Description**	**Reasonable accommodations**
Pre-term labor risk	Pregnant women may develop symptoms that put them at risk for pre-term labor and delivery, including contractions, shortened cervix, advanced cervical dilation early in pregnancy, abnormal vaginal bleeding or preterm premature rupture of membranes. In addition to medical management, recommendations for women at risk range from modified or complete bedrest to inpatient management.	(See sections pertaining to related conditions, *infra*.)
Symphyseal separation (i.e. pubic symphysis separation)	Loosening of the joint on the front of the pelvic bone (pubic symphysis) in preparation for childbirth is caused by pregnancy hormones. This condition can result in severe pelvic pain and limited mobility like with some back problems.	Limits on lifting requirements; providing a stool or chair to sit on; more frequent breaks.
Syncope or near-syncope	Feeling lightheaded, dizzy or fainting is common in pregnancy due to the increase in proportion of blood volume going to the uterus and fetus. Symptoms can be caused by heat, stress or unusual exertion. The patient may also experience palpitations or a racing heart beat.	Providing a stool or chair to sit on; more frequent breaks.
Urinary tract or bladder infection	Pregnant women have to urinate frequently. Although this is nearly universal in pregnancy, it can also be a symptom of a bladder infection—which is more common in pregnancy. Urinary frequency can result in poor quality sleep as well.	More frequent bathroom breaks; carrying a bottle of water.
Varicose veins	Hormonal changes, increased blood flow and increased resistance in the pelvis can cause swelling and back-filling of veins in the legs. This can be painful and worsen as pregnancy advances and is exacerbated by standing or sedentary positions.	More frequent breaks; ability to sit or stand as needed.

Accommodations Employees May Need for Other Related Medical Conditions

Lactation

Most nursing parents must use a breast pump[14] to remove milk from their body during the workday. Physicians instruct lactating parents to express milk on the same schedule as they feed their child—which is typically every two to three hours for young infants—to maintain their milk supply and avoid serious health consequences.[15] If a nursing parent suddenly changes their pumping schedule or misses pumping sessions, their body will likely respond by beginning to produce less milk (as the body constantly produces breast milk on a demand-and-supply basis). The diminution of milk supply may mean the nursing parent can no longer produce enough milk to meet their infant's feeding needs.[16] Additionally, inability to pump milk on schedule can cause considerable discomfort or illness for the nursing parent, including painful breast engorgement, infections, and mastitis.[17] Lactating employees who are not producing milk for their own child may also need to pump in cases of surrogacy or infant loss.

Break Time

Breastfeeding, chestfeeding, and pumping employees generally require sufficient break time and a private, non-bathroom space to express milk on an as-needed basis. According to the U.S. Department of Health and Human Services, a pumping break should allow fifteen to twenty minutes for expressing milk, plus time for (i) set up, (ii) clean up, and (iii) the walk to and from the work area and the pumping space, if any.[18] Longer may be needed due to certain physical or workplace conditions.

Pumping Space

The space must not be a bathroom; pumping requires a sanitary environment to reduce the risk of contaminating the breast milk, which is food for a baby.[19] Many parents also

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[14] A breast pump is equipment that creates a rhythmic suction mimicking the pace and physical effect of a nursing baby to remove breast milk from the body. Breast pumps typically require access to an electrical outlet. U.S. Food and Drug Admin., *What to Know When Buying or Using a Breast Pump*, FDA.GOV, https://www.fda.gov/consumers/consumer-updates/what-know-when-buying-or-using-breast-pump.

[15] U.S. Dep't of Labor, Wage & Hour Div., Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073, 80075 (Dec. 21, 2010).

[16] Susan Reslewic Keatley, *How to Deal with Low Breastmilk Supply*, N.Y. TIMES (Apr. 17, 2020), https://www.nytimes.com/article/increase-breastmilk-supply.html.

[17] *Breast Engorgement*, CHILDREN'S HOSP. OF PHILA., https://www.chop.edu/pages/breast-engorgement (last visited Nov. 21, 2022); *see also Engorgement*, WIC BREASTFEEDING SUPPORT—U.S. DEPT. OF AGRIC., https://wicbreastfeeding.fns.usda.gov/engorgement (last visited Nov. 21, 2022).

[18] *Time for breaks*, OFF. ON WOMEN'S HEALTH—U.S. DEPT. OF HEALTH & HUM. SERV., https://www.womenshealth.gov/supporting-nursing-moms-work/break-time-and-private-space/time-breaks (last visited Nov. 22, 2022).

[19] *What employers need to know*, OFF. ON WOMEN'S HEALTH—U.S. DEPT. OF HEALTH AND HUM. SERV., https://www.womenshealth.gov/supporting-nursing-moms-work/what-law-says-about-breastfeeding-and-

require a private space because using a pump exposes the breast/chest. The pumping space should have a seat and a flat surface on which to place the pump. It should be clean and a comfortable temperature. Employees may also need access to electricity (e.g., an outlet or extension cord), access to a refrigerator or permission to carry a cooler to store the milk, and running water to clean their hands and pump parts.

Other Lactation Accommodations

Lactating employees sometimes need accommodations that extend beyond reasonable break time and a private space, either because of the nature of their jobs or health needs like maintaining their milk supply.[20] For example, a lactating employee may need:

- Time off for lactation-related complications such as mastitis;
- Modified work duties, PPE, or a temporary transfer to avoid exposure to toxic chemicals or other hazards that can contaminate human milk, such as pesticides or lead[21];
- Excusal from long-distance travel, or flight schedules and layovers that allow for pumping;
- Accommodations for direct nursing, which may be necessary when a parent is unable to pump milk and/or unable to feed their infant formula (e.g., a formula allergy or national shortage, and/or the infant is struggling to bottle feed). Accommodations that may allow for direct nursing include:
    - remote work,
    - having a child brought to the worksite (assuming it is not a space where children are not permitted to be on premises for safety or similar reasons), and
    - a schedule change to permit the employee to go to the child (such as in a daycare setting) to breastfeed;
- Assignment to work locations where pumping is more feasible;
- Remote work to establish breastfeeding or to address a medical issue like a clogged milk duct;
- Modification of a work uniform that compresses the chest and therefore hinders milk production;
- Permission to arrive late to allow pumping immediately before beginning the workday;
- Adjustments to quotas or production standards to reflect pumping breaks; and

work/what-employers-need-know (last visited Dec. 14, 2022). *See also* U.S. Dep't of Labor, Wage & Hour Div., Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073, 80076 (Dec. 21, 2010).

[20] Ctr. for WorkLife Law, *Exposed: Discrimination Against Breastfeeding Workers* (2016) at 31, https://www.pregnantatwork.org/wp-content/uploads/WLL-Breastfeeding-Discrimination-Report.pdf.

[21] Nat'l Inst. for Occupational Safety and Health, *Learn about Specific Exposures during Pregnancy & Breastfeeding*, CDC.GOV, https://www.cdc.gov/niosh/topics/repro/specificexposures.html.

- Access to a refrigerator or ice, or provision of a cooler, to store pumped breast milk so it is safe for infant consumption.

Fertility Treatment, Miscarriage, and Pregnancy Loss

Employees may need time off for medical appointments and procedures, counseling, physical recovery, and/or bereavement. Employees under fertility treatment may need breaks at specific times of day to administer medication.

Abortion

Employees may need time off for medical procedures, including travel to abortion providers, physical recovery, and/or bereavement.

Menstruation

Employees may need accommodations for issues related to menstruation, including menstrual disorders like abnormal bleeding or premenstrual dysphoric disorder (PMDD). Employees may need modified or work hours, excusal from overnight shifts, [22] additional restroom breaks, moving the workstation closer to the restroom, permission to carry a bag with personal care and hygiene products, or time off for medical appointments.

Questions? For information about the laws that give rights to employees who need accommodations for pregnancy and related conditions, contact the Center for WorkLife Law at 415-565-4640 or info@worklifelaw.org.

[22] Working at night and working long hours has been related to menstrual disorders. See Nat'l Inst. for Occupational Safety and Health, *Work Schedule-Reproductive Health*, CDC.GOV, https://www.cdc.gov/niosh/topics/repro/workschedule.html.