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May 5, 2023

The Pregnant Workers Fairness Act: What NY Attorneys Should Know:

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DIVISION II—PREGNANT WORKERS

SEC. 101. SHORT TITLE.

This division may be cited as the "Pregnant Workers Fairness Act".

SEC. 102. DEFINITIONS.

As used in this division—

(1) the term "Commission" means the Equal Employment Opportunity Commission;

(2) the term "covered entity"—

(A) has the meaning given the term "respondent" in section 701(n) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(n)); and

(B) includes—

(i) an employer, which means a person engaged in industry affecting commerce who has 15 or more employees as defined in section 701(b) of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e(b));

(ii) an employing office, as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301) and section 411(c) of title 3, United States Code;

(iii) an entity employing a State employee described in section 304(a) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16c(a)); and

(iv) an entity to which section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16(a)) applies;

(3) the term "employee" means—

(A) an employee (including an applicant), as defined in section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f));

(B) a covered employee (including an applicant), as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301), and an individual described in section 201(d) of that Act (2 U.S.C. 1311(d));

(C) a covered employee (including an applicant), as defined in section 411(c) of title 3, United States Code;

(D) a State employee (including an applicant) described in section 304(a) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16c(a)); or

(E) an employee (including an applicant) to which section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16(a)) applies;

(4) the term "known limitation" means 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 (42 U.S.C. 12102);

(5) the term "person" has the meaning given such term in section 701(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(a));

(6) the term "qualified employee" means an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position, except that an employee or applicant shall be considered qualified if—

(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

(C) the inability to perform the essential function can be reasonably accommodated; and

(7) the terms "reasonable accommodation" and "undue hardship" have the meanings given such terms in section 101 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111) and shall be construed as such terms are construed under such Act and as set forth in the regulations required by this division, including with regard to the interactive process that will typically be used to determine an appropriate reasonable accommodation.

SEC. 103. NONDISCRIMINATION WITH REGARD TO REASONABLE ACCOMMODATIONS RELATED TO PREGNANCY.

It shall be an unlawful employment practice for a covered entity to—

(1) not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;

(2) require 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 referred to in section 102(7);

(3) deny employment opportunities to a qualified employee if such denial is based on the need of the covered entity to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee;

(4) require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee; or

(5) take adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee.

SEC. 104. REMEDIES AND ENFORCEMENT.

(a) EMPLOYEES COVERED BY TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.—

(1) IN GENERAL.—The powers, remedies, and procedures provided in sections 705, 706, 707, 709, 710, and 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4 et seq.) to the Commission, the Attorney General, or any person alleging a violation of title VII of such Act (42 U.S.C. 2000e et seq.)

shall be the powers, remedies, and procedures this division provides to the Commission, the Attorney General, or any person, respectively, alleging an unlawful employment practice in violation of this division against an employee described in section 102(3)(A) except as provided in paragraphs (2) and (3) of this subsection.

(2) COSTS AND FEES.—The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes (42 U.S.C. 1988) shall be the powers, remedies, and procedures this division provides to the Commission, the Attorney General, or any person alleging such practice.

(3) DAMAGES.—The powers, remedies, and procedures provided in section 1977A of the Revised Statutes (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this division provides to the Commission, the Attorney General, or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes (42 U.S.C. 1981a(a)(1))).

(b) EMPLOYEES COVERED BY CONGRESSIONAL ACCOUNTABILITY ACT OF 1995.—

(1) IN GENERAL.—The powers, remedies, and procedures provided in the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) for the purposes of addressing allegations of violations of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)) shall be the powers, remedies, and procedures this division provides to address an allegation of an unlawful employment practice in violation of this division against an employee described in section 102(3)(B), except as provided in paragraphs (2) and (3) of this subsection.

(2) COSTS AND FEES.—The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes (42 U.S.C. 1988) for the purposes of addressing allegations of such a violation shall be the powers, remedies, and procedures this division provides to address allegations of such practice.

(3) DAMAGES.—The powers, remedies, and procedures provided in section 1977A of the Revised Statutes (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, for purposes of addressing allegations of such a violation, shall be the powers, remedies, and procedures this division provides to address any allegation of such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes (42 U.S.C. 1981a(a)(1))).

(c) EMPLOYEES COVERED BY CHAPTER 5 OF TITLE 3, UNITED STATES CODE.—

(1) IN GENERAL.—The powers, remedies, and procedures provided in chapter 5 of title 3, United States Code, to the President, the Commission, the Merit Systems Protection Board, or any person alleging a violation of section 411(a)(1) of such title shall be the powers, remedies, and procedures this division provides to the President, the Commission, the Board, or any person, respectively, alleging an unlawful employment practice in violation of this division against an employee

described in section 102(3)(C), except as provided in paragraphs (2) and (3) of this subsection.

(2) COSTS AND FEES.—The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes (42 U.S.C. 1988) shall be the powers, remedies, and procedures this division provides to the President, the Commission, the Board, or any person alleging such practice.

(3) DAMAGES.—The powers, remedies, and procedures provided in section 1977A of the Revised Statutes (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this division provides to the President, the Commission, the Board, or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes (42 U.S.C. 1981a(a)(1))).

(d) EMPLOYEES COVERED BY GOVERNMENT EMPLOYEE RIGHTS ACT OF 1991.—

(1) IN GENERAL.—The powers, remedies, and procedures provided in sections 302 and 304 of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16b; 2000e–16c) to the Commission or any person alleging a violation of section 302(a)(1) of such Act (42 U.S.C. 2000e–16b(a)(1)) shall be the powers, remedies, and procedures this division provides to the Commission or any person, respectively, alleging an unlawful employment practice in violation of this division against an employee described in section 102(3)(D), except as provided in paragraphs (2) and (3) of this subsection.

(2) COSTS AND FEES.—The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes (42 U.S.C. 1988) shall be the powers, remedies, and procedures this division provides to the Commission or any person alleging such practice.

(3) DAMAGES.—The powers, remedies, and procedures provided in section 1977A of the Revised Statutes (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this division provides to the Commission or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes (42 U.S.C. 1981a(a)(1))).

(e) EMPLOYEES COVERED BY SECTION 717 OF THE CIVIL RIGHTS ACT OF 1964.—

(1) IN GENERAL.—The powers, remedies, and procedures provided in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16) to the Commission, the Attorney General, the Librarian of Congress, or any person alleging a violation of that section shall be the powers, remedies, and procedures this division provides to the Commission, the Attorney General, the Librarian of Congress, or any person, respectively, alleging an unlawful employment practice in violation of this division against an employee described in section 102(3)(E), except as provided in paragraphs (2) and (3) of this subsection.

(2) COSTS AND FEES.—The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes (42 U.S.C. 1988) shall be the powers,

remedies, and procedures this division provides to the Commission, the Attorney General, the Librarian of Congress, or any person alleging such practice.

(3) DAMAGES.—The powers, remedies, and procedures provided in section 1977A of the Revised Statutes (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this division provides to the Commission, the Attorney General, the Librarian of Congress, or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes (42 U.S.C. 1981a(a)(1))).

(f) PROHIBITION AGAINST RETALIATION.—

(1) IN GENERAL.—No person shall discriminate against any employee because such employee has opposed any act or practice made unlawful by this division or because such employee made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this division.

(2) PROHIBITION AGAINST COERCION.—It shall be unlawful to coerce, intimidate, threaten, or interfere 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 granted or protected by this division.

(3) REMEDY.—The remedies and procedures otherwise provided for under this section shall be available to aggrieved individuals with respect to violations of this subsection.

(g) LIMITATION.—Notwithstanding subsections (a)(3), (b)(3), (c)(3), (d)(3), and (e)(3), if an unlawful employment practice involves the provision of a reasonable accommodation pursuant to this division or regulations implementing this division, damages may not be awarded under section 1977A of the Revised Statutes (42 U.S.C. 1981a) 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.

SEC. 105. RULEMAKING.

(a) EEOC RULEMAKING.—Not later than 1 year after the date of enactment of this Act, the Commission shall issue regulations in an accessible format in accordance with subchapter II of chapter 5 of title 5, United States Code, to carry out this division. Such regulations shall provide examples of reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions.

(b) OCWR RULEMAKING.—

(1) IN GENERAL.—Not later than 6 months after the Commission issues regulations under subsection (a), the Board (as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301)) shall (in accordance with section 304 of the Congressional Accountability Act of 1995 (2 U.S.C. 1384)), issue regulations to implement the provisions of this division made applicable to employees described in section 102(3)(B), under section 104(b).

(2) PARALLEL WITH AGENCY REGULATIONS.—The regulations issued under paragraph (1) shall be the same as substantive regulations issued by the Commission under subsection (a) except to the extent that the Board may determine, for good cause shown and stated together with the regulations issued under paragraph (1) that a modification of such substantive regulations would be more effective for the implementation of the rights and protection under this division.

SEC. 106. WAIVER OF STATE IMMUNITY.

A State shall not be immune under the 11th Amendment to the Constitution from an action in a Federal or State court of competent jurisdiction for a violation of this division. In any action against a State for a violation of this division, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

SEC. 107. RELATIONSHIP TO OTHER LAWS.

(a) IN GENERAL.—Nothing in this division shall be construed—

(1) to invalidate or limit the powers, remedies, and procedures under any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions; or

(2) by regulation or otherwise, to require an employer-sponsored health plan to pay for or cover any particular item, procedure, or treatment or to affect any right or remedy available under any other Federal, State, or local law with respect to any such payment or coverage requirement.

(b) RULE OF CONSTRUCTION.—This division is subject to the applicability to religious employment set forth in section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–1(a)).

SEC. 108. SEVERABILITY.

If any provision of this division or the application of that provision to particular persons or circumstances is held invalid or found to be unconstitutional, the remainder of this division and the application of that provision to other persons or circumstances shall not be affected.

SEC. 109. EFFECTIVE DATE.

This division shall take effect on the date that is 180 days after the date of enactment of this Act.

DIVISION JJ—NORTH ATLANTIC RIGHT WHALES

TITLE I—NORTH ATLANTIC RIGHT WHALES AND REGULATIONS

SEC. 101. NORTH ATLANTIC RIGHT WHALES AND REGULATIONS.

(a) IN GENERAL.—Notwithstanding any other provision of law except as provided in subsection (b), for the period beginning on the date of enactment of this Act and ending on December 31,

What is the Pregnant Workers Fairness Act?

The Pregnant Workers Fairness Act (PWFA) is a **landmark civil rights law that will ensure pregnant and postpartum workers are not forced off the job, and get the accommodations they need, without facing discrimination or retaliation in the workplace.**

Specifically, the PWFA guarantees workers the affirmative right to receive reasonable accommodations for known limitations stemming from pregnancy, childbirth, and related medical conditions unless the requested accommodations would pose an "undue hardship" to the employer (similar to the familiar process in place for workers with disabilities). The law ensures that millions of pregnant workers, and those who have recently given birth, can protect their health without risking their paycheck. It is a major milestone for gender, racial, and economic justice across the country.

When does the Pregnant Workers Fairness Act go into effect?

The PWFA goes into effect on **June 27, 2023**.

What problem did the Pregnant Workers Fairness Act fix?

By guaranteeing a right to reasonable accommodations for pregnancy, childbirth, and related medical conditions, **the PWFA closes a gap in federal law that left pregnant and postpartum workers without remedy if they needed accommodations in order to prevent health complications and keep working**. Prior to the PWFA, existing law like the Pregnancy Discrimination Act only provided workers the right to receive accommodations if they could identify other similarly-situated people in their workplace who received accommodations — an insurmountable hurdle for most workers. Likewise, the Americans with Disabilities Act only provided the right to reasonable accommodations if the worker had a pregnancy-related disability. Before the PWFA's passage, then, many workers who had a medical need for accommodations related to pregnancy had no legal protections and were often forced off the job and into financial precarity.

What rights do workers have under the Pregnant Workers Fairness Act?

Workers will now have a right to reasonable accommodation for pregnancy, childbirth, and related medical conditions, unless the accommodation would be really difficult or expensive (an **"undue hardship"**) for the employer to provide.

Some examples of **reasonable accommodations** include:

- Light duty, or help with manual labor and lifting
- Temporary transfer to a less physically demanding or safer position
- Additional, longer, or more flexible breaks to drink water, eat, rest, or use the bathroom
- Changing food or drink policies to allow a worker to have a water bottle or food
- Changing equipment, devices, or work station, such as providing a stool to sit on or adding a lock to a clean meeting room to turn it into a temporary lactation space
- Making existing facilities easier to use, such as relocating a workstation closer to the restroom
- Changing a uniform or dress code, like allowing wearing maternity pants
- Changing a work schedule, like having shorter work hours or a later start time to accommodate morning sickness

- Breaks, private space (not in a bathroom), and other accommodations for lactation needs
- Flexible scheduling for prenatal or postnatal appointments
- Remote work or telework
- Time off for bedrest, recovery from childbirth, postpartum depression, mastitis, and more

Workers have a right to reasonable accommodations as long as it would not be significantly difficult or expensive — an "undue hardship" — for their employers to provide. Undue hardship is based on factors like the cost of an accommodation and the employer's financial resources.

- For example, it would likely not be an undue hardship for a multimillion-dollar corporation with thousands of employees to temporarily transfer a warehouse worker to a light duty position.
- Likewise, it would probably not be an undue hardship for an accounting firm to provide a clerk with extra breaks to use the restroom and drink water.

Workers will now have a right to accommodations for a wide range of needs "related to pregnancy, childbirth, or related medical conditions."

- That includes common needs related to pregnancy and recovery from childbirth.
- Related medical condition includes lactation, mastitis, and more.
- A pregnant or postpartum worker does not need to have a pregnancy-related *disability* in order to receive an accommodation. **This is a very important change to existing federal law.**

Under the Pregnant Workers Fairness Act, an employer must have a good-faith conversation with a worker seeking reasonable accommodations about the worker's needs and reasonable accommodations that could meet those needs. This is called the **"interactive process."**

- The interactive process can occur in person, by phone, over email, or in other ways. For example, Human Resources might have a meeting with a pregnant worker requesting accommodations to discuss what job duties the employee can safely do, or talk about available positions that the employee could temporarily transfer to.
- A worker does not need to use any "magic words," or mention the "Pregnant Workers Fairness Act" or the phrase "reasonable accommodation," in order to start this process.
- The employer must respond to the request and engage in the interactive process promptly.
- Even if you're not able to perform some of your main job duties, sometimes referred to as "essential functions," it may still be possible to receive accommodations so long as you're able to perform those duties in the near future and you only need the accommodation for a temporary amount of time.

Retaliating against a worker for needing, requesting, or using a reasonable accommodation is unlawful. An employer cannot force a worker to accept an accommodation that the worker does not want or need, or force a worker to take leave, whether paid or unpaid. For example, an employer cannot force a pregnant employee to accept a reduced work schedule or stop traveling for work, if the employee does not want or need those changes.

Who does the Pregnant Workers Fairness Act protect?

The law protects people who work for the government, and for private employers with at least 15 employees. In addition to full-time workers, the law also protects part-time, temporary, and seasonal workers as well as people applying for jobs.

What other laws protect pregnant and postpartum workers?

Other federal laws, including the Pregnancy Discrimination Act (PDA), Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and the Fair Labor Standards Act (FLSA), provide additional protections, such as the right to be free from pregnancy discrimination, the right to unpaid, job-protected time off, and the right to break time and space to express milk at work. State and local pregnant workers fairness acts, paid family and medical leave laws, paid sick time statutes, and anti-discrimination laws provide further protections.

Where can I get help and learn more?

Call A Better Balance's free, confidential legal helpline at 1-833-633-3222 or visit our Get Help, PWFA Resources, or Workplace Rights Hub webpages. Even though the PWFA does not go into effect until June 27, 2023, you may have existing rights and protections that could help you, such as those noted above.

U.S. Equal Employment Opportunity Commission

What You Should Know About the Pregnant Workers Fairness Act

1. **What is the Pregnant Workers Fairness Act?**

   The **Pregnant Workers Fairness Act (PWFA) (https://www.congress.gov/117/bills/hr2617/BILLS-117hr2617enr.pdf#page=1626)** is a new law that requires **covered employers** to provide "reasonable accommodations" to a worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an "undue hardship."

   The PWFA applies only to accommodations. **Existing laws (https://www.eeoc.gov/pregnancy-discrimination)** that the EEOC enforces make it illegal to fire or otherwise discriminate against workers on the basis of pregnancy, childbirth, or related medical conditions.

   The PWFA does not replace federal, state, or local laws that are **more protective** of workers affected by pregnancy, childbirth, or related medical conditions. More than 30 **states (https://www.dol.gov/agencies/wb/pregnant-nursing-employment-protections)** and cities have laws that provide accommodations for pregnant workers.

2. **When does the PWFA go into effect, and will the public have input on any regulations?**

   The PWFA goes into effect on June 27, 2023. The EEOC is required to issue regulations to carry out the law. The EEOC will issue a proposed version of the PWFA regulations so the public can give their input and offer comments before the regulations become final.

3. **Is the EEOC accepting charges under the PWFA?**

   The EEOC will start accepting charges under the PWFA on June 27, 2023. For the PWFA to apply, the situation complained about in the charge must have

happened on June 27, 2023, or later. A pregnant worker who needs an accommodation before June 27th may, however, have a right to receive an accommodation under another federal or state law.

In some situations, workers affected by pregnancy, childbirth, or a related medical condition may be able to get an accommodation under **Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act (ADA)**. Therefore, until June 27, 2023, the EEOC will continue to accept and process Title VII and/or ADA charges involving a lack of accommodation regarding pregnancy, childbirth, or related medical conditions.

After June 27, 2023, the EEOC will analyze charges regarding accommodations for workers affected by pregnancy, childbirth, or related medical conditions under the PWFA (if the violation occurred after June 27, 2023) and, where applicable, under the ADA and/or Title VII.

4. **Who does the PWFA protect?**

   The PWFA protects employees and applicants of "covered employers" who have known limitations related to pregnancy, childbirth, or related medical conditions.

   "Covered employers" include private and public sector employers with at least 15 employees, Congress, Federal agencies, employment agencies, and labor organizations.

5. **What are some examples of reasonable accommodations for pregnant workers?**

   "Reasonable accommodations" are changes to the work environment or the way things are usually done at work.

   The **House Committee on Education and Labor Report on the PWFA (https://www.congress.gov/congressional-report/117th-congress/house-report/27/1?overview=closed)** provides several examples of possible reasonable accommodations including the ability to sit or drink water; receive closer parking; have flexible hours; receive appropriately sized uniforms and safety apparel; receive additional break time to use the bathroom, eat, and rest; take leave or time off to recover from childbirth; and be excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy. Employers are required to provide reasonable accommodations unless they would cause an "undue hardship" on the employer's operations. An "undue hardship" is significant difficulty or expense for the employer.

6. **What else does the PWFA prohibit?**

   Covered employers cannot:

   - Require an employee to accept an accommodation without a discussion about the accommodation between the worker and the employer;
   - Deny a job or other employment opportunities to a qualified employee or applicant based on the person's need for a reasonable accommodation;
   - Require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working;
   - Retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
   - Interfere with any individual's rights under the PWFA.

7. **What other federal laws may apply to pregnant workers?**

   Other laws that apply to workers affected by pregnancy, childbirth, or related medical conditions, include:

   - Title VII (enforced by the EEOC), which:
     - Protects an employee from discrimination based on **pregnancy (https://www.eeoc.gov/pregnancy-discrimination)** , childbirth, or related medical conditions; and
     - Requires covered employers to treat a worker affected by pregnancy, childbirth, or related medical conditions the same as other workers similar in their ability or inability to work;
   - The ADA (enforced by the EEOC), which:
     - Protects an employee from discrimination based on **disability (https://www.eeoc.gov/eeoc-disability-related-resources)** ; and
     - Requires covered employers to provide reasonable accommodations to a person with a disability if the reasonable accommodation would not cause an undue hardship for the employer.
     - While pregnancy is not a disability under the ADA, some pregnancy-related conditions **may be disabilities (https://www.eeoc.gov/laws/guidance/questions-and-answers-about-eeocs-enforcement-guidance-pregnancy-discrimination-and#q17)**

under the law.

- The **Family and Medical Leave Act of 1993 (https://www.dol.gov/agencies/whd/fmla)** (enforced by the U.S. Department of Labor), which provides covered employees with unpaid, job-protected leave for certain family and medical reasons; and
- The **PUMP Act (https://www.dol.gov/agencies/whd/nursing-mothers)** (Providing Urgent Maternal Protections for Nursing Mothers Act) (enforced by the U.S. Department of Labor), which broadens workplace protections for employees to express breast milk at work.

U.S. Equal Employment Opportunity Commission

Enforcement Guidance on Pregnancy Discrimination and Related Issues

This guidance document was issued upon approval by vote of the U.S. Equal Employment Opportunity Commission.

OLC Control Number:	EEOC-CVG-2015-1
Concise Display Name:	Enforcement Guidance on Pregnancy Discrimination and Related Issues
Issue Date:	06-25-2015
General Topics:	Pregnancy, Sex
Summary:	This document addresses the Pregnancy Discrimination Act and the ADA as they apply to pregnant workers.
Citation:	Title VII, 29 CFR Part 1604
Document Applicant:	Employers, Employees, Applicants, Attorneys and Practitioners, EEOC Staff
Previous Revision:	Yes. This document replaced a 2014 document by the same name.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

	NOTICE	**Number**
EEOC		915.003
		Date

		June 25, 2015

SUBJECT: EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues

PURPOSE: This transmittal covers the issuance of the Enforcement Guidance on Pregnancy Discrimination and Related Issues. This document provides guidance regarding the Pregnancy Discrimination Act and the Americans with Disabilities Act as they apply to pregnant workers.

EFFECTIVE DATE: Upon receipt.

EXPIRATION DATE: This Notice will remain in effect until rescinded or superseded.

OBSOLETE DATA: This Enforcement Guidance supersedes the Enforcement Guidance on Pregnancy Discrimination and Related Issues dated July 14, 2014. Most of this revised guidance remains the same as the prior version, but changes have been made to Sections I.B.1 (Disparate Treatment), and I.C.1 (Light Duty) in response to the Supreme Court's decision in *Young v. United Parcel Serv., Inc.*, --- U.S. ---, 135 S.Ct. 1338 (2015). Section I A.5 of the July 14, 2014 guidance has also been deleted in response to *Young*.

ORIGINATOR: Office of Legal Counsel.

Jenny R. Yang
Chair

ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES

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PREGNANCY DISCRIMINATION AND RELATED ISSUES

OVERVIEW OF STATUTORY PROTECTIONS

Pregnancy Discrimination Act

Congress enacted the Pregnancy Discrimination Act (PDA) in 1978 to make clear that discrimination based on pregnancy, childbirth, or related medical conditions is a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964 (Title VII).[1] Thus, the PDA extended to pregnancy Title VII's goals of "'[achieving] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of . . . employees over other employees.'"[2]

By enacting the PDA, Congress sought to make clear that "[p]regnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working."[3] The PDA requires that pregnant employees be treated the same as non-pregnant employees who are similar in their ability or inability to work.[4]

Fundamental PDA Requirements

1) An employer[5] may not discriminate against an employee[6] on the basis of pregnancy, childbirth, or related medical conditions; and

2) Women affected by pregnancy, childbirth, or related medical conditions must be treated the same as other persons not so affected but similar in their ability or inability to work.

In the years since the PDA was enacted, charges alleging pregnancy discrimination have increased substantially. In fiscal year (FY) 1997, more than 3,900 such charges were filed with the Equal Employment Opportunity Commission (EEOC) and state and local Fair Employment Practices Agencies, but in FY 2013, 5,342 charges were filed.

In 2008, a study by the National Partnership for Women & Families found that pregnancy discrimination complaints have risen at a faster rate than the steady influx of women into the workplace.[7] This suggests that pregnant workers continue to face inequality in the workplace.[8] Moreover, the study found that much of the increase in these complaints has been fueled by an increase in charges filed by women of color. Specifically, pregnancy discrimination claims filed by women of color increased by 76% from FY 1996 to FY 2005, while pregnancy discrimination claims overall increased 25% during the same time period.

The issues most commonly alleged in pregnancy discrimination charges have remained relatively consistent over the past decade. The majority of charges include allegations of discharge based on pregnancy. Other charges include allegations of disparate terms and conditions of employment based on pregnancy, such as closer scrutiny and harsher discipline than that administered to non-pregnant employees, suspensions pending receipt of medical releases, medical examinations that are not job related or consistent with business necessity, and forced leave.[9]

Americans with Disabilities Act (ADA)

Title I of the ADA protects individuals from employment discrimination on the basis of disability, limits when and how an employer may make medical inquiries or require medical examinations of employees and applicants for employment, and requires that an employer provide reasonable accommodation for an employee or applicant with a disability.[10] While pregnancy itself is not a disability, pregnant workers and job applicants are not excluded from the protections of the ADA. Changes to the definition of the term "disability" resulting from enactment of the ADA Amendments Act of 2008 (ADAAA) make it much easier for pregnant workers with pregnancy-related impairments to demonstrate that they have disabilities for which they may be entitled to a reasonable accommodation under the ADA.[11] Reasonable accommodations available to pregnant workers with impairments that constitute disabilities might include allowing a pregnant worker to take more frequent breaks, to keep a water bottle at a work station, or to use a stool; altering how job functions are performed; or providing a temporary assignment to a light duty position.

Part I of this document provides guidance on Title VII's prohibition against pregnancy discrimination. It describes the individuals to whom the PDA applies, the ways in which violations of the PDA can be demonstrated, and the PDA's requirement that pregnant employees be treated the same as employees who are not pregnant but who are similar in their ability or inability to work (with a particular emphasis on light duty and leave policies). Part II addresses the impact of the ADA's expanded definition of "disability" on employees with pregnancy-related impairments, particularly when employees with pregnancy-related impairments would be entitled to reasonable accommodation, and describes some specific accommodations that may help pregnant workers. Part III briefly describes other requirements unrelated to the PDA and the ADA that affect pregnant workers. Part IV contains best practices for employers.

I. THE PREGNANCY DISCRIMINATION ACT

A. PDA Coverage

In passing the PDA, Congress intended to prohibit discrimination based on "the whole range of matters concerning the childbearing process,"[12] and gave women "the right . . . to be financially and legally protected before, during, and after [their] pregnancies."[13] Thus, the PDA covers all aspects of pregnancy and all aspects of employment, including hiring, firing, promotion, health insurance benefits, and treatment in comparison with non-pregnant persons similar in their ability or inability to work.

Extent of PDA Coverage

Title VII, as amended by the PDA, prohibits discrimination based on the following:

- **Current Pregnancy**
- **Past Pregnancy**
- **Potential or Intended Pregnancy**
- **Medical Conditions Related to Pregnancy or Childbirth**

1. Current Pregnancy

The most familiar form of pregnancy discrimination is discrimination against an employee based on her current pregnancy. Such discrimination occurs when an employer refuses to hire, fires, or takes any other adverse action against a woman because she is pregnant, without regard to her ability to perform the duties of the job.[14]

a. Employer's Knowledge of Pregnancy

If those responsible for taking the adverse action did not know the employee was pregnant, there can be no finding of intentional pregnancy discrimination.[15] However, even if the employee did not inform the decision makers about her pregnancy before they undertook the adverse action, they nevertheless might have been aware of it through, for example, office gossip or because the pregnancy was obvious. Since the obviousness of pregnancy "varies, both temporally and as between different affected individuals,"[16] an issue may arise as to whether the employer knew of the pregnancy.[17]

EXAMPLE 1
Knowledge of Pregnancy

When Germaine learned she was pregnant, she decided not to inform management at that time because of concern that such an announcement would affect her chances of receiving a bonus at the upcoming anniversary of her employment. When she was three months pregnant, Germaine's supervisor told her that she would not receive a bonus. Because the pregnancy was not obvious and the evidence indicated that the decision makers did not know of Germaine's pregnancy at the time of the bonus decision, there is no reasonable cause to believe that Germaine was subjected to pregnancy discrimination.

b. Stereotypes and Assumptions

Adverse treatment of pregnant women often arises from stereotypes and assumptions about their job capabilities and commitment to the job. For example, an employer might refuse to hire a pregnant woman based on an assumption that she will have attendance problems or leave her job after the child is born.

Employment decisions based on such stereotypes or assumptions violate Title VII.[18] As the Supreme Court has explained, "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[19] Such decisions are unlawful even when an employer relies on stereotypes unconsciously or with a belief that it is acting in the employee's best interest.

EXAMPLE 2
Stereotypes and Assumptions

Three months after Maria told her supervisor that she was pregnant, she was absent several days due to an illness unrelated to her pregnancy. Soon after, pregnancy complications kept her out of the office for two additional days. When Maria returned to work, her supervisor said her body was trying to tell her something and that he needed someone who would not have attendance problems. The following day, Maria was discharged. The investigation reveals that Maria's attendance record was comparable to, or better than, that of non-pregnant co-workers who remained employed. It is reasonable to conclude that her discharge was attributable to

the supervisor's stereotypes about pregnant workers' attendance rather than to Maria's actual attendance record and, therefore, was unlawful.[20]

EXAMPLE 3
Stereotypes and Assumptions

Darlene, who is visibly pregnant, applies for a job as office administrator at a campground. The interviewer tells her that July and August are the busiest months of the year and asks whether she will be available to work during that time period. Darlene replies that she is due to deliver in late September and intends to work right up to the delivery date. The interviewer explains that the campground cannot risk that she will decide to stop working earlier and, therefore, will not hire her. The campground's refusal to hire Darlene on this basis constitutes pregnancy discrimination.

2. Past Pregnancy

An employee may claim she was subjected to discrimination based on past pregnancy, childbirth, or related medical conditions. The language of the PDA does not restrict claims to those based on current pregnancy. As one court stated, "It would make little sense to prohibit an employer from firing a woman during her pregnancy but permit the employer to terminate her the day after delivery if the reason for termination was that the woman became pregnant in the first place."[21]

A causal connection between a claimant's past pregnancy and the challenged action more likely will be found if there is close timing between the two.[22] For example, if an employee was discharged during her pregnancy-related medical leave (i.e., leave provided for pregnancy or recovery from pregnancy) or her parental leave (i.e., leave provided to bond with and/or care for a newborn or adopted child), and if the employer's explanation for the discharge is not believable, a violation of Title VII may be found.[23]

EXAMPLE 4
Unlawful Discharge During Pregnancy or Parental Leave

Shortly after Teresa informed her supervisor of her pregnancy, he met with her to discuss alleged performance problems. Teresa had consistently received outstanding performance reviews during her eight years of employment with the company. However, the supervisor now for the first time accused Teresa of having a bad attitude and providing poor service to clients. Two weeks after Teresa began her pregnancy-related medical leave, her employer discharged her for poor performance. The employer produced no evidence of customer complaints or any other documentation of poor performance. The evidence of outstanding performance reviews preceding notice to the employer of Teresa's pregnancy, the lack of documentation of subsequent poor performance, and the timing of the discharge support a finding of unlawful

pregnancy discrimination.

A lengthy time difference between a claimant's pregnancy and the challenged action will not necessarily foreclose a finding of pregnancy discrimination if there is evidence establishing that the pregnancy, childbirth, or related medical conditions motivated that action.[24] It may be difficult to determine whether adverse treatment following an employee's pregnancy was based on the pregnancy as opposed to the employee's new childcare responsibilities. If the challenged action was due to the employee's caregiving responsibilities, a violation of Title VII may be established where there is evidence that the employee's gender or another protected characteristic motivated the employer's action.[25]

3. Potential or Intended Pregnancy

The Supreme Court has held that Title VII "prohibit[s] an employer from discriminating against a woman because of her capacity to become pregnant."[26] Thus, women must not be discriminated against with regard to job opportunities or benefits because they might get pregnant.

a. Discrimination Based on Reproductive Risk

An employer's concern about risks to the employee or her fetus will rarely, if ever, justify sex-specific job restrictions for a woman with childbearing capacity.[27] This principle led the Supreme Court to conclude that a battery manufacturing company violated Title VII by broadly excluding all fertile women — but not similarly excluding fertile men — from jobs in which lead levels were defined as excessive and which thereby potentially posed hazards to unborn children.[28]

The policy created a facial classification based on sex, according to the Court, since it denied fertile women a choice given to fertile men "as to whether they wish[ed] to risk their reproductive health for a particular job."[29] Accordingly, the policy could only be justified if the employer proved that female infertility was a bona fide occupational qualification (BFOQ).[30] The Court explained that, "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents."[31]

b. Discrimination Based on Intention to Become Pregnant

Title VII similarly prohibits an employer from discriminating against an employee because of her intention to become pregnant.[32] As one court has stated, "Discrimination against an employee because she intends to, is trying to, or simply has the potential to become pregnant is . . . illegal discrimination."[33] In addition, Title VII prohibits employers from treating men and women differently based on their family status or their intention to have children.

Because Title VII prohibits discrimination based on pregnancy, employers should not make inquiries into whether an applicant or employee intends to become pregnant. The EEOC will generally regard such an inquiry as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant worker.[34]

EXAMPLE 5
Discrimination Based on Intention to Become Pregnant

Anne, a high-level executive who has a two-year-old son, told her manager she was trying to get pregnant. The manager reacted with displeasure, stating that the pregnancy might interfere with her job responsibilities. Two weeks later, Anne was demoted to a lower paid position with no supervisory responsibilities. In response to Anne's EEOC charge, the employer asserts it demoted Anne because of her inability to delegate tasks effectively. Anne's performance evaluations were consistently outstanding, with no mention of such a concern. The timing of the demotion, the manager's reaction to Anne's disclosure, and the documentary evidence refuting the employer's explanation make clear that the employer has engaged in unlawful discrimination.

c. Discrimination Based on Infertility Treatment

Employment decisions related to infertility treatments implicate Title VII under limited circumstances. Because surgical impregnation is intrinsically tied to a woman's childbearing capacity, an inference of unlawful sex discrimination may be raised if, for example, an employee is penalized for taking time off from work to undergo such a procedure.[35] In contrast, with respect to the exclusion of infertility from employer-provided health insurance, courts have generally held that exclusions of all infertility coverage for all employees is gender neutral and does not violate Title VII.[36] Title VII may be implicated by exclusions of particular treatments that apply only to one gender.[37]

d. Discrimination Based on Use of Contraception

Depending on the specific circumstances, employment decisions based on a female employee's use of contraceptives may constitute unlawful discrimination based on gender and/or pregnancy. Contraception is a means by which a woman can control her capacity to become pregnant, and, therefore, Title VII's prohibition of discrimination based on potential pregnancy necessarily includes a prohibition on discrimination related to a woman's use of contraceptives.[38] For example, an employer could not discharge a female employee from her job because she uses contraceptives.[39]

Employers can violate Title VII by providing health insurance that excludes coverage of prescription contraceptives, whether the contraceptives are prescribed for birth control or for medical purposes.[40] Because prescription contraceptives are available only for women, a health insurance plan facially discriminates against women on the basis of gender if it excludes

prescription contraception but otherwise provides comprehensive coverage.[41] To comply with Title VII, an employer's health insurance plan must cover prescription contraceptives on the same basis as prescription drugs, devices, and services that are used to prevent the occurrence of medical conditions other than pregnancy.[42] For example, if an employer's health insurance plan covers preventive care for medical conditions other than pregnancy, such as vaccinations, physical examinations, prescription drugs that prevent high blood pressure or to lower cholesterol levels, and/or preventive dental care, then prescription contraceptives also must be covered.

4. Medical Condition Related to Pregnancy or Childbirth

a. In General

Title VII prohibits discrimination based on pregnancy, childbirth, or a related medical condition. Thus, an employer may not discriminate against a woman with a medical condition relating to pregnancy or childbirth and must treat her the same as others who are similar in their ability or inability to work but are not affected by pregnancy, childbirth, or related medical conditions.[43]

EXAMPLE 6
Uniform Application of Leave Policy

Sherry went on medical leave due to a pregnancy-related condition. The employer's policy provided four weeks of medical leave to employees who had worked less than a year. Sherry had worked for the employer for only six months and was discharged when she did not return to work after four weeks. Although Sherry claims the employer discharged her due to her pregnancy, the evidence showed that the employer applied its leave policy uniformly, regardless of medical condition or sex and, therefore, did not engage in unlawful disparate treatment.[44]

Title VII also requires that an employer provide the same benefits for pregnancy-related medical conditions as it provides for other medical conditions.[45] Courts have held that Title VII's prohibition of discrimination based on sex and pregnancy does not apply to employment decisions based on costs associated with the medical care of employees' offspring.[46] However, taking an adverse action, such as terminating an employee to avoid insurance costs arising from the pregnancy-related impairment of the employee or the impairment of the employee's child, would violate Title I of the ADA if the employee's or child's impairment constitutes a "disability" within the meaning of the ADA.[47] It also might violate Title II of the Genetic Information Nondiscrimination Act (GINA)[48] and/or the Employee Retirement Income Security Act (ERISA).[49]

b. Discrimination Based on Lactation and Breastfeeding

There are various circumstances in which discrimination against a female employee who is lactating or breastfeeding can implicate Title VII. Lactation, the postpartum production of milk, is a physiological process triggered by hormones.[50] Because lactation is a pregnancy-related medical condition, less favorable treatment of a lactating employee may raise an inference of unlawful discrimination.[51] For example, a manager's statement that an employee was demoted because of her breastfeeding schedule would raise an inference that the demotion was unlawfully based on the pregnancy-related medical condition of lactation.[52]

To continue producing an adequate milk supply and to avoid painful complications associated with delays in expressing milk,[53] a nursing mother will typically need to breastfeed or express breast milk using a pump two or three times over the duration of an eight-hour workday.[54] An employee must have the same freedom to address such lactation-related needs that she and her co-workers would have to address other similarly limiting medical conditions. For example, if an employer allows employees to change their schedules or use sick leave for routine doctor appointments and to address non-incapacitating medical conditions,[55] then it must allow female employees to change their schedules or use sick leave for lactation-related needs under similar circumstances.

Finally, because only women lactate, a practice that singles out lactation or breastfeeding for less favorable treatment affects only women and therefore is facially sex-based. For example, it would violate Title VII for an employer to freely permit employees to use break time for personal reasons except to express breast milk.[56]

Aside from protections under Title VII, female employees who are breastfeeding also have rights under other laws, including a provision of the Patient Protection and Affordable Care Act that requires employers to provide reasonable break time and a private place for hourly employees who are breastfeeding to express milk.[57] For more information, see Section III C., *infra*.

c. Abortion

Title VII protects women from being fired for having an abortion or contemplating having an abortion.[58] However, Title VII makes clear that an employer that offers health insurance is not required to pay for coverage of abortion except where the life of the mother would be endangered if the fetus were carried to term or medical complications have arisen from an abortion.[59] The statute also makes clear that, although not required to do so, an employer is permitted to provide health insurance coverage for abortion.[60] Title VII would similarly prohibit adverse employment actions against an employee based on her decision not to have an abortion. For example, it would be unlawful for a manager to pressure an employee to have an abortion, or not to have an abortion, in order to retain her job, get better assignments, or stay on a path for advancement.[61]

B. Evaluating PDA-Covered Employment Decisions

Pregnancy discrimination may take the form of disparate treatment (pregnancy, childbirth, or a related medical condition is a motivating factor in an adverse employment action) or disparate impact (a neutral policy or practice has a significant negative impact on women affected by pregnancy, childbirth, or a related medical condition, and either the policy or practice is not job related and consistent with business necessity or there is a less discriminatory alternative and the employer has refused to adopt it).

1. Disparate Treatment

The PDA defines discrimination because of sex to include discrimination because of or on the basis of pregnancy. As with other claims of discrimination under Title VII, an employer will be found to have discriminated on the basis of pregnancy if an employee's pregnancy, childbirth, or related medical condition was all or part of the motivation for an employment decision. Intentional discrimination under the PDA can be proven using any of the types of evidence used in other sex discrimination cases. Discriminatory motive may be established directly, or it can be inferred from the surrounding facts and circumstances.

The PDA further provides that discrimination on the basis of pregnancy includes failure to treat women affected by pregnancy "the same for all employment related purposes . . . as other persons not so affected but similar in their ability or inability to work." Employer policies that do not facially discriminate on the basis of pregnancy may nonetheless violate this provision of the PDA where they impose significant burdens on pregnant employees that cannot be supported by a sufficiently strong justification.[62]

As with any other charge, investigators faced with a charge alleging disparate treatment based on pregnancy, childbirth, or a related medical condition should examine the totality of evidence to determine whether there is reasonable cause to believe the particular challenged action was unlawfully discriminatory. All evidence should be examined in context, and the presence or absence of any particular kind of evidence is not dispositive.

Evidence indicating disparate treatment based on pregnancy, childbirth, or related medical conditions includes the following:

- An explicit policy[63] or a statement by a decision maker or someone who influenced the challenged decision that on its face demonstrates pregnancy bias and is linked to the challenged action.
    - In *Deneen v. Northwest Airlines, Inc.*,[64] a manager stated the plaintiff would not be rehired "because of her pregnancy complication." This statement directly proved pregnancy discrimination.[65]
- Close timing between the challenged action and the employer's knowledge of the employee's pregnancy, childbirth, or related medical condition.
    - In *Asmo v. Keane, Inc.,*[66] a two-month period between the time the employer

learned of the plaintiff's pregnancy and the time it decided to discharge her raised an inference that the plaintiff's pregnancy and discharge were causally linked.[67]

- More favorable treatment of employees of either sex[68] who are not affected by pregnancy, childbirth, or related medical conditions but are similar in their ability or inability to work.
    - In *Wallace v. Methodist Hospital System*,[69] the employer asserted that it discharged the plaintiff,a pregnant nurse, in part because she performed a medical procedure without a physician's knowledge or consent. The plaintiff produced evidence that this reason was pretextual by showing that the employer merely reprimanded a non-pregnant worker for nearly identical misconduct.[70]
- Evidence casting doubt on the credibility of the employer's explanation for the challenged action.
    - In *Nelson v. Wittern Group*,[71] the defendant asserted it fired the plaintiff not because of her pregnancy but because overstaffing required elimination of her position. The court found a reasonable jury could conclude this reason was pretextual where there was evidence that the plaintiff and her co-workers had plenty of work to do, and the plaintiff's supervisor assured her prior to her parental leave that she would not need to worry about having a job when she got back. [72]
- Evidence that the employer violated or misapplied its own policy in undertaking the challenged action.
    - In *Cumpiano v. Banco Santander Puerto Rico*,[73] the court affirmed a finding of pregnancy discrimination where there was evidence that the employer did not enforce the conduct policy on which it relied to justify the discharge until the plaintiff became pregnant.[74]
- Evidence of an employer policy or practice that, although not facially discriminatory, significantly burdens pregnant employees and cannot be supported by a sufficiently strong justification.
    - In *Young v. United Parcel Serv., Inc.*,[75] the Court said that evidence of an employer policy or practice of providing light duty to a large percentage of nonpregnant employees while failing to provide light duty to a large percentage of pregnant workers might establish that the policy or practice significantly burdens pregnant employees. If the employer's reasons for its actions are not sufficiently strong to justify the burden, that will "give rise to an inference of intentional discrimination." [76]

a. Harassment

Title VII, as amended by the PDA, requires employers to provide a work environment free of

harassment based on pregnancy, childbirth, or related medical conditions. An employer's failure to do so violates the statute. Liability can result from the conduct of a supervisor, co-workers, or non-employees such as customers or business partners over whom the employer has some control.[77]

Examples of pregnancy-based harassment include unwelcome and offensive jokes or name-calling, physical assaults or threats, intimidation, ridicule, insults, offensive objects or pictures, and interference with work performance motivated by pregnancy, childbirth, or related medical conditions such as breastfeeding. Such motivation is often evidenced by the content of the remarks but, even if pregnancy is not explicitly referenced, Title VII is implicated if there is other evidence that pregnancy motivated the conduct. Of course, as with harassment on any other basis, the conduct is unlawful only if the employee perceives it to be hostile or abusive and if it is sufficiently severe or pervasive to alter the terms and conditions of employment from the perspective of a reasonable person in the employee's position.[78]

Harassment must be analyzed on a case-by-case basis, by looking at all the circumstances in context. Relevant factors in evaluating whether harassment creates a work environment sufficiently hostile to violate Title VII may include any of the following (no single factor is determinative):

- The frequency of the discriminatory conduct;
- The severity of the conduct;
- Whether the conduct was physically threatening or humiliating;
- Whether the conduct unreasonably interfered with the employee's work performance; and
- The context in which the conduct occurred, as well as any other relevant factor.

The more severe the harassment, the less pervasive it needs to be, and vice versa. Accordingly, unless the harassment is quite severe, a single incident or isolated incidents of offensive conduct or remarks generally do not create an unlawful hostile working environment. Pregnancy-based comments or other acts that are not sufficiently severe standing alone may become actionable when repeated, although there is no threshold number of harassing incidents that gives rise to liability.

EXAMPLE 7
Hostile Environment Harassment

Binah, a black woman from Nigeria, claims that when she was visibly pregnant with her second child, her supervisors increased her workload and shortened her deadlines so that she could not complete her assignments, ostracized her, repeatedly excluded her from meetings to which she should have been invited, reprimanded her for failing to show up for work due to snow

when others were not reprimanded, and subjected her to profanity. Binah asserts the supervisors subjected her to this harassment because of her pregnancy status, race, and national origin. A violation of Title VII would be found if the evidence shows that the actions were causally linked to Binah's pregnancy status, race, and/or national origin.[79]

b. Workers with Caregiving Responsibilities

After an employee's child is born, an employer might treat the employee less favorably not because of the prior pregnancy, but because of the worker's caregiving responsibilities. This situation would fall outside the parameters of the PDA. However, as explained in the Commission's Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007),[80] although caregiver status is not a prohibited basis under the federal equal employment opportunity statutes, discrimination against workers with caregiving responsibilities may be actionable when an employer discriminates based on sex or another characteristic protected by federal law. For example, an employer violates Title VII by denying job opportunities to women -- but not men -- with young children, or by reassigning a woman recently returned from pregnancy-related medical leave or parental leave to less desirable work based on the assumption that, as a new mother, she will be less committed to her job. An employer also violates Title VII by denying a male caregiver leave to care for an infant but granting such leave to a female caregiver, or by discriminating against a Latina working mother based on stereotypes about working mothers and hostility towards Latinos generally.[81] An employer violates the ADA by treating a worker less favorably based on stereotypical assumptions about the worker's ability to perform job duties satisfactorily because the worker also cares for a child with a disability.[82]

c. Bona Fide Occupational Qualification (BFOQ) Defense

In some instances, employers may claim that excluding pregnant or fertile women from certain jobs is lawful because non-pregnancy is a bona fide occupational qualification (BFOQ).[83] The defense, however, is an extremely narrow exception to the general prohibition of discrimination on the basis of sex. An employer who seeks to prove a BFOQ must show that pregnancy actually interferes with a female employee's ability to perform the job,[84] and the defense must be based on objective, verifiable skills required by the job rather than vague, subjective standards.[85]

Employers rarely have been able to establish a pregnancy-based BFOQ. The defense cannot be based on fears of danger to the employee or her fetus, fears of potential tort liability, assumptions and stereotypes about the employment characteristics of pregnant women such as their turnover rate, or customer preference.[86]

Without showing a BFOQ, an employer may not require that a pregnant worker take leave until her child is born or for a predetermined time thereafter, provided she is able to perform her job.[87]

2. Disparate Impact

Title VII is violated if a facially neutral policy has a disproportionate adverse effect on women affected by pregnancy, childbirth, or related medical conditions and the employer cannot show that the policy is job related for the position in question and consistent with business necessity.[88] Proving disparate impact ordinarily requires a statistical showing that a specific employment practice has a discriminatory effect on workers in the protected group. However, statistical evidence might not be required if it could be shown that all or substantially all pregnant women would be negatively affected by the challenged policy.[89]

The employer can prove business necessity by showing that the requirement is "necessary to safe and efficient job performance."[90] If the employer makes this showing, a violation still can be found if there is a less discriminatory alternative that meets the business need and the employer refuses to adopt it.[91] The disparate impact provisions of Title VII have been used by pregnant plaintiffs to challenge, for example, weight lifting requirements,[92] light duty limitations,[93] and restrictive leave policies.[94]

EXAMPLE 8
Weight Lifting Requirement

Carol applied for a warehouse job. At the interview, the hiring official told her the job requirements and asked if she would be able to meet them. One of the requirements was the ability to lift up to 50 pounds. Carol said that she could not meet the lifting requirement because she was pregnant but otherwise would be able to meet the job requirements. She was not hired. The employer asserts that it did not select Carol because she could not meet the lifting requirement and produces evidence that it treats all applicants the same with regard to this hiring criterion. If the evidence shows that the lifting requirement disproportionately excludes pregnant applicants, the employer would have to prove that the requirement is job related for the position in question and consistent with business necessity.[95]

C. Equal Access to Benefits

An employer is required under Title VII to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other employees similar in their ability or inability to work, whether by providing modified tasks, alternative assignments, or fringe benefits such as disability leave and leave without pay.[96] In addition to leave, the term "fringe benefits" includes, for example, medical benefits and retirement benefits.

1. Light Duty

a. Disparate Treatment

i. Evidence of Pregnancy-Related Animus

If there is direct evidence that pregnancy-related animus motivated an employer's decision to deny a pregnant employee light duty, it is not necessary for the employee to show that another employee was treated more favorably than she was.

EXAMPLE 9
Evidence of Pregnancy-Related Animus Motivating Denial of Light Duty

An employee requests light duty because of her pregnancy. The employee's supervisor is aware that the employee is pregnant and knows that there are light duty positions available that the pregnant employee could perform. Nevertheless, the supervisor denies the request, telling the employee that having a pregnant worker in the workplace is just too much of a liability for the company. It is not necessary in this instance that the pregnant worker produce evidence of a non-pregnant worker similar in his or her ability or inability to work who was given a light duty position.

ii. Proof of Discrimination Through *McDonnell Douglas* Burden-Shifting Framework

A plaintiff need not resort to the burden shifting analysis set out in *McDonnell Douglas Corp. v. Green*[97] in order to establish an intentional violation of the PDA where there is direct evidence that pregnancy-related animus motivated the denial of light duty. Absent such evidence, however, a plaintiff must produce evidence that a similarly situated worker was treated differently or more favorably than the pregnant worker to establish a prima facie case of discrimination.

According to the Supreme Court's decision in *Young v. United Parcel Serv., Inc.*,[98] a PDA plaintiff may make out a prima facie case of discrimination by showing "that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'"[99] As the Court noted, "[t]he burden of making this showing is not 'onerous.'"[100] For purposes of the prima facie case, the plaintiff does not need to point to an employee that is "similar in all but the protected ways."[101] For example, the plaintiff could satisfy her prima facie burden by identifying an employee who was similar in his or her ability or inability to work due to an impairment (e.g., an employee with a lifting restriction) and who was provided an accommodation that the pregnant employee sought.

Once the employee has established a prima facie case, the employer must articulate a legitimate, non-discriminatory reason for treating the pregnant worker differently than a non-pregnant worker similar in his or her ability or inability to work. "That reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ('similar in their ability or inability to work') whom the employer accommodates."[102]

Even if an employer can assert a legitimate non-discriminatory reason for the different treatment, the pregnant worker may still show that the reason is pretextual. *Young* explains that

> [t]he plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather-when considered along with the burden imposed-give rise to an inference of intentional discrimination.[103]

An employer's policy of accommodating a large percentage of nonpregnant employees with limitations while denying accommodations to a large percentage of pregnant employees may result in a significant burden on pregnant employees.[104] For example, in *Young* the Court noted that a policy of accommodating most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations would present a genuine issue of material fact.[105]

b. Disparate Impact

A policy of restricting light duty assignments may also have a disparate impact on pregnant workers.[106] If impact is established, the employer must prove that its policy was job related and consistent with business necessity.[107]

EXAMPLE 10
Light Duty Policy - Disparate Impact

Leslie, who works as a police officer, requested light duty when she was six months pregnant and was advised by her physician not to push or lift over 20 pounds. The request was not granted because the police department had a policy limiting light duty to employees injured on the job. Therefore, Leslie was required to use her accumulated leave for the period during which she could not perform her normal patrol duties. In her subsequent lawsuit, Leslie proved that since substantially all employees denied light duty were pregnant women, the police department's light duty policy had an adverse impact on pregnant officers. The police department claimed that state law required it to pay officers injured on the job regardless of whether they worked and that the light duty policy enabled taxpayers to receive some benefit from the salaries paid to those officers. However, there was evidence that an officer not injured on the job was assigned to light duty. This evidence contradicted the police department's claim that it truly had a business necessity for its policy.[108]

This policy may also be challenged on the ground that it impermissibly distinguishes between pregnant and non-pregnant workers who are similar in their ability or inability to work based on the cause of their limitations.

2. Leave

a. Disparate Treatment[109]

An employer may not compel an employee to take leave because she is pregnant, as long as she is able to perform her job. Such an action violates Title VII even if the employer believes it is acting in the employee's best interest.[110]

EXAMPLE 11
Forced Leave

Lena worked for a janitorial service that provided after hours cleaning in office spaces. When she advised the site foreman that she was pregnant, the foreman told her that she would no longer be able to work since she could harm herself with the bending and pushing required in the daily tasks. She explained that she felt fine and that her doctor had not mentioned that she should change any of her current activities, including work, and did not indicate any particular concern that she would have to stop working. The foreman placed Lena immediately on unpaid leave for the duration of her pregnancy. Lena's leave was exhausted before she gave birth and she was ultimately discharged from her job. Lena's discharge was due to stereotypes about pregnancy.[111]

A policy requiring workers to take leave during pregnancy or excluding all pregnant or fertile women from a job is illegal except in the unlikely event that an employer can prove that non-pregnancy or non-fertility is a bona fide occupational qualification (BFOQ).[112] To establish a BFOQ, the employer must prove that the challenged qualification is "reasonably necessary to the normal operation of [the] particular business or enterprise."[113]

While employers may not force pregnant workers to take leave, they must allow women with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work.[114] Thus, an employer could not fire a pregnant employee for being absent if her absence fell within the provisions of the employer's sick leave policy.[115] An employer may not require employees disabled by pregnancy or related medical conditions to exhaust their sick leave before using other types of accrued leave if it does not impose the same requirement on employees who seek leave for other medical conditions. Similarly, an employer may not impose a shorter maximum period for pregnancy-related leave than for other types of medical or short-term disability leave. Title VII does not, however, require an employer to grant pregnancy-related medical leave or parental leave or to treat pregnancy-related absences more favorably than absences for other medical conditions.[116]

EXAMPLE 12
Pregnancy-Related Medical Leave - Disparate Treatment

Jill submitted a request for two months of leave due to pregnancy- related medical complications. The employer denied her request, although its sick leave policy permitted such leave to be granted. Jill's supervisor had recommended that the company deny the request, arguing that her absence would present staffing problems and noting that this request could turn into additional leave requests if her medical condition did not improve. Jill was unable to report to work due to her medical condition, and was discharged. The evidence shows that the alleged staffing problems were not significant and that the employer had approved requests by non-pregnant employees for extended sick leave under similar circumstances. Moreover, the employer's concern that Jill would likely request additional leave was based on a stereotypical assumption about pregnant workers.[117] This evidence is sufficient to establish that the employer's explanation for its difference in treatment of Jill and her non-pregnant co-workers is a pretext for pregnancy discrimination.[118]

EXAMPLE 13
Medical Leave Policy -- No Disparate Treatment

Michelle requests two months of leave due to pregnancy-related medical complications. Her employer denies the request because its policy providing paid medical leave requires employees to be employed at least 90 days to be eligible for such leave. Michelle had only been employed for 65 days at the time of her request. There was no evidence that non-pregnant employees with less than 90 days of service were provided medical leave. Because the leave decision was made in accordance with the eligibility rules, and not because of Michelle's pregnancy, there is no evidence of pregnancy discrimination under a disparate treatment analysis.[119] For the same reason, if the employer had granted leave under the Family and Medical Leave Act to another employee with a serious health condition, it would not be required to provide a pregnant worker with the same leave if she had not attained eligibility by working with the employer for the requisite number of hours during the preceding 12 months.[120]

b. Disparate Impact

A policy that restricts leave might disproportionately impact pregnant women. For example, a 10-day ceiling on sick leave and a policy denying sick leave during the first year of employment have been found to disparately impact pregnant women.[121]

If a claimant establishes that such a policy has a disparate impact, an employer must prove that the policy is job related and consistent with business necessity. An employer must have supporting evidence to justify its policy. Business necessity cannot be established by a mere articulation of reasons. Thus, one court refused to find business necessity where the employer argued that it provided no leave to employees who had worked less than one year because it had a high turnover rate and wanted to allow leave only to those who had demonstrated "staying power," but provided no supporting evidence.[122] The court also found that an

alternative policy denying leave for a shorter time period might have served the same business goal, since the evidence showed that most of the first year turnover occurred during the first three months of employment.[123]

3. Parental Leave

For purposes of determining Title VII's requirements, employers should carefully distinguish between leave related to any physical limitations imposed by pregnancy or childbirth (described in this document as pregnancy-related medical leave) and leave for purposes of bonding with a child and/or providing care for a child (described in this document as parental leave).

Leave related to pregnancy, childbirth, or related medical conditions can be limited to women affected by those conditions.[124] However, parental leave must be provided to similarly situated men and women on the same terms.[125] If, for example, an employer extends leave to new mothers beyond the period of recuperation from childbirth (e.g. to provide the mothers time to bond with and/or care for the baby), it cannot lawfully fail to provide an equivalent amount of leave to new fathers for the same purpose.

EXAMPLE 14
Pregnancy-Related Medical Leave and Parental Leave Policy - No Disparate Treatment

An employer offers pregnant employees up to 10 weeks of paid pregnancy-related medical leave for pregnancy and childbirth as part of its short-term disability insurance. The employer also offers new parents, whether male or female, six weeks of parental leave. A male employee alleges that this policy is discriminatory as it gives up to 16 weeks of leave to women and only six weeks of leave to men. The employer's policy does not violate Title VII. Women and men both receive six weeks of parental leave, and women who give birth receive up to an additional 10 weeks of leave for recovery from pregnancy and childbirth under the short-term disability plan.

EXAMPLE 15
Discriminatory Parental Leave Policy

In addition to providing medical leave for women with pregnancy-related conditions and for new mothers to recover from childbirth, an employer provides six additional months of paid leave for new mothers to bond with and care for their new baby. The employer does not provide any paid parental leave for fathers. The employer's policy violates Title VII because it does not provide paid parental leave on equal terms to women and men.

4. Health Insurance

a. Generally

As with other fringe benefits, employers who offer employees health insurance must include coverage of pregnancy, childbirth, and related medical conditions. [126]

Employers who have health insurance benefit plans must apply the same terms and conditions for pregnancy-related costs as for medical costs unrelated to pregnancy.[127] For example:

- If the plan covers pre-existing conditions, then it must cover the costs of an insured employee's pre-existing pregnancy.[128]
- If the plan covers a particular percentage of the medical costs incurred for non-pregnancy-related conditions, it must cover the same percentage of recoverable costs for pregnancy-related conditions.
- If the medical benefits are subject to a deductible, pregnancy-related medical costs may not be subject to a higher deductible.
-
- The plan may not impose limitations applicable only to pregnancy-related medical expenses for any services, such as doctor's office visits, laboratory tests, x-rays, ambulance service, or recovery room use.
- The plan must cover prescription contraceptives on the same basis as prescription drugs, devices, and services that are used to prevent the occurrence of medical conditions other than pregnancy.[129]

The following principles apply to pregnancy-related medical coverage of employees and their dependents:

- Employers must provide the same level of medical coverage to female employees and their dependents as they provide to male employees and their dependents.
- Employers need not provide the same level of medical coverage to their employees' wives as they provide to their female employees.

b. Insurance Coverage of Abortion

The PDA makes clear that if an employer provides health insurance benefits, it is not required to pay for health insurance coverage of abortion except where the life of the mother would be endangered if the fetus were carried to term. If complications arise during the course of an abortion, the health insurance plan is required to pay the costs attributable to those complications.[130]

The statute also makes clear that an employer is not precluded from providing abortion benefits directly or through a collective bargaining agreement. If an employer decides to cover

the costs of abortion, it must do so in the same manner and to the same degree as it covers other medical conditions.[131]

5. Retirement Benefits and Seniority

Employers must allow women who are on pregnancy-related medical leave to accrue seniority in the same way as those who are on leave for reasons unrelated to pregnancy. Therefore, if an employer allows employees who take medical leave to retain their accumulated seniority and to accrue additional service credit during their leaves, the employer must treat women on pregnancy-related medical leave the same way. Similarly, employers must treat pregnancy-related medical leave the same as other medical leave in calculating the years of service that will be credited in evaluating an employee's eligibility for a pension or for early retirement.[132]

II. AMERICANS WITH DISABILITIES ACT[133]

Title I of the ADA protects individuals from employment discrimination on the basis of disability. Disability discrimination occurs when a covered employer or other entity treats an applicant or employee less favorably because she has a disability or a history of a disability, or because she is believed to have a physical or mental impairment.[134] Discrimination under the ADA also includes the application of qualification standards, tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class or individuals with disabilities, unless the standard, test, or other selection criterion is shown to be job related for the position in question and consistent with business necessity.[135] The ADA forbids discrimination in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, and any other term or condition of employment. Under the ADA, an employer's ability to make disability-related inquiries or require medical examinations is limited.[136] The law also requires that an employer provide reasonable accommodation to an employee or job applicant with a disability unless doing so would cause undue hardship, meaning significant difficulty or expense for the employer.[137]

A. Disability Status

The ADA defines the term "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having a disability.[138] Congress made clear in the ADA Amendments Act of 2008 (ADAAA) that the question of whether an individual's impairment is a covered disability should not demand extensive analysis and that the definition of disability should be construed in favor of broad coverage. The determination of whether an individual has a disability must be made without regard to the ameliorative effects of mitigating measures, such as medication or treatment that lessens or eliminates the effects of an impairment.[139] Under the ADAAA, there is no requirement that an impairment last a particular length of time to be considered substantially

limiting.[140] In addition to major life activities that may be affected by impairments related to pregnancy, such as walking, standing, and lifting, the ADAAA includes the operation of major bodily functions as major life activities. Major bodily functions include the operation of the neurological, musculoskeletal, endocrine, and reproductive systems, and the operation of an individual organ within a body system.

Prior to the enactment of the ADAAA, some courts held that medical conditions related to pregnancy generally were not impairments within the meaning of the ADA, and so could not be disabilities.[141] Although pregnancy itself is not an impairment within the meaning of the ADA,[142] and thus is never on its own a disability, [143] some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA, as amended. An impairment's cause is not relevant in determining whether the impairment is a disability.[144] Moreover, under the amended ADA, it is likely that a number of pregnancy-related impairments that impose work-related restrictions will be substantially limiting, even though they are only temporary.[145]

Some impairments of the reproductive system may make a pregnancy more difficult and thus necessitate certain physical restrictions to enable a full term pregnancy, or may result in limitations following childbirth. Disorders of the uterus and cervix may be causes of these complications.[146] For instance, someone with a diagnosis of cervical insufficiency may require bed rest during pregnancy. One court has concluded that multiple physiological impairments of the reproductive system requiring an employee to give birth by cesarean section may be disabilities for which an employee was entitled to a reasonable accommodation.[147]

Impairments involving other major bodily functions can also result in pregnancy-related limitations. Some examples include pregnancy-related anemia (affecting normal cell growth); pregnancy-related sciatica (affecting musculoskeletal function); pregnancy-related carpal tunnel syndrome (affecting neurological function); gestational diabetes (affecting endocrine function); nausea that can cause severe dehydration (affecting digestive or genitourinary function); abnormal heart rhythms that may require treatment (affecting cardiovascular function); swelling, especially in the legs, due to limited circulation (affecting circulatory function); and depression (affecting brain function). [148]

In applying the ADA as amended, a number of courts have concluded that pregnancy-related impairments may be disabilities within the meaning of the ADA, including: pelvic inflammation causing severe pain and difficulty walking and resulting in a doctor's recommendation that an employee have certain work restrictions and take early pregnancy-related medical leave;[149] symphysis pubis dysfunction causing post-partum complications and requiring physical therapy;[150] and complications related to a pregnancy in a breech presentation that required visits to the emergency room and bed rest.[151] In another case, the court concluded that there was a triable issue on the question of whether the plaintiff had a disability within the meaning of the amended ADA, where her doctor characterized the pregnancy as "high risk" and recommended that the plaintiff limit her work hours and not lift heavy objects, even though the

doctor did not identify a specific impairment.[152]

EXAMPLE 16
Pregnancy-Related Impairment Constitutes ADA Disability Because It Substantially Limits a Major Life Activity

In Amy's fifth month of pregnancy, she developed high blood pressure, severe headaches, abdominal pain, nausea, and dizziness. Her doctor diagnosed her as having preeclampsia and ordered her to remain on bed rest through the remainder of her pregnancy. This evidence indicates that Amy had a disability within the meaning of the ADA, since she had a physiological disorder that substantially limited her ability to perform major life activities such as standing, sitting, and walking, as well as major bodily functions such as functions of the cardiovascular and circulatory systems. The effects that bed rest may have had on alleviating the symptoms of Amy's preeclampsia may not be considered, since the ADA Amendments Act requires that the determination of whether someone has a disability be made without regard to mitigating measures.

An employer discriminates against a pregnant worker on the basis of her record of a disability when it takes an adverse action against her because of a past substantially limiting impairment.

EXAMPLE 17
Discrimination Against a Job Applicant Because of Her Record of a Disability

A county police department offers an applicant a job as a police officer. It then asks her to complete a post-offer medical questionnaire and take a medical examination.[153] On the questionnaire, the applicant indicates that she had gestational diabetes during her pregnancy three years ago, but the condition resolved itself following the birth of her child. The police department will violate the ADA if it withdraws the job offer based on this past history of gestational diabetes when the applicant has no current impairment that would affect her ability to perform the job safely.

Finally, an employer regards a pregnant employee as having a disability if it takes a prohibited action against her (e.g., termination or reassignment to a less desirable position) based on an actual or perceived impairment that is not transitory (lasting or expected to last for six months or less) and minor.[154]

EXAMPLE 18
Pregnant Employee Regarded as Having a Disability

An employer reassigns a welder who is pregnant to a job in its factory's tool room, a job that requires her to keep track of tools that are checked out for use and returned at the end of the day, and to complete paperwork for any equipment or tools that need to be repaired. The job

pays considerably less than the welding job and is considered by most employees to be "make work." The manager who made the reassignment did so because he believed the employee was experiencing pregnancy-related "complications" that "could very possibly result in a miscarriage" if the employee was allowed to continue working in her job as a welder. The employee was not experiencing pregnancy-related complications, and her doctor said she could have continued to work as a welder. The employer has regarded the employee as having a disability, because it took a prohibited action (reassigning her to a less desirable job at less pay) based on its belief that she had an impairment that was not both transitory and minor. The employer also is liable for discrimination because there is no evidence that the employee was unable to do the essential functions of her welder position or that she would have posed a direct threat to her own or others' safety in that job. Since the evidence indicated that the employee was able to perform her job, the employer is also liable under the PDA.[155]

B. Reasonable Accommodation

A pregnant employee may be entitled to reasonable accommodation under the ADA for limitations resulting from pregnancy-related conditions that constitute a disability or for limitations resulting from the interaction of the pregnancy with an underlying impairment.[156] A reasonable accommodation is a change in the workplace or in the way things are customarily done that enables an individual with a disability to apply for a job, perform a job's essential functions, or enjoy equal benefits and privileges of employment.[157] An employer may only deny a reasonable accommodation to an employee with a disability if it would result in an undue hardship.[158] An undue hardship is defined as an action requiring significant difficulty or expense.[159]

EXAMPLE 19
Conditions Resulting from Interaction of Pregnancy and an Underlying Disability

Jennifer had been successfully managing a neurological disability with medication for several years. Without the medication, Jennifer experienced severe fatigue and had difficulty completing a full work day. However, the combination of medications she had been prescribed allowed her to work with rest during the breaks scheduled for all employees. When she became pregnant, her physician took her off some of these drugs due to risks they posed during pregnancy. Adequate substitutes were not available. She began to experience increased fatigue and found that rest during short breaks in the day and lunch time was insufficient. Jennifer requested that she be allowed more frequent breaks during the day to alleviate her fatigue. Absent undue hardship, the employer would have to grant such an accommodation.

Examples of reasonable accommodations that may be necessary for a disability caused by pregnancy-related impairments include, but are not limited to, the following:[160]

- Redistributing marginal functions that the employee is unable to perform due to the disability. Marginal functions are the non-fundamental (or non-essential) job duties.

  Example: The manager of an organic market is given a 20-pound lifting restriction for the latter half of her pregnancy due to pregnancy-related sciatica. Usually when a delivery truck arrives with the daily shipment, one of the stockers unloads and takes the produce into the store. The manager may need to unload the produce from the truck if the stocker arrives late or is absent, which may occur two to three times a month. Since one of the cashiers is available to unload merchandise during the period of the manager's lifting restrictions, the employer is able to remove the marginal function of unloading merchandise from the manager's job duties.

- Altering how an essential or marginal job function is performed (e.g., modifying standing, climbing, lifting, or bending requirements).

  Example: A warehouse manager who developed pregnancy-related carpal tunnel syndrome was advised by her physician that she should avoid working at a computer key board. She is responsible for maintaining the inventory records at the site and completing a weekly summary report. The regional manager approved a plan whereby at the end of the week, the employee's assistants input the data required for the summary report into the computer based on the employee's dictated notes, with the employee ensuring that the entries are accurate.

- Modification of workplace policies.

  Example: A clerk responsible for receiving and filing construction plans for development proposals was diagnosed with a pregnancy-related kidney condition that required that she maintain a regular intake of water throughout the work day. She was prohibited from having any liquids at her work station due to the risk of spillage and damage to the documents. Her manager arranged for her to have a table placed just outside the file room where she could easily access water.

- Purchasing or modifying equipment and devices.

  Example: A postal clerk was required to stand at a counter to serve customers for most of her eight-hour shift. During her pregnancy she developed severe pelvic pain caused by relaxed joints that required her to be seated most of the time due to instability. Her manager provided her with a stool that allowed her to work comfortably at the height of the counter.

- Modified work schedules.

  Example: An employee with depression found that her condition worsened during her pregnancy because she was taken off her regular medication. Her physician provided

documentation indicating that her symptoms could be alleviated by a counseling session each week. Since appointments for the counseling sessions were available only during the day, the employee requested that she be able to work an hour later in the afternoon to cover the time. The manager concluded that, because the schedule change would not adversely affect the employee's ability to meet with customers and clients and that some of the employee's duties, such as sending out shipments and preparing reports, could be done later in the day, the accommodation would not be an undue hardship.

- Granting leave (which may be unpaid leave if the employee does not have accrued paid leave) in addition to what an employer would normally provide under a sick leave policy for reasons related to the disability.

  Example: An account representative at a bank was diagnosed during her pregnancy with a cervical abnormality and was ordered by her physician to remain on bed rest until she delivered the baby. The employee has not worked at the bank long enough to qualify for leave under the Family and Medical Leave Act, and, although she has accrued some sick leave under the employer's policy, it is insufficient to cover the period of her recommended bed rest. The company determines that it would not be an undue hardship to grant her request for sick leave beyond the terms of its unpaid sick leave policy.

- Temporary assignment to a light duty position.[161]

  Example: An employee at a garden shop was assigned duties such as watering, pushing carts, and lifting small pots from carts to bins. Her physician placed her on lifting restrictions and provided her with documentation that she should not lift or push more than 20 pounds due to her pregnancy-related pelvic girdle pain, which is caused by hormonal changes to pelvic joints. The manager approved her for a light duty position at the cash register.

III. OTHER REQUIREMENTS AFFECTING PREGNANT WORKERS

A. Family and Medical Leave Act (FMLA)

Although Title VII does not require an employer to provide pregnancy-related or child care leave if it provides no leave for other temporary illness or family obligations, the FMLA does require covered employers to provide such leave.[162] The FMLA covers private employers with 50 or more employees in 20 or more workweeks during the current or preceding calendar year, as well as federal, state, and local governments.[163]

Under the FMLA, an eligible employee[164] may take up to 12 workweeks of leave during any 12-month period for one or more of the following reasons:

(1) the birth and care of the employee's newborn child;

(2) the placement of a child with the employee through adoption or foster care;

(3) to care for the employee's spouse, son, daughter, or parent with a serious health condition; or

(4) to take medical leave when the employee is unable to work because of a serious health condition.[165]

The FMLA also specifies that:

- an employer must maintain the employee's existing level of coverage under a group health plan while the employee is on FMLA leave as if the employee had not taken leave;
- after FMLA leave, the employer must restore the employee to the employee's original job or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment;
- spouses employed by the same employer are not entitled to more than 12 weeks of family leave between them for the birth and care of a healthy newborn child, placement of a healthy child for adoption or foster care, or to care for a parent who has a serious health condition; and
- an employer may not interfere with, restrain, or deny the exercise of any right provided by FMLA; nor may it discriminate against any individual for opposing any practice prohibited by the FMLA, or being involved in any FMLA related proceeding.

B. Executive Order 13152 Prohibiting Discrimination Based on Status as Parent

Executive Order 13152[166] prohibits discrimination in federal employment based on an individual's status as a parent. "Status as a parent" refers to the status of an individual who, with respect to someone under age 18 or someone 18 or older who is incapable of self-care due to a physical or mental disability, is:

(1) a biological parent;

(2) an adoptive parent;

(3) a foster parent;

(4) a stepparent;

(5) a custodian of a legal ward;

(6) in loco parentis over such an individual; or

(7) actively seeking legal custody or adoption of such an individual.

C. Reasonable Break Time for Nursing Mothers[167]

Section 4207 of the Patient Protection and Affordable Care Act[168] provides the following: [169]

- Employers must provide "reasonable break time" for breastfeeding employees to express breast milk until the child's first birthday.
- Employers must provide a private place, other than a bathroom, for this purpose.
- An employer need not pay an employee for any work time spent for this purpose. [170]
- Hourly employees who are not exempt from the overtime pay requirements of the Fair Labor Standards Act are entitled to breaks to express milk.
- Employers with fewer than 50 employees are not subject to these requirements if the requirements "would impose an undue hardship by causing significant difficulty or expense when considered in relation to the size, nature, or structure of the employer's business."
- Nothing in this law preempts a state law that provides greater protections to employees.[171]

D. State Laws

Title VII does not relieve employers of their obligations under state or local laws except where such laws require or permit an act that would violate Title VII.[172] Therefore, employers must comply with state or local provisions regarding pregnant workers unless those provisions require or permit discrimination based on pregnancy, childbirth, or related medical conditions.[173]

In *California Fed. Sav. & Loan Ass'n v. Guerra*,[174] the Supreme Court held that the PDA did not preempt a California law requiring employers in that state to provide up to four months of unpaid pregnancy disability leave. Cal Fed claimed the state law was inconsistent with Title VII because it required preferential treatment of female employees disabled by pregnancy, childbirth, or related medical conditions. The Court disagreed, concluding that Congress intended the PDA to be "a floor beneath which pregnancy disability benefits may not drop - not a ceiling above which they may not rise."[175]

The Court, in *Guerra*, stated that "[i]t is hardly conceivable that Congress would have extensively discussed only its intent not to require preferential treatment if in fact it had intended to prohibit such treatment."[176] The Court noted that the California statute did not compel employers to treat pregnant women better than employees with disabilities. Rather, the state law merely established benefits that employers were required, at a minimum, to

provide pregnant workers. Employers were free, the Court stated, to give comparable benefits to other employees with disabilities, thereby treating women affected by pregnancy no better than others not so affected but similar in their ability or inability to work.[177]

IV. BEST PRACTICES

Legal obligations pertaining to pregnancy discrimination and related issues are set forth above. Below are suggestions for best practices that employers may adopt to reduce the chance of pregnancy-related PDA and ADA violations and to remove barriers to equal employment opportunity.

Best practices are proactive measures that may go beyond federal non-discrimination requirements or that may make it more likely that such requirements will be met. These policies may decrease complaints of unlawful discrimination and enhance employee productivity. They also may aid recruitment and retention efforts.

General

- Develop, disseminate, and enforce a strong policy based on the requirements of the PDA and the ADA.
    - Make sure the policy addresses the types of conduct that could constitute unlawful discrimination based on pregnancy, childbirth, and related medical conditions.
    - Ensure that the policy provides multiple avenues of complaint.
- Train managers and employees regularly about their rights and responsibilities related to pregnancy, childbirth, and related medical conditions.
    - Review relevant federal, state, and local laws and regulations, including Title VII, as amended by the PDA, the ADA, as amended, the FMLA, as well as relevant employer policies.
- Conduct employee surveys and review employment policies and practices to identify and correct any policies or practices that may disadvantage women affected by pregnancy, childbirth, or related medical conditions or that may perpetuate the effects of historical discrimination in the organization.
- Respond to pregnancy discrimination complaints efficiently and effectively. Investigate complaints promptly and thoroughly. Take corrective action and implement corrective and preventive measures as necessary to resolve the situation and prevent problems from arising in the future.
- Protect applicants and employees from retaliation. Provide clear and credible assurances that if applicants or employees internally or externally report discrimination or provide information related to discrimination based on pregnancy, childbirth, or related medical

conditions, the employer will protect them from retaliation. Ensure that these anti-retaliation measures are enforced.

Hiring, Promotion, and Other Employment Decisions

- Focus on the applicant's or employee's qualifications for the job in question. Do not ask questions about the applicant's or employee's pregnancy status, children, plans to start a family, or other related issues during interviews or performance reviews.
- Develop specific, job related qualification standards for each position that reflect the duties, functions, and competencies of the position and minimize the potential for gender stereotyping and for discrimination on the basis of pregnancy, childbirth, or related medical conditions. Make sure these standards are consistently applied when choosing among candidates.
- Ensure that job openings, acting positions, and promotions are communicated to all eligible employees.
- Make hiring, promotion, and other employment decisions without regard to stereotypes or assumptions about women affected by pregnancy, childbirth, or related medical conditions.
- When reviewing and comparing applicants' or employees' work histories for hiring or promotional purposes, focus on work experience and accomplishments and give the same weight to cumulative relevant experience that would be given to workers with uninterrupted service.
- Make sure employment decisions are well documented and, to the extent feasible, are explained to affected persons. Make sure managers maintain records for at least the statutorily required periods. *See* 29 C.F.R. § 1602.14.
- Disclose information about fetal hazards to applicants and employees and accommodate resulting requests for reassignment if feasible.**[178]**

Leave and Other Fringe Benefits

- Leave related to pregnancy, childbirth, or related conditions can be limited to women affected by those conditions. Parental leave must be provided to similarly situated men and women on the same terms.
- If there is a restrictive leave policy (such as restricted leave during a probationary period), evaluate whether it disproportionately impacts pregnant workers and, if so, whether it is necessary for business operations. Ensure that the policy notes that an employee may qualify for leave as a reasonable accommodation.
- Review workplace policies that limit employee flexibility, such as fixed hours of work and

mandatory overtime, to ensure that they are necessary for business operations.

- Consult with employees who plan to take pregnancy and/or parental leave in order to determine how their job responsibilities will be handled in their absence.
- Ensure that employees who are on leaves of absence due to pregnancy, childbirth, or related medical conditions have access to training, if desired, while out of the workplace.**[179]**

Terms and Conditions of Employment

- Monitor compensation practices and performance appraisal systems for patterns of potential discrimination based on pregnancy, childbirth, or related medical conditions. Ensure that compensation practices and performance appraisals are based on employees' actual job performance and not on stereotypes about these conditions.
- Review any light duty policies. Ensure light duty policies are structured so as to provide pregnant employees access to light duty equal to that provided to people with similar limitations on their ability to work.
- Temporarily reassign job duties that employees are unable to perform because of pregnancy or related medical conditions if feasible.
- Protect against unlawful harassment. Adopt and disseminate a strong anti-harassment policy that incorporates information about pregnancy-related harassment; periodically train employees and managers on the policy's contents and procedures; incorporate into the policy and training information about harassment of breastfeeding employees; vigorously enforce the anti-harassment policy.
- Develop the potential of employees, supervisors, and executives without regard to pregnancy, childbirth, or related medical conditions.
- Provide training to all workers, including those affected by pregnancy or related medical conditions, so all have the information necessary to perform their jobs well.**[180]**
- Ensure that employees are given equal opportunity to participate in complex or high-profile work assignments that will enhance their skills and experience and help them ascend to upper-level positions.
- Provide employees with equal access to workplace networks to facilitate the development of professional relationships and the exchange of ideas and information.

Reasonable Accommodation

- Have a process in place for expeditiously considering reasonable accommodation requests made by employees with pregnancy-related disabilities, and for granting

accommodations where appropriate.

- State explicitly in any written reasonable accommodation policy that reasonable accommodations may be available to individuals with temporary impairments, including impairments related to pregnancy.
- Make any written reasonable accommodation procedures an employer may have widely available to all employees, and periodically remind employees that the employer will provide reasonable accommodations to employees with disabilities who need them, absent undue hardship.
- Train managers to recognize requests for reasonable accommodation and to respond promptly to all requests. Given the breadth of coverage for pregnancy-related impairments under the ADA, as amended, managers should treat requests for accommodation from pregnant workers as requests for accommodation under the ADA unless it is clear that no impairment exists.
- Make sure that anyone designated to handle requests for reasonable accommodations knows that the definition of the term "disability" is broad and that employees requesting accommodations, including employees with pregnancy-related impairments, should not be required to submit more than reasonable documentation to establish that they have covered disabilities. Reasonable documentation means that the employer may require only the documentation needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation. The focus of the process for determining an appropriate accommodation should be on an employee's work-related limitations and whether an accommodation could be provided, absent undue hardship, to assist the employee.
- If a particular accommodation requested by an employee cannot be provided, explain why, and offer to discuss the possibility of providing an alternative accommodation.

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[1] The text of the PDA is as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall 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, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect

bargaining agreements in regard to abortion.

42 U.S.C. § 2000e(k).

[2] *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 288 (1987) (*quoting Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971)).

[3] S. Rep. No. 95-331, at 4 (1977), *as reprinted in* Legislative History of the Pregnancy Discrimination Act of 1978 (Committee Print prepared for the Senate Committee on Labor and Human Resources), at 41 (1980). The PDA was enacted to supersede the Supreme Court's decisions in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (excluding pregnancy-related disabilities from disability benefit plans did not constitute discrimination based on sex absent indication that exclusion was pretext for sex discrimination), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (policy of denying sick leave pay to employees disabled by pregnancy while providing such pay to employees disabled by other non-occupational sickness or injury does not violate Title VII unless the exclusion is a pretext for sex discrimination).

[4] *California Fed. Sav. & Loan Ass'n*, 479 U.S. at 290.

[5] The term "employer" in this document refers to any entity covered by Title VII, including labor organizations and employment agencies.

[6] Use of the term "employee" in this document includes applicants for employment or membership in labor organizations and, as appropriate, former employees and members.

[7] Nat'l Partnership for Women & Families, *The Pregnancy Discrimination Act: Where We Stand 30 Years Later* (2008), *available at* **http://qualitycarenow.nationalpartnership.org/site/DocServer/ Pregnancy_Discrimination_Act_-_Where_We_Stand_30_Years_L.pdf?docID=4281 (http://qualitycarenow.nationalpartnership.org/site/DocServer/Pregnancy_Discrimination_Act_-_Where_We_Stand_30_Years_L.pdf?docID=4281)** (last visited May 5, 2014).

[8] While there is no definitive explanation for the increase in complaints, and there may be several contributing factors, the National Partnership study indicates that women today are more likely than their predecessors to remain in the workplace during pregnancy and that some managers continue to hold negative views of pregnant workers. *Id.* at 11.

[9] Studies have shown how pregnant employees and applicants experience negative reactions in the workplace that can affect hiring, salary, and ability to manage subordinates. *See* Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty,* 59 HASTINGS L.J. 1359 (2008)*; see also* Stephen Benard, *Written Testimony of Dr. Stephen Benard*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, **http://www.eeoc.gov/eeoc/meetings/2-15-12/benard.cfm (http://www.eeoc.gov/eeoc/meetings/2-15-12/benard.cfm)** (last visited April 29, 2014) (discussing studies

examining how an identical woman would be treated when pregnant versus when not pregnant);Sharon Terman, *Written Testimony of Sharon Terman*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, **http://www.eeoc.gov/eeoc/meetings/2-15-12/terman.cfm (http://www.eeoc.gov/eeoc/meetings/2-15-12/terman.cfm)** (last visited April 29, 2014)*;* Joan Williams, *Written Testimony of Joan Williams*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, **http://www.eeoc.gov/eeoc/meetings/2-15-12/williams.cfm (http://www.eeoc.gov/eeoc/meetings/2-15-12/williams.cfm)** (last visited April 29, 2014) (discussing the types of experiences reported by pregnant employees seeking assistance from advocacy groups).

[10] 42 U.S.C. § 12112.

[11] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008). The expanded definition of "disability" under the ADA also may affect the PDA requirement that pregnant workers with limitations be treated the same as employees who are not pregnant but who are similar in their ability or inability to work by expanding the number of non-pregnant employees who could serve as comparators where disparate treatment under the PDA is alleged.

[12] H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 5, *reprinted in* 5 U.S.C.C.A.N. 4749, 4753 (1978).

[13] 124 Cong. Rec. 38574 (daily ed. Oct. 14, 1978) (statement of Rep. Sarasin, a manager of the House version of the PDA).

[14] *See, e.g., Asmo v. Keane*, *Inc.*, 471 F.3d 588, 594-95 (6th Cir. 2006) (close timing between employer's knowledge of pregnancy and the discharge decision helped create a material issue of fact as to whether employer's explanation for discharging plaintiff was pretext for pregnancy discrimination); *Palmer v. Pioneer Inn Assocs., Ltd*., 338 F.3d 981, 985 (9th Cir. 2003) (employer not entitled to summary judgment where plaintiff testified that supervisor told her that he withdrew his job offer to plaintiff because the company manager did not want to hire a pregnant woman); *cf. Cleveland Bd. of Educ. v. LeFleur*, 414 U.S. 642 (1974) (state rule requiring pregnant teachers to begin taking leave four months before delivery due date and not return until three months after delivery denied due process).

[15] *See, e.g., Prebilich-Holland v. Gaylord Entm't Co*., 297 F.3d 438, 444 (6th Cir. 2002) (no finding of pregnancy discrimination if employer had no knowledge of plaintiff's pregnancy at time of adverse employment action); *Miller v. Am. Family Mut. Ins. Co*., 203 F.3d 997, 1006 (7th Cir. 2000) (claim of pregnancy discrimination "cannot be based on [a woman's] being pregnant if [the employer] did not know she was"); *Haman v. J.C. Penney Co.,* 904 F.2d 707, 1990 WL 82720, at *5 (6th Cir. 1990) (unpublished) (defendant claimed it could not have discharged plaintiff due to her pregnancy because the decision maker did not know of it, but evidence showed plaintiff's supervisor had knowledge of pregnancy and had significant input into the termination decision).

[16] *Geraci v. Moody-Tottrup, Int'l, Inc*., 82 F.3d 578, 581(3d Cir. 1996).

[17] *See, e.g., Griffin v. Sisters of Saint Francis, Inc.*, 489 F.3d 838, 844 (7th Cir. 2007) (disputed issue as to whether employer knew of plaintiff's pregnancy where she asserted that she was visibly pregnant during the time period relevant to the claim, wore maternity clothes, and could no longer conceal the pregnancy). Similarly, a disputed issue may arise as to whether the employer knew of a past pregnancy or one that was intended. *See Garcia v. Courtesy Ford, Inc.*, 2007 WL 1192681, at *3 (W.D. Wash. Apr. 20, 2007) (unpublished) (although supervisor may not have been aware of plaintiff's pregnancy at time of discharge, his knowledge that she was attempting to get pregnant was sufficient to establish PDA coverage).

[18] *See, e.g., Asmo v. Keane, Inc.*, 471 F.3d at 594-95 (manager's silence after employee announced that she was pregnant with twins, in contrast to congratulations by her colleagues, his failure to discuss with her how she planned to manage her heavy business travel schedule after the twins were born, and his failure even to mention her pregnancy during the rest of her employment could be interpreted as evidence of discriminatory animus and, thus, a motive for plaintiff's subsequent discharge); *Laxton v. Gap Inc.*, 333 F.3d 572, 584 (5th Cir. 2003) (where supervisor negatively reacted to news of plaintiff's pregnancy and expressed concern about having others fill in around time of the delivery date, it was reasonable to infer that supervisor harbored stereotypical presumption about plaintiff's inability to fulfill job duties as result of her pregnancy); *Wagner v. Dillard Dep't Stores, Inc.*, 17 Fed. Appx. 141, 149 (4th Cir. 2001) (unpublished) (evidence did not support defendant's stereotypical assumption that plaintiff could not or would not come to work because of her pregnancy or in the wake of the anticipated childbirth); *Maldonado v. U.S. Bank*, 186 F.3d 759, 768 (7th Cir.1999) (employer could not discharge pregnant employee "simply because it 'anticipated' that she would be unable to fulfill its job expectations"); *Duneen v. Northwest Airlines, Inc.*, 132 F.3d 431, 436 (8th Cir. 1998) (evidence of discrimination shown where employer assumed plaintiff had pregnancy-related complication that prevented her from performing her job and therefore decided not to permit her to return to work).

[19] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

[20] These facts were drawn from the case of *Troy v. Bay State Computer Group, Inc.*, 141 F.3d 378 (1st Cir. 1998). The court in *Troy* found the jury was not irrational in concluding that stereotypes about pregnancy and not actual job attendance were the cause of the discharge. *See also* Joan Williams, *Written Testimony of Joan Williams*, *supra* note 9 (discussing examples of statements that may be evidence of stereotyping).

[21] *Donaldson v. Am. Banco Corp., Inc.*, 945 F. Supp. 1456, 1464 (D. Colo. 1996)*; see also Piraino v. Int'l Orientation Res., Inc.*, 84 F.3d 270, 274 (7th Cir. 1996) (rejecting "surprising claim" by defendant that no pregnancy discrimination can be shown where challenged action occurred after birth of plaintiff's baby); *Pacourek v. Inland Steel* Co., 858 F. Supp. 1393, 1402 (N.D. Ill. 1994) (quoting Legislative History of the PDA at 124 Cong. Rec. 38574 (1978)) ("[T]he PDA gives a woman 'the right . . . to be financially and legally protected before, during, and after her pregnancy.'").

[22] *See, e.g.*, *Neessen v. Arona Corp.*, 2010 WL 1731652, at *7 (N.D. Iowa Apr. 30, 2010) (plaintiff was in PDA's protected class where defendant allegedly failed to hire her because, at the time of her application, she had recently been pregnant and given birth).

[23] *See, e.g.*, *Shafrir v. Ass'n of Reform Zionists of Am.*, 998 F. Supp. 355, 363 (S.D.N.Y. 1998) (allowing plaintiff to proceed with pregnancy discrimination claim where she was fired during parental leave and replaced by non-pregnant female, supervisor had ordered plaintiff to return to work prior to end of her leave knowing she could not comply, and supervisor allegedly expressed doubts about plaintiff's desire and ability to continue working after having child).

[24] *See Solomen v. Redwood Advisory Co*., 183 F. Supp. 2d 748, 754 (E.D. Pa. 2002) ("a plaintiff who was not pregnant at or near the time of the adverse employment action has some additional burden in making out a prima facie case").

[25] For a discussion of disparate treatment of workers with caregiving responsibilities, *see* Section I B.1.b., *infra*; the EEOC's Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007), *available at* **http://www.eeoc.gov/policy/docs/caregiving.html (http://www.eeoc.gov/policy/docs/caregiving.html)** (last visited May 5, 2014); and the EEOC's *Employer Best Practices for Workers with Caregiving Responsibilities*, *available at* **http://www.eeoc.gov/policy/docs/caregiver-best-practices.html (http://www.eeoc.gov/policy/docs/caregiver-best-practices.html)** (last visited May 5, 2014).

[26] *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 206 (1991); *see also Kocak v. Cmty. Health Partners of Ohio*, 400 F.3d 466, 470 (6th Cir. 2005) (plaintiff "cannot be refused employment on the basis of her potential pregnancy"); *Krauel v. Iowa Methodist Med. Ctr*., 95 F.3d 674, 680 (8th Cir. 1996) ("Potential pregnancy . . . is a medical condition that is sex-related because only women can become pregnant.").

[27] *Johnson Controls*, 499 U.S. at 206.

[28] *Id*. at 209.

[29] *Id.* at 197; *see also Spees v. James Marine, Inc*., 617 F.3d 380, 392-94 (6th Cir. 2010) (finding genuine issue of material fact as to whether employer unlawfully transferred pregnant welder to tool room because of perceived risks of welding while pregnant); *EEOC v. Catholic Healthcare West*, 530 F. Supp. 2d 1096, 1105-07 (C.D. Cal. 2008) (hospital's policy prohibiting pregnant nurses from conducting certain medical procedures was facially discriminatory); *Peralta v. Chromium Plating & Polishing*, 2000 WL 34633645 (E.D.N.Y. Sept. 15, 2000) (unpublished) (employer violated Title VII when it instructed plaintiff that she could not continue to pack and inspect metal parts unless she provided letter from doctor stating that her work would not endanger herself or her fetus).

[30] *Johnson Controls,* 499 U.S. at 200. For a discussion of the BFOQ defense, *see* Section I B.1.c.,

infra.

[31] *Id*. at 206.

[32] For examples of cases finding evidence of discrimination based on an employee's stated or assumed intention to become pregnant, see *Walsh v. National Computer Sys, Inc*., 332 F.3d 1150, 1160 (8th Cir. 2003) (judgment and award for plaintiff claiming pregnancy discrimination upheld where evidence included the following remarks by supervisor after plaintiff returned from parental leave: "I suppose you'll be next," in commenting to plaintiff about a co-worker's pregnancy; "I suppose we'll have another little Garrett [the name of plaintiff's son] running around," after plaintiff returned from vacation with her husband; and "You better not be pregnant again!" after she fainted at work); *Santiago-Ramos v. Centennial P.R. Wireless Corp*., 217 F.3d 46, 55-6 (1st Cir. 2000) (manager's expressions of concern about the possibility of plaintiff having a second child, along with other evidence of sex bias and lack of evidence supporting the reasons for discharge, raised genuine issue of material fact as to whether explanation for discharge was pretextual).

[33] *Pacourek v. Inland Steel Co.,* 858 F. Supp. 1393, 1401 (N.D. Ill.1994); *see also Batchelor v. Merck & Co., Inc*., 651 F. Supp. 2d 818, 830-31(N.D. Ind. 2008) (plaintiff was member of protected class under PDA where her supervisor allegedly discriminated against her because of her stated intention to start a family); *Cleese v. Hewlett-Packard Co*., 911 F. Supp. 1312, 1317-18 (D. Or. 1995) (plaintiff, who claimed defendant discriminated against her because it knew she planned to become pregnant, fell within PDA's protected class).

[34] See Section II, *infra*, for information about prohibited medical inquiries under the ADA.

[35] *See Hall v. Nalco Co*., 534 F.3d 644, 648-49 (7th Cir. 2008) (employee terminated for taking time off to undergo in vitro fertilization was not fired for gender-neutral condition of infertility but rather for gender-specific quality of childbearing capacity); *Pacourek*, 858 F. Supp. at 1403-04 (plaintiff stated Title VII claim where she alleged that she was undergoing in vitro fertilization and her employer disparately applied its sick leave policy to her).

Employment decisions based on infertility also may implicate the Americans with Disabilities Act, since infertility that is, or results from, an impairment may be found to substantially limit the major life activity of reproduction and thereby qualify as a disability. For further discussion regarding coverage under the ADA, see Section II, *infra*.

[36] *See Saks v. Franklin Covey, Inc.*, 316 F.3d 337, 346 (2d Cir. 2003) ("[i]nfertility is a medical condition that afflicts men and women with equal frequency"); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996) ("because the policy of denying insurance benefits for treatment of fertility problems applies to both female and male workers and thus is gender-neutral," it does not violate Title VII); *cf. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 198 (1991) (finding that employer's policy impermissibly classified on the basis of gender and childbearing capacity "rather than fertility

alone").

In *Krauel*, the Eighth Circuit also rejected the plaintiff's argument that exclusion of benefits for infertility treatments had an unlawful disparate impact on women since the plaintiff did not provide statistical evidence showing that female plan participants were disproportionately harmed by the exclusion. 95 F.3d at 681; *see also Saks*, 316 F.3d at 347 (exclusion of surgical impregnation procedures does not discriminate against female employees since such procedures are used to treat both male and female infertility, and therefore, infertile male and female employees are equally disadvantaged by exclusion).

[37] *See, e.g.*, *Commission Decision on Coverage of Contraception* (Dec. 14, 2000) (because prescription contraceptives are available only for women, employer's explicit refusal to offer insurance coverage for them is, by definition, a sex-based exclusion), *available at* **https://www.eeoc.gov/commission-decision-coverage-contraception (https://www.eeoc.gov/commission-decision-coverage-contraception)** (last visited May 5, 2014).

[38] *Id.; see also Cooley v. DaimlerChrysler Corp*., 281 F. Supp. 2d 979, 984 (E.D. Mo. 2003) ("[A]s only women have the potential to become pregnant, denying a prescription medication that allows women to control their reproductive capacity is necessarily a sex-based exclusion."); *Erickson v. Bartell Drug Co*., 141 F. Supp. 2d 1266, 1271-72 (W.D. Wash. 2001) (exclusion of prescription contraceptives from employer's generally comprehensive prescription drug plan violated PDA). The Eighth Circuit's assertion in *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 942 (2007), that contraception is not "related to pregnancy" because "contraception is a treatment that is only indicated prior to pregnancy" is not persuasive because it is contrary to the *Johnson Controls* holding that the PDA applies to potential pregnancy.

[39] The Religious Freedom Restoration Act (RFRA) provides for religious exemption from a federal law, even if the law is of general applicability and neutral toward religion, if it substantially burdens a religious practice and the government is unable to show that its application would further a compelling government interest and is the least restrictive means of furthering the interest. 42 U.S.C. § 2000bb-1. In a case decided in June 2014, *Burwell v. Hobby Lobby Stores, Inc., et al.*, --- U.S. ---, 134 S. Ct. 2751 (2014), the Supreme Court ruled that the Patient Protection and Affordable Care Act's contraceptive mandate violated the RFRA as applied to closely held family for-profit corporations whose owners had religious objections to providing certain types of contraceptives. The Supreme Court did not reach the question whether owners of such businesses can assert that the contraceptive mandate violates their rights under the Constitution's Free Exercise Clause. This enforcement guidance explains Title VII's prohibition of pregnancy discrimination; it does not address whether certain employers might be exempt from Title VII's requirements under the First Amendment or the RFRA.

[40] *See, e.g., Commission Decision on Coverage of Contraception, supra* note 37*; see also* Section

2713(a)(4) of the Public Health Service Act, as amended by the Patient Protection and Affordable Care Act, PL 111-148, 124 Stat. 119 (2010) (requiring that non-grandfathered group or individual insurance coverage provide benefits for women's preventive health services without cost sharing). On August 1, 2011, the Health Resources and Services Administration released guidelines requiring that contraceptive services be included as women's preventive health services. These requirements became effective for most new and renewed health plans in August 2012. 26 C.F.R. § 54.9815-2713T(b)(1); 29 C.F.R. § 2590.715-2713(b)(1); 45 C.F.R. § 147.130(b)(1) (plans and insurers must cover a newly recommended preventive service starting with the first plan year that begins on or after the date that is one year after the date on which the new recommendation is issued). The Departments of Treasury, Labor, and Health and Human Services issued regulations clarifying the criteria for the religious employer exemption from contraceptive coverage, accommodations with respect to the contraceptive coverage requirement for group health plans established or maintained by eligible organizations (and group health insurance coverage provided in connection with such plans), and student health insurance coverage arranged by eligible organizations that are institutions of higher education. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39869 (July 2, 2013) (to be codified at 26 C.F.R. Part 54; 29 C.F.R. Parts 2510 and 2590; 45 C.F.R. Parts 147 and 1560). *But see supra* note 39.

[41] *See Commission Decision on Coverage of Contraception, supra* note 37; *Erickson*, 141 F. Supp. 2d at 1272 ("In light of the fact that prescription contraceptives are used only by women, [defendant's] choice to exclude that particular benefit from its generally applicable benefit plan is discriminatory.").

[42] *See supra* note 37. The Commission disagrees with the conclusion in *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936 (8th Cir. 2007), that contraception is gender-neutral because it applies to both men and women. *Id.* at 942. The court distinguished the EEOC's decision on coverage of contraception by noting that the Commission decision involved a health insurance policy that denied coverage of prescription contraception but included coverage of vasectomies and tubal ligations while the employer in *Union Pacific* excluded all contraception for women and men, both prescription and surgical, when used solely for contraception and not for other medical purposes. However, the EEOC's decision was not based on the fact that the plan at issue covered vasectomies and tubal ligations. Instead, the Commission reasoned that excluding prescription contraception while providing benefits for drugs and devices used to prevent other medical conditions is a sex-based exclusion because prescription contraceptives are available only for women. *See also Union Pacific*, 479 F.3d at 948-49 (Bye, J., dissenting) (contraception is "gender-specific, female issue because of the adverse health consequences of an unplanned pregnancy"; therefore, proper comparison is between preventive health coverage provided to each gender).

[43] *See, e.g., Miranda v. BBII Acquisition*, 120 F. Supp. 2d 157, 167 (D. Puerto Rico 2000) (finding genuine issue of fact as to whether plaintiff's discharge was discriminatory where discharge

occurred around one half hour after plaintiff told supervisor she needed to extend her medical leave due to pregnancy-related complications, there was no written documentation of the process used to determine which employees would be terminated, and plaintiff's position was not initially selected for elimination).

[44] The facts in this example were drawn from the case of *Kucharski v. CORT Furniture Rental,* 342 Fed. Appx. 712, 2009 WL 2524041 (2d Cir. Aug. 19, 2009) (unpublished). Although the plaintiff in *Kucharski* did not allege disparate impact, an argument could have been made that the restrictive medical leave policy had a disparate impact on pregnant workers. For a discussion of disparate impact, see Section I B.2., *infra*.

If the employer made exceptions to its policy for non-pregnant workers who were similar to Sherry in their ability or inability to work, denying additional leave to Sherry because she worked for the employer for less than a year would violate the PDA. *See* Section I C., *infra*. Additionally, if the pregnancy-related condition constitutes a disability within the meaning of the ADA, then the employer would have to make a reasonable accommodation of extending the maximum four weeks of leave, absent undue hardship, even though the employee has been working for only six months. *See* Section II B., *infra*.

[45] For a discussion of the PDA's requirements regarding health insurance, see Section I C.4., *infra*.

[46] *Fleming v. Ayers & Assocs.*, 948 F.2d 993, 997 (6th Cir. 1991) ("It seems to us obvious that the reference in the Act to 'women affected by . . . related medical conditions' refers to related medical conditions of the pregnant women, not conditions of the resulting offspring. Both men and women are 'affected by' medical conditions of the resulting offspring."); *Barnes v. Hewlett Packard Co*., 846 F. Supp. 442, 445 (D. Md.1994) ("There is, in sum, a point at which pregnancy and immediate post-partum requirements - clearly gender-based in nature-end and gender-neutral child care activities begin.").

[47] *See* 42 U.S.C. § 12112(b)(3), (4); Appendix to 29 C.F.R. § 1630.15(a) ("The fact that the individual's disability is not covered by the employer's current insurance plan or would cause the employer's insurance premiums or workers' compensation costs to increase, would not be a legitimate non-discriminatory reason justifying disparate treatment of an individual with a disability."); EEOC *Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer Provided Health Insurance* (June 8, 1993), *available at* **http://www.eeoc.gov/policy/docs/health.html (http://www.eeoc.gov/policy/docs/health.html)** (last visited May 5, 2014) ("decisions about the employment of an individual with a disability cannot be motivated by concerns about the impact of the individual's disability on the employer's health insurance plan")*; see also Trujillo v. PacifiCorp*, 524 F.3d 1149, 1156-57 (10th Cir. 2008) (employees raised inference that employer discharged them because of their association with their son whose cancer led to significant healthcare costs); *Larimer v. Int'l Bus. Machs. Corp*., 370 F.3d 698, 700 (7th Cir. 2004) (adverse

action against employee due to medical cost arising from disability of person associated with employee falls within scope of associational discrimination section of ADA).

[48] Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. § 2000ff *et seq*., prohibits basing employment decisions on an applicant's or employee's genetic information. Genetic information includes information about the manifestation of a disease or disorder in a family member of the applicant or employee (i.e., family medical history). It also includes genetic tests such as amniocentesis and newborn screening tests for conditions such as Phenylketonuria (PKU). The statute prohibits discriminating against an employee or applicant because of his or her child's medical condition. *See* 42 U.S.C. §§ 2000ff-(3) (defining "family member"), 2000ff-(4) (defining "genetic information"); 29 C.F.R. § 1635.3(a)-(c) (definitions of "family member," "family medical history," and "genetic information"), 1635.4 (prohibited practices under GINA). Employment decisions based on high health care costs resulting from an employee's current pregnancy-related medical conditions do not violate GINA, though they may violate the ADA and the PDA.

[49] *Fleming*, 948 F.2d at 997 (ERISA makes it unlawful to discharge or otherwise penalize a plan participant or beneficiary for exercising his or her rights under the plan).

[50] *See generally* ARTHUR C. GUYTON, TEXTBOOK OF MED. PHYSIOLOGY 1039-40 (2006) (describing physiological processes by which milk production occurs).

[51] *EEOC v. Houston Funding II, Ltd*., 717 F.3d 425 (5th Cir. 2013) (lactation is a related medical condition of pregnancy for purposes of the PDA, and an adverse employment action motivated by the fact that a woman is lactating clearly imposes upon women a burden that male employees need not suffer).

[52] Whether the demotion was ultimately found to be unlawful would depend on whether the employer asserted a legitimate, non-discriminatory reason for it and, if so, whether the evidence revealed that the asserted reason was pretextual.

[53] *Overcoming Breastfeeding Problems*, U.S. NAT'L LIBRARY OF MED., **http://www.nlm.nih.gov/medlineplus/ency/article/002452.htm (http://www.nlm.nih.gov/medlineplus/ency/article/002452.htm)** (last visited May 5, 2014); *see also,* DIANE WIESSINGER, THE WOMANLY ART OF BREASTFEEDING 385 (8th ed. 2010).

[54] *Breastfeeding,* U.S. DEP'T OF HEALTH & HUMAN SERVS., **https://www.womenshealth.gov/breastfeeding/breastfeeding-home-work-and-public/breastfeeding-and-going-back-work (https://www.womenshealth.gov/breastfeeding/breastfeeding-home-work-and-public/breastfeeding-and-going-back-work)** (last visited May 5, 2014).

[55] The Commission disagrees with the conclusion in *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867 (W.D. Ky. 1990), *aff'd*, 951 F.2d 351 (6th Cir. 1991) (table), that protection of pregnancy-related medical conditions is "limited to incapacitating conditions for which medical care or

treatment is usual and normal." The PDA requires that a woman affected by pregnancy, childbirth, or related medical conditions be treated the same as other workers who are similar in their "ability or inability to work." Nothing limits protection to incapacitating pregnancy-related medical conditions. *See Notter v. North Hand Prot.*, 1996 WL 342008, at *5 (4th Cir. June 21, 1996) (unpublished) (concluding that PDA includes no requirement that "related medical condition" be "incapacitating," and therefore medical condition resulting from caesarian section delivery was covered under PDA even if it was not incapacitating).

[56] *See Houston Funding II, Ltd*., 717 F.3d at 430. The Commission disagrees with the decision in *Wallace v. Pyro Mining Co.*, 789 F. Supp. at 869, which, relying on *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), concluded that denial of personal leave for breastfeeding was not sex-based because it merely removed one situation from those for which leave would be granted. *Cf. Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305, 310-11 (S.D.N.Y. 1999) (discrimination based on breastfeeding is not cognizable as sex discrimination as there can be no corresponding subclass of men, i.e., men who breastfeed, who are treated more favorably). As explained in *Newport News Shipbuilding Co. v. EEOC*, 462 U.S. 669 (1983), when Congress passed the PDA, it rejected not only the holding in *Gilbert* but also the reasoning. Thus, denial of personal leave for breastfeeding discriminates on the basis of sex by limiting the availability of personal leave to women but not to men. *See also Allen v. Totes/Isotoner*, 915 N.E. 2d 622, 629 (Ohio 2009) (O'Connor, J., concurring) (concluding that gender discrimination claims involving lactation are cognizable under Ohio Fair Employment Practices Act and rejecting other courts' reliance on *Gilbert* in evaluating analogous claims under other statutes, given Ohio legislature's "clear and unambiguous" rejection of *Gilbert* analysis).

[57] Pub. L. No. 111-148, amending Section 7 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 207.

[58] 42 U.S.C. § 2000e(k). *See Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. pt. 1604 app., Question 34 (1979) ("An employer cannot discriminate in its employment practices against a woman who has had or is contemplating having an abortion."); H.R. Conf. Rep. No. 95-1786, at 4 (1978), *as reprinted in* 95th Cong., 2d Sess. 4, 1978 U.S.C.C.A.N. 4749, 4766 ("Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion."); *see also, Doe v. C.A.R.S. Protection Plus, Inc*., 527 F.3d 358, 364 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 576 (2008) (PDA prohibits employer from discriminating against female employee because she has exercised her right to have an abortion); *Turic v. Holland Hospitality, Inc*., 85 F.3d 1211, 1214 (6th Cir. 1996) (discharge of pregnant employee because she contemplated having abortion violated PDA).

[59] 42 U.S.C. § 2000e(k) ("This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.").

[60] *Id.*

[61] *Velez v. Novartis Pharmaceuticals Corp*., 244 F.R.D. 243 (S.D.N.Y. 2007) (declaration by a female employee that she was encouraged by a manager to get an abortion was anecdotal evidence supporting a class claim of pregnancy discrimination).

[62] *See Young v. United Parcel Serv., Inc*., --- U.S. ---, 135 S.Ct. 1338, 1354-55 (2015); *see also* Section I C., *infra*.

[63] *See, e.g*., *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 197-98 (1991) (employer's policy barring all women, except those whose infertility was medically documented, from jobs involving actual or potential lead exposure exceeding certain threshold, facially discriminated against women based on their capacity to become pregnant).

[64] 132 F.3d 431, 436 (8th Cir. 1998).

[65] *See also Maldonado v. U.S. Bank*, 186 F.3d 759, 766 (7th Cir.1999) (company vice president's remark to plaintiff that she was being fired "due to her condition" on the day after the plaintiff informed the vice president of her pregnancy directly proved pregnancy discrimination); *Sheehan v. Donlen Corp*., 173 F.3d 1039, 1044-45 (7th Cir. 1999) (supervisor's comment when discharging pregnant plaintiff that the discharge would hopefully give her time at home with her children and his similar comment the following day proved discrimination despite manager's lack of specific statement that plaintiff's pregnancy was reason for discharge); *Flores v. Flying J., Inc*., 2010 WL 785969, at *3 (S.D. Ill. Mar. 4, 2010) (manager's alleged statement to plaintiff on her last day of employment that she could no longer work because she was pregnant raised material issue of fact as to whether discharge was due to pregnancy discrimination).

[66] 471 F.3d 588, 593-94 (6th Cir. 2006).

[67] *Compare with Gonzalez v. Biovail Corp. Int'l*, 356 F. Supp. 2d 68, 80 (D. Puerto Rico 2005) (temporal link between discharge and plaintiff's pregnancy was too far removed to establish claim where discharge occurred six months after plaintiff's parental leave ended). *See also Piraino v. Int'l Orientation Res., Inc.*, 84 F.3d 270, 274 (7th Cir. 1996) (timing "suspicious" where less than two months after newly hired employee disclosed her pregnancy, defendant issued policy restricting maternity leave to employees who had worked at least one year); *Kalia v. Robert Bosch Corp*., 2008 WL 2858305, at *10 (E.D. Mich. Jul. 22, 2008) (unpublished) (plaintiff showed prima facie link between her pregnancy and discharge where supervisor started keeping written notes of issues with plaintiff the day after disclosure of pregnancy and discharge occurred the following month).

[68] *See EEOC v. Ackerman, Hood & McQueen, Inc.*, 956 F.2d 944, 948 (10th Cir. 1992) (clear language of PDA requires comparison between pregnant and non-pregnant workers, not

between men and women).

[69] 271 F.3d 212, 221 (5th Cir. 2001).

[70] The *Wallace* court nevertheless affirmed judgment as a matter of law for the employer because the plaintiff was unable to rebut the employer's other reason for the discharge, i.e., that she falsified medical records. *Id.* at 221-22; *see also Carreno v. DOJI, Inc.,* 668 F. Supp. 2d 1053, 1062 (M.D. Tenn. 2009) (plaintiff set forth prima facie case of pregnancy discrimination based in part on evidence that she was discharged while similarly situated non-pregnant co-workers were demoted and given opportunities to improve their behavior); *Brockman v. Avaya*, 545 F. Supp. 2d 1248, 1255-56 (M.D. Fla. 2008) (employer's motion for summary judgment denied because plaintiff, who was pregnant when she was discharged, was treated less favorably than non-pregnant female who replaced her).

[71] 140 F. Supp. 2d 1001 (S.D. Iowa 2001).

[72] *Id.* at 1008; *see also Zisumbo v. McLeodUSA Telecomm. Servs., Inc*., 154 Fed. Appx. 715, 724 (10th Cir. 2005) (unpublished) (finding material issue of fact regarding employer's explanation for demoting pregnant worker where explanation it advanced in court was dramatically different than the one it asserted to EEOC); *Kerzer v. Kingly Mfg.,* 156 F.3d 396, 403-04 (2d Cir. 1998) (evidence of pretext in discriminatory discharge claim under PDA included alleged statement by company president that an employer could easily get away with firing pregnant worker by stating the position was eliminated, president's alleged unfriendliness toward plaintiff following plaintiff's announcement of pregnancy, and plaintiff's discharge shortly before her scheduled return from maternity leave).

[73] 902 F.2d 148, 157-58 (1st Cir. 1990).

[74] *See also DeBoer v. Musashi Auto Parts,* 124 Fed. Appx. 387, 392-93 (6th Cir. 2005) (unpublished) (circumstantial evidence of pregnancy discrimination included employer's alleged failure to follow its disciplinary policy before demoting plaintiff).

[75] --- U.S. ---, 135 S.Ct. 1338 (2015).

[76] *Id.* at 1354-55.

[77] For more detailed guidance on what constitutes unlawful harassment and when employers can be held liable for unlawful harassment, *see* EEOC Enforcement Guidance*: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999), *available at* **http://www.eeoc.gov/policy/docs/harassment.html (http://www.eeoc.gov/policy/docs/harassment.html)** (last visited May 5, 2014); *Enforcement Guidance on Harris v. Forklift Sys., Inc.* (Mar, 8, 1994), *available at* **http://www.eeoc.gov/policy/docs/harris.html (http://www.eeoc.gov/policy/docs/harris.html)** (last visited May 5, 2014); EEOC *Policy Guidance on Current Issues of Sexual Harassment* (Mar. 19,1990), *available at*

http://www.eeoc.gov/policy/docs/currentissues.html (http://www.eeoc.gov/policy/docs/currentissues.html) (last visited May 5, 2014); 29 C.F.R. § 1604.11.

[78] *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Harassment may also violate Title VII if it results in a tangible employment action. To date, we are aware of no decision in which a court has found that pregnancy based harassment resulted in a tangible employment action.

[79] These facts were drawn from the case of *Iweala v. Operational Technologies Services, Inc.,* 634 F. Supp. 2d 73 (D.D.C. 2009). The court in that case denied the employer's motion for summary judgment on the plaintiff's hostile environment claim. *See also Dantuono v. Davis Vision, Inc*., 2009 WL 5196151, at *9 (E.D.N.Y. Dec. 29, 2009) (unpublished) (finding material issue of fact as to hostile environment based on pregnancy where plaintiff alleged that manager, after learning of her intention to become pregnant, was "snippy" and "short" with her, "talked down" to her, "scolded" her, "bad mouthed" her to other executives, communicated through email rather than in person, and banished her from the manager's office when the manager was speaking with others); *Zisumbo,* 154 Fed. Appx. at 726-27 (overturning summary judgment for defendant on hostile environment claim where there was evidence that plaintiff's supervisor was increasingly rude and demeaning to her after learning of her pregnancy, frequently referred to her as "prego," told her to quit or "go on disability" if she could not handle the stress of her pregnancy, and demoted her for alleged performance problems despite her positive job evaluations); *Walsh v. National Computer Sys, Inc*., 332 F.3d 1150, 1160 (8th Cir. 2003) (affirming finding that plaintiff was subjected to hostile environment due to her potential to become pregnant where evidence showed supervisor's hostility towards plaintiff immediately following her maternity leave, supervisor made several discriminatory remarks regarding plaintiff's potential future pregnancy, and supervisor set more burdensome requirements for plaintiff as compared to co-workers).

[80] Detailed guidance on this subject is set forth in EEOC's Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, *supra,* note 25.

[81] For further discussion of childcare leave issues, *see* Section I C.3., *infra*.

[82] The ADA is violated in these circumstances because the statute prohibits discrimination based on the disability of an individual with whom an employee has a relationship or association, such as the employee's child. For more information, *see* EEOC's *Questions and Answers About the Association Provision of the ADA, available at* **http://www.eeoc.gov/facts/association_ada.html (http://www.eeoc.gov/facts/association_ada.html)** (last visited May 5, 2014).

[83] 42 U.S.C. § 2000e-2(e).

[84] *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 204 (1991).

[85] *Id.* at 201.

[86] *Johnson Controls,* 499 U.S. at 206-07 and 208-211 (no BFOQ based on risk to employee or fetus, nor on fear of tort liability); 29 C.F.R. § 1604.2(a) (1972) (no BFOQ based on stereotypes or customer preference). One court found that non-pregnancy was a BFOQ for unmarried employees at an organization whose mission included pregnancy prevention. *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987). However, the dissent to the order denying rehearing en banc argued that the court should have conducted "a more searching examination of the facts and circumstances . . . ." 840 F.2d at 584-86.

[87] *Cleveland Board of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643 (8th Cir. 1987).

[88] 42 U.S.C. § 2000e-2(k). *See also* 42 U.S.C. § 2000e-2(a)(2); Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

[89] *Garcia v. Woman's Hosp. of Tex.*, 97 F.3d 810, 813 (5th Cir. 1996) (finding that if all or substantially all pregnant women would be advised by their obstetrician not to lift 150 pounds, then they would certainly be disproportionately affected by this job requirement and statistical evidence would be unnecessary).

[90] *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977). By requiring an employer to show that a policy that has a discriminatory effect is job related and consistent with business necessity, Title VII ensures that the policy does not operate as an "artificial, arbitrary, and unnecessary barrier[]" to the employment of pregnant workers. *See Griggs*, 401 U.S. at 431.

[91] *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (k)(1)(C).

[92] *Garcia*, 97 F.3d at 813.

[93] *Spivey v. Beverly Enters.*, 196 F.3d 1309, 1314 (11th Cir. 1999). For a discussion of light duty, see Section I C.1., *infra*.

[94] *Abraham v. Graphic Arts. Int'l. Union*, 660 F.2d 811, 819 (D.C. Cir. 1981). For a discussion of restrictive leave policies, see Section I C.2., *infra*.

[95] The facts in this example were adapted from the case of *Garcia v. Woman's Hospital of Texas*, 97 F.3d 810 (5th Cir. 1996).

[96] 42 U.S.C. § 2000e(k).

[97] 411 U.S. 792, 802 (1973); *see also Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-256 (1981); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 504-510 (1983); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000); *Raytheon Co. v. Hernandez*, 540

U.S. 44, 50 (2003).

[98] --- U.S. ---, 135 S.Ct. 1338 (2015).

[99] *Id.* at 1354.

[100] *Id*. (citing *Texas Dep't of Community Affairs v. Burdine*, 430 U.S. 248, 253 (1981)).

[101] *Id*. (citing *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973).

[102] *Id.*

[103] *Id.* at 1354.

[104] *See id.* at 1354-55.

[105] *Id.* at 1354.

[106] Courts have disagreed as to how disparate impact is established in the context of light duty policies. *Compare Germain*, 2009 WL 1514513, at *4 (to establish a prima facie case of disparate impact, pregnant women must be compared to all others similar in their ability or inability to work, without regard to the cause of the inability to work), *with Woodard v. Rest Haven Christian Servs.*, 2009 WL 703270, at *7 (N.D. Ill. Mar. 16, 2009) (unpublished) (because pregnancy discrimination is sex discrimination, proper comparison would appear to be between the percentage of females who have been disparately affected and the percentage of males, though even if the comparison is between pregnant women and males, plaintiff failed to establish evidence of disparate impact). The EEOC agrees with *Germain's* holding that the appropriate comparison is between pregnant women and all others similar in their ability or inability to work, and disagrees with *Woodard's* holding that all women or all pregnant women should be compared to all men. As the *Germain* court recognized (*Germain*, 2009 WL 1514513, at *4), the Supreme Court has held that, "[t]he second clause [of the PDA] could not be clearer: it mandates that pregnant employees 'shall be treated the same for all employment-related purposes' as nonpregnant employees similarly situated *with respect to their ability to work*." *Int'l Union v. Johnson Controls*, 499 U.S. 187, 204-05 (1991) (emphasis added). That statutory language applies to disparate impact as well as to disparate treatment claims.

[107] 42 U.S.C. § 2000e-2(k)(1)(A)(i). *See, e.g., Germain*, 2009 WL 1514513, at *4 (denying summary judgment based on genuine issue of material fact as to business necessity).

[108] These facts were adapted from the case of *Lehmuller v. Incorporated Village of Sag Harbor*, 944 F. Supp. 1087 (E.D.N.Y. 1996). The court in that case found material issues of fact precluding summary judgment. These facts could also be analyzed as disparate treatment discrimination.

[109] This subsection addresses leave issues that arise under the PDA. For a discussion of the interplay between leave requirements under the PDA and the Family and Medical Leave Act, see

Section III A., *infra*.

[110] *See Johnson Controls*, 499 U.S. at 200 ("The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination under § 703(a) ….").

[111] *See* Sharon Terman, *Written Testimony of Sharon Terman*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 9 (citing Stephanie Bornstein, *Poor, Pregnant and Fired: Caregiver Discrimination Against Low-Wage Workers* (UC Hastings Center for WorkLife Law 2011)).

[112] In the past, airlines justified mandatory maternity leave for flight attendants or mandatory transfer of them to ground positions at a certain stage of pregnancy based on evidence that side effects of pregnancy can impair a flight attendant's ability to perform emergency functions. *See*, *e.g.*, *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994 (5th Cir. 1984) (mandatory leave was justified by business necessity as the policy was neither unrelated to airline safety concerns, nor a manifestly unreasonable response to these concerns); *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980) (mandatory leave was justified as a bona fide occupational qualification based on the safety risks posed by pregnancy). These decisions predated, and are inconsistent with, the Supreme Court's decision in *Johnson Controls*, 499 U.S. at 198-205. Moreover, the Commission agrees with the position taken by the Federal Aviation Administration (FAA) that, as long as a flight attendant can perform her duties, no particular stage of pregnancy renders her unfit. *See* Department of Transportation Federal Aviation Administration Memo (5/5/1980) and confirming e-mail (3/5/2010) (on file with EEOC, Office of Legal Counsel).

[113] 42 U.S.C. § 2000e-2(e)(1). For further discussion of the BFOQ defense, see Section I B.1.c., *supra*.

[114] *See, e.g.*, *Orr v. City of Albuquerque*, 531 F.3d 1210, 1216 (10th Cir. 2008) (reversing summary judgment for defendants where plaintiffs presented evidence that they were required to use sick leave for their maternity leave while others seeking non-pregnancy FMLA leave were routinely allowed to use vacation or compensatory time); *Maddox v. Grandview Care Ctr., Inc.*, 780 F.2d 987, 991 (11th Cir. 1986) (affirming finding in favor of plaintiff where employer's policy limited maternity leave to three months while leave of absence for "illness" could be granted for indefinite duration).

[115] *See Byrd v. Lakeshore Hosp.*, 30 F.3d 1380, 1383 (11th Cir. 1994) (rejecting employer's argument that plaintiff, who was discharged partly due to her use of accumulated sick leave for pregnancy-related reasons, additionally was required to show that non-pregnant employees with similar records of medical absences were treated more favorably; the court noted that an employer is presumed to customarily follow its own sick leave policy and, if the employer commonly violates the policy, it would have the burden of proving the unusual scenario).

[116] *See Stout v. Baxter Healthcare*, 282 F.3d 856, 859-60 (5th Cir. 2002) (discharge of plaintiff

due to pregnancy-related absence did not violate PDA where there was no evidence she would have been treated differently if her absence was unrelated to pregnancy); *Armindo v. Padlocker*, 209 F.3d 1319, 1321 (11th Cir. 2000) (PDA does not require employer to treat pregnant employee who misses work more favorably than non-pregnant employee who misses work due to a different medical condition); *Marshall v. Am. Hosp. Ass'n*, 157 F.3d 520 (7th Cir. 1998) (upholding summary judgment for employer due to lack of evidence it fired her because of her pregnancy rather than her announced intention to take eight weeks of leave during busiest time of her first year on the job).

Note that although Title VII does not require pregnancy-related leave, the Family and Medical Leave Act does require covered employers to provide such leave under specified circumstances. *See* Section III A., *infra*.

[117] For further information about stereotypes and assumptions regarding pregnancy, *see* Section I A.1.b., *supra*.

[118] These facts were drawn from *EEOC v. Lutheran Family Services in the Carolinas*, 884 F. Supp. 1022 (E.D.N.C. 1994). The court in that case denied the defendant's motion for summary judgment.

[119] If Michelle's pregnancy-related complications are disabilities within the meaning of the ADA, the employer will have to consider whether granting the leave, in spite of its policy, or some other reasonable accommodation is possible without undue hardship. *See* Section II B., *infra*.

[120] See Section III A, *supra* for additional information on the Family and Medical Leave Act.

[121] *See Abraham v. Graphic Arts. Int'l. Union*, 660 F.2d 811, 819 (D.C. Cir. 1981) (10-day absolute ceiling on sick leave drastically affected female employees of childbearing age, an impact males would not encounter); *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 655 (N.D. Ill. 1991) (requiring employees to work for a full year before being eligible for sick leave had a disparate impact on pregnant workers and was not justified by business necessity); 29 C.F.R. § 1604.10(c) ("Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."); *cf. Maganuco v. Leyden Cmty. High Sch. Dist. 212*, 939 F.2d 440, 444 (7th Cir. 1991) (court noted that PDA claimant challenging leave policy on basis of disparate impact might have been able to establish that women disabled by pregnancy accumulated more sick days than men, or than women who have not experienced pregnancy-related disability, but plaintiff never offered such evidence).

The Commission disagrees with *Stout v. Baxter Healthcare*, 282 F.3d 856 (5th Cir. 2002), in which the court refused to find a prima facie case of disparate impact despite the plaintiff's showing that her employer's restrictive leave policy for probationary workers adversely affected all or

substantially all pregnant women who gave birth during or near their probationary period, on the ground that "to [allow disparate impact challenges to leave policies] would be to transform the PDA into a guarantee of medical leave for pregnant employees." The Commission believes that the Fifth Circuit erroneously conflated the issue of whether the plaintiff has made out a prima facie case with the ultimate issue of whether the policy is unlawful. As noted, an employer is not required to eliminate or modify the policy if it is job related and consistent with business necessity and the plaintiff fails to present an equally effective less discriminatory alternative. *See Garcia v. Woman's Hosp. of Tex.*, 97 F.3d 810, 813 (5th Cir. 1996) ("[t]he PDA does not mandate preferential treatment for pregnant women"; the plaintiff loses if the employer can justify the policy).

[122] *Warshawsky*, 768 F. Supp. at 655.

[123] *Id.*

[124] *See California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 290 (1987) (The state could require employers to provide up to four months of medical leave to pregnant women where "[t]he statute is narrowly drawn to cover only the period of actual physical disability on account of pregnancy, childbirth, or related medical conditions."); *Johnson v. Univ. of Iowa*, 431 F.3d 325, 328 (8th Cir. 2005) ("If the leave given to biological mothers is granted due to the physical trauma they sustain giving birth, then it is conferred for a valid reason wholly separate from gender.").

[125] *See Johnson*, 431 F.3d at 328 (if leave given to mothers is designed to provide time to care for and bond with newborn, "then there is no legitimate reason for biological fathers to be denied the same benefit"); EEOC Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, supra* note 25. Although Title VII does not require an employer to provide child care leave if it provides no leave for other family obligations, the Family and Medical Leave Act requires covered employers to provide such leave. *See* Section III A., *infra*.

[126] The legislative history of the PDA makes clear that the statute "in no way requires the institution of any new programs where none currently exist." H.R.Rep. No. 95-948, p. 4 (1978), Leg. Hist. 150, U.S. Code Cong. & Admin. News 1978, pp. 4749, 4752. The application of the non-discrimination principle to infertility and contraception is discussed at Section I A.3.c. and I A.3.d., *supra*.

[127] 29 C.F.R. § 1604.10(b) ("Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment.").

[128] The Patient Protection and Affordable Care Act (also known as Health Care Reform), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code)

contains provisions regarding insurance coverage of pre-existing conditions. Effective January 1, 2014, insurers can no longer exclude coverage for treatments based on such conditions.

[129] For further discussion of discrimination based on use of contraceptives, *see* Section I A.3.d., *supra*; *see also supra* note 39.

[130] *See Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. pt. 1604 app., Question 36 (1979).

[131] 42 U.S.C. § 2000e(k); *see also Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. pt. 1604 app., Question 37 (1979).

[132] However, prior to the passage of the PDA, it did not violate Title VII for an employer's seniority system to allow women on pregnancy-related medical leave to earn less seniority credit than workers on other forms of short-term medical leave. Because the PDA is not retroactive, an employer is not required to adjust seniority credits for pregnancy-related medical leave that was taken prior to the effective date of the PDA (April 29, 1979), even if pregnancy-related medical leave was treated less favorably than other forms of short-term medical leave. *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009).

[133] The principles set forth in this section also apply to claims arising under Section 501 of the Rehabilitation Act. 29 U.S.C. § 791.

[134] Under the ADA, an "employer" includes a private sector employer, and a state or local government employer, with 15 or more employees. 42 U.S.C. § 12111(5)(A). The term "employer" in this document refers to any entity covered by the ADA including labor organizations and employment agencies.

[135] *See* 42 U.S.C. §§ 12112(b)(6), 12113(a); 29 C.F.R. § 1630.10.

[136] 42 U.S.C. § 12112(d); 29 C.F.R. § 1630.13.

[137] 42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1630.9.

[138] 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g).

[139] Pub. L. No. 110-325, §§ 2(b)(5), 4(a), 122 Stat. 3553 (2008); 29 C.F.R. §§ 1630.1(c)(4), 1630.2(j)(1)(vi). Plaintiffs seeking to show that their pregnancy-related impairments are covered disabilities should provide specific evidence of symptoms and impairments and the manner in which they are substantially limiting.

[140] 29 C.F.R. § 1630.2(j)(1)(ix).

[141] *See, e.g., Gorman v. Wells Mfg. Corp.*, 209 F. Supp. 2d 970, 976 (S.D. Iowa 2002), *aff'd,* 340 F.3d 543 (8th Cir. 2003) (periodic nausea, vomiting, dizziness, severe headaches, and fatigue were not disabilities within the meaning of the ADA because they are "part and parcel of a

normal pregnancy"); *Gudenkauf v. Stauffer Commc'ns, Inc.*, 922 F. Supp. 465, 473 (D. Kan. 1996) (morning sickness, stress, nausea, back pain, swelling, and headaches or physiological changes related to a pregnancy are not impairments unless they exceed normal ranges or are attributable to a disorder); *Tsetseranos v. Tech Prototype, Inc.,* 893 F. Supp. 109, 119 (D.N.H. 1995) ("pregnancy and related medical conditions do not, without unusual circumstances, constitute a 'physical or mental impairment' under the ADA").

[142] 29 C.F.R. pt. 1630 app. § 1630.2(h).

[143] *See, e.g.*, *Walker v. Fred Nesbit Distrib. Co*., 331 F. Supp. 2d 780, 790 (S.D. Iowa 2004) (routine pregnancy is not a disability under ADA); *Gover v. Speedway Super America, LLC*, 254 F. Supp. 2d 695, 705 (S.D. Ohio 2002) (same).

[144] The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. 29 C.F.R. pt. 1630 app. §1630.2(j). The ADA includes a functional rather than a medical definition of disability. 136 Cong. Rec. H1920 H1921 (daily ed. May 1, 1990) (Statement of Rep. Bartlett).

[145] *See* 29 C.F.R. § 1630.2(j)(ix) (impairments lasting fewer than six months can be disabilities).

[146] *See Insufficient Cervix,* U.S. NAT'L LIBRARY OF MED., **http://www.nlm.nih.gov/medlineplus/ency/patientinstructions/000595.htm (http://www.nlm.nih.gov/medlineplus/ency/patientinstructions/000595.htm)** (last visited April 30, 2014) (general information about insufficient cervix). Uterine fibroids (non-cancerous tumors that grow in and around the wall of the uterus) may cause severe localized abdominal pain, carry an increased of risk of miscarriage, or cause preterm or breech birth and may necessitate a cesarean delivery. *See* Hee Joong Lee, MD et al., *Contemporary Management of Fibroids in Pregnancy*, REVIEWS IN OBSTETRICS & GYNECOLOGY (2010), **http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2876319/ (http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2876319/)** (last visited Apr. 30, 2014).

[147] *Price v. UTi, U.S., Inc*., 2013 WL 798014, at *2 (E.D. Mo. Mar. 5, 2013), *reconsideration denied in Price v. UTi, U.S., Inc.*, 2013 WL 1411547 (E.D. Mo. Apr. 08, 2013) (denying summary judgment to employer who terminated employee three weeks after she gave birth by cesarean section).

[148] Nausea causing severe vomiting resulting in dehydration may be a condition known as hyperemesis gravidarum. Excessive swelling due to fluid retention, edema, may require rest and elevation of legs. Abnormal heart rhythms may require further monitoring. *See Pregnancy*, U.S. DEP'T OF HEALTH & HUMAN SERVS., **http://womenshealth.gov/pregnancy/you-are-pregnant/pregnancy-complications.html (http://womenshealth.gov/pregnancy/you-are-pregnant/pregnancy-complications.html)** (last visited Apr. 30, 2014).

[149] *McKellips v. Franciscan Health Sys.*, 2013 WL 1991103, at *4 (W.D. Wash. May 13, 2013) (plaintiff's allegations that she suffered severe pelvic inflammation and immobilizing pain that

necessitated workplace adjustments to reduce walking and early pregnancy-related medical leave were sufficient to allow her to amend her complaint to include an ADA claim).

[150] *Nayak v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 2013 WL 121838, at *3 (S.D. Ind. Jan. 9, 2013) (denying defendant's motion to dismiss plaintiff's ADA claim).

[151] *Mayorga v. Alorica, Inc.*, 2012 WL 3043021, at *6 (S.D. Fla. July 25, 2012) (unpublished) (denying defendant's motion to dismiss where plaintiff claimed impairments related to her pregnancy included premature uterine contractions, irritation of the uterus, increased heart rate, severe morning sickness, severe pelvic bone pains, severe back pain, severe lower abdominal pain, and extreme headaches). Several recent district court decisions that have concluded that impairments related to pregnancy are not disabilities have been based either on a lack of any facts describing how the impairment limited major life activities, or on the incorrect application of the more stringent requirements for establishing that an impairment constitutes a disability that existed prior to the effective date of the ADA Amendments Act (ADAAA). *See Wanamaker v. Westport Board of Education*, 899 F. Supp. 2d 193 (D. Conn. 2012) (plaintiff did not allege facts that would demonstrate that the spinal injury, transverse myelitis, she suffered in childbirth substantially limited a major life activity); *Selkow v. 7-Eleven, Inc*., 2012 WL 2054872 (M.D. Fla. June 7, 2012) (without acknowledging the ADAAA, which applied at the time of plaintiff's termination, the court held that plaintiff presented no evidence to withstand summary judgment on whether her weakened back constituted the type of "severe complication" related to pregnancy required to establish a disability); *Sam-Sekur v. Whitmore Group, LTD*, 2012 WL 2244325 (E.D.N.Y. June 15, 2012) (relying on case law pre-dating the ADAAA, the court held that "temporary impairments, pregnancies, and conditions arising from pregnancy are not typically disabilities," but allowed the *pro se* plaintiff to amend her complaint to allege facts concerning the duration of her chronic cholecystitis, which required removal of her gall bladder, and how the condition was linked to pregnancy).

[152] *Heatherly v. Portillo's Hot Dogs, Inc.,* 2013 WL 3790909, at *6 (N.D. Ill. July 19, 2013).

[153] Prior to an offer of employment, the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job. After an applicant is given a conditional offer, but before she starts work, an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category. After employment begins, an employer may make disability-related inquiries and require medical examinations only if they are job related and consistent with business necessity. A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. 42 U.S.C. § 12112(d)(4); 29 C.F.R. §§ 1630.13, 1630.14; EEOC Enforcement Guidance: *Preemployment Disability-Related Questions and Medical Examinations* (Oct. 10, 1995), *available at***http://www.eeoc.gov/policy/docs/preemp.html (http://www.eeoc.gov/policy/docs/preemp.html)** (last visited May 5, 2014); *see also EEOC Enforcement Guidance on Disability-Related Inquiries and Medical*

Examinations of Employees Under the Americans with Disabilities Act (ADA), at question 1, (July 27, 2000), *available at* **http://www.eeoc.gov/policy/docs/guidance-inquiries.html (http://www.eeoc.gov/policy/docs/guidance-inquiries.html)** (last visited May 5, 2014).

[154] 29 C.F.R. § 1630.2(l)(1).

[155] These facts were drawn from the case of *Spees v. James Marine, Inc.,* 617 F.3d 380, 398 (6th Cir. 2010). The court's decision that the employer regarded the pregnant employee as having a disability because she had complications with previous pregnancies was made under the more stringent "regarded as" standard in place prior to the ADAAA.

[156] *See* Job Accommodation Network, "Accommodation Ideas for Pregnancy," *available at* **https://askjan.org/articles/Getting-Over-the-Bump-Pregnancy-at-Work.cfm (https://askjan.org/articles/Getting-Over-the-Bump-Pregnancy-at-Work.cfm)** (last visited May 5, 2014).

[157] 29 C.F.R. § 1630.2(o); *see* EEOC Revised Enforcement Guidance: *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (Oct. 17, 2002), *available at* **http://www.eeoc.gov/policy/docs/accommodation.html (http://www.eeoc.gov/policy/docs/accommodation.html)** (last visited May 5, 2014).

[158] 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9.

[159] *See* 29 C.F.R. § 1630.2(p). Factors that may be considered in determining whether an accommodation would impose an undue hardship include the nature and cost of the accommodation, the overall financial resources of the facility or entity, and the type of operation of the entity.

[160] *See supra* note 157.

[161] *See EEOC Enforcement Guidance: Workers' Compensation and the ADA*, at Q&A 28, (Sept.10, 1996), available at **http://www.eeoc.gov/policy/docs/workcomp.html (http://www.eeoc.gov/policy/docs/workcomp.html)** (last visited May 5, 2014). For further discussion of light duty issues, see Section I C.1., *supra*.

[162] The Department of Labor (DOL) enforces the FMLA. Recently revised DOL regulations under the FMLA can be found at 29 C.F.R. Part 825. Additional information about the interaction between the FMLA and the laws enforced by the EEOC can be found in the EEOC's *Fact Sheet on the Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964, available at* **http://www.eeoc.gov/policy/docs/fmlaada.html (http://www.eeoc.gov/policy/docs/fmlaada.html)** (last visited May 5, 2014).

[163] In comparison, Title VII covers employers with 15 or more employees for each working day in each of 20 or more calendar weeks in the same calendar year as, or in the calendar year prior to when, the alleged discrimination occurred. Title VII also covers governmental entities.

[164] Employees are "eligible" for FMLA leave if they: (1) have worked for a covered employer for at least 12 months; (2) had at least 1,250 hours of service during the 12 months immediately preceding the start of leave; and (3) work at a location where the employer employs 50 or more employees within 75 miles. 29 C.F.R. § 825.110. Special hours of service requirements apply to flight crew members. Airline Flight Crew Technical Corrections Act, Pub. L. No. 111-119, 123 Stat. 3476 (codified as amended at 29 U.S.C. § 2611(2)(D)).

[165] The FMLA also provides military family leave entitlements to employees with family members in the armed forces in circumstances not likely to be relevant to pregnancy-related leave, or leave to care for a newborn child, a newly adopted child, or a child newly placed in foster care.

[166] 65 Fed. Reg. 26115 (May 4, 2000). The Office of Personnel Management is charged with issuing guidance pursuant to this order.

[167] For a discussion of discrimination based on lactation and breastfeeding, *see* Section I A.4.b., *supra*.

[168] Pub. L. No. 111-148, amending Section 7 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 207. Because the Affordable Care Act provides no specific effective date, the new break time law for nursing mothers was effective on the date of enactment - March 23, 2010.

[169] DOL has published a Fact Sheet providing general information on the break time requirement for nursing mothers. The Fact Sheet can be found at **http://www.dol.gov/whd/regs/compliance/whdfs73.htm (http://www.dol.gov/whd/regs/compliance/whdfs73.htm)** (last visited May 5, 2014).

[170] The DOL Fact Sheet explains that, where employers already provide compensated breaks, an employee who uses that break time to express milk must be compensated in the same way other employees are compensated for break time.

[171] Currently, 24 states, Puerto Rico, and the District of Columbia have legislation setting workplace requirements related to breastfeeding.

[172] Section 708 of Title VII provides: "Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title." 42 U.S.C. § 2000e-7.

Section 1104 of Title XI, applicable to all titles of the Civil Rights Act, provides: "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of the Act be construed as invalidating any

provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof." 42 U.S.C. § 2000h-4.

[173] Some states, including Alaska, California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, New Jersey, Texas, Minnesota, and West Virginia, have passed laws requiring that employers provide some reasonable accommodation for a pregnant worker. For instance, in the state of Maryland an employee with a disability contributed to or caused by pregnancy may request reasonable accommodation and the employer must explore "all possible means of providing the reasonable accommodation." The law lists various options to consider such as changing job duties, changing work hours, providing mechanical or electrical aids, transferring employees to less strenuous or less hazardous positions, and providing leave. Md. Code Ann., State Gov't Article, §20-609.

[174] 479 U.S. 272 (1987).

[175] *Id.* at 280 (citation omitted).

[176] *Id.* at 287.

[177] *Id.* at 291.

[178] *See* Section I A.3.a., *supra*.

[179] Employers should consider, however, how the pay provisions of the Fair Labor Standards Act could be implicated by an employee's involvement in training while on leave. Under U.S. Department of Labor regulations, certain training activities outside of working hours need not be treated as compensable time. *See* 29 C.F.R. §§ 785.11-785.32.

[180] *Id.*

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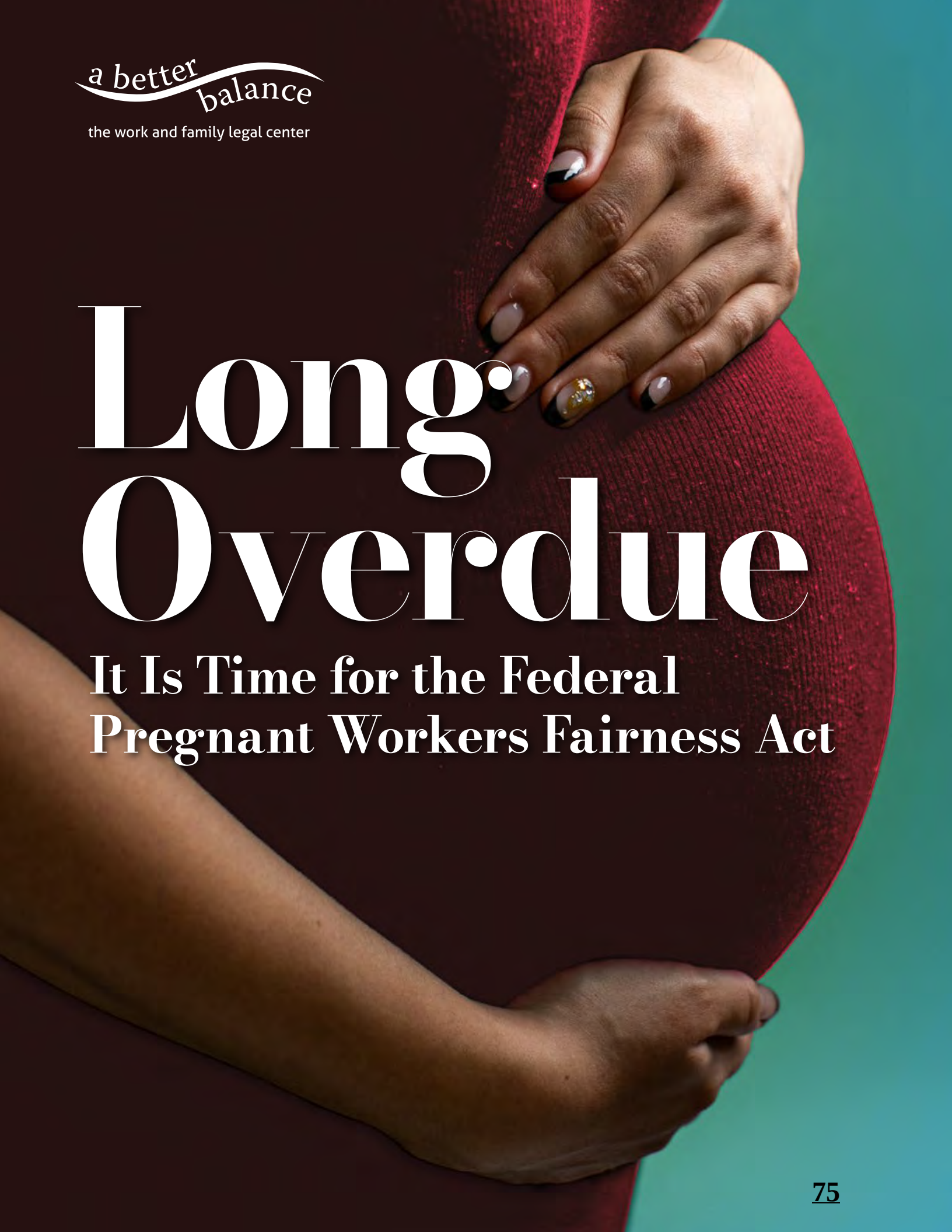

Long Overdue

It Is Time for the Federal Pregnant Workers Fairness Act

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Long Overdue

It Is Time for the Federal Pregnant Workers Fairness Act

By Dina Bakst, Elizabeth Gedmark, and Sarah Brafman

A Better Balance is a national legal advocacy organization dedicated to promoting fairness in the workplace. We help workers across the economic spectrum care for themselves and their families without risking their economic security. Through legislative advocacy, litigation, and public education, A Better Balance leverages the power of the law to ensure that no workers have to make the impossible choice between their job and their family. We believe that when all working parents and caregivers have a fair shot in the workplace, our families, our communities, and our nation are healthier and stronger.

Call A Better Balance's national legal helpline at **1-833-NEED-ABB** for free and confidential information about your workplace rights around caring for yourself and your family.


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The authors wish to thank **Beth Potter** for her extensive research into state legislative histories and citation checking, **Susanna Barron** and **Madeleine Gyory** for their significant contributions to the legal research, **Feroza Freeland** for her research and input, and **Marcella Kocolatos** for her careful editing.

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Part IV

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Executive Summary

More than forty years after the passage of the Pregnancy Discrimination Act (PDA), pregnant workers are still being forced to choose between their job and a healthy pregnancy.

As evidenced by story after story included in this report, pregnant workers, especially women in low-wage and physically demanding jobs, routinely jeopardize their health, and often their economic security, when denied medically necessary reasonable accommodations. States are stepping in to remedy this problem by passing state pregnant workers fairness laws, but state-by-state change is not enough. We need a federal fix. We need the Pregnant Workers Fairness Act (PWFA).

PHOTOGRAPH BY ANDRAE RICKETTS FOR UNSPLASH

1. Federal law is not cutting it for pregnant workers in need of accommodations to stay healthy and on the job.

In 2015, in *Young v. UPS*, the Supreme Court set a new legal standard for evaluating pregnancy accommodation cases under the PDA, a standard that employers and employees alike hoped would provide clarity in a muddled legal landscape. Unfortunately, for too many women it did not.

In an extensive review of post-Young pregnancy accommodation cases conducted for this report, A Better Balance found that in over two-thirds of cases, despite the new *Young* standard, courts held employers were permitted to deny pregnant workers accommodations under the PDA.

In **Vassar, Michigan,** Lauri Huffman just wanted to continue working as a shift leader at a Speedway convenience store.[1] In **Memphis, Tennessee,** Cassandra Adduci needed the paycheck she brought home working at a FedEx warehouse.[2] In **Langhorne, Pennsylvania,** Janasia Wadley wanted to keep her job as a teaching assistant at a daycare facility.[3] In **Kingston, New York,** Anne Marie Legg took pride in her job as a corrections officer at the Ulster County Jail and wanted to continue working through her pregnancy.[4] In **Pell City, Alabama,** Kimberlie Durham needed and wanted to continue working as an EMT during her pregnancy.[5]

Unfortunately, a cruel thread connects these women: while they all requested modest accommodations at their doctor's orders and presented doctor's notes, their employers refused to accommodate them and courts or juries found they had no valid claims under the Pregnancy Discrimination Act.[6]

Post-*Young*, pregnant women are facing three main problems in these cases: 1) they are still being forced to show that other employees are accommodated to merit accommodations under the PDA;[7] 2) even if they are able to find "comparators," women are still forced to discredit the employer's justification for failing to accommodate them, and one way of doing this is by showing the employer's policy imposed a "significant burden" on pregnant workers, but courts are struggling to correctly apply this standard;[8] and 3) many pregnant women need accommodations immediately and cannot afford—both in terms of their health and finances—to litigate a case for multiple years.[9] These problems can be succinctly summed up as **the "comparator problem," the "significant burden" problem, and the "costly and time-consuming litigation" problem.**

2. A bipartisan movement to pass pregnant workers fairness laws is sweeping the nation.

State legislators on both sides of the aisle have realized the health, economic, and business benefits of providing reasonable accommodations to pregnant workers and have stepped in to fill the gaps in federal law. As of May 2019, twenty-five states and five cities require certain employers to provide some form of accommodations to pregnant employees.[10]

Every one of the post-2013 state-level accommodation laws passed with bipartisan, and in many cases, unanimous support. The new wave of laws track the familiar Americans with Disabilities Act (ADA) accommodation framework, and include "reasonable accommodation" and "undue hardship" language.[11]

PHOTOGRAPH BY SOLSTOCK/ISTOCK

This report—through its deep analysis of state legislative histories—centers the voices of those state lawmakers, as well as business groups, who worked to pass pregnancy accommodation laws, recognizing the many health, economic, and government benefits such laws bring to workers, employers, and the state.

A Better Balance is proud to have developed model language, worked with local advocates on most of these state and local laws, and helped pregnant workers gain immediate relief under these new laws.

But even state legislators understand that the ultimate goal is a federal law. As former **Republican Delaware State Senator Colin Bonini**—who sponsored the Delaware pregnant workers fairness bill—said in a Congressional briefing on the federal PWFA:

"This policy is so obvious that it's tremendously frustrating that it hasn't happened. This is a public policy slam dunk. Do we want women to keep their jobs? Of course we do."[12]

3. There is a solution: the bipartisan federal Pregnant Workers Fairness Act.

The bipartisan federal Pregnant Workers Fairness Act, championed by Rep. Jerrold Nadler (D-NY), Rep. John Katko (R-NY), and Senator Bob Casey (D-PA), would require employers to provide reasonable accommodations to employees for pregnancy, childbirth, and related medical conditions, unless such accommodation would cause an undue hardship for the employer. Much like all the post-2013 state laws, the PWFA uses an existing reasonable accommodation framework, closely modeled after the Americans with Disabilities Act, that is familiar to employers. The federal PWFA would solidify the groundwork laid by the states and create a much-needed uniform federal standard. **Two decades into the 21st century, the time for true equality and fairness for pregnant women is overdue: now is the time to pass the bipartisan Pregnant Workers Fairness Act.**

PHOTOGRAPH BY WAVEBREAKMEDIA/SHUTTERSTOCK

Introduction

When Congress passed the Pregnancy Discrimination Act (PDA)[13] in 1978, pregnant workers faced many challenges in the workplace. Employers routinely and openly pushed pregnant women off the job based on paternalistic stereotypes that women could not work while pregnant. At the same time, pregnant women needed and wanted to work.[14]

Congress stepped in to act. The PDA mandated that pregnant workers must be able to participate fully and equally in the workplace, and barred employers from discriminating against women, i.e. treating them unfairly, based on pregnancy, childbirth, or related medical conditions. In many ways, the PDA succeeded in fundamentally shifting norms in the American workplace. No longer could employers ask about an applicant's plans to start a family or refuse to hire a pregnant woman or cut a pregnant worker's hours. However, the PDA left out one key component to achieving true equality for pregnant workers: the need for pregnancy accommodations. On this point, the PDA was—and still is—lacking.

Employers routinely refuse to grant pregnant workers modest accommodations, such as carrying a water bottle on the retail floor,[15] light duty,[16] or additional bathroom breaks to stay healthy and on the job.[17]

A Better Balance runs a free and confidential legal helpline, and for years we have heard from pregnant women across the country who have faced the impossible choice of maintaining a healthy pregnancy or earning a paycheck. We've heard from women like **Yvette**, a supermarket worker with a lifting restriction who was sent home and forced onto disability insurance, which ran out a month after she gave birth and resulted in her losing her health insurance and needing to go onto Medicaid.[18] We heard from one doctor who treated a **pregnant retail worker** after she was rushed to the emergency room when she fainted on the job because her boss would not let her drink water.[19] We heard from **Betzaida**, who was pushed off the job because she had a lifting restriction and, with no paycheck, became homeless and had to rely on family and friends for shelter.[20]

The law is too often of little help. Gaps in federal law permit too many pregnant workers—especially low-income women in physically demanding jobs—to be forced off the job and robbed of critical income when they need it most. While the PDA bans pregnancy discrimination, it requires employers to make accommodations only if they accommodate other workers, or if an employee unearths evidence of discrimination. The Americans with Disabilities Act requires employers to provide reasonable accommodations to workers with disabilities, which can

PHOTOGRAPH BY MONKEY BUSINESS IMAGES/SHUTTERSTOCK

include some pregnancy-related disabilities.[21] However, pregnancy itself is not a disability, leaving a gap wherein many employers are in no way obligated to accommodate pregnant workers in need of immediate relief to stay healthy and on the job.

In 2015, the Supreme Court attempted to clarify federal law in *Young v. UPS* when it took up the question of when, and under what circumstances, employers must provide workplace accommodations to pregnant workers under the PDA.[22] While the Court laid out a new standard that reaffirmed the purpose of the PDA and seemed promising, many courts have either misinterpreted the standard or interpreted it too narrowly, leaving pregnant workers without the relief they need.

In a comprehensive review of pregnancy accommodation cases following the *Young v. UPS* decision, conducted for this report, we found that over two-thirds of courts held employers were not obligated to accommodate pregnant workers under the Pregnancy Discrimination Act. This is more than a devastating statistic. This number reflects a shameful reality that too many pregnant workers are forced to make the impossible choice between their job and a healthy pregnancy.

There is a simple solution to the problem, one that A Better Balance Co-Founder and Co-President Dina Bakst laid out in a 2012 Op-Ed in *The New York Times,* and started to set in motion three years before the *Young* decision was even handed down—a solution that we still need today.[23] In order for pregnant workers to achieve true equality and equal opportunity in the workplace, the law must grant pregnant workers a clear right to reasonable accommodations.[24]

PHOTOGRAPH BY STOCKNROLL/ISTOCK

State legislators around the country agree. The *Times* Op-Ed and A Better Balance's call to action sparked a concerted legislative movement to create a clearer pregnancy accommodation standard. Prior to 2012, only six states had stronger legal protections for pregnant workers than federal law provides: Alaska, California, Connecticut, Hawaii, Louisiana, and Texas.[25]

Since 2013, twenty states have passed accommodation laws similar to the federal Pregnant Workers Fairness Act, all with bipartisan and often unanimous support, as well as support from the business community.

As this report lays out in detail, these states have paved the way for a federal law. A comprehensive review of state legislative testimony from the states that have passed these laws since 2013—everywhere from South Carolina to Kentucky to Nebraska to West Virginia—makes clear that this country is ready for the federal Pregnant Workers Fairness Act: one uniform and clear standard that applies to all fifty states.

In the states with pregnant workers fairness laws, we see the difference this type of law makes in the lives of pregnant workers and businesses. With clear law, pregnant workers can remain healthy and earn an income when they need it most, and businesses can avoid lengthy conflict by working with employees to determine an appropriate accommodation. This was exactly what happened to **Takirah Woods**.

Takirah worked in family services for a state agency and lives in a state with a pregnant workers fairness law. In 2018, when Takirah's doctor advised her not to lift over 15 pounds, HR pushed her out onto unpaid leave due to her lifting restriction. Desperate to keep earning an income, Takirah asked her doctor to lift the restriction even though it could compromise her health and pregnancy. Fortunately, her doctor knew about the state's pregnancy accommodation law and suggested she seek legal assistance. A Better Balance assisted Takirah in explaining the law to her employer and just two weeks later, the employer reinstated her and provided her with a light duty accommodation through the rest of her pregnancy.[26]

Contrast Takirah's experience with women in states without a pregnancy accommodation law, where we continue to see the heartbreaking consequences of the absence of such laws. A 2018 report in *The New York Times* shared the experiences of several women who miscarried during their time working at a warehouse in Memphis, Tennessee.[27]

Takirah Woods

After becoming pregnant, **Ceeadria Walker** provided her supervisor with a doctor's note saying that she should not lift more than 15 pounds.[28] Her supervisor ignored her request and routinely instructed her to handle 45-pound boxes.[29] One day, after a long shift of handling these heavier boxes, Ceeadria miscarried.[30] "This was going to be my first," Ceeadria told *The New York Times*.[31]

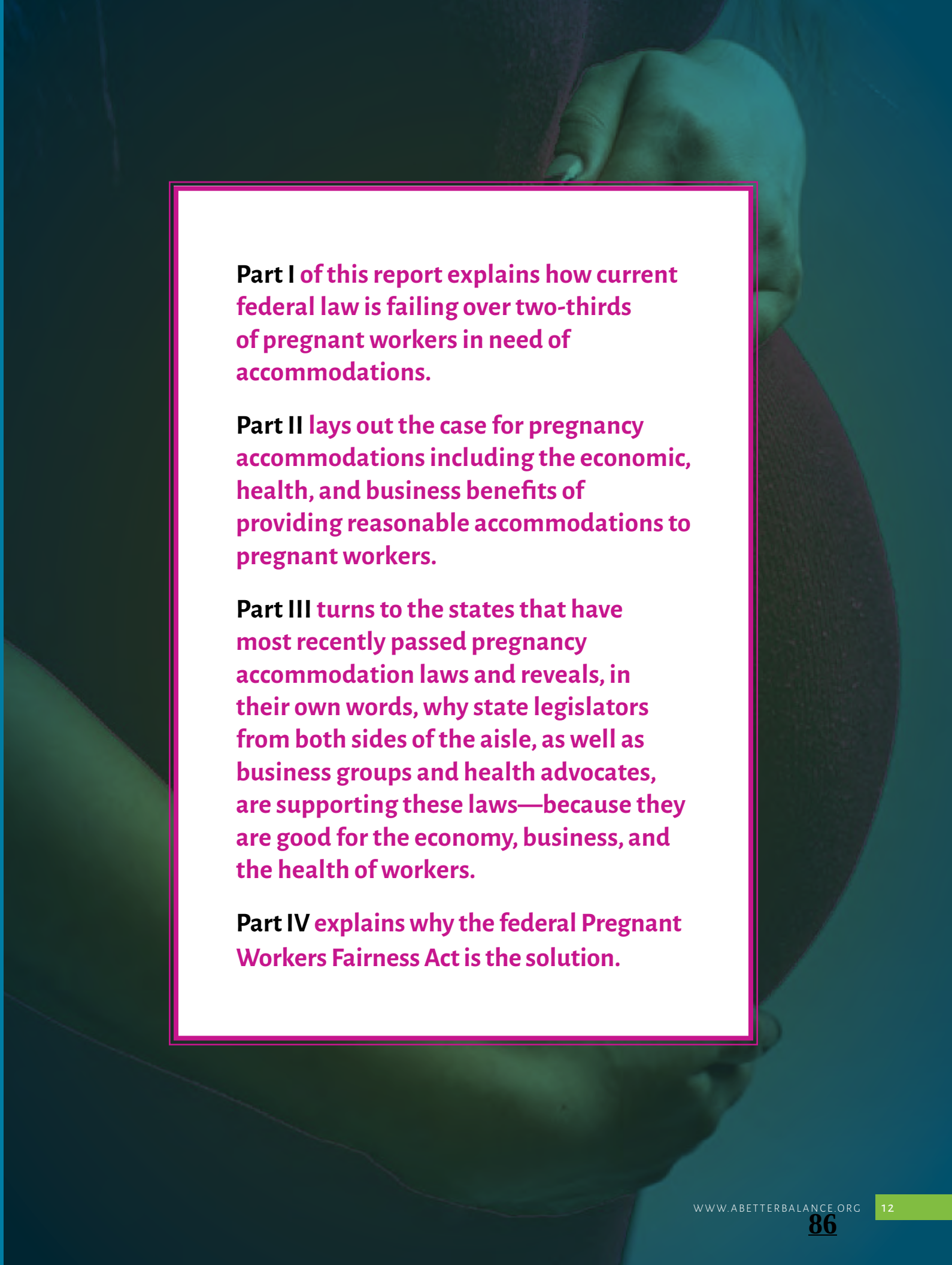
Ceeadria was not alone.[32] At least two other women had provided a doctor's note to supervisors at the warehouse indicating they needed light duty, but supervisors ignored the notes and forced the women to continue to lift heavy boxes.[33] Ceeadria and her co-workers' stories underscore the urgent need for the PWFA.

State-by-state and company-by-company changes are not enough. It is time for a federal fix. Why?

1. **Current federal law is not cutting it for pregnant workers in need of accommodations.**

2. **State legislators on both sides of the aisle have realized the health, economic, and business benefits of providing reasonable accommodations and have stepped in to fill the gaps in federal law.**

3. **There is a solution: the federal Pregnant Workers Fairness Act.**



Part I of this report explains how current federal law is failing over two-thirds of pregnant workers in need of accommodations.

Part II lays out the case for pregnancy accommodations including the economic, health, and business benefits of providing reasonable accommodations to pregnant workers.

Part III turns to the states that have most recently passed pregnancy accommodation laws and reveals, in their own words, why state legislators from both sides of the aisle, as well as business groups and health advocates, are supporting these laws—because they are good for the economy, business, and the health of workers.

Part IV explains why the federal Pregnant Workers Fairness Act is the solution.

Part I.

Pregnant Women Are Not Getting the Relief They Need Under Federal Law

Pregnant women—even those with healthy pregnancies—sometimes need modest accommodations to stay healthy and on the job.[34] The problem is that too often federal law—as interpreted by courts—does not provide legal protections for pregnant women in need of accommodations.

In 2015, in *Young v. UPS*, the Supreme Court laid out a new multi-step test[35] in an attempt to clarify when employers must provide workplace accommodations to pregnant workers under the Pregnancy Discrimination Act (PDA).[36] Workers hoped the new standard would bring relief and clarity to a very muddled legal landscape,[37] and for some workers, *Young* has brought positive relief.[38] Unfortunately—for too many—it has not.

In an extensive review of post-*Young* pregnancy accommodation cases conducted for this report, A Better Balance found that in over two-thirds of cases, despite the new *Young* standard, courts held employers were permitted to deny pregnant workers accommodations under the PDA.

The table on the following pages details those cases and reveals how women across the country—from Alabama to Florida to Michigan to Pennsylvania to Wyoming—working in a wide range of jobs, fell victim to an inadequate federal standard for pregnancy accommodations.

PHOTOGRAPH BY KALI9/ISTOCK

Post-*Young v. UPS* Cases With Negative Results for Pregnant Workers*†

Case	Location	Year	Why Did the Court Rule Against the Pregnant Worker's Pregnancy Discrimination Act Claim?
Swanger-Metcalfe v. Bowhead Integrated Support Servs., LLC	Pennsylvania	2019	The court granted employer's motion to dismiss a PDA claim brought by an auto worker who was forced to take leave after her employer refused to grant her physician-advised accommodation request not to work in a poorly-ventilated room with hazardous chemicals while pregnant. The court dismissed her claim because she "failed to identify any similarly situated individuals outside of her class who were accommodated" and provided "no factual details as to how other employees. . . .were so accommodated."[39]
Portillo v. IL Creations, Inc.	District of Columbia	2019	The court granted employer's motion for summary judgment on a PDA claim brought by a cashier who was denied a stool to sit on while pregnant because, among other things, she did not offer evidence that the employer "granted similar accommodations to other employees who had difficulty standing for extended periods of time, but refused her the same accommodation based on her pregnancy."[40]
Dudhi v. Temple Health Oaks Lung Center	Pennsylvania	2019	The court granted the employer's motion to dismiss a medical assistant's PDA claim that her employer failed to provide her with breastfeeding accommodations, finding she could not meet the *Young* standard because she could not cite to another employee who received accommodations.[41]
Luke v. C Place Forest Park SNF	Louisiana	2019	The court affirmed a grant of summary judgment to the employer, dismissing a certified nursing assistant's PDA claim that she was denied light duty, because she could not point to other CNAs who were granted accommodations when they had medical restrictions on heavy lifting.[42]
Sorah v. New Horizons Home Healthcare L.L.C.	Indiana	2018	The court granted employer's summary judgment motion on plaintiff's PDA claim, finding that it was not pregnancy discrimination to fire a director of HR almost immediately after returning from bed rest due to a pregnancy complication and short recovery period following childbirth.[43]
Waite v. Bd. of Trustees of Univ. of Alabama	Alabama	2018	The court granted the university's motion to dismiss a graduate student and university employee's PDA claim that the school denied her a modified schedule following childbirth and ultimately withdrew her from her classes, forcing her out onto leave.[44]
Durham v. Rural/ Metro Corp.	Alabama	2018	The court granted the employer's motion for summary judgment, dismissing the PDA claim of an EMT who was denied light duty even though the employer provided accommodations for on-the- job injuries.[45]
Wadley v. Kiddie Acad. Int'l, Inc.	Pennsylvania	2018	The court granted the employer's motion to dismiss a daycare assistant's PDA claim that she was denied light duty and extra breaks because she could not point to a valid comparator.[46]
Lee v. TransAm Trucking, Inc.	Kansas	2018	The court granted employer's motion for summary judgment on a PDA claim brought by a sales manager who was fired after requesting to go on bed rest because, among other things, she did not provide evidence that other employees were treated differently from her.[47]
Adduci v. Fed. Express Corp.	Tennessee	2018	The court denied a FedEx employee's motion to reconsider a grant of summary judgment in favor of the employer with respect to her PDA claim that the employer failed to provide her light duty, finding that she did not provide a valid comparator even though she could point to other employees in her same position who were provided accommodations.[48]
Santos v. Wincor Nixdorf, Inc.	Texas	2018	The court granted the employer's motion for summary judgment, dismissing a PDA claim by a project analyst who requested a modified work arrangement and was terminated a few days before giving birth, because she could not offer information such as "names, titles, and other information" of "similarly situated" employees.[49]

(Continued on next page)

Post-*Young v. UPS* Cases With Negative Results for Pregnant Workers (continued)*†

Case	Location	Year	Why Did the Court Rule Against the Pregnant Worker's Pregnancy Discrimination Act Claim?
Jones v. Brennan	Oklahoma	2017	The court granted the employer's motion for summary judgment, dismissing a postal worker's PDA claim that the employer failed to accommodate her standing restriction.[50]
Everett v. Grady Mem'l Hosp. Corp.	Georgia	2017	The court affirmed the employer's motion for summary judgment, dismissing a hospital program manager's PDA claim that the employer forced her out onto leave after she requested light duty because she could not point to "specific" enough evidence showing her employer was motivated by "animus."[51]
Vidovic v. City of Tampa	Florida	2017	The court granted an employer's motion for summary judgment, dismissing a firefighter's PDA claim that she was denied light duty, because she could not point to "nearly identical" comparators.[52]
Webster v. U.S. Dep't. of Energy	District of Columbia	2017	The court granted the employer's motion for summary judgment on a PDA claim brought by an attorney who was denied a different chair and a modified schedule as an accommodation.[53]
Legg v. Ulster Cty.	New York	2017	A jury found a corrections officer who was denied a light duty accommodation did not have a valid PDA claim. At trial, the judge gave confusing jury instructions about the *Young* standard.[54] In addition, the court later held that Legg could also not prove that the employer's policy disproportionately impacted pregnant women even though the policy permitted accommodations only for on- the-job injuries.[55]
Turner v. Hartford Nursing and Rehab	Michigan	2017	The court granted an employer's motion for summary judgment on a PDA claim by a certified nursing assistant fired due to her high-risk pregnancy and lifting restriction because she could not point to non-pregnant employees with lifting restrictions who were accommodated.[56]
LaCount v. South Lewis SH OPCO	Oklahoma	2017	The court denied a certified nursing assistant's motion for reconsideration of dismissal of her PDA claim. LaCount was pushed out onto FMLA leave and then fired when her only request was to refrain from lifting one particular patient. The court dismissed her motion because her evidence of comparators was too general.[57]
Anfeldt v. United Parcel Serv., Inc.	Illinois	2017	The court granted UPS's motion to dismiss a PDA claim where the plaintiff was challenging the exact same policy at issue in *Young v. UPS,* finding she could not provide enough detail about the comparators she presented.[58]
Jackson v. J.R. Simplot Co.	Wyoming	2016	The court affirmed a grant of summary judgment to the employer on a PDA claim by an operator at a fertilizer plant who was pushed out after she requested light duty.[59]
Brown v. OMO Group, Inc.	South Carolina	2016	The court granted employer's motion for summary judgment on PDA claim brought by a dental hygienist who was fired because she needed emergency surgery related to her pregnancy.[60]
Diaz v. Florida	Florida	2016	The court granted employer's motion for summary judgment on a PDA claim brought by an administrative assistant who alleged she was terminated because her employer did not want to accommodate her need to move a bit more slowly on the job and, among other things, the court found she could not show she was treated less favorably than her non-pregnant co-workers.[61]
Mercer v. Gov't of the Virgin Islands Dep't of Educ.	U.S. Virgin Islands	2016	The court entered a judgment against an employee who brought a PDA claim after her employer denied her accommodations following a stillbirth, finding that she could not point to other similar employees who were provided accommodations.[62]

(Continued on next page)

Post-*Young v. UPS* Cases With Negative Results for Pregnant Workers (continued)*†

Case	Location	Year	Why Did the Court Rule Against the Pregnant Worker's Pregnancy Discrimination Act Claim?
Lawson v. City of Pleasant Grove	Alabama	2016	The court granted the employer's motion for summary judgment with respect to a PDA claim brought by a police officer who was denied light duty, because she could not point to non-pregnant comparators.[63]
Salmon v. Applegate Homecare & Hospice, LLC	Utah	2016	The court granted the employer's motion for summary judgment on a PDA claim brought by a certified nursing assistant who was terminated after being forced out onto unpaid FMLA leave when she requested a light duty assignment, finding her claim failed because there was no evidence that another CNA was accommodated at the same time she needed the accommodation.[64]
Mejdoub v. Desjardins Bank, N.A.	Florida	2016	The court granted the employer's motion for summary judgment on a PDA claim brought by a bank teller who missed work due to a pregnancy-related condition right after which the supervisor chastised her for absenteeism, finding her claim failed because she could not show she was treated differently than non-pregnant employees.[65]
Brown v. Sam's E., Inc.	South Carolina	2015	The court granted summary judgment to an employer with respect to a PDA claim brought by a cashier who argued her compensation suffered because she did not carry a 25-pound bag of flour to a customer's car even though she asked for help and received none. Among other issues, the court found her comparators were "far from specific enough" and found it problematic she could not point to specific personnel records.[66]
Sanchez-Estrada v. MAPFRE PRAICO Ins. Co.	Puerto Rico	2015	The court granted the employer's motion for summary judgment on a PDA claim brought by an employee at an auto-repair company who was fired after she needed to be absent for pregnancy-related reasons, even though the court did "not doubt" that her absences were pregnancy-related.[67]
Huffman v. Speedway LLC	Michigan	2015	The court affirmed a grant of summary judgment to the employer on a state pregnancy discrimination claim that the lower court "analyzed under the same framework as Title VII" because even though Huffman's co-worker told Huffman she was provided an accommodation, the court would not permit the co-worker's statement since she did not work for the company's HR department.[68]

*In conducting this survey, we reviewed over 200 cases decided after *Young v. UPS* in which a plaintiff alleged a PDA claim. Our analysis and two-thirds statistic are based on narrowing those 200-plus cases down to forty-three cases that 1) involved a plaintiff who had an issue related to the need for a pregnancy accommodation; 2) alleged a PDA claim (or the court made explicit that a state law pregnancy discrimination claim tracked the Title VII analysis); and 3) cited to and/or analyzed *Young* in the case opinion. We did not count cases in the analysis if the plaintiff alleged only a retaliation claim and not an underlying PDA claim. We also excluded accommodation cases that did not reach the merits of the PDA claim (e.g. they were dismissed for procedural reasons such as issues of timeliness). Finally, we did not research cases where a PDA claim could have been, but was not, brought. In cases where the accommodation was related to time off or leave, we factored cases into our analysis only when the leave was related to a pregnancy-related complication or the clear need for the worker to recover from childbirth, but not cases where the leave could have been solely for bonding purposes. In making the determination that a court's result came out "negatively" or "positively" for a pregnant worker, we considered both published and unpublished opinions and only took into account the court's analysis of the worker's PDA claim and the court's holding as to that claim, and not any other claims the worker may have also alleged. If a pregnant worker prevailed on a defendant's dispositive motion (a motion to dismiss or motion for summary judgment) on the PDA claim, then we categorized that as a "positive" case. Likewise, if a pregnant worker's PDA claim did not survive a defendant's dispositive motion, then we categorized that as a "negative" case. Appeals were also analyzed similarly. In motion to dismiss cases, we viewed the facts in the light most favorable to the plaintiff and in motion for summary judgment cases, we viewed the facts and reasonable inferences in the light most favorable to the nonmoving party, in accordance with the legal standards for dispositive motions. In a very small number of cases, the court assessed the validity of a jury verdict or rendered a judgment following a bench trial. We recognize other methodology may have yielded slightly different outcomes.

†If, in a post-*Young* case in which a plaintiff alleged a PDA claim, the court did not cite to *Young* at all, that case was not included in the analysis and two-thirds statistic because the focus of this survey is on post-*Young* case law that cites to this important Supreme Court precedent. That said, we do believe there are some post-*Young* PDA accommodation cases wherein a court did not cite to, or analyze *Young*, but should have done so as part of analyzing the plaintiff's PDA claim, and that failing to do so may have been at least part of the reason for the court's dismissal of the claim. Had the court applied the *Young* burden-shifting test, we believe the results may have been different for the pregnant workers, further demonstrating the confusion around this legal standard. *See, e.g.*, *Tomiwa v. PharMEDium Servs., LLC*, No. 4:16-CV-3229, 2018 WL 1898458, at *4–5 (S.D. Tex. Apr. 20, 2018) (granting employer's motion for summary judgment on a PDA claim brought by a pharmacy technician who was fired after requesting to go on bed rest because, among other reasons, she could not point to similarly situated employees who were provided accommodations); *Pawlow v. Dep't of Emergency Servs. & Pub. Prot.*, 172 F. Supp. 3d 568, 575 (D. Conn. 2016) (granting employer's motion to dismiss a PDA claim brought by a police officer who alleged that she was punished for needing to pump breastmilk, finding she had no claim even though she was required to go home to express breast milk and was forced to pump in an area used to make bullets); *Agee v. Mercedes-Benz U.S. Intern., Inc.*, No. 7:12-cv-4014-SLB, 2015 WL 1419080, at *2 (N.D. Ala. Mar. 26, 2015) (granting employer's motion for summary judgment, dismissing an assembly line worker's PDA claim that she was terminated after requesting to work no more than 40 hours per week because, even though she provided information about other people who were accommodated, those names were not based on her "personal knowledge.").

Federal law—even with the new *Young* standard—is too often unresponsive to the reality of pregnant women's needs. The *Young* standard presents **three** key problems:

1. **The comparator problem** Even under the new *Young* test, workers must still find "comparators," meaning that they must show that the employer accommodated others "similar in their ability or inability to work."[69] This standard presents many issues for both workers and employers:

    a. Courts are continuing to construe the comparator requirement narrowly;

    b. The standard is tone deaf to the realities of the American workplace; and

    c. The standard places a unique burden on pregnant workers not placed on workers with disabilities.

2. **The significant burden problem** Even if a pregnant worker is able to produce valid comparators, the worker is still not done proving her case. The worker must then disprove any "legitimate, non-discriminatory reason" the employer offers, and one way of doing this is by "providing sufficient evidence that the employer's policies impose a *significant burden* on pregnant workers" and that the employer's reasons do not outweigh the burden on the worker.[70] As if the comparator standard were not confusing enough, the "significant burden" standard has only confounded courts further.

3. **The costly and time-consuming litigation problem** Confusion in applying the *Young* standard can extend litigation.[71] Without clear, strong protections for pregnant workers, we can expect continued costly and lengthy litigation clogging up the courts—a lose-lose for both employers and workers, no matter the outcome.

PHOTOGRAPH BY VORDA/ISTOCK

The Comparator Problem

Cassandra Adduci, a former Fed-Ex employee, knows the burdens of the comparator standard all too well.

Cassandra worked part-time at a FedEx facility in Memphis, Tennessee loading and unloading boxes off of FedEx freight vehicles. When she became pregnant in 2014, her doctor gave her a 25-pound lifting restriction.[72] When she informed FedEx of the restriction, they refused to re-assign her to temporary work, even though they had a Temporary Return to Work (TRW) program.[73] They pushed her out onto unpaid leave and ultimately terminated her. Though FedEx claimed part-time employees did not qualify for the program, Adduci produced a spreadsheet showing 261 FedEx employees, some of them part-time, who were given temporary work reassignments or light duty during 2014, at the same time the TRW program was in effect.[74]

The court refused to accept those *hundreds* of employees as comparators even though it also indicated that some of the employees accommodated were Material Handlers in the Offload area, Aducci's exact position.[75]

The court found that since the spreadsheet did not have detailed information about the other employees' "ability or inability to work similar to Adduci's," they were insufficient comparators.[76]

In addition to the spreadsheet, Adduci also pointed to a specific co-worker who directly told her that she was accommodated but because Adduci did not have her co-worker's "medical documentation, personnel file, or other first-hand information," and was unable to obtain it during discovery, the court refused to credit her as a comparator.[77] As a result, the court found in 2018 that Adduci could not make out a case of pregnancy discrimination based on disparate treatment[78] and, ultimately, threw out her case entirely.[79]

While *Young* should have ideally put an end to categorical bans on groups of comparators[80]—such as the ability to grant light duty for on-the-job injuries, but not for limitations incurred off-the-job—courts are continuing to impose those bright-line rules. Workers like **Kimberlie Dunham,** an EMT in Alabama, are paying the price.

A court in Alabama held in late 2018 that Kimberlie, who was an EMT, did not have a valid pregnancy discrimination claim even though she could point to three other people who were given light or modified duty when they too had lifting restrictions.[81] The reason: those three people had on-the-job injuries.[82] The Durham decision is even more troubling, and indicative of the confusion in case law post-*Young*, given that three years prior, in *Bray v. Town of Wake Forest*, the Eastern District of North Carolina came to the exact opposite conclusion.[83]

Lauri Huffman worked as a shift leader at a convenience store in Vassar, Michigan.[84] When she became pregnant and requested light duty, her employer forced her out onto unpaid leave and ultimately terminated her.[85] She heard from three separate co-workers that another employee, Chelsea, with similar working restrictions, was provided an accommodation for a knee injury.[86] Nevertheless, the court would not consider the facts of Chelsea's accommodation.[87]

The Court's stringent standard is tone deaf to the realities of the American workplace. Workers, especially low-wage workers, do not have access to their co-workers' personnel files or medical records and if they are able to glean comparator information at all, it may often be through word of mouth.

As A Better Balance Co-President Dina Bakst pointed out in a U.S. News & World Report Op-Ed, "many pregnant workers who need temporary adjustments to their work duties are new to their jobs, lack bargaining power, are unfamiliar with company policies (if there are any) and simply do not have the luxury of time to sort out these questions."[88] Above all, pregnant workers need immediate relief to remain healthy and working. Yet, the current process is far from expeditious: it requires pregnant workers to go through a long, complicated, tedious, and opaque process to determine if their employer potentially accommodates others, and even if they are able to produce that information, courts will often find that it comes up short.

Pregnant workers' own experiences should be enough to prove discrimination, irrespective of comparators or a significant burden showing, just as it is for workers with disabilities, who do not have to jump through these evidentiary hoops in order to receive the accommodations they need.[89]

PHOTOGRAPH BY EUGENIO MARONGIU/SHUTTERSTOCK

Consider **Janasia Wadley's** harrowing experience: Wadley worked as a teaching assistant at a daycare facility in Pennsylvania. She previously miscarried due to a UTI-related infection and when she became pregnant again, she requested a pregnancy accommodation of additional bathroom breaks which were necessary to prevent contracting a UTI.[90] Soon after, in October 2016, she asked for assistance so that she could use the restroom.[91] She had to wait over an hour for someone to cover for her so that she could use the restroom.[92] She was fired later that day.[93] The court dismissed Janasia's PDA claim because she could not point to a comparator.[94]

The Significant Burden Problem

As if the comparator standard were not confusing enough, the "significant burden" standard has only confounded courts further. **Anne Marie Legg**—among others[95]—can attest to this.

Anne Marie was a corrections officer at a jail in upstate New York.[96] When she became pregnant, she brought in a note from her doctor requesting to be temporarily re-assigned to a shift that would not require her to work directly with inmates, many of whom were violent offenders.[97] The jail had a policy of accommodating only on-the-job injuries and refused to accommodate Legg.[98]

Anne Marie needed to continue earning an income, so she got a revised doctor's note to remove the restriction.[99] After that, she was again assigned to work in a sector of the jail with violent offenders, including sex offenders.[100] Later in her pregnancy, a dormitory fight broke out among the inmates and Legg was physically unable to respond.[101] At that point, she decided to take a leave of absence until she gave birth, even though she faced significant economic harm for doing so.[102]

Legg filed a lawsuit. At trial, the judge gave confusing instructions to the jury, conflating different steps of the *Young* analysis, and wholly misinterpreting the standard.[103] The judge instructed the jury that evidence of discrimination could be found if "the light-duty policy places a significant burden on pregnant women as opposed to all other employees who are similar in their ability or inability to work and were not granted a light-duty accommodation."[104] This instruction wholly misinterpreted the *Young* "significant burden" standard. Nowhere in *Young* does it say that to show pretext under the "significant burden" standard the worker must show they are "similar in their ability or inability to work." That language pertains to an earlier step in the analysis. Legg lost at trial, and one is left wondering if that is owing to the judge's confusing and misstated jury charge.

The Costly and Time-Consuming Litigation Problem

The confusion in applying the *Young* standard can also lead to lengthy litigation which is harmful to both employers and employees. While, following *Young*, some employers proactively changed their policies to provide reasonable accommodations to pregnant employees in order to avoid the confusion of the federal standard, many employers still maintain no policies or confusing policies that can lead them into long, drawn-out legal battles. And even in cases that resulted in a positive

outcome for workers, the years it took courts to parse through the legal standard could have been avoided had a clearer law, like a reasonable accommodation law, been in place.

Legg, for example, was initially filed in 2009. Since then, the case has gone to trial twice and, after a recent decision in the district court, is heading back up to the Second Circuit on appeal.[105] In another case, a firefighter in Chicago challenged a pattern and practice the City has of placing pregnant employees on immediate leave.[106] While the firefighter's Title VII claims were permitted to proceed, the court held that her Illinois reasonable accommodation claims could not because the Illinois pregnancy accommodation law is not retroactive.[107] Had the court been able to apply the Illinois pregnancy accommodation law, this policy likely would have been challenged long ago, and may have avoided this costly and lengthy litigation.

Moreover, many attorneys do not have the expertise to properly parse the *Young* standard, and even those who do have expertise may be unwilling to take on a case, especially on behalf of low-wage workers, because they do not want to assume the risk when the law is so unclear. As such, workers, especially low-wage workers, are unable to access attorneys and exercise their rights under the law.

The vast majority of women A Better Balance hears from do not want to sue their employers. They just want the accommodations they need to remain healthy and on the job. Women should have an immediate remedy before they face devastating health or economic consequences.

The current federal framework fails to recognize the grave consequences that can unfold for workers if not accommodated. It places a unique burden on pregnant workers to find comparators when other workers, such as those with disabilities, are legally entitled to reasonable accommodations.

For example, under federal disability law, the Americans with Disabilities Amendments Act, people with disabilities are entitled to a reasonable accommodation simply by requesting one, unless their employer can show that the requested accommodation would "impose an undue hardship."[108] Pregnant workers should be entitled to the same reasonable accommodations, which is the standard laid out in the Pregnant Workers Fairness Act. Twenty-five states and five cities have stepped in to remedy the shortcomings of federal law. Now, drawing on lessons learned from the states, it is time for Congress to do its job and create a clear, workable standard for pregnancy accommodations.

PHOTOGRAPH BY DMYTRO ZINKEVYCH/SHUTTERSTOCK

Part II.

The Case for Pregnancy Accommodations

As of May 2019, twenty-five states and five cities require certain employers to provide some form of accommodations to pregnant employees.[109] In a sign of renewed frustration with federal law and a recognition that federal law remains inadequate for pregnant workers, twenty of these state laws have passed since 2013.

Legislators on both sides of the aisle, as well as business groups, have made consistent arguments in favor of reasonable accommodations for pregnant workers including a desire to:

- provide clarity to federal law[110]
- combat pregnancy discrimination in the workplace[111]
- support healthy pregnancies[112]
- promote women's economic security[113]
- keep women in the workforce[114]
- reduce costly litigation for businesses[115]
- reduce the number of workers receiving public assistance[116]
- improve employee retention, morale, and productivity[117]

PHOTOGRAPH BY ALEXKICH/SHUTTERSTOCK

In her testimony in support of a state-level pregnant workers fairness bill, **Iris Wilbur, Director of Government Affairs at Greater Louisville Inc.**—the metro Louisville, Kentucky chamber of commerce—underscored that "[i]n today's historically tight labor market, we need to make sure that anyone who wants to work is able to work and participate in the workforce. . . . [This bill] balances the need to support women in the workplace while clearly and concisely defining what constitutes reasonable accommodations and when an employer is and is not obligated to provide them."[118]

Testifying in support of a state-level accommodation bill in another state, **small business owner Dean Cycon** said, "If a water bottle or restroom breaks are all that is standing in the way of a pregnant worker putting food on her family's table, then it's a no-brainer."[119]

Pregnancy accommodation laws are a no-brainer for three key reasons:

1. They help ensure workers can support themselves and their families when they need it most;

2. Accommodations are pivotal to pregnant workers' health and safety; and

3. Accommodation laws clear up confusion for businesses and help employers retain valuable, dedicated workers and benefit our economy.

Natasha Jackson

The Economic Case for Pregnancy Accommodations

Seventy-five percent of women will be pregnant and employed at some point in their careers.[120] Pregnant women want and need to keep working. Census data shows that 88 percent of all women work into their last trimester of pregnancy, and 65 percent during their last month of pregnancy.[121] At the same time, many pregnant women need a modest accommodation while working, with modest being the key word. As one survey showed, the most common type of accommodation pregnant workers need are more frequent breaks, such as bathroom breaks.[122] Families rely on pregnant workers' paychecks to meet basic needs—needing to use the bathroom a few more times while pregnant should not be a reason to push a woman off the job and force her to risk her economic security.[123]

As advocates have pointed out, "mothers are breadwinners in half of families with children under 18" and "nearly 15 million households in the United States are headed by women."[124] And a staggering 78 percent of Americans live paycheck to paycheck.[125] As A Better Balance illustrated in story after story in the 2015 *Pregnant and Jobless* report, losing out on even one paycheck, let alone multiple, can spell financial ruin for families.[126] It remains true for too many pregnant workers today.

A Better Balance Community Advocate **Natasha Jackson** knows this all too well. Natasha was the highest-ranking account executive and the only female employee at the business where she worked. When she became pregnant, she was forced to take unpaid leave, and eventually terminated. Appearing before the South Carolina legislature, Natasha testified that:

"My husband and I had just made a down payment on a house and were about to close the deal. Without my income, we were forced to back out of the contract. . . . so I was out of a job and no longer able to support my family. And my husband and I saw our dream to own a home vanish."[127]

In a matter of months, Natasha went from earning a stable income and nearly buying a home to needing emergency public housing.[128]

Natasha's not alone. Some pregnant workers who are pushed off the job risk losing not just their paycheck but also their health insurance. Women who lose their health insurance shortly before going into labor could be looking at astronomical childbirth costs, which average $30,000 for a vaginal delivery and $50,000 for a C-section in the U.S.[129] And pregnant workers who are pushed out of the workplace might feel the effects for decades, losing out on everything from 401K or other retirement contributions to short-term disability benefits to seniority, pensions, social security contributions, life insurance, and more.[130]

After **Armanda Legros** pulled a muscle while working at an armored truck company, she asked her employer to avoid heavy lifting for the duration of her pregnancy. Her employer refused and sent her home without pay. As a result, Armanda lost her health insurance, and she had to apply for food stamps to feed her four-year-old son. Struggling to make ends meet, she used water in her son's cereal because she could not afford milk.[131]

For those workers who need to address a health need while pregnant, accommodations are the surest way to stay both healthy and providing for themselves and their families. As the American College of Obstetricians and Gynecologists has emphasized, "Accommodations that allow a woman to keep working are the most reliable way to guarantee pay, benefits, and job protection."[132]

Armanda Legros

The Health Case for Pregnancy Accommodations

Many women can work through their pregnancies without needing a single accommodation and for the most part, it is absolutely safe for women to work their regular job duties while pregnant.

That said, women, especially those in physically demanding jobs,[133] may need modest accommodations to stay healthy and on the job. **Outlined here are several of the health risks that may be avoided if workers request reasonable accommodations.** Of course, many pregnant workers will not need accommodations to avoid these health risks and it is entirely up to a worker to consult with her healthcare provider and determine necessary accommodations. Accommodations will never be a one-size-fits-all solution and public health advocates are sure to never imply that pregnant women are not entitled to continue their regular duties.

PHOTOGRAPH BY FOTOANDALUCIA/SHUTTERSTOCK

- **Miscarriage:**
  - » A recent large study conducted in Denmark showed that **heavy, extensive lifting** can increase the risk of miscarriage.[134]
  - » **Working the night shift** has also been linked to miscarriage.[135]
- **Preterm Birth:**
  - » Multiple studies have shown that physically demanding work—including **extensive standing, long work hours, heavy lifting, elevated physical exertion, and working at night**[136] have been associated with a statistically significant increased risk of preterm delivery and low birth weight.[137]
  - » **The risks associated with premature birth are staggering:**
    - According to the March of Dimes,[138] premature babies are at risk for the following health problems:
      - Apnea (temporary cessation of breathing)
      - Respiratory distress syndrome
      - Intraventricular hemorrhage (bleeding into the brain)
      - Patent ductus arteriosis (an unclosed hole in the heart's aorta)
      - Necrotizing enterocolitis (serious intestinal illness)
      - Retinopathy of prematurity (a potentially blinding eye disorder)
      - Jaundice
      - Anemia (condition that develops when your blood lacks enough healthy red blood cells or hemoglobin)
      - Bronchoplumonary dsyplasia (a form of chronic lung disease)
      - Infections

- **Falls & Injuries:**
  - » Pregnant workers who engage in hazardous work may also be at an increased risk for falls due to their shifting center of gravity.[139]
- **Other Maternal and Infant Health Problems:**
  - » According to a 2019 Health Impact Assessment conducted by the Louisville, Kentucky Department of Public Health and Wellness, "Accommodating pregnant workers, upon their request, is critical for reducing poor health outcomes including:
    - **low birth weight**
    - **birth defects**
    - **dehydration**
    - **insufficient amniotic fluid** and related birth outcomes
    - **unnecessary pain** resulting from excessive standing, bending, or lifting
    - **urinary tract infections and related risk of preeclampsia** (dangerous high blood pressure); and
    - **mastitis** (an infection) due to insufficient, safe locations for pumping breastmilk."[140]

Every pregnant worker has individual health needs and works in a unique workplace environment. Granting modest workplace accommodation requests can go a long way in reducing these grave health disparities, the Louisville Department concluded. For instance:

- **Additional water breaks** could help "prevent dehydration and maintain amniotic fluid."[141]
- **A few additional bathroom breaks** could help reduce "urinary tract infections and the associated risk of preeclampsia and preterm birth."[142]
- **A stool** for a worker that ordinarily stands all day could go a long way in "alleviat[ing] the pain and discomfort of standing" during pregnancy.[143]
- **A reduction in the amount of heavy lifting,** bending, or standing could help "avoid preterm births and miscarriages."[144]

Women of color are especially impacted as they are more likely to work in low-wage, physically demanding jobs.[145] According to the Centers for Disease Control and Prevention, the maternal mortality rate for Black women is over three times that of white women, at forty deaths per 100,000 live births.[146] Black infants are twice as likely to die in their first year of life than white infants.[147] The PWFA is one crucial step we need to reduce these disparities by ensuring that all pregnant women, and especially women of color, can remain safe and healthy at work.

PHOTOGRAPH BY MONKEY BUSINESS IMAGES/SHUTTERSTOCK

The Business Case for Pregnancy Accommodations

Across the country, many employers are supporting pregnancy accommodation laws because they create a clear standard that borrows from the well-established ADA reasonable accommodation framework. As one business publication wrote after the South Carolina pregnancy accommodation law—which also uses the ADA framework—passed there in 2018, "The mutual uncertainty that employees and employers often face in this situation is why a new state law, the South Carolina Pregnancy Accommodations Act, is a welcome development for both employees and employers in the state. . . . [T]he SCPAA contains specific guidance regarding the requirements for accommodating workers with medical needs arising from pregnancy that should be particularly helpful for small businesses."[148]

The business benefits of the PWFA are manifold:

- **Greater clarity** The PWFA, unlike current federal law, provides specific guidance so that employers can understand their obligations. Clarity is especially important for small businesses that cannot afford to hire attorneys or turn to in-house counsel to help them navigate the confusing web of current laws.
- **Smoother business operations** For larger employers with a presence in multiple states, one clear, consistent standard will make it easier for HR departments to comply with the law rather than having to navigate a patchwork of state and local laws.
- **Reduction in litigation** At least two states with pregnant workers fairness laws have reported a reduction in litigation since the state laws went into effect,[149] and this number is likely to increase as the more recent laws take effect.
- **Increase in employee retention and morale, and reduction in employee turnover and training costs** Providing accommodations can help employers maintain a consistent, happy, and steady workforce, free from high turnover and the costs that go with it.
- **Reduction in healthcare costs** Providing accommodations also stands to reduce healthcare costs for employers. According to the March of Dimes, each premature/low birth weight baby costs employers an additional $49,760 in newborn health care costs. When maternal costs are added, employers and their employees pay $58,917 more when a baby is born prematurely.[150]

PHOTOGRAPH BY DRAGON IMAGES/SHUTTERSTOCK

No one can make the business case for pregnant workers fairness laws better than businesses themselves, and they have done so over and over again. As our state timeline reveals, business groups in states across the country have made clear why accommodation laws make good business sense. Here's just a sampling:

Greater Louisville Inc. (the metro Louisville, Kentucky chamber of commerce): **"[This] legislative proposal also results in important health and safety benefits and should cut down on hiring and retraining costs for employers. Survey data shows that these sorts of policies have led to increased talent attraction and retention, improved productivity, and reduced absenteeism. There's a clear bottom line here: [Sen.] Kerr's bill to support pregnant workers and new mothers is pro-business, pro-workforce legislation that will be good for our state's economy."**[151]

Davis Chamber of Commerce (Utah): **"We not only think it's the right thing to do, but we think that keeping women in the workforce is smart," and citing research that helping women stay in the workforce helps the economy in general, especially if it places no undue burdens on the corporate world.**[152]

Business leaders across the country are supporting reasonable accommodations for pregnant workers—not just because it is the right thing to do, but because of the benefits to the bottom line. Businesses also realize that given the time-limited nature of pregnancy, accommodations are often short-term and relatively minor.[153]

Finally, keeping pregnant women in the workforce is not only beneficial to employers and workers, but also crucial to the American economy. A 2018 report by the International Monetary Fund revealed that the U.S. ranks behind most other advanced economies in female labor force participation. And studies show labor force participation rates for pregnant women are even worse,[154] and failing to increase the number of women in the workforce will hurt the U.S. economy in coming years.[155] Pregnancy accommodations are a crucial policy the U.S. must adopt to help jumpstart the stalled labor participation of women in the workforce and boost our economic growth.

Part III.

From Statehouses to Congress: The Bipartisan Pregnancy Accommodation Movement

The data proves that pregnancy accommodations are good for workers' health and economic security, and businesses' bottom lines. Half of all states agree. This report lifts up state voices to provide both a lesson and roadmap to Congress: extend accommodation protections by passing the federal Pregnant Workers Fairness Act so that pregnant workers across the nation have a clear legal right to remain safe and healthy on-the-job. Since passage, workers in these states have greatly benefited from legal protections allowing them to continue to support their families without risking their health or safety. Every pregnant worker, no matter where they live, deserves equality, dignity, and fairness in the workplace.

Every one of the post-2013 state-level accommodation laws passed with bipartisan, and in many cases, unanimous support. The new wave of laws tracks the ADA reasonable accommodation framework. The post-2013 state laws include "reasonable accommodation" and "undue hardship" language. Moving in chronological order from those cities and states that have passed laws from 2013 onward, this report centers the voices of those state lawmakers and business groups who recognized the need to further stamp out pregnancy discrimination and worked to pass these accommodation laws, and those who recognized the many health, economic, and government benefits accommodation laws bring to workers, employers, and the state. **A Better Balance is proud to have worked with local advocates on most of these state and local campaigns and to witness pregnant workers benefitting from these new critical protections.**

PHOTOGRAPH BY ROCKETCLIPS, INC./SHUTTERSTOCK

Comparison of State Pregnant Workers Fairness Laws

State	Effective Date	Employee Threshold	Covered Employees	Reasonable Accommodation	Undue Hardship	Administrative Enforcement	Private Right of Action
Alaska[156]	1992	1 or more	Public only	No[157]	No	Alaska Department of Labor and Workforce Development	No
California[158]	2000	5 or more	Private and public	Yes	No	California Department of Fair Employment and Housing	Yes
Colorado[159]	2016	1 or more	Private and public	Yes	Yes	Colorado Civil Rights Commission	Yes
Connecticut[160]	2017	3 or more	Private and public	Yes	Yes	Connecticut Commission on Human Rights and Opportunities	Yes
Delaware[161]	2014	4 or more	Private and public	Yes	Yes	Delaware Department of Labor, Division of Industrial Affairs, Office of Anti-Discrimination	Yes
D.C.[162]	2015	1 or more	Private and public	Yes	Yes	DC Office of Human Rights	Yes
Hawaii[163]	1990	1 or more	Private and public	Yes[164]	No	Hawai'i Civil Rights Commission	Yes
Illinois[165]	2015	1 or more	Private and public	Yes	Yes	Illinois Department of Human Rights	Yes
Kentucky[166]	2019	15 or more	Private and public	Yes	Yes	Kentucky Commission on Human Rights	Yes
Louisana[167]	1997	25 or more	Private and public	No[168]	No	Louisiana Commission on Human Rights	Yes
Maryland[169]	2013	15 or more	Private and public	Yes	Yes	Maryland Commission on Civil Rights	Yes
Massachusetts[170]	2018	6 or more	Private and public	Yes	Yes	Massachusetts Commission Against Discrimination	Yes
Minnesota[171]	2014	21 or more	Private and public	Yes	Yes	Minnesota Division of Labor Standards and Apprenticeship	Yes
Nebraska[172]	2015	15 or more	Private and public	Yes	Yes	Nebraska Equal Opportunity Commission	Yes
Nevada[173]	2017	15 or more	Private and public	Yes	Yes	Nevada Equal Rights Commission	Yes
New Jersey[174]	2014	1 or more	Private and public	Yes	Yes	New Jersey Division on Civil Rights	Yes
New York[175]	2016	4 or more	Private and public	Yes	Yes	New York Division of Human Rights	Yes
North Carolina[176]	2018	1 or more	Public only	No[177]	Yes	North Carolina Office of State Human Resources	No
North Dakota[178]	2015	1 or more	Private and public	Yes	Yes	North Dakota Department of Labor and Human Rights	Yes
Rhode Island[179]	2015	4 or more	Private and public	Yes	Yes	Rhode Island Commission for Human Rights	Yes
South Carolina[180]	2018	15 or more	Private and public	Yes	Yes	South Carolina Human Affairs Commission	Yes
Texas[181]	2001	1 or more	Public only	Yes	No	No	No
Utah[182]	2016	15 or more	Private and public	Yes	Yes	Utah Antidiscrimination & Labor Division	No
Vermont[183]	2018	1 or more	Private and public	Yes	Yes	Vermont Human Rights Commission	Yes
Washington[184]	2017	15 or more	Private and public	Yes	Yes	Washington State Office of the Attorney General	Yes
West Virginia[185]	2014	12 or more	Private and public	Yes	Yes	West Virginia Human Rights Commission	Yes

Current as of May 1, 2019

2013

New York City

UNANIMOUS PASSAGE

History

In response to Dina Bakst's 2012 Op-Ed in *The New York Times*, "Pregnant, and Pushed Out of a Job," the New York City Council introduced and unanimously passed the Pregnant Workers Fairness Act in October 2013 and Mayor Bloomberg (I) signed it into law.[186] Council Members' primary goals for this legislation were to combat pregnancy discrimination in the workplace and promote pregnant workers' economic security.[187] Emphasizing that current federal and state laws were inadequate, Council Members recognized the necessity of a law explicitly requiring reasonable accommodations for pregnant workers.[188]

DID YOU KNOW?

Motherhood is a key driver of poverty and economic inequality. In New York City, single, childless women under age 35 earn 96 cents for every dollar men earn, whereas women between the ages of 35 and 65, who are likely to have children, earn only 78 cents to the dollar.[192]

Key Quotes

"I wish that this bill was not needed; that in 2013 pregnant women were not in danger of losing their jobs or positions of authority based on pregnancy. The Federal Pregnancy Discrimination Act was passed more than 30 years ago, but still the problem persists."[189]

—Council Member Deborah Rose (D)

"ACOG's National Office has recognized and is supporting the federal Pregnant Workers Fairness Act. . . .The New York City Pregnant Workers Fairness Act closely resembles this federal legislation through its inclusion of clear definitions for 'reasonable accommodations' and 'undue hardship.' These clear definitions provide an essential protection not only to the working mother and unborn child but also to the businesses that employ these women."[190]

— American College of Obstetricians and Gynecologists District II testimony in support of the New York City PWFA

"Physically demanding work—including prolonged standing, long work hours, irregular work schedules, heavy lifting, and high physical activity—has consistently been shown to be associated with a statistically significantly [sic] increased risk of preterm delivery and low birth weight. High levels of physical activity at work and work-related stress have also been found to be associated with increased risk for pregnancy-induced hypertension."[191]

– Dr. Wendy Chavkin, MD, MPH, Professor of Population and Family Health and Obstetrics-Gynecology, Columbia University in a letter to bill sponsor Council Member James Vacca

2014

Philadelphia

UNANIMOUS PASSAGE

History

In December 2013, soon after New York City passed the NYC PWFA, the Philadelphia City Council passed an ordinance requiring accommodations for pregnant workers, and Mayor Michael Nutter signed it into law in January 2014.[193] Philadelphia City Council Member William Greenlee emphasized the importance of hearing and recognizing real women's stories of being pushed out of the job after becoming pregnant.[194]

DID YOU KNOW?

According to one survey conducted on the experiences of expecting and new mothers, over 40 percent of pregnant women who needed more frequent bathroom breaks did not ask their employers for an accommodation.[198]

Key Quotes

"I think it just addresses a very basic need, and we use the words that I think make it really clear, reasonable accommodations for pregnant workers. Those reasonable accommodations, things like letting women take a little extra break, letting them drink water at their workplace, using restrooms a little more frequently, that kind of thing most employers do anyway, but unfortunately sometimes we have to pass the laws that deal with folks that do not."[195]

—Council Member William Greenlee (D, sponsor)

"The economic security of Philadelphia families depends on the job security of working women. About 53 percent of Philadelphia children are raised by just one parent, the vast majority in female-run households. . . .Very simply put, women cannot afford to lose their jobs or income due to pregnancy or childbirth."[196]

—Rue Landau, Executive Director, Philadelphia Commission on Human Relations

"At the Commission, we have seen cases of pregnant women working in Philadelphia who have been forced to choose between their wages and their health. In many of these cases, the Commission was powerless to help the women because of the limits of current law. . . . The Commission supports this bill because it would make these kinds of employer actions illegal and fill an important gap in employment protections for pregnant women."[197]

—Reynelle Staley, Deputy Director of Compliance Division, Philadelphia Commission on Human Relations

2014

New Jersey

BIPARTISAN, NEAR UNANIMOUS PASSAGE

History

The New Jersey law requiring reasonable accommodations for pregnant workers passed just one vote shy of unanimity in 2013 and Governor Chris Christie (R) signed it into law in January 2014.[199] Senator Loretta Weinberg, the bill's sponsor, argued that the legislation was necessary to prevent workplace discrimination against pregnant women.[200] She emphasized that low-wage pregnant workers have a particular need for reasonable accommodations in order to remain working and supporting their families.[201]

DID YOU KNOW?

According to the U.S. Department of Labor Job Accommodation Network, 58 percent of accommodations for disabilities cost nothing, and for one-time accommodations, employers spent only $100 more than they otherwise would have.[204]

Key Quotes

"This bill quite simply prohibits workplace discrimination against women affected by pregnancy, childbirth, or related medical conditions, and only asks for reasonable accommodations so that a woman can continue to earn a living while pregnant, affording security to her and her family."[202]

—Sen. Loretta Weinberg (D, sponsor)

"The impact of the legislation can also be positive for companies. For example, retaining pregnant employees throughout their pregnancies will allow employers to benefit from continued work by trained employees. This in turn allows for continuity of operations and job performance and is likely cost efficient—job skills and institutional knowledge are maintained and training of others is possibly avoided, or at a minimum delayed. And workers who are able to be accommodated will have fewer reasons to be absent."[203]

– New Jersey Law Journal, "N.J.'s Pregnant Worker's Fairness Act: The Impetus, Impact and Hidden Benefits for Employers"

PHOTOGRAPH BY CAROL M. HIGHSMITH

2014

Minnesota

BIPARTISAN PASSAGE

History

The Minnesota reasonable accommodation law, passed with strong bipartisan support, and went into effect on Mother's Day 2014.[205] The law was part of the Women's Economic Security Act, a package of bills intended to promote equal opportunities for women.[206] Representative Carly Melin, the bill's sponsor, was pregnant herself when the bill was debated, and offered a personal perspective on the issue.[207] **"Being that I am expecting myself, it has really opened my eyes to the problems in the workplace facing women,"** she said.[208] In a sign that the law is working for both workers and employers, in a 2018 enforcement assessment, the Minnesota Department of Labor and Industry reported only one pregnancy accommodation complaint between September 2017 and August 2018.[209]

Key Quotes

"This is not about giving people special treatment. This is about not discriminating against people."[210]

—Rep. Carly Melin (D, sponsor)

"This is about economic security for working families and lifting women out of poverty."[211]

—Rep. Carly Melin (D, sponsor)

DID YOU KNOW?

According to data analyzed by the Institute for Women's Policy Research, "As of 2014, nearly six in ten women aged 16 and older (57.0 percent) worked outside the home. . . .Women now comprise nearly half of the U.S. labor force at 46.8 percent. In each state, however, women are still less likely to be in the workforce than men."[212]

2014

West Virginia

BIPARTISAN, NEAR UNANIMOUS PASSAGE

History

The West Virginia Pregnant Workers' Fairness Act passed in 2014, just one vote shy of unanimous passage, with the intent of eliminating discrimination and promoting women's health and economic security.[213] West Virginia legislators argued that the bill would protect the health of women and children while allowing pregnant workers to keep their jobs.[214]

A local Chamber of Commerce "did not oppose" the bill.[215]

DID YOU KNOW?

Even the most conservative estimates show that women with children face a 3 percent to 5 percent pay penalty per child, with some researchers estimating the penalty is closer to 10 percent per child.[217]

Key Quotes

"It was something that we had pursued for several years. We had heard reports over the years of pregnant women being discomforted by their employers. We were very much compelled to do something because of the anecdotal evidence we had, and we also knew it was a burgeoning national issue. I'm very proud that we were able to get this done."[216]

—Delegate Don Perdue (D, sponsor)

Paul Espinosa
@PaulEspinosa_WV

Voted "Yes" on HB 4284, Pregnant Workers' Fairness Act. Passed 94-0. — at West Virginia Legislature. . . .[218]

12:44 PM - Feb. 5, 2014

—Delegate Paul Espinosa (R)

2014

Delaware

UNANIMOUS PASSAGE

History

Delaware legislators unanimously passed a law requiring reasonable accommodations for pregnant workers in 2014.[219] State Senator Colin Bonini (R), the bill's sponsor, argued that reasonable accommodations would allow pregnant women to remain working and keep them from seeking public assistance.[220]

The Delaware State Chamber of Commerce had "no issues with the bill."[221]

DID YOU KNOW?

Low-income pregnant women face a much tougher economic reality. Nearly 70 percent of women in the bottom income quintile are the sole or primary breadwinners for their families.[226]

Key Quotes

"From a fiscal-conservative standpoint, we don't want people to lose their jobs and get on public assistance. We want women to work and to have successful pregnancies and successful families. This just made so much sense."[222]

—Sen. Colin Bonini (R, sponsor)

"We want to encourage women to be able to keep their jobs. . . . And we want to encourage women to have successful families."[223]

—Sen. Colin Bonini (R, sponsor)

"Nobody had any problem at all with this bill. Nothing from the Chamber (of Commerce)."[224]

—Sen. Colin Bonini (R, sponsor)

"This policy is so obvious that it's tremendously frustrating that it hasn't happened. This is a public policy slam dunk. Do we want women to keep their jobs? Of course we do."[225]

— Delaware State Senator Colin Bonini (R) speaking at a Congressional briefing in support of the federal Pregnant Workers Fairness Act

2015

Illinois

UNANIMOUS PASSAGE

History

Illinois passed a law requiring reasonable accommodations for pregnant workers in August 2014 with unanimous, bipartisan support and the law went into effect on January 1, 2015.[227] Illinois state legislators spoke about the need to supplement existing laws in order to eliminate discrimination against pregnant women, protect women's economic security, and protect women's health.[228] They also argued that the law would benefit businesses and decrease litigation.[229]

Among the lawmakers who voiced support for the bill were Representative Emily McAsey, a new mother, and Representative Jehan Gordon-Booth, who was currently pregnant.[230] Illinois governor Pat Quinn signed the bill into law, saying, "Women should not have to choose between being a mother and having a job. These common-sense accommodations will provide peace of mind, safety and opportunity for moms-to-be and also help strengthen our workforce across the state."[231]

The Illinois Chamber of Commerce's Employment Law Council took a neutral stance on the bill, saying that opposing the law was "like being against motherhood."[232]

Key Quotes

"I was a small business employer, so I looked at this language very seriously. I employed 20 architects and various employees, over half of them were female employees. . . . I would argue that this language in this Bill is reasonable. To be able to allow reasonable accommodation so that my female employees could serve our clients is good for an employer. It allows me to keep on deadline, to keep serving our clients, and to allow women to be able to contribute to the workforce and work through their pregnancy."[233]

—Rep. Carol Sente (D)

"Sorry for rising so slowly, but luckily, I serve here in the General Assembly where I can prop my feet up underneath my desk on a garbage can that's been flipped over. Those accommodations have been provided to me by the General Assembly, so thank you so very much. . . . All women in this state don't have the same privileges that myself, Representative McAsey, yourself, and other women who have had children, while they also worked and helped to take care and provide for their families."[234]

—Rep. Jehan Gordon-Booth (D)

DID YOU KNOW?

The preterm birth rate is on the rise in the U.S. As of 2017, close to 1 in 10 pregnancies result in preterm birth.[235]

2015

District of Columbia

UNANIMOUS PASSAGE

History

The District of Columbia passed the Protecting Pregnant Workers Fairness Act in October 2014, and it went into effect in March 2015.[236] The bill was intended to eliminate discrimination and promote women's health and economic security.[237] The report on the bill from the Committee on Business, Consumer, and Regulatory Affairs noted that the bill was "essential to closing the gap between the intent of the PDA and the current reality, where pregnant women can face health risks and financial ruin."[238] The report also noted that the law would benefit business by reducing turnover costs, improving retention, increasing employee morale and productivity, and reducing litigation costs.[239]

Key Quotes

"The overall arch of this bill is to provide opportunities for pregnant women to continue to be able to work in the workplace."[240]

—Council Member Vincent Orange (D, sponsor)

"This bill will help provide for a better quality of life for pregnant workers as they go through the processes of providing new life in this city."[241]

—Council Member Vincent Orange (D, sponsor)

DID YOU KNOW?

Low-wage workers are particularly impacted by employers' failure to accommodate their pregnancies. For instance, in general, women who are nursing assistants earn a median income of just $11.83 per hour but are 3.5 times more likely to face workplace injuries due to the physically strenuous nature of their work.[242]

2015

Nebraska

UNANIMOUS PASSAGE

History

The Supreme Court decided *Young v. UPS* while the Nebraska legislature was considering a state pregnancy accommodation bill.[243] Before the final vote, Senator Heath Mello argued that a law giving pregnant workers the affirmative right to reasonable accommodations was still necessary after *Young*, saying, "What the Supreme Court did in its decision was to create a new adjudication process within the constraints of the existing law that lays out how to compare a pregnant worker with other employees. . . . L.B. 627 is still needed because it moves Nebraska from using the confusing and complicated comparative standard used in the Pregnancy Discrimination Act to using a reasonable accommodation standard similar to current laws regarding workers with disabilities."[244]

Bob Hallstrom, a lobbyist for the Nebraska Federation of Independent Businesses (NFIB), said the bill was "not a big concern" and Senator Mello emphasized, "There's a reason why the Nebraska Chamber of Commerce did not oppose this bill. There's a reason the Nebraska Federation of Independent Businesses did not oppose this bill, and those are the voices for small business and big business in our state because right now, under current law, there is a lot of gray matter as it relates to pregnancy in regards to trying to provide accommodation to a pregnant worker."[245]

Key Quotes

"I believe this is a bill that we need to ensure that women can confidently remain employed as they are nursing children and that's an important part of. . . . our workforce."[246]

—Sen. Lydia Brasch (R)

"The temporary nature of pregnancy accommodations indicate[s] that they would be similarly inexpensive. Providing accommodations for employees have also been shown to improve employee retention, morale, and productivity."[247]

—Sen. Heath Mello (D, sponsor)

DID YOU KNOW?

Supporting lactation is a public health issue. Mothers who breastfeed have lower rates of type 2 diabetes, breast cancer, and ovarian cancer.[248] Non-breastfed children are three times more likely to be hospitalized for respiratory or other infections of the immune system.[249] Yet due to gaps in federal law, nearly 1 in 4 women—or over 9 million women of childbearing age—do not have a federal right to time and space to express milk.[250]

2015

North Dakota

BIPARTISAN, NEAR UNANIMOUS PASSAGE

History

North Dakota passed a bill requiring reasonable accommodations for pregnant workers in April 2015 and Republican Governor Jack Dalrymple signed it into law.[251] Representative Naomi Muscha, the bill's sponsor, argued that the law was needed to provide protections to pregnant workers that are not provided under the American with Disabilities Act, Pregnancy Discrimination Act, and Family and Medical Leave Act, and noted that employers sometimes use FMLA leave against pregnant workers by insisting that they take leave time instead of providing them with simple accommodations.[252] Representative Muscha also noted how businesses can benefit from providing reasonable accommodations through the resulting increase in employee morale.[253]

Key Quotes

"Statistics show that the majority of pregnant workers who need some slight accommodations are low-wage earners or in nontraditional occupations. Very frequently the women are primary breadwinners in the family or even the sole-breadwinner. If they are forced to leave work unpaid, it's not just the woman who suffers, but rather the whole family."[254]

—Rep. Naomi Muscha (D, sponsor)

"[This legislation] would add pregnancy to the list of circumstances where an employer must provide a reasonable accommodation. The Department [of Labor] would interpret HB 1463 to require the same type of accommodations that an employer must provide to an individual with a disability or sincerely held religious belief. Therefore, the Department would use the same analysis and factors to complaints from a pregnant employee that it currently uses for complaints from individuals with disabilities or sincerely held religious beliefs."[255]

— Troy Seibel, Commissioner of Labor to Republican Governor Jack Dalrymple

DID YOU KNOW?

According to the U.S. Department of Labor Job Accommodation Network, 90 percent of employers reported that providing an accommodation for a worker with disabilities allowed them to retain valued employees.[256]

2015

Rhode Island

UNANIMOUS PASSAGE

History

After two Rhode Island cities, Providence and Central Falls, passed city pregnancy accommodation laws in 2014, Rhode Island legislators unanimously passed a law requiring employers to make reasonable accommodations for pregnant workers in June 2015.[257] Representative Shelby Maldonado, who had supported the Central Falls ordinance as a city councilwoman there, spoke about the need to "make sure that [pregnant workers are] able to earn their paycheck and be able to support their families. The last thing we want to do is to have a pregnant woman. . . .have a miscarriage, or. . . .be out of work for a period of time therefore depending on our taxes and social services."[258] Representative Elaine Coderre spoke about how her interest in the bill was sparked after she loaned a legislative employee her office as a location to pump breastmilk, saying, "I felt it was a common-sense humanitarian kind of thing to do. There was a problem presented, I wanted to solve it, and I came up with a solution."[259]

Key Quotes

"This is what I believe is a human rights issue as well as a workplace issue. These are accommodations that must be afforded to our women in the workplace. They're very modest. . . .And to me that attitude streamlines and makes for a more efficient and happier workplace than saying, oh that bathroom break is going to take away from my worker's productivity. Their opinion of their job and their coworkers will improve, and that will improve their efficiency. So any counter concern to this bill to me has no credit whatsoever."[260]

—Asher Schofield, small business owner

"The legislation that's before you is designed to close a gap between current discrimination and disability laws in order to increase the protection for both pregnant women and new mothers in the workplace."[261]

—Rep. Shelby Maldonado (D, sponsor)

"Having worked as a housekeeper for the past 20 years, I have seen firsthand that appropriate accommodations are not always provided to pregnant women in the workplace. The Council's passage of this ordinance will help expectant mothers protect their health and the health of their babies."[262]

—Providence City Council member Carmen Castillo testifying in support of the Providence pregnant workers fairness bill in 2014

DID YOU KNOW?

When workers are unable to use the bathroom when needed it can cause urinary tract infections (UTI) and UTIs can lead to preterm birth. Not only that, E. coli based UTI, a particularly aggressive infection, can put women at risk of miscarriage.[263]

2016

New York

UNANIMOUS PASSAGE

History

New York unanimously passed its pregnant workers' fairness law in October 2015, as part of the New York Women's Equality Agenda, a package of bills intended to eliminate discrimination and inequality based on gender.[264] The law went into effect January 2016. Senator Kemp Hannon (R), the bill's sponsor, said the law was necessary to fill gaps in existing law and prevent employers from discriminating against pregnant workers.[265] Other New York lawmakers argued that the law was necessary to protect women's health.[266]

DID YOU KNOW?

Census data shows 88 percent of all women work into their last trimester of pregnancy.[271]

Key Quotes

"We all know today that many more women work and are a large percentage of the workforce, and many women work through their entire pregnancy, right up to being 8 ½ months, almost to the day that they deliver. . . . While pregnancy is not a disability. . . . all we're asking for in this is some reasonable considerations."[267]

—Sen. Betty Little (R)

"In the absence of this legislation what we're doing is saying to somebody who is pregnant: 'No, you can't continue to work. No, you can't continue to have your usual routine.' And that just puts an economic burden on the rest of society."[268]

—Sen. Kemp Hannon (R, sponsor)

"It's common sense. We want to make sure women who are pregnant are helped in all ways possible to carry to term healthy infants. We want to make sure they don't end up losing their jobs and their source of income so they're not able to care for themselves and their children."[269]

—Sen. Elizabeth Krueger (D)

"Businesses depend on a female workforce, so issues affecting women's health, safety, and economic stability must be a priority. . . . The PWFA would ensure consistency and certainty for employers while ending a particularly pernicious form of sex discrimination."[270]

—Greater New York Chamber of Commerce in a letter supporting the federal Pregnant Workers Fairness Act

2016

Utah

BIPARTISAN PASSAGE

History

In March 2016, Utah passed a law requiring reasonable accommodations for pregnant workers.[272] The legislation's sponsors, two Republicans, argued it was necessary to provide additional protections not provided under federal and state antidiscrimination law.[273] Republican Senator Todd Weiler, the bill's sponsor, explained that because the bill borrowed language from the Americans with Disabilities Act, the law would provide clarity to employers already familiar with their responsibilities under the ADA.[274] Lawmakers and members of the public testifying in support of the bill also focused on its health benefits for both mothers and babies, particularly the health benefits of providing reasonable accommodations for mothers to support breastfeeding.[275]

The bill passed with strong support from the business community, including support from the Salt Lake City Chamber of Commerce and the Davis Chamber of Commerce.[276]

Key Quotes

"I'm not suggesting that either pregnant or nursing mothers are disabled, but the language is borrowed from the ADA, and the good news is that we know exactly what reasonably accommodate means and what it doesn't mean, and we know exactly what unduly burdensome means and what it doesn't mean, because those issues have been litigated under the ADA for the last 25 years."[277]

—Sen. Todd Weiler (R, sponsor)

"This is a necessary bill just to make sure there's a process in place, and protects both the employer and the employee."[278]

—Sen. Luz Escamilla (D)

"Utah is a family friendly state, and this legislation reflects Utah's values. The costs to businesses for providing reasonable accommodations are small, particularly in relation to the benefits. And no woman should be placed in the untenable position of having to choose between her job and a healthy pregnancy or her job and breastfeeding her baby. In conclusion, as a small business owner and a lifelong member of the Salt Lake City community, I completely support this bill and urge all of you to do the same."[279]

—Jonathan Ruga, CEO of Sentry Financial, a small business employing 20 people in Salt Lake City

DID YOU KNOW?

Small businesses in other states agree with Ruga's assertion. Helen Halton, an owner of a self storage facility in Kentucky, said: "As an owner of a storage facility, the benefits of a happy, healthy and productive pregnant worker far outweigh the 'cost' of providing basic accommodations necessary. The challenges that small business owners such as myself would face would be limiting physical activity such as heavy lifting which co-workers could cover and scheduling. A great employee is a valuable asset to a business and it makes business sense to offer basic accommodations for pregnant workers."[280]

2016

Colorado

BIPARTISAN PASSAGE

History

Colorado passed a law requiring employers to provide reasonable accommodations for pregnant workers for health conditions related to pregnancy or the physical recovery from childbirth in 2016.[281] Representative Faith Winter, the bill's Democratic sponsor in the Colorado General Assembly, argued that the law was necessary to clarify a convoluted area of existing law and that this clarity would benefit both workers and businesses and reduce litigation.[282] Senator Beth Martinez Humenik (R), another bill sponsor, emphasized that the law would protect pregnant workers' economic security and keep them from needing support from public assistance programs.[283]

The Colorado Chamber of Commerce worked to "make the bill fair to workers and reasonable for manufacturers" and ultimately took a neutral position on the bill as did the Colorado Association of Commerce and Industry (CACI), the state chapter of the National Federation of Independent Business (NFIB), Denver Chamber of Commerce, and the Colorado Civil Justice League. [284]

Key Quotes

"When women are pushed out of the workplace because of their desire to have a healthy pregnancy, not only do they lose income, but they lose economic security, health benefits, insurance, especially at a time when they need it most and they need more stability for their families. This lack of stability increases the amount of people needing Medicaid and other government programs rather than being self-sustaining."[285]

—Sen. Beth Martinez Humenik (R, sponsor)

"What this bill is designed to do is ensure that no pregnant woman has to choose between having a healthy pregnancy and keeping her job and having a paycheck."[286]

—Rep. Faith Winter (D, sponsor)

DID YOU KNOW?

Nearly half of all U.S. births occur on Medicaid,[287] and women living in poverty are more likely to have costly health complications during their pregnancies that impact both maternal and infant health.[288] This same population is disproportionately affected by the lack of clear law providing simple accommodations so they can stay healthy and on the job.

2017

Nevada

BIPARTISAN PASSAGE

History

The Nevada Pregnant Workers' Fairness Act passed in June 2017.[289] Senator Nicole Cannizzaro focused on the need to give pregnant workers the right to a reasonable accommodation following *Young v. UPS*, because "unless we are enacting policies that specifically require employers to provide these accommodations, the PDA may not cover them unless employers are providing similar accommodations for injured or disabled workers."[290] Senator Cannizzaro emphasized the common-sense nature of the legislation and the minimal cost of most accommodations.[291]

The Nevada Resort Association, Las Vegas Metro Chamber of Commerce, Nevada Restaurant Association, Reno + Sparks Chamber of Commerce, and Retail Association of Nevada all took a neutral position on the bill.[292]

Key Quotes

"I rise in firm support of this bill. We need to support families."[293]

—Sen. Joe Hardy (R, co-sponsor)

"From West Virginia to Utah to California, lawmakers have concluded that accommodating pregnant workers who need accommodations is a measured approach grounded in family values and basic fairness."[294]

—Sen. Nicole J. Cannizzaro (D)

DID YOU KNOW?

Ensuring pregnant workers stay safe on the job will reduce employers' healthcare costs. According to the March of Dimes, each premature/low birth weight baby costs employers an additional $49,760 in newborn health care costs. When maternal costs are added, employers and their employees pay $58,917 more when a baby is born prematurely.[295]

2017

Washington

UNANIMOUS PASSAGE

History

In 2017, the Washington state legislature passed a bill requiring reasonable accommodations for pregnant workers.[296] Washington legislators speaking in support of the bill, which also established a Healthy Pregnancy Advisory Committee, emphasized that reasonable accommodations for pregnant workers improve health outcomes for pregnant women and babies.[297] Washington state lawmakers spoke passionately about the role the law would play in protecting pregnant workers' economic security and in remedying discrimination in the workplace.[298]

The Washington Federation of Independent Business (the NFIB Chapter) and the Washington Retail Association supported the bill.[299]

DID YOU KNOW?

Access to a healthy pregnancy is a racial justice issue. Black women are more than three times as likely to die due to pregnancy and childbirth as white women.[303] The PWFA is one of numerous solutions the U.S. must adopt to address the racial disparities in maternal mortality.

Key Quotes

"Certainly every member of this body appreciates the challenges of a woman when she is trying to stay in the labor force. And I think this is a pretty simple and straightforward bill, that if employers do the right thing, do the reasonable thing, everything should work out all right."[300]

—Sen. Michael Baumgartner (R)

"Every single woman, whether she works in the tech industry, is making beds working in a hotel, standing in a checkout line as a cashier. . . . every single woman should have access to a healthy pregnancy. And reasonable accommodation on the job is a key ingredient to that. I am urging a yes vote tonight. A vote on this bill is to stand with women."[301]

—Rep. Jessyn Farrell (D, sponsor)

"[The Washington Retail Association] has worked on this issue for several years. WRA was able to negotiate a bill that in essence sets in place common practice in the employer community. The bill is a reasonable compromise to ensure both pregnant employees and their employers are protected."[302]

—Washington Retail Association, 2017 Laws and Legislative Review

NFIB Washington
@nfib_wa

Congratulations #waleg Sen. @KarenKeiser1. SB 5835, Healthy Outcomes for Pregnant Workers, passed 48-0. We appreciate cooperative approach.[304]

2:56 PM - Mar. 8, 2017

2017

Connecticut

BIPARTISAN PASSAGE

History

Connecticut passed a law requiring reasonable accommodations for pregnant workers in July 2017.[305] Connecticut legislators argued that the bill was needed to clarify and strengthen existing law, protect women's financial security, and promote healthy pregnancies.[306] Connecticut lawmakers also noted that the reasonable accommodations contemplated by the law are not expensive to employers, but end up benefiting businesses by reducing turnover and increasing employee satisfaction and productivity.[307]

Key Quotes

"HB 6668. . . . emerged a far better bill thanks to bipartisan cooperation, with lawmakers considering its impact on businesses."[308]

—Connecticut Business and Industry Association

"Just as women should be given equal pay for equal work, they should not face discrimination when pregnant in the workplace."[309]

—Rep. Cristin McCarthy Vehey (D)

DID YOU KNOW?

The wage gap between men and women has stayed stubbornly stuck around 20 percent for the last decade.[310] And the figure is much worse for women of color. In Connecticut, for example, Black women are paid only 58 cents and Latina women only 47 cents for every dollar earned by white, non-Hispanic men. And in other states the gap is much worse. For instance, Wyoming has a state-wide gap of 36 percent and Indiana has a gap of 27 percent.[311]

2018

Vermont

BIPARTISAN PASSAGE

History

The Vermont law calling for reasonable accommodations for pregnant workers passed in 2017[312] and went into effect January 2018. The bill, signed into law by Governor Phil Scott (R), was sponsored in the House of Representatives by Representative George Till, an obstetrician and gynecologist who had seen the need for this law in his own patients' struggles to maintain their jobs while pregnant, and argued that pregnant workers should be entitled to reasonable accommodations in the same way workers with disabilities are.[313] Lawmakers pointed to the shortcomings of existing law, particularly the PDA following *Young*, and argued that pregnant workers should be entitled to reasonable accommodations in the same way workers with disabilities are.[314]

Key Quotes

"I've seen people fired for asking for a completely reasonable accommodation. I've seen people too afraid to ask for an accommodation because they feared losing their job just for asking. I look forward to telling these women that Vermont law now protects them."[315]

—Rep. George Till (D, sponsor) and OB-GYN

"Madam Speaker, this bill demonstrates that the Green Mountain State is a kind state, ad [sic] the kind of state where young people and their families can work, live and play."[316]

—Rep. Valerie Stuart (D)

DID YOU KNOW?

Nearly 40 percent of women who feel they need an accommodation never request one, likely out of fear of retaliation.[317]

2018

MASSACHUSETTS

UNANIMOUS PASSAGE

History

The Massachusetts Pregnant Workers Fairness Act passed unanimously in July 2017[318] and went into effect April 2018. Massachusetts lawmakers focused on the need to protect the economic security of pregnant workers and their families.[319] Legislators recognized that women are valued members of the workforce and that a law requiring reasonable accommodations was necessary to ensure that pregnant workers are able to remain at work and continue earning paychecks to support their families.[320]

The Associated Industries of Massachusetts—one of the largest business lobbies in the state with 4,000 employer members—outspokenly supported the bill.[321]

DID YOU KNOW?

Women who lose their health insurance shortly before going into labor could be looking at astronomical childbirth costs, which average $30,000 for a vaginal delivery and $50,000 for a C-section in the U.S. [327]

Key Quotes

"A woman's healthy pregnancy should not be incompatible with her ability to earn a paycheck, maintain economic security and retain insurance benefits all of which are of vital importance as a family is about to grow."[322]

—Sen. Bruce Tarr (R)

"It doesn't seem unreasonable to ask employers to provide accommodations for an expectant mother to be able to do their job. It's a fair compromise."[323]

—Rep. Brad Jones (R)

"I write on behalf of 4,000 member employers of Associated Industries of Massachusetts (AIM) to urge you to sign H.3680, an act establishing the pregnant workers fairness act. H.3680 was passed unanimously in both branches. . . . [it] allows employees to make arrangements that permit them to remain on the job through a pregnancy while creating a pathway for employers to create reasonable accommodations."[324]

—Richard C. Lord, President and CEO of Associated Industries of Massachusetts in a letter urging Governor Charlie Baker to sign the PWFA

"Many people might call this long overdue in common sense reforms. But I think for all of us today, we'll just leave it as a job well done."[325]

—Governor Charlie Baker (R)

"Pregnant workers and their families deserve the protections contained in this law to ensure their health, safety and prosperity. It is a clear recognition of the important role these individuals play in our households, economy and society."[326]

—Sen. Joan Lovely (D, sponsor)

2018

South Carolina

UNANIMOUS PASSAGE

History

The South Carolina Pregnancy Accommodations Act passed with overwhelming bipartisan support on May 18, 2018.[328] South Carolina legislators argued existing federal and state laws did not directly address the issue of pregnancy accommodations, and that accommodations were needed in order to keep women in the workplace throughout their pregnancies.[329] Legislators also noted that reasonable accommodations are simple and inexpensive to employers, and benefit them by improving retention.[330]

The South Carolina Chamber of Commerce took a "neutral" position on the bill.[331]

Key Quotes

"My big thing was, do people really not give their pregnant employees some accommodations, I mean, is this a problem that we're really having, and some of the testimony that we heard was that yes, that they're not able to be accommodated. . . . I would like to think that if you've got a good employee you're going to want to keep her, and therefore you would make accommodations that are reasonable."[332]

—Sen. Sandy Senn (R, sponsor)

"This legislation is aimed at helping women, pregnant women, to continue to work when they are pregnant through the later stages of pregnancy. And current federal law addresses pregnant [sic] discrimination, leave, and disability in the workplace, those are too limited."[333]

—Rep. Beth Bernstein (D, sponsor)

DID YOU KNOW?

Sixty-five percent of women work through their last month of pregnancy.[334]

2019

Kentucky

BIPARTISAN PASSAGE

History

The Kentucky Pregnant Workers Act passed in March 2019 with overwhelming bipartisan support,[335] and Governor Bevin (R) signed the bill into law on April 9, 2019. The legislation was inspired in part by Florence, Kentucky police officers Lyndi Trischler and Sam Riley, who bravely spoke out after they were pushed off their jobs for requesting light duty.[336] As Officer Trischler explained, "My heavy gun belt was causing abdominal pains, my bullet-proof vest was so tight I could barely breathe, and I was having heart palpitations. But my employer, the City of Florence, would not accommodate me"[337] because they had a policy of not accommodating off-the-job injuries. Officers Trischler and Riley fought for the bill's passage so that no pregnant worker would have to go through what they did. The bill sponsor, Senator Alice Forgy Kerr (R), emphasized the "rare opportunity" to support legislation that "helps employers and helps a vital, growing part of our workforce."[338]

The bill garnered outspoken support from Greater Louisville Inc., the metro Louisville, Kentucky chamber of commerce.[339]

Key Quotes

"If there had been a clear law on the books, then this likely never would have happened. I am fighting for the Kentucky Pregnant Workers' Rights Act so that no other woman in my home state has to go through what I did."[342]

–Lyndi Trischler, police officer for the City of Florence, Kentucky

"[This] is a simple, straightforward bill that answers a difficult and complex question: What are an employer's responsibilities when it comes to making reasonable accommodations for employees affected by pregnancy?"[343]

—Sen. Alice Forgy Kerr (R, sponsor)

"This is pro-business, pro-workforce legislation that will be good for our state's economy."[344]

—Iris Wilbur, Director of Government Affairs for Greater Louisville Inc.

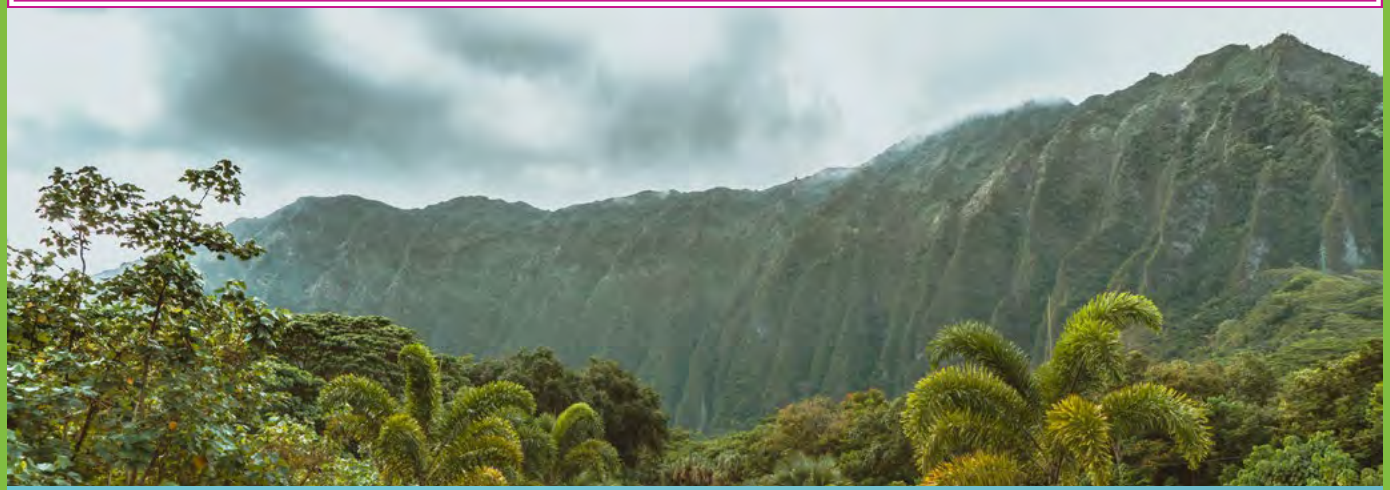
"Making reasonable accommodations to the physical transitions of pregnancy can help alleviate health concerns, and the related disparities, while allowing pregnant workers to continue earning an income during this important stage of their lives."[345]

—Louisville Department of Public Health

DID YOU KNOW?

According to the Louisville Department of Public Health, Kentucky has the fifth highest rate of preterm birth in the country, with more than 11 percent of babies born preterm.[340] Reasonable accommodations can help reduce the risk of preterm birth.[341]

In addition to the laws outlined, laws in Alaska,[346] California,[347] Hawaii,[348] Louisiana,[349] Maryland,[350] North Carolina,[351] and Texas[352] also require reasonable accommodations or greater protections to be made for certain pregnant workers.



PHOTOGRAPHS BY ROMAN ROMENKO, WILD & AWAY, AND SPENCER RUSSELL

Part IV.

Conclusion

It Is Time for a Federal Pregnant Workers Fairness Act

As state legislators have said time and again, federal law is confusing and needs to be fixed. It is time for the federal government to step in and do just that.

The bipartisan Pregnant Workers Fairness Act would ensure that pregnant workers can stay safe and healthy at work. The law would require employers to provide reasonable accommodations to employees for pregnancy, childbirth, and related medical conditions, unless such accommodation would cause an undue hardship for the employer. Examples of reasonable accommodations might include more frequent or longer breaks, access to a stool to sit on, and access to a water bottle. An employer cannot unilaterally force a pregnant worker to take leave when another reasonable accommodation could help keep her on the job. Much like all the post-2013 state laws, the PWFA uses an existing reasonable accommodation framework, closely modeled after the Americans with Disabilities Act, that is familiar to employers. All the state laws that have passed since 2013 use this reasonable accommodation framework.[353]

The PWFA would solidify the groundwork laid by the states. As one conservative state senator said in a letter to Congress supporting the federal PWFA, "This is a necessary, simple and logical approach to ensuring equality."[354]

The United States is failing its pregnant workers, and in turn its families. Current federal law failed Ceeadria, Cassandra, Janasia, and all the other women featured in this report, who deserved so much better. In order to ensure that pregnant women stand on an equal plane in the workplace, and that no woman ever has to face what these women did, this country needs an explicit right to reasonable accommodations for pregnant workers.

When Democratic New Jersey Senator Harrison Williams introduced the Pregnancy Discrimination Act (PDA) in 1978, he said, "The Congress has consistently recognized that there cannot be a place for unequal treatment of men and women in a country that takes pride in its heritage of freedom and democracy."[355] Yet, nearly two decades into the 21st Century, pregnant workers still face terribly unequal treatment in the workplace. It is time for Congress to finally make good on its promise to pregnant workers by passing the Pregnant Workers Fairness Act.

PHOTOGRAPH BY BK-DOG/SHUTTERSTOCK

Endnotes

1 *Huffman v. Speedway LLC*, 621 Fed. App'x 792, 793 (6th Cir. 2015).

2 *Adduci v. Fed. Express Corp.*, 298 F. Supp. 3d 1153, 1156 (W.D. Tenn. 2018).

3 *Wadley v. Kiddie Acad. Int'l, Inc.*, No. CV 17-05745, 2018 WL 3035785, at *1 (E.D. Pa. June 19, 2018).

4 *Legg v. Ulster Cty.*, No. 1:09-CV-550 (FJS/RFT), 2017 WL 3207754, at *5 (N.D.N.Y. July 27, 2017), *appeal docketed*, No. 17-2861 (2d Cir. Sept. 14, 2017).

5 *Durham v. Rural/Metro Corp.*, No. 4:16-CV-01604-ACA, 2018 WL 4896346, at *1 (N.D. Ala. Oct. 9, 2018), *appeal docketed*, No. 18-14687 (11th Cir. Nov. 7, 2018). *See also* Brief of A Better Balance & Ctr. for WorkLife Law et al. as Amici Curiae Supporting Plaintiff-Appellant, *Durham v. Rural/Metro Corp.*, No. 18-14687 (11th Cir. Feb. 8, 2019) [hereinafter Durham Amicus Brief], https://www.abetterbalance.org/resources/brief-of-amici-curiae-a-better-balance-center-for-worklife-law-et-al-in-support-of-plaintiff-appellant-urging-reversal/.

6 *See Huffman*, 621 Fed. App'x at 793, 799–800; *Adduci*, 298 F. Supp. 3d at 1156, 1161–63; *Legg*, 2017 WL 3207754, at *5–10; *Wadley*, 2018 WL 3035785, at *1, *4; *Durham*, 2018 WL 4896346, at *1, *3–4.

7 *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015).

8 *Id.*

9 Dina Bakst, Op-Ed., *Peggy Young's Victory Is Not Enough*, U.S. News & World Report (Mar. 26, 2015), https://www.usnews.com/opinion/economic-intelligence/2015/03/26/peggy-young-supreme-court-victory-is-not-enough-for-pregnant-workers.

10 *See infra* Part III.

11 *See infra* p. 30.

12 *Sen. Bonini Testifies in Support of Pregnant Workers Fairness Act*, Cape Gazette (Apr. 2, 2016), https://www.capegazette.com/article/sen-bonini-testifiessuport-pregnant-workers-fairness-act/101508.

13 42 U.S.C. § 2000e(k) (2019).

14 123 Cong. Rec. 29,385 (1977), *reprinted in* Legislative History of the Pregnancy Discrimination Act of 1978, Public law 95-555: Prepared for the Comm. on Labor and Human Resources, United States Senate 3 (1980) (Senator Harrison Williams, the PDA's sponsor, said in his introductory remarks, "There are more women in the workforce than ever before. . . . Twenty-five million of these women are [working] because of the basic need to support their families.").

15 *See* Wendy Chavkin, Op-Ed., *Congress Should Help Pregnant Workers Stay Healthy and On the Job*, The Hill (June 4, 2015, 11:30 AM), http://thehill.com/blogs/congress-blog/healthcare/243899-congress-should-help-pregnant-workers-stay-healthy-and-on-the.

16 *See Enforcing the Rights of Pregnant Workers*, A Better Balance (May 3, 2017), https://www.abetterbalance.org/resources/enforcing-the-rights-of-pregnant-workers-success-stories/ (highlighting the stories of two pregnant police officers who were pushed off the job when they needed light duty).

17 *See* A Better Balance, Pregnant and Jobless: Thirty-Seven Years after Pregnancy Discrimination Act, Pregnant Women Still Choose Between a Paycheck and a Healthy Pregnancy 11 (2015) [hereinafter Pregnant and Jobless], https://www.abetterbalance.org/wp-content/uploads/2017/01/PregnantandJobless.pdf; Oxfam America, Women on the Line: A Review of Workplace Gender Issues in the US Poultry Industry 11–12 (2018) (citing interview of Ahmed Ali, Lead Organizer at the Greater Minnesota Worker Center in St. Cloud, Minnesota, on January 7, 2016), https://s3.amazonaws.com/oxfam-us/www/static/media/files/Women_on_the_Line_Poultry_Workers.pdf.

18 *See* A Better Balance & Nat'l Women's Law Ctr., It Shouldn't Be A Heavy Lift: Fair Treatment for Pregnant Workers 11 (2013), [hereinafter It Shouldn't Be A Heavy Lift], https://www.abetterbalance.org/resources/it-shouldnt-be-a-heavy-lift/.

19 *Id.* at 12.

20 Pregnant and Jobless, *supra* note 17, at 21.

21 *See* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(h) (2018); *see also* Equal Emp. Opportunity Comm'n, Enforcement Guidance: Pregnancy Discrimination and Related Issues (2015), https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

22 *See Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1349 (2015); *see also* Brief of Am. Civil Liberties Union & A Better Balance et al. as Amici Curiae Supporting Petitioner, *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015) (No. 12-1226) [hereinafter Young Amicus Brief], https://www.abetterbalance.org/resources/supreme-court-pregnancy-decision-young-v-ups/.

23 Dina Bakst, Op-Ed., *Pregnant, and Pushed Out of a Job*, N.Y. Times, Jan. 30, 2012, http://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html.

24 *Id.*

25 *See* A Better Balance, Pregnancy Accommodations in States & Cities (2019) [hereinafter Pregnancy Accommodations in States & Cities], https://www.abetterbalance.org/wp-content/uploads/2019/01/PWFA_StateList.pdf.

26 *See Client Victory: New Jersey Worker Illegally Pushed Off the Job Is Reinstated!*, A Better Balance (Oct. 17, 2018), https://www.abetterbalance.org/client-victory-new-jersey-worker-illegally-pushed-off-the-job-is-reinstated/.

27 Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, N.Y. Times, Oct. 21, 2018, https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html.

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 See *infra* Part II: The Health Case for Pregnancy Accommodations.

35 *See* Pregnant and Jobless, *supra* note 17, at 5.

36 *See Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1349 (2015).

37 Young Amicus Brief, *supra* note 22, at 8–9 (discussing the circuit split on the issue of accommodations prior to *Young*).

38 *See, e.g., Hicks v. City of Tuscaloosa*, 870 F.3d 1253, 1261 (11th Cir. 2017) (affirming judgment on PDA claim in favor of a patrol officer who was denied a breastfeeding accommodation); *Brown v. Aria Health*, No. CV 17-1827, 2019 WL 1745653, at *8 (E.D. Pa. Apr. 17, 2019) (denying employer's motion for summary judgment on a PDA claim brought by an operating room nurse who was forced out of work after, on the advice of her doctor, she requested to be re-assigned to operating rooms where she could avoid exposure to dangerous substances during her pregnancy); *Thomas v. Fla. Parishes Juvenile Justice Comm'n*, No. 18-2921, 2019 WL 118011, at *8 (E.D. La. Jan. 7, 2019) (denying employer's motion for summary judgment on a PDA claim by a juvenile detention officer who was denied a request to be excused from a physical fitness test); *Clark v. City of Tucson*, No. CV 14-02543-TUC-CKJ, 2018 WL 1942771, at *17 (D. Ariz. Apr. 25, 2018) (denying defendant's motion for summary judgement on PDA claim brought by a fire department employee penalized for needing breastfeeding accommodations, finding "reasonable minds could differ as to whether Defendant's actions were discriminatory on the whole"); *Norris v. City Portland*, No. 2:16-cv-390-NT, 2017 WL 3613024, at *3 (D. Me. Aug. 22, 2017) (denying employer's motion for summary judgment on PDA claim brought by a financial eligibility specialist terminated very shortly after telling her employer she was pregnant and requesting reasonable accommodation related to temporary pregnancy-related restrictions); *Taylor v. C&B Piping, Inc.*, No. 2:14-cv-01828-MHH, 2017 WL 1047573, at *4 (N.D. Ala. Mar. 20, 2017) (denying an employer's motion to dismiss a PDA claim brought by an accounting clerk who was denied a lifting restriction); *Boyne v. Town & Country Pediatrics & Family Med.*, No. 3:15-CV-1455 (MPS), 2017 WL 507212, at *4 (D. Conn. Feb. 7, 2017) (denying employer's motion to dismiss a PDA claim brought by a medical assistant who was refused receptionist duty as an accommodation following a complicated birth); *Thomas v. Monroe Cty. Sheriff's Dep't.*, No. 15-11344, 2016 WL 5390860, at *8 (E.D. Mich. Sept. 27, 2016) (denying employer's motion for summary judgment on a PDA claim brought by a plaintiff who was not rehired as a deputy sheriff while on light duty); *Oliver v. Scranton Materials, Inc.*, No. 3:14-CV-00549, 2016 WL 3397679, at *5–6 (M.D. Pa. June 13, 2016) (denying employer's motion for summary judgment on a PDA claim brought by a plaintiff who was fired after requesting additional leave as an accommodation after giving birth to triplets); *Allen-Brown v. D.C.*, 174 F. Supp. 3d 463, 480 (D.D.C. 2016) (denying employer's motion for summary judgment on a PDA claim brought by a patrol officer who was denied a limited-duty accommodation); *Gonzales v. Marriott Int'l, Inc.*, 142 F. Supp. 3d 961, 978 (C.D. Cal. 2015) (denying employer's motion to dismiss a PDA claim brought by an accountant who was denied lactation accommodations after giving birth as a surrogate); *Martin v. Winn-Dixie Louisiana, Inc.*, 132 F. Supp. 3d 794, 822 (M.D. La. 2015) (denying employer's motion for summary judgment on a PDA claim brought by a store manager forced onto unpaid leave after requesting lifting accommodation); *Bray v. Town of Wake Forest*, No. 5:14-CV-276-FL, 2015 WL 1534515, at *6 (E.D.N.C. Apr. 6, 2015) (denying employer's motion to dismiss a PDA claim brought by a police officer who was denied a light duty accommodation); *LaSalle v. City of New York*, No. 13-civ-5109, 2015 WL 1442376, at *4 (S.D.N.Y. Mar. 30, 2015) (denying employer's motion to dismiss a PDA claim brought by a van driver who was denied a light duty accommodation).

39 *Swanger-Metcalfe v. Bowhead Integrated Support Servs., LLC*, No. 1:17-cv-2000, 2019 WL 1493342, at *8 (M.D. Pa. Mar. 31, 2019).

40 *Portillo v. IL Creations, Inc.*, No. CV 17-1083 (RDM), 2019 WL 1440129, at *6 (D.D.C. Mar. 31, 2019).

41 *Dudhi v. Temple Health Oaks Lung Ctr*, No. 18-3514, 2019 WL 426145, at *6 (E.D. Pa. Feb. 4, 2019).

42 *Luke v. CPlace Forest Park SNF*, 747 Fed. App'x. 978, 980 (5th Cir. 2019).

43 *Sorah v. New Horizons Home Healthcare L.L.C.*, No. 1:16-CV-291-TLS, 2018 WL 5830753, at *5 (N.D. Ind. Nov. 7, 2018).

44 *Waite v. Bd. of Trustees of Univ. of Alabama*, No. 2:16-CV-01244-JEO, 2018 WL 5776265, at *16 (N.D. Ala. Nov. 2, 2018).

45 *Durham v. Rural/Metro Corp.*, No. 4:16-CV-01604-ACA, 2018 WL 4896346, at *4 (N.D. Ala. Oct. 9, 2018).

46 *Wadley v. Kiddie Acad. Int'l, Inc.*, No. CV 17-05745, 2018 WL 4732479, at *5 (E.D. Pa. Oct. 1, 2018).

47 *Lee v. TransAm Trucking, Inc.*, No. 17-2150, 2018 WL 3432045, at *7 (D. Kan. July 16, 2018).

48 *Adduci v. Fed. Express Corp.*, 298 F. Supp. 3d 1153, 1160–63 (W.D. Tenn. 2018). The court allowed Adduci's disparate impact claim to proceed, but subsequently dismissed that claim following a bench trial. *See* Opinion and Order Following Non-Jury Trial, *Adduci v. Fed. Express Corp.*, No. 17-cv-2017-JPM-tmp (W.D. Tenn. July 26, 2018), ECF No. 106.

49 *Santos v. Wincor Nixdorf, Inc.*, No. 16 Civ. 440-RP, 2018 WL 1463710, at *8 (W.D. Tex. Mar. 23, 2018).

50 *Jones v. Brennan*, 16-CV-0049-CVE-FHM, 2017 WL 5586373, at *6–7 (N.D. Okla. Nov. 20, 2017).

51 *Everett v. Grady Mem'l Hosp. Corp.*, 703 Fed. App'x 938, 949 (11th Cir. 2017).

52 *Vidovic v. City of Tampa*, No. 8:16-cv-T-17AAS, 2017 WL 10294807, at *9 (M.D. Fla. Oct. 12, 2017).

53 *Webster v. U.S. Dep't of Energy*, 267 F. Supp. 3d 246, 264 (D.D.C. 2017).

54 *See* Jury Instructions, *Legg v. Ulster Cty.*, No. 1:09-CV-550 (FJS/RFT) (N.D.N.Y. Aug. 30, 2016), ECF No. 185.

55 *Legg v. Ulster Cty.*, No. 1:09-CV-550 (FJS/RFT), 2017 WL 3207754, at *8 (N.D.N.Y. July 27, 2017), *appeal docketed*, No. 17-2861 (2d Cir. Sept. 14, 2017).

56 *Turner v. Hartford Nursing and Rehab*, No. 16 Civ. 12926, 2017 WL 3149143, at *6 (E.D. Mich. July 25, 2017).

57 *LaCount v. South Lewis SH OPCO*, No. 16-CV-0545-CVE-TLW, 2017 WL 2821814, at *2 (N.D. Okla. June 29, 2017).

58 *Anfeldt v. United Parcel Serv., Inc.*, No. 15 Civ. 10401, 2017 WL 839486, at *3 (N.D. Ill. Mar. 3, 2017).

59 *Jackson v. J.R. Simplot Co.*, 666 Fed. App'x 739, 743 (10th Cir. 2016).

60 *Brown v. OMO Group, Inc.*, No. 15–cv–01473–MSK–CBS, 2016 WL 11200704, at *6 (D.S.C. Dec. 12, 2016).

61 *Diaz v. Florida*, 219 F. Supp. 3d 1207, 1218 (S.D. Fla. 2016).

62 *Mercer v. Gov't of the Virgins Islands Dep't of Educ.*, No. 2014-50, 2016 WL 5844467, at *11–12 (D.V.I. Sept. 30, 2016).

63 *Lawson v. City of Pleasant Grove*, No. 2:14-CV-0536-JEO, 2016 WL 2338560, at *10–11 (N.D. Ala. Feb. 16, 2016), *rep. and recommendation adopted*, No. 2:14-CV-536-KOB, 2016 WL 1719667 (N.D. Ala. Apr. 29, 2016).

64 *Salmon v. Applegate Homecare & Hospice, LLC*, No. 1:13-cv-00109-DN, 2016 WL 389987, at *10 (D. Utah Feb. 1, 2016).

65 *Mejdoub v. Desjardins Bank, N.A.*, No. 15–cv–01473–MSK–CBS, 2016 WL 4369968, at *5 (S.D. Fla. Jan. 11, 2016).

66 *Brown v. Sam's E., Inc.*, No. CA 3:13-1149-MBS, 2015 WL 5671436, at *15 (D.S.C. Sept. 25, 2015).

67 *Sanchez-Estrada v. MAPFRE PRAICO Ins. Co.*, 126 F. Supp. 3d 220, 231–35 (D.P.R. 2015).

68 *Huffman v. Speedway LLC*, 621 Fed. App'x 792, 799 (6th Cir. 2015).

69 *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015).

70 *Id.*

71 *Legg*, for example, was initially filed in 2009. Since then, the case has gone to trial twice and, after a 2017 decision in the district court, is back up on appeal to the Second Circuit. *See Meadors v. Ulster Cty.*, 984 F. Supp. 2d 83, 88 (N.D.N.Y. 2013) (complaint filed May 11, 2009); *vacated sub nom., Legg v. Ulster Cty.*, 820 F.3d 67 (2d Cir. 2016); *Legg v. Ulster Cty.*, No. 1:09-CV-550, 2017 WL 3207754 (N.D.N.Y. 2017); *appeal docketed*, No. 17-2861 (2d Cir. Sept. 14, 2017).

72 *Adduci v. Fed. Express Corp.*, 298 F. Supp. 3d 1153, 1156 (W.D. Tenn. 2018).

73 *Id.*

74 *Id.* at 1160.

75 *Id.* at 1164.

76 *Id.* at 1161–62. It should be noted that while the court dismissed Adduci's disparate treatment claim, it did permit her disparate impact claim to move forward on the theory that "those employees' [the employees in the spreadsheet] requests were granted means that less than 100% of TRW requests were denied when made by members outside of the protected class: pregnant women." *Id.* at 1164. Several months later, the case went to a bench trial and Adduci lost. The court dismissed the case with prejudice finding Adduci "failed to show by a preponderance of the evidence that she has standing to challenge FedEx's former AGFS exclusion to the TRW policy." See Opinion and Order Following Non-Jury Trial, *Adduci v. Fed. Express Corp.*, No. 17-cv-2017-JPM-tmp (W.D. Tenn. July 26, 2018), ECF No. 106.

77 *Adduci*, 298 F. Supp. 3d. at 1161.

78 *Id.* at 1163.

79 See Opinion and Order Following Non-Jury Trial, *Adduci v. Fed. Express Corp.*, No. 17-cv-2017-JPM-tmp (W.D. Tenn. July 26, 2018), ECF No. 106.

80 *See Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015) (holding that making a prima facie case under the PDA does not "require the plaintiff to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways").

81 *Durham v. Rural/Metro Corp.*, No. 4:16-CV-01604-ACA, 2018 WL 4896346, at *3–4 (N.D. Ala. Oct. 9, 2018), *appeal docketed*, No. 18-14687 (11th Cir. Nov. 7, 2018). *See also* Durham Amicus Brief, *supra* note 5.

82 *Durham*, 2018 WL 4896346, at *3.

83 The court in *Bray v. Town of Wake Forest* found that Bray, a police officer who was denied a light duty accommodation, met the comparator prong of the test by pointing to two other officers who were given light duty assignments. *Bray v. Town of Wake Forest,* No. 5:14-CV-276-FL, 2015 WL 1534515, at *6 (E.D.N.C. Apr. 6, 2015). While the court opinion does not specify whether the injuries were on-the-job or off-the-job injuries, the Town's briefing documents in the case made clear that the officers' injuries were on-the-job injuries. See Memorandum of Law in Support of Defendant's Motion to Dismiss, *Bray v. Town of Wake Forest,* No. 5:14-CV-276-FL (E.D.N.C. June 17, 2014), ECF No. 11.

84 *Huffman v. Speedway LLC*, 621 Fed. App'x 792, 793 (6th Cir. 2015).

85 *Id*. at 793–95.

86 *Id*. at 799.

87 *Id*.

88 Bakst, *supra* note 9.

89 42 U.S.C. §§ 12101–12213 (2012).

90 *Wadley v. Kiddie Acad. Int'l, Inc.*, No. CV 17-05745, 2018 WL 3035785, at *1 (E.D. Pa. June 19, 2018).

91 *Id*.

92 *Id*.

93 *Id*.

94 *Id*. at *4 (granting employer's motion to dismiss because "Wadley does not allege however, any facts that allow the Court to infer that Kiddie accommodated others 'similar in their ability or inability to work'").

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A Better Balance is a non-profit legal advocacy organization working nationally to promote fairness, equality, and justice in the workplace for women and families.

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a better balance

Pregnant in New York?

A Guide to Your Workplace Rights During and After Pregnancy

If you work in New York, this guide will walk you through your rights and options:

During Pregnancy | After Birth | Returning to Work

If you have questions, call A Better Balance's free, confidential legal helpline at **1-833-NEED-ABB (1-833-633-3222)** or fill out our **online help form**.

First, get started with this quick checklist:

Learned you're pregnant? Think about:

- ☐ Do I know **my rights at work** while pregnant?
- ☐ If there is another parent, do they know **their rights at work?**

Do you need a change to your job duties, schedule, or work environment to stay healthy on the job while pregnant? Think about:

- ☐ Have I asked my boss for a **pregnancy accommodation**?
- ☐ Have I mentioned my pregnancy-related workplace concerns to my **health provider**?

Do you need a few hours or days of time-off for prenatal appointments or morning sickness during pregnancy? Think about:

- ☐ Have I told my boss I need **time-off**?
- ☐ Do I need a **loved one to take time-off** from work to care for me or attend appointments with me?

Will you need a longer leave of absence during pregnancy for pregnancy complications? Think about:

- ☐ Have I given my boss a heads-up that **I'll need leave** and when?
- ☐ Have I prepared my application for **NY Temporary Disability Insurance** cash benefits?
- ☐ Have I given my **health provider** any paperwork they will need to fill out?
- ☐ Will I need a loved one to take time-off to **care for me**?

Have you taken steps to prepare for maternity leave to recover from birth and bond? Think about:

- ☐ Have I given my boss a heads-up that **I'll need leave** and when?
- ☐ Have I prepared my application for **NY Temporary Disability Insurance** cash benefits?
- ☐ Have I given my **health provider** any paperwork they will need to fill out?
- ☐ Will I need a **loved one to take time-off** to care for me while I recover?
- ☐ If there is another parent, have they made a plan for **time-off to bond**?
- ☐ Have I talked to my employer about getting a clean, private **space and break time** to express milk for my baby when I return to work?

Have you given birth, or experienced a loss of pregnancy? Think about:

- ☐ Have I submitted my application for **NY Temporary Disability Insurance** cash benefits to recover?
- ☐ Have I submitted my application for **NY Paid Family Leave** to bond?
- ☐ If the baby has another parent, have they submitted **their application** for NY Paid Family Leave to bond?

Returning to work? Think about:

- ☐ Do I need **time-off** to attend postnatal appointments or my baby's check-ups?
- ☐ Do I need a clean, private **space and break time** to pump milk?
- ☐ Do I need time-off or other accommodations for **postpartum depression** or other pregnancy-related conditions?
- ☐ Did my boss refuse to return me to **my same or similar job**?

Your Rights During Pregnancy

While You're Pregnant

While you're pregnant, you might need a change to your job duties or work environment to stay healthy.

NY workers have the right to reasonable accommodations for medical needs related to pregnancy or childbirth.

Purpose: Use this law to get extra rest or bathroom breaks, permission to eat or drink at your workstation, a larger uniform, changed work schedule, light duty, or other reasonable accommodations. In NY, employers generally must provide reasonable accommodations for a medical need related to pregnancy or childbirth, unless doing so would be very difficult or expensive for your employer (an "undue hardship").

Job-protected? Yes, retaliation is against the law.

Eligible? Learn **here.**

How to use: Learn how to request a pregnancy accommodation **here.**

TIP: Under NY law, workers do not need to have a disability to get an accommodation. Any pregnancy-related condition (such as morning sickness) or pregnancy-related medical need (such as the need for extra bathroom breaks or increased water intake) is enough.

While you're pregnant, you might need occasional time-off or a longer leave of absence.

For instance, you might need a few hours off to attend a prenatal appointment, a few days off due to nausea, or a longer period of leave due to a serious pregnancy complication.

There are **three laws** that can provide time-off in circumstances like these, as well as a **fourth law** that can provide cash benefits while you are on leave.

- **NY & NYC Sick Time**
- **Family and Medical Leave Act (FMLA)**
- **Time-off as a reasonable accommodation for a pregnancy-related medical need**

Plus: Temporary Disability Insurance (TDI)

NY & NYC Sick Time

Many NY workers have the right to earn paid, job-protected sick time.

Purpose? Use this time for prenatal or postnatal appointments, a child's routine check-ups, morning sickness, or many other reasons.

Paid? Yes, for most workers.

Job-protected? Yes.

Amount of time? Up to either 40 or 56 hours a year, depending on the size of your employer.

Eligible? Learn if you're covered under NY's law **here** or NYC's law **here**.

How to use: Tell your boss you need to use your sick time. Your employer must pay you like normal.

TIP: Your employer can require you to give advance notice of a planned use of sick time (like a prenatal appointment) but not an unexpected use of sick time (like a sudden illness or medical emergency). Your boss cannot require a doctor's note unless you use more than 3 sick days in a row. You do not have to give your employer details about why you used sick time.

FMLA

Many workers have the right to unpaid, job-protected leave under the federal Family and Medical Leave Act (FMLA).

Purpose? Use this time to address your own serious health needs, including for prenatal care or if unable to work due to pregnancy or childbirth. FMLA can also be used to care for a seriously ill family member or to bond with a new baby.

Paid? No. But check if you can receive pay under your employer's policy or union contract (if you have one), or if you are eligible for **NY Temporary Disability Insurance** (TDI).

Job-protected? Yes.

Amount of time? Up to 12 weeks a year. Generally, FMLA can be taken all at once or in shorter chunks of time, like a few hours or days.

Eligible? Learn **here.**

How to use:

- Tell your employer you will need to take FMLA leave, at least 30 days before your leave will begin. If you need leave for an emergency, tell your boss as soon as you can.
- If your employer requests medical certification, get a certification form from your boss. Give the form to your health care provider promptly. You generally must return the completed certification to your employer within 15 calendar days.
- Ask your employer if there are any other steps you must take. Sometimes employers have their own leave policy and process that you must also follow.

Time-off as a reasonable accommodation for a pregnancy-related medical need

Even if you are not eligible for sick time or FMLA, or if you have used up your sick time or FMLA, you may have the right to unpaid, job-protected time-off as a reasonable accommodation for a pregnancy-related medical need.

Purpose? Use this time for prenatal or postnatal appointments, morning sickness, or many other reasons. It can also be used over a period of weeks or months for longer-lasting pregnancy-related needs. In NY, employers must provide time-off as a reasonable accommodation for pregnancy-related medical needs, unless it would be very difficult or expensive for them to do so (an "undue hardship").

Paid? No. But check if you can receive pay under your employer's policy or union contract, or if you are eligible for **NY Temporary Disability Insurance**.

Job-protected? Yes.

Amount of time? It depends.

Eligible? Learn **here.**

How to use:

- Tell your boss you need time-off as a reasonable accommodation due to pregnancy. Give a specific date when you'll be able to return to work—it's okay if it needs to change later. Keep in mind that your employer can deny the leave if it would be an undue hardship to provide it.
- If your boss asks for a note from a health care provider, try to get one in a timely manner. Your provider can learn how to write you a strong note **here**.

NY Temporary Disability Insurance (TDI)

You may have the right to cash benefits while on leave.

Purpose? Use if you have an off-the-job injury or illness, including if you are unable to work due to pregnancy or childbirth.

Paid? Yes. 50% of wages, up to $170 a week.

Job-protected? No. TDI is not a source of job-protection—just pay—so it does not protect you from being fired. However, if you are taking unpaid time-off under the **FMLA** or **pregnancy accommodation laws**, those laws may protect your job while you're receiving TDI.

Amount of time? Up to 26 weeks a year.

Eligible? Learn **here**.

How to use:

- Download Form DB-450 **here** as soon as you become disabled. Typically, the first 7 days of TDI are unpaid. Even after that, it may take several weeks for your benefits to arrive. You must apply within 30 days of becoming disabled.
- Fill out the employee section of the claim form and give the form to your health care provider to complete their portion.
- If you are currently or very recently employed, mail the completed form to your employer or to your employer's TDI insurance carrier. If you have been unemployed for more than 4 weeks, mail the form to the Workers' Compensation Board.

TIP: The first week of TDI is generally unpaid. For example, if your health care provider certifies you as disabled for 6 weeks, generally you will receive only 5 weeks of TDI benefits.

Your Rights After Birth

After Giving Birth

After you give birth, you may need leave to recover, as well as time to bond with your baby.

Although you will recover from childbirth and bond with your baby at the same time, the law treats time to recover from childbirth and time to bond with your baby differently.

Often, covered workers will use the **recovery laws** first, typically in the 6 weeks after a vaginal delivery or the 8 weeks after a c-section. Then, they will use a **bonding law** to bond with their baby.

But, for financial reasons, some workers will structure their leave differently, such as taking paid bonding leave immediately after childbirth, without taking leave to recover.

Leave to Recover from Birth

FMLA

Many workers have the right to unpaid, job-protected leave under the federal Family and Medical Leave Act (FMLA).

Purpose? Use this time for your own serious health condition, including recovering from childbirth (typically 6 weeks after a vaginal delivery and 8 weeks after a c-section) or attending postnatal appointments. FMLA can also be used to care for a seriously ill family member or to bond with a baby.

Paid? No. But check if you can receive pay under your employer's policy or union contract, or if you are eligible for **NY Temporary Disability Insurance**.

Job-protected? Yes.

Amount of time? Up to 12 weeks a year.

Eligible? Learn **here.**

How to use: Review the **FMLA section** of this guide.

TIP: Many of these laws also apply to workers who experience miscarriage or stillbirth. Learn more **here**.

Time-off as a reasonable accommodation to recover from childbirth or for a related condition

Even if you are not eligible for time-off under the FMLA, or have used up your FMLA, you may have the right to unpaid, job-protected time-off as a reasonable accommodation for childbirth or a related condition.

Purpose? Use this time for many reasons, including to recover from childbirth, to attend postnatal appointments, or for your own pregnancy-related medical need or condition, such as postpartum depression or mastitis. In NY, employers generally must provide time-off as a reasonable accommodation for childbirth or related medical needs, unless it would be very difficult or expensive for them to do so (an "undue hardship").

Paid? No. But check if you can receive pay under your employer's policy or union contract, or if you are eligible for **NY Temporary Disability Insurance**.

Job-protected? Yes.

Amount of time? It depends.

Eligible? Learn **here.**

How to use: Review the **time-off as a reasonable accommodation section** of this guide.

NY Temporary Disability Insurance (TDI)

You may have the right to cash benefits while on leave.

Purpose? Use if you have an off-the-job injury or illness, including if you are recovering from childbirth (typically 6 weeks after a vaginal delivery and 8 weeks after a c-section).

Paid? Yes. 50% of wages, up to $170 a week.

Job-protected? No. TDI is not a source of job-protection—just pay—so it does not protect you from being fired. However, if you are taking unpaid time-off under the **FMLA** or **pregnancy accommodation laws**, those laws may protect your job while you're receiving TDI.

Amount of time? Up to 26 weeks a year.

Eligible? Learn **here.**

How to use: Review the **TDI section** of this guide.

Leave to Bond with Your Baby

Option A: NY Paid Family Leave (PFL)

Many NY workers have the right to paid, job-protected leave to bond with a new baby.

Purpose? Use this time to bond with a new baby anytime within 12 months of the baby's birth. PFL can also be used to care for a seriously ill family member.

Paid? Yes. 67% of wages, up to a cap.

Job-protected? Yes.

Amount of time? Up to 12 weeks a year.

Eligible? Learn **here.**

How to use: Learn **here.** You can use PFL all at once or in chunks of time as short as one day. In some circumstances, your employer can require you to use up FMLA leave at the same time as PFL leave. If so, follow the steps for taking FMLA leave, in addition to the steps for taking PFL.

TIP: Workers cannot receive TDI and PFL at the same time, but they could receive one and then the other. For instance, a worker could receive 6 weeks of TDI after a vaginal delivery (though the first week will be unpaid), followed by 12 weeks of PFL.

Option B: FMLA

Even if you are not eligible for paid bonding leave under PFL, you may be eligible for unpaid, job-protected bonding leave under the FMLA, if you have not used up your FMLA.

Purpose? Use this time to bond, if you are not eligible for PFL.

Paid? No.

Job-protected? Yes.

Amount of time? Up to 12 weeks a year.

Eligible? Learn **here.**

How to use: Review the **FMLA section** of this guide. Employers cannot require medical certification for FMLA leave used for bonding, though they can require documentation of family relationship.

TIP: Many dads and other non-birth parents have the right to PFL or FMLA leave to bond with their baby. If both parents meet PFL's coverage requirements, they generally each have the right to their own 12 weeks paid bonding leave. Learn more **here**.

Your Rights When Returning to Work

Returning to Work

When you return to work, you might need a private, clean space and break time to pump milk for your baby. You might also need other accommodations related to pregnancy or childbirth.

NY workers have the right to pump milk at work and receive accommodations for other postpartum needs.

Purpose? Use these laws to get reasonable break time to express milk for up to three years after your baby's birth and a private space, other than a bathroom, to pump. You can also receive **reasonable accommodations** for childbirth- or pregnancy-related medical needs or conditions, like mastitis or postpartum depression, unless it would be very difficult or expensive for your employer to provide (an "undue hardship").

Paid? No, generally break time does not have to be paid.

Job-protected? Yes, retaliation is against the law.

Amount of time? Breaks to pump generally at least once every three hours, for at least 20 minutes, or more if needed.

Eligible? Learn **here**.

How to use? Learn how to request a lactation accommodation **here**, or another accommodation for a pregnancy- or childbirth-related medical need **here**.

TIP: Covered workers can also use **sick time** to attend postnatal appointments or to attend their baby's check-ups.

TIP: Some workers experience health conditions related to their pregnancy, such as postpartum depression, many weeks after giving birth. These workers may have the right to reasonable accommodations (such as flexible start time or telework) or additional time-off, to address these conditions. Learn more **here**.

Retaliation is illegal.

Your employer cannot fire or punish you for requesting or receiving accommodations or time-off under the law.

For More Information:

- Visit A Better Balance's **Workplace Rights Hub**.
- Employers can always provide more than the bare minimum the law requires, so be sure to check your employer's policies for any additional benefits they may offer. If you are in a union, check if your union contract guarantees any additional benefits.
- The information in this guide does not constitute legal advice. It is always advisable to consult an attorney about your individual circumstances.
- **If you have questions, call A Better Balance's free, confidential legal helpline at 1-833-NEED-ABB (1-833-633-3222) or fill out our online help form.**

LOCAL LAWS
OF
THE CITY OF NEW YORK
FOR THE YEAR 2013

No. 78

Introduced by Council Members Vacca, Lander, Palma, Rose, Lappin, Arroyo, Brewer, Chin, Eugene, Ferreras, Gentile, Jackson, James, Koo, Koppell, Koslowitz, Mendez, Reyna, Rivera, Williams, Rodriguez, Mark-Viverito, Crowley, Gonzalez, Levin, Van Bramer, Weprin, Garodnick, Barron, Gennaro, Greenfield, Mealy and Ulrich.

A LOCAL LAW

To amend the administrative code of the city of New York, in relation to prohibiting discrimination in employment based on pregnancy, childbirth, or a related medical condition.

Be it enacted by the Council as follows:

Section 1. Legislative findings and intent. The Council finds that pregnant women are vulnerable to discrimination in the workplace in New York City. For example, there are reports that women who request an accommodation that will allow them to maintain a healthy pregnancy, or who need a reasonable accommodation while recovering from childbirth, are being removed from their positions, placed on unpaid leave, or fired. It is the intent of the Council to combat this form of discrimination by requiring employers to provide reasonable accommodations to pregnant women and those who suffer medical conditions related to pregnancy and childbirth. Such a reasonable accommodation may include bathroom breaks, leave for a period of disability arising from childbirth, breaks to facilitate increased water intake, periodic rest for those who stand for long periods of time, and assistance with manual labor, among other things. It is not the intent of the Council to require such accommodations if their provision would cause an undue hardship in the conduct of an employer's business.

§2. Subdivision 5 of section 8-102 of chapter one of title eight of the administrative code of the city of New York, as amended by local law number 14 for the year 2013, is amended to read as follows:

5. For purposes of subdivisions one, two, three, *twenty-two,* subparagraph one of paragraph a of subdivision twenty-one, and paragraph e of subdivision twenty-one of section 8-107 of this chapter, the term "employer" does not include any employer with fewer than four persons in his or her employ. For purposes of this subdivision, natural persons employed as independent contractors to carry out work in furtherance of an employer's business enterprise who are not themselves employers shall be counted as persons in the employ of such employer.

§3. Subdivision 18 of section 8-102 of chapter one of title eight of the administrative code of the city of New York, as amended by local law number 54 for the year 2011, is amended to read as follows:

18. The term "reasonable accommodation" means such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business. The covered entity shall have the burden of proving undue hardship. In making a determination of undue hardship with respect to claims filed under subdivisions one, [or] two*, or twenty-two* of section 8-107, or section 8-107.1 of this chapter, the factors which may be considered include but shall not be limited to:

(a) the nature and cost of the accommodation;

(b) the overall financial resources of the facility or the facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(c) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and

(d) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

In making a determination of undue hardship with respect to claims for reasonable accommodation to an employee's or prospective employee's religious observance filed under subdivision three of section 8-107 of this chapter, the definition of "undue hardship" set forth in paragraph b of such subdivision shall apply.

§4. Section 8-107 of chapter one of title eight of the administrative code of the city of New York is amended by adding a new subdivision 22 to read as follows:

(22) Employment; Pregnancy, childbirth, or a related medical condition. (a) It shall be an unlawful discriminatory practice for an employer to refuse to provide a reasonable accommodation, as defined in subdivision eighteen of section 8-102 of this chapter, to the needs of an employee for her pregnancy, childbirth, or related medical condition that will allow the employee to perform the essential requisites of the job, provided that such employee's pregnancy, childbirth, or related medical condition is known or should have been known by the employer. In any case pursuant to this subdivision where the need for reasonable accommodation is placed in issue, it shall be an affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job.

(b) Notice of rights. (i) An employer shall provide written notice in a form and manner to be determined by the commission of the right to be free from discrimination in relation to

pregnancy, childbirth, and related medical conditions pursuant to this subdivision to: (1) new employees at the commencement of employment; and (2) existing employees within one hundred twenty days after the effective date of the local law that added this subdivision. Such notice may also be conspicuously posted at an employer's place of business in an area accessible to employees. (ii) The commission shall develop courses of instruction and conduct ongoing public education efforts as necessary to inform employers, employees, employment agencies, and job applicants about their rights and responsibilities under this subdivision.

(c) This subdivision shall not be construed to affect any other provision of law relating to sex discrimination or pregnancy, or in any way to diminish the coverage of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth under any other provision of this section.

§5. This local law shall take effect 120 days after it shall have become a law, except that the commissioner shall, prior to such effective date, take such actions as are necessary to implement the provisions of this law.

THE CITY OF NEW YORK, OFFICE OF THE CITY CLERK, s.s.:

I hereby certify that the foregoing is a true copy of a local law of The City of New York, passed by the Council on September 24, 2013 and approved by the Mayor on October 2, 2013.

MICHAEL M. McSWEENEY, City Clerk Clerk of the Council.

CERTIFICATION OF CORPORATION COUNSEL

I hereby certify that the form of the enclosed local law (Local Law No. 78 of 2013, Council Int. No. 974-A of 2012) to be filed with the Secretary of State contains the correct text of the local law passed by the New York City Council and approved by the Mayor.

JEFFREY D. FRIEDLANDER, Acting Corporation Counsel.

Last updated: July 2021

NYC Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy, Childbirth, Related Medical Conditions, Lactation Accommodations, and Sexual or Reproductive Health Decisions

The New York City Human Rights Law ("NYCHRL") prohibits discrimination in employment, public accommodations, and housing. It also prohibits discriminatory harassment and bias-based profiling by law enforcement.[1] The NYCHRL, pursuant to the 2005 Civil Rights Restoration Act, must be construed "independently from similar or identical provisions of New York state or federal statutes," such that "similarly worded provisions of federal and state civil rights laws [are] a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise."[2] In addition, exemptions to the NYCHRL must be construed "narrowly in order to maximize deterrence of discriminatory conduct."[3]

The New York City Commission on Human Rights (the "Commission") is the City agency charged with enforcing the NYCHRL. Individuals interested in vindicating their rights under the NYCHRL can choose to file a complaint with the Commission's Law Enforcement Bureau within one year of the discriminatory act and within three years for claims of gender-based harassment,[4] or file a complaint in court within three years of the discriminatory act.[5]

The NYCHRL prohibits unlawful discrimination in employment, public accommodations, and housing on the basis of actual or perceived pregnancy. It also requires employers to provide reasonable accommodation for the "needs of an employee for [their] pregnancy, childbirth, or related medical condition that will allow the employee to perform the essential requisites of the job, provided that such employee's pregnancy, childbirth, or related medical condition is known or should have been known by the employer."[6] The NYCHRL requires employers to provide lactation accommodations (including specific lactation accommodations set forth in the law) and also prohibits employers from discriminating based on employees' actual or perceived sexual or reproductive health decisions. This document serves as the Commission's legal enforcement guidance on the NYCHRL's protections as they apply to discrimination and reasonable accommodations based on pregnancy, childbirth, or related medical conditions; the specific employer requirements related to lactation accommodations; and discrimination based on sexual and reproductive health decisions. This document is not intended to serve as an exhaustive list of all forms of these discrimination claims under the NYCHRL.

I Legislative Intent

Pregnancy discrimination under the NYCHRL is discrimination based on gender.[7] Prior to 2014, however, people who needed reasonable accommodations in the workplace relating to pregnancy or for medical conditions related to pregnancy or childbirth had to show that their conditions amounted to a

[1] Local Law No. 85 § 1 (2005); *see* N.Y.C. Admin. Code § 8-130(a) ("The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have been so construed.").
[2] Local Law No. 35 (2016); N.Y.C. Admin. Code § 8-130(b).
[3] Local Law No. 78 (2013); N.Y.C. Admin. Code § 8-107(22)(a).
[4] N.Y.C. Admin. Code § 8-109(e).
[5] *Id.* § 8-402(a).
[6] Protections related to employees also apply to interns, freelancers, and independent contractors. *Id.* § 8-107(23).
[7] "Pregnancy discrimination is a form of gender discrimination under the NYCHRL." *Cameron v. N.Y.C. Dep't of Educ.*, No. 15-CV-9900 (KMW), 2018 WL 1027710, at *10 (S.D.N.Y. Feb. 21, 2018) (citing *Chauca v. Abraham*, 841 F.3d 86, 90 n.2 (2d Cir. 2016), *as amended* (Nov. 8, 2016)). The NYCHRL prohibits "an employer or an employee or agent thereof, because of the actual or perceived . . . gender . . . of any person" from "discriminat[ing] against such person in compensation or in terms, conditions or privileges of employment." N.Y.C. Admin. Code § 8-107(1)(a)(3).

temporary disability. As a result, people with uncomplicated pregnancies were regularly denied even the most minor accommodations and forced to work under conditions that compromised their pregnancies and their well-being. Realizing that the law, as it was often interpreted, excluded individuals with routine pregnancies from requesting and receiving accommodations, on October 2, 2013, New York City enacted Local Law 78, the Pregnant Workers Fairness Act, to affirmatively require employers to reasonably accommodate "the needs of an employee for her pregnancy, childbirth, or related medical condition" without necessitating that the employee's limitation qualifies as a disability.[8]

The legislative history of the Pregnant Workers Fairness Act reflects the growing recognition that expanded protections for employees related to pregnancy, childbirth, and related medical conditions are necessary. Given the often time-sensitive nature of accommodations needed for pregnancy, childbirth, and related medical conditions, and the relatively short duration of the need, reasonable accommodations related to pregnancy, childbirth, and related medical conditions are intended to be liberally granted so that employees may continue working without compromising their health or safety, or the safety of their pregnancy. With an overwhelming majority of women working late into their pregnancies and an increasing number of families relying on the income of working women as primary breadwinners,[9] protecting an individual's right to maintain stable employment while raising a family is increasingly important to the overall health and well-being of families and children.

Similarly, a package of bills to specifically address the rights of workers to lactation accommodations was introduced in 2018. While lactation was already considered a pregnancy-related medical condition under the NYCHRL for which employees had a right to a reasonable accommodation, the new bills established mandatory requirements for employers to provide specific reasonable lactation accommodations to employees who need to express breast milk in the workplace, including to create a lactation room with specific minimum requirements and to require employers to have and distribute amongst its employees a lactation accommodation policy.[10]

The City then enacted Local Law 20 on January 20, 2019, a law preventing employers from discriminating against their employees because of any decision related to sexual or reproductive health, including but not limited to birth control, fertility treatments, sterilization procedures, HIV testing, and abortion.[11]

II Definitions

These definitions are intended to help people understand the following guidance as well as their rights and responsibilities under the NYCHRL.

Childbirth:
labor or childbirth, whether or not it results in a live birth.[12]

Cooperative Dialogue:
the process by which an employer and a person entitled to an accommodation, or who may be entitled to an accommodation under the law, engage in good faith in a written or oral dialogue concerning the person's accommodation needs; potential accommodations that may address the person's accommodation needs, including alternatives to a requested accommodation; and any difficulties that such potential accommodations may pose for the employer.[13]

[8] N.Y.C. Admin. Code § 8-107(22)(a).
[9] Dina Bakst, Elizabeth Gedmark & Sarah Brafman, Long Overdue, A BETTER BALANCE, 26 (May 2019), https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf.
[10] Local Law 185 (2018); Local Law 186 (2018), codified as N.Y.C. Admin. Code §§ 8-107(22)(b)–(c).
[11] Local Law 20 (2019) codified as N.Y.C. Admin. Code §§ 8-102, 8-107(1).
[12] 47 R.C.N.Y. § 2-01.
[13] N.Y.C. Admin. Code § 8-102.

Lactation Room:
a sanitary place, other than a restroom, that can be used to express breast milk shielded from view and free from intrusion and that includes, at minimum, an electrical outlet, a chair, a surface on which to place a breast pump and other personal items, and nearby access to running water.[14]

Pregnancy:
being pregnant, and symptoms of pregnancy, including, without limitation, nausea, morning sickness, dehydration, increased appetite, swelling of extremities, and increased body temperature.[15]

Related Medical Condition:
any medical condition that is related to or caused by pregnancy or childbirth or the state of seeking to become pregnant, including, but not limited to, infertility, gestational diabetes, pregnancy-induced hypertension, hyperemesis, preeclampsia, depression, miscarriage, lactation, and recovery from childbirth, miscarriage, and termination of pregnancy.[16]

Sexual or Reproductive Health Decision:
any decision by an individual to receive or not to receive services, which are arranged for or offered or provided to individuals relating to sexual or reproductive health, including the reproductive system and its functions. Such services include, but are not limited to, fertility-related medical procedures, sexually transmitted disease prevention, testing, and treatment, and family planning services and counseling, such as birth control drugs and supplies, emergency contraception, sterilization procedures, pregnancy testing, and abortion.[17]

III Violations of the NYCHRL's Prohibitions on Discrimination Based on Pregnancy, Childbirth, and Related Medical Conditions

A. Disparate Treatment

Discrimination based on actual or perceived pregnancy, childbirth, or related medical conditions is prohibited under the NYCHRL in employment, housing, and public accommodations.[18] Pregnancy discrimination is a form of gender discrimination.[19] Similarly, discrimination based on menstruation is a form of gender discrimination.[20] Treating an individual less well than others because of their actual or perceived pregnancy or related medical condition is a violation of the NYCHRL. To establish disparate treatment under the NYCHRL, an individual must show that the treatment or adverse action was motivated at least in part by discriminatory animus.[21] An individual may demonstrate this through direct evidence of discrimination or indirect evidence that gives rise to an inference of discrimination.[22]

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[14] *Id*.
[15] 47 R.C.N.Y. § 2-01.
[16] *Id*.
[17] *Id*.
[18] N.Y.C. Admin. Code § 8-107; 47 R.C.N.Y. § 2-09(a).
[19] *See Cameron,* 2018 WL 1027710, at *10; N.Y.C. Admin. Code § 8-107(1)(a)(3).
[20] *See, e.g.*, *Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179, 189 (4th Cir. 2000) (court held there was sufficient evidence for jury to support a finding of hostile work environment under Title VII where female former employee suffered from uterine bleeding episodes at work and employer told her, when she asked for permission to go home, "You show me that you're bleeding, and I'll let you go"); *Harper v. Thiokol Chemical Corp.*, 619 F.2d 489, 492–93 (5th Cir. 1980) (Employer's policy requiring women who had been on pregnancy leave to have sustained a "normal" menstrual cycle before returning to work constituted an unlawful employment practice).
[21] *See Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 78 (1st Dep't 2009).
[22] Examples of direct evidence could include explicit statements by a covered entity that an adverse action was based on a protected status or explicitly discriminatory policies. *See In re Comm'n on Human Rights ex rel. Stamm v. E&E Bagels*, OATH Index No. 803/14, Comm'n Dec. & Order, 2016 WL 1644879, at *4 (Apr. 21, 2016). A plaintiff may prevail in an action under the NYCHRL if "he or she proves that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for

While adverse treatment may be overt, such as refusing to accept a rental application for an apartment because the applicant is pregnant or firing an employee because they are pregnant or pumping at work, discriminatory conduct on the basis of pregnancy often manifests itself in more subtle and patronizing ways. Such subtle forms of discrimination are also actionable under the NYCHRL because they subject pregnant workers to lesser treatment. Whether intentional or unintentional, these actions push pregnant individuals out of the job market, disrupt earnings, hamper economic advancement, and violate the NYCHRL.

1. Disparate Treatment Based on Stereotypes or Assumptions Regarding Pregnancy, Childbirth, or Related Medical Conditions

Judgments and stereotypes about how pregnant individuals should behave, their physical capabilities, and what is or is not healthy for a fetus are pervasive in our society and cannot be used as pretext for unlawful discriminatory decisions in employment, housing, and public accommodations.[23] Adverse treatment of pregnant individuals based on assumptions and stereotypes about the capacity, reliability, or dedication of pregnant workers is similarly unlawful under the NYCHRL.[24] Assumptions about a pregnant worker's commitment to their job or career, for example, are often rooted in traditional gender norms around parenting and women in the workforce, and may not be used to justify disparate treatment.

Examples of Violations

- An employer decides not to offer a promotion to a pregnant employee who is otherwise qualified based on the assumption that they will likely decide not to return to work after childbirth.
- An employer elects not to assign a pregnant employee to a new project after learning the employee is pregnant because he is concerned that the employee will be distracted by the pregnancy.
- A bouncer denies a pregnant individual entrance to a bar based on the belief that pregnant individuals should not be going to bars and/or drinking alcohol.
- An employer does not hire someone otherwise qualified because the applicant is pregnant and the employer assumes they will likely miss too much work after childbirth.
- A landlord refuses to accept a housing application from a person based in part on their pregnancy.
- A hotel worker refuses to let a pregnant guest use the hotel hot tub.

2. Harassment Based on Pregnancy, Childbirth, or Related Medical Conditions

Under the NYCHRL, gender-based harassment related to pregnancy, childbirth, or related medical conditions covers a broad range of conduct that causes an individual to be treated less well because of their actual or perceived pregnancy, including conduct related to sex stereotyping, bias, or objectification. Gender-based harassment may consist of a single incident[25] or repeated acts or behavior. Unlawful harassment exists when the incident or behavior creates, reflects, or fosters an atmosphere or culture that is demeaning, humiliating, or offensive. While the severity or pervasiveness of the harassment is relevant to damages, the existence of differential treatment based on pregnancy is sufficient under the

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an adverse employment decision, or that the action was 'more likely than not based in whole or in part on discrimination.'" *Melman v. Montefiore Med. Ctr*., 98 A.D.3d 107, 127 (1st Dep't 2012) (quoting *Aulicino v. N.Y.C. Dep't of Homeless Servs.*, 580 F.3d 73, 80 (2d Cir. 2009)). If plaintiff makes this prima facie showing, then the burden shifts to the employer to rebut the presumption of discrimination by demonstrating that there was a legitimate and non-discriminatory reason for its employment decision. If the employer articulates a legitimate, non-discriminatory basis for its decision, then the burden shifts back to the plaintiff "to prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination." *Ferrante v. Am. Lung Ass'n*, 90 N.Y.2d 623, 629–30 (1997); *see Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). *Fields v. Dep't of Educ. of N.Y.*, No. 154283/2016, 2019 WL 1580151 (Sup. Ct. N.Y. Cty. Apr. 12, 2019).

[23] 47 R.C.N.Y. § 2-09(a).

[24] *Id*.

[25] *See Cardenas v. Automatic Meter Reading Corp.*, OATH 1240/13, Dec. & Order, 2015 WL 7260567, at *8 (Oct. 28, 2015) (citing *Williams*, 872 N.Y.S.2d at 41 n.30).

NYCHRL to state a claim of gender-based harassment.[26] Harassment may include comments about a pregnant individual's weight or appearance or about pumping, their age in relation to their pregnancy, their commitment to their job, or their ability to focus.

Examples of Violations

- An employer makes offensive jokes and comments on the basis of an individual's pregnancy, such as talking about weight gain or stating that pregnancy is making the individual overly sensitive.
- A restaurant manager tells a patron to leave the restaurant because the patron is breastfeeding their child and exposing their breast.
- A manager fails to intervene after overhearing several employees call their coworker a cow, saying comments like: "Hey! Can I get milk with my coffee?" and "How about you do one, and I'll do the other."[27]
- Because of their pregnancy, an employee begins receiving negative performance reviews and fewer work assignments.
- A student at school is bullied for being pregnant. They tell one of their teachers about the bullying and the teacher does nothing.

3. Policies that Single Out People Who Experience Pregnancy, Childbirth, or Related Medical Conditions

Any policy that singles out people who experience pregnancy, childbirth, or related medical conditions is unlawful disparate treatment under the NYCHRL.[28] Discriminatory policies may be directed at individuals who are currently pregnant or those believed capable of or likely to become pregnant in the future. Unlawful policies include those that categorically exclude pregnant workers or workers who are capable of becoming pregnant from specific job categories or positions,[29] deny entrance to pregnant individuals to certain public accommodations or refuse to serve certain foods or drinks to pregnant individuals or individuals perceived to be pregnant. This is true even if covered entities attempt to justify certain categorical exclusions based on their concerns for the safety of the pregnant individual or their fetus.[30] Using safety as a pretext for discrimination or as a way to reinforce traditional gender norms or stereotypes is unlawful.[31]

Examples of Violations

- A hospital regularly drug tests pregnant people without their consent but does not test nonpregnant patients without their consent.
- An employer does not permit an individual to continue to accrue vacation and sick time while on leave to recover from childbirth, despite allowing other employees to continue to accrue vacation and sick time while on temporary disability leave.
- An employer refuses to hire pregnant individuals for specific positions or consider them for certain promotions because the positions involve working with hazardous chemicals.[32]
- A restaurant policy prohibits staff from serving pregnant people raw fish or coffee.
- A drug detoxification program has a blanket rule prohibiting any pregnant person from participating.
- An employer requires all pregnant employees to start taking unpaid leave at a certain month in their pregnancy.
- An employer's policy requires medical clearance from pregnant workers to perform certain job duties when medical clearance is not required for other employees.

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[26] *Goffe v. NYU Hosp. Ctr.*, 201 F. Supp. 3d 337, 351 (E.D.N.Y. 2016) ("the federal severe or pervasive standard of liability no longer applies to NYCHRL claims, and the severity or pervasiveness of conduct is relevant only to the scope of damages…"); *Williams*, 872 N.Y.S.2d at 38.

[27] *See Kim v. Goldberg,* No. 153013/12, 2013 WL 1783550 (N.Y. Sup. Ct. Apr. 12, 2013) (plaintiff who was in the process of expressing breast milk was told by coworker "women who breast fed were cows").

[28] 47 R.C.N.Y. § 2-09(b).

[29] *Id*. § 2-09(f)(5).

[30] *Id*. § 2-09(b).

[31] *Id*.

[32] *See generally*, *UAW v. Johnson Controls, Inc.,* 499 U.S. 187 (1991).

- A hospital policy allows medical providers to override the informed consent of a patient with capacity to provide consent for medical procedures only when the patient is pregnant.
- An employer has a policy of not hiring female job applicants of childbearing age out of fear that they may be or will become pregnant.[33]

B. Neutral Policies or Practices that Have a Disparate Impact on People Who Experience Pregnancy, Childbirth, or Related Medical Conditions

A covered entity's neutral policy or practice may have a disparate impact on people who experience, or are perceived to experience, pregnancy, childbirth, or related medical conditions, meaning it may in effect exclude or disproportionately impact individuals based on pregnancy or related conditions.[34] Facially neutral policies or practices can include, without limitation, light duty policies, hiring practices, and housing restrictions. An entity may be liable for disparate impact discrimination if it fails to plead and prove that: (1) the policy or practice or a group of policies or practices bears a significant relationship to a significant business objective of the covered entity; or (2) does not contribute to the disparate impact.[35] An entity may also be liable for disparate impact discrimination if there is substantial evidence that an alternative policy or practice with less disparate impact is available to the covered entity and the covered entity fails to prove that such alternative policy or practice would not serve the covered entity as well.[36]

For example, a policy that permits workers to be moved to light duty only for on-the-job injuries would likely have a disparate impact on pregnant workers and constitute a violation of the NYCHRL unless the covered entity can show that the alleged policy or practice bears "a significant relationship to a significant business objective of the covered entity or does not contribute to the disparate impact."[37] Similarly, an employer with a policy that limits all employees to three fifteen-minute breaks without any exceptions would likely have a disparate impact on workers with a pregnancy-related medical condition if it does not give employees who need to express breast milk enough time to do so.

C. Failure to Provide Reasonable Accommodations in Employment Based on Pregnancy, Childbirth, or Related Medical Conditions

The NYCHRL requires an employer to provide reasonable accommodations for an employee's pregnancy, childbirth, or related medical condition that will allow the employee to perform the essential requisites of the job,[38] so long as the employer knew or should have known of the employee's pregnancy, childbirth, or related medical condition.[39] While many pregnant employees or employees who have recently experienced childbirth or a related medical condition will be able to work without any need for modification, some may require modest and/or temporary reasonable accommodations to allow them to feel well and continue to work while maintaining a healthy pregnancy or recovery. Reasonable accommodation is defined as such accommodation that can be made that shall not cause undue hardship "in the conduct of the covered entity's business."[40]

While reasonable accommodations for individuals with disabilities under the NYCHRL have historically included medical conditions related to pregnancy or childbirth, the enactment of the Pregnant Workers Fairness Act obviated the need to request accommodations in employment through the disability

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33 47 R.C.N.Y. § 2-09(b)(1).
34 N.Y.C. Admin. Code § 8-107(17); 47 R.C.N.Y. § 2-09(c).
35 N.Y.C. Admin. Code § 8-107(17); 47 R.C.N.Y. § 2-09(c).
36 N.Y.C. Admin. Code § 8-107(17); 47 R.C.N.Y. § 2-09(c).
37 N.Y.C. Admin. Code § 8-107(17)(a)(2).
38 In raising this defense, an employer must also show that there are no comparable positions available for which the employee is qualified that would accommodate the employee, and that a lesser position or an unpaid leave of absence is either not acceptable to the employee or would pose an undue hardship. *See infra* p. 11 for a discussion on when an employer may offer an alternative position or unpaid leave as a reasonable accommodation.
39 This provision applies only in the context of employment. *See* N.Y.C. Admin. Code § 8-107(22); 47 R.C.N.Y. § 2-09(e).
40 *See* N.Y.C. Admin. Code § 8-102.

framework, meaning that pregnant people need not show they have a disability to qualify for a reasonable accommodation in employment. However, when the pregnancy, childbirth, or related medical condition qualifies as a disability under the NYCHRL, an employee may also be entitled to reasonable accommodations based on disability.

The NYCHRL is more protective than the federal Pregnancy Discrimination Act of 1978 and requires employers to make reasonable accommodations for pregnancy, childbirth, or related medical conditions regardless of whether and to what degree other employees are accommodated.[41] Minor or temporary modifications to work schedules, requests for temporary job or shift reassignments, additional breaks or requests to sit during shifts, and temporary unpaid leave, regardless of whether they are offered to other employees, must be granted absent evidence that such accommodations will pose an undue hardship for the employer.[42] The employer has the burden to show such accommodation poses an undue hardship.[43]

Under the NYCHRL, employers must provide reasonable accommodations for pumping or expressing milk in the workplace and are required—at a minimum—to provide certain lactation accommodations, including a lactation room, as defined in the law, that must be near running water and a refrigerator, and must satisfy other requirements listed under Sections 8-102 and 8-107(22)(c) of the NYCHRL. This is further discussed in subsection 4 below.

To establish discrimination on the basis of an employer's failure to provide a reasonable accommodation, the aggrieved individual must show: (1) they are pregnant, have recently experienced childbirth, or have a medical condition related to pregnancy or childbirth; (2) they requested a reasonable accommodation due to pregnancy, childbirth, or a related medical condition, or the employer knew or should have known that they were in need of an accommodation due to pregnancy, childbirth, or a related medical condition; and (3) the employer failed to provide a reasonable accommodation. For a requested accommodation that is not specifically required under the NYCHRL, the employer must engage in a cooperative dialogue with the person making the request by having a good faith dialogue, either orally or in writing, about their accommodation needs and must provide the person with a final written determination.[44]

1. Process for Requesting or Offering Reasonable Accommodations

a. Initiating a Cooperative Dialogue

When an employer learns, either directly or indirectly, that an employee requires an accommodation due to pregnancy, childbirth, or a related medical condition, an employer must engage in a cooperative dialogue with the employee.[45] Where an employee has not requested an accommodation, the employer

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[41] *See id.* § 8-107(22). The premise of the Pregnancy Discrimination Act of 1978 ("PDA") is one of equal treatment: employers must treat pregnancy like any other temporary medical condition. Specifically, the PDA sets forth that employers must treat "women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k).

[42] N.Y.C. Admin. Code § 8-107(22)(b); 47 R.C.N.Y. § 2-09(e)(1). *See* discussion of accommodations *infra* pp. 10–12. *See* discussion on essential requisites of the job *infra* p. 17.

[43] In assessing whether an undue hardship exists, factors to be considered include:

> (a) The nature and cost of the accommodation; (b) The overall financial resources of the facility or the facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (c) The overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and (d) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

N.Y.C. Admin. Code § 8-102.

[44] *Id*. § 8-107(28); 47 R.C.N.Y. § 2-09(f).

[45] N.Y.C. Admin. Code § 8-107(28)(a)(3).

has an affirmative obligation to initiate a cooperative dialogue when the employer: (1) has knowledge that an employee's performance at work has been affected or that their behavior at work could lead to an adverse employment action; and (2) has a reasonable basis to believe that the issue is related to pregnancy, childbirth, or a related medical condition.[46] The employer should be cautious in initiating the cooperative dialogue in a way to open the conversation and invite the employee to feel comfortable in making a request, such as asking if there is anything going on with the employee, or reminding the employee of the various types of support available, including accommodations. An employer's obligation to engage in the cooperative dialogue when they "should know" about an employee's pregnancy, childbirth, or related medical condition is not a permissible basis for an employer to act on speculation based on stereotypes or assumptions about pregnancy.[47] The obligation to initiate a cooperative dialogue can be met simply by reminding the employee of the employer's accommodations policy.[48] If an employer approaches an employee to initiate a cooperative dialogue and the employee does not reveal that they are pregnant in that conversation, the employee does not waive their opportunity to reveal their pregnancy and initiate a cooperative dialogue with their employer at a later time.[49]

In order to avoid situations in which employers are not sure whether employees are aware of their right to request reasonable accommodations and engage in a cooperative dialogue, the NYCHRL requires employers to provide a notice of rights to all new employees detailing their rights to be free from discrimination based on pregnancy, childbirth, or related medical conditions. Such notice may also be conspicuously posted at an employer's place of business in an area accessible to employees.[50]

b. Engaging in a Cooperative Dialogue

The purpose of a cooperative dialogue is to ensure that employers understand the individual needs of their employees and have the opportunity to explore the various ways in which they can meet those needs. Without this type of dialogue, employees and employers may not realize the full universe of available accommodations. The employer need not provide the specific accommodation sought by the employee so long as they propose reasonable alternatives that meet the specific needs of the employee or that specifically address the limitation at issue.

A cooperative dialogue involves an employer communicating in good faith with the employee in an open and expeditious manner, particularly given the time-sensitive nature of these requests.[51] The employer should focus on understanding the employee's specific need and how the request can be accommodated, without making assumptions about what requests are reasonable or unreasonable. The dialogue may be in person, by phone, or via electronic means. If an employer has a "no-fault" or absence-control attendance policy, an employer may not assess points or violations or take disciplinary action pursuant to the policy prior to engaging in a written or oral dialogue related to a person's accommodation needs.

In evaluating whether or not an employer has engaged in a cooperative dialogue in good faith with an employee, the Commission will consider various factors, including: (1) whether the employer has a written policy for employees about how to request accommodations based on pregnancy, childbirth, or related medical conditions; (2) whether the employer responded to the request in a timely manner in light of the urgency of the request; (3) whether the employer attempted to explore the existence and feasibility of alternative accommodations or alternative positions; and (4) whether the employer tried to block or delay the cooperative dialogue or in any way intimidate or deter the employee from requesting the accommodation.[52]

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46 47 R.C.N.Y. § 2-09(f).
47 *Id.* § 2-09(f)(1).
48 *Id.*
49 *Id*. § 2-09(f).
50 N.Y.C. Admin. Code § 8-107(22)(b); *see infra* pp. 17–18 for discussion on notices.
51 *See* 47 R.C.N.Y. § 2-09(f)(2); N.Y.C. Admin. Code § 8-102 (definition of *cooperative dialogue*).
52 47 R.C.N.Y. § 2-09(f)(2).

c. Concluding a Cooperative Dialogue

A cooperative dialogue is ongoing until one of the following occurs: (1) a reasonable accommodation is reached; or (2) the employer reasonably arrives at the conclusion that (i) there is no accommodation available that will not cause an undue hardship to the employer, or (ii) that no accommodation exists that will allow the employee to perform the essential requisites of the job.[53] Once a conclusion is reached, either to offer an accommodation or that no accommodation can be made, an employer should promptly notify the employee of the determination in writing.[54]

If the employee rejects an accommodation offered by the employer, the employer should continue to engage with the employee to identify alternatives. However, if the employee rejects accommodations offered that would not cause an undue hardship to the employer and would meet the employee's needs and/or would allow the employee to perform the essential requisites of the job and is unable or unwilling to propose any alternative options that would address their needs, the employer may conclude the cooperative dialogue. If there are two possible reasonable accommodations and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation. If more than one accommodation is effective, the preference of the employee should be given primary consideration, but the employer has the ultimate discretion to choose between effective accommodations.[55]

Where an accommodation proposed by an employee is immediately agreed to by an employer, the cooperative dialogue will have been successfully completed. Under such circumstances, the cooperative dialogue will consist solely of the employee making the request and the employer granting the accommodation. As an employee's condition changes over time, an employee may make new requests for accommodations. Each time an employee makes a new request, the employer must engage in a cooperative dialogue with the employee.

Beyond the legal requirement to provide a written final determination,[56] employers should document all efforts to initiate, engage in, and conclude the cooperative dialogue with an employee. Employers should keep a log for each employee in which they document the following information:

- when and under what circumstances the cooperative dialogue was initiated;
- what information, if any, was provided by the employee to the employer throughout the cooperative dialogue;
- the employee's stated or observed limitation;
- the types of accommodations that were requested by the employee or suggested by the employer during the cooperative dialogue;
- the dates of each subsequent conversation relating to the accommodation between the employer and the employee;
- whether or not an accommodation was ultimately identified and, if not, justification, for denying an accommodation;
- a copy of the notice provided to the employee that the cooperative dialogue had ended.

Employers may be required to share this information with the Commission in the course of an investigation. Prompt responses to Commission requests for information or documents may help avoid a Commission-initiated investigation into employment practices. Employers should make all efforts to keep communications regarding requests for reasonable accommodations and all circumstances surrounding an employee's pregnancy, childbirth, or related medical condition confidential.

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53 *Id*. § 2-09(f)(3).
54 N.Y.C. Admin. Code § 8-107(28)(d); 47 R.C.N.Y. § 2-09(f)(3).
55 *NYC Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Disability*, N.Y.C. COMM'N ON HUMAN RIGHTS, 67 (Apr. 2019) (in-depth discussion of cooperative dialogue process), https://www1.nyc.gov/assets/cchr/downloads/pdf/NYCCHR_LegalGuide-DisabilityFinal.2.pdf.
56 N.Y.C. Admin. Code § 8-107(28)(d).

d. Failure to Engage in a Cooperative Dialogue

An employer's failure to engage in a cooperative dialogue with an employee prior to denying a request for an accommodation is a violation of the NYCHRL.[57] Without engaging in a cooperative dialogue, an employer will not be able to completely assess the individual needs of the employee. An employer who fails to provide a reasonable accommodation to an employee for their pregnancy, childbirth, or related medical condition without engaging in a cooperative dialogue will not be able to demonstrate that they explored all available options that could have met the employee's needs and that no reasonable accommodation was available.

2. Requesting Medical Documentation

It is generally unnecessary and prohibited for employers to require an employee to provide medical confirmation of pregnancy, childbirth, or related medical conditions as part of the accommodation process.[58] In limited circumstances, an employer may request medical documentation to confirm that a person requires one of the following accommodations based on pregnancy, childbirth, or a related medical condition: (1) the employee is requesting time away from work, including for medical appointments[59] (other than the presumptive eight-week period[60] following childbirth for recovery from childbirth) *and* the employer typically requests verification from other employees requesting leave-related accommodations for reasons other than pregnancy, childbirth, or a related medical condition; or (2) an employee is requesting to work from home, either on an intermittent basis or a longer-term basis.[61] It is unnecessary and a violation of the law for an employer to request medical documentation for minor accommodations, including: minor or temporary modifications to work schedules; adjustments to uniform requirements or dress codes; additional or longer food, drink, bathroom, or rest breaks; being permitted to sit or eat at locations where eating or drinking is not typically allowed; moving a workstation to permit movement or stretching of extremities, or to be closer to a bathroom; limits on lifting; minor physical modifications to a workstation, including the addition of a fan or seat; periodic rest; assistance with manual labor; light duty or desk duty assignments; and temporary transfers to less strenuous or hazardous work, among others.[62]

During the time period in which an employee is making good faith efforts to obtain documentation for those limited circumstances when the employer may require it, the employer shall provide reasonable accommodation(s), absent undue hardship.[63] An employer also must not take adverse action against an employee related to their need for accommodation while the employee is engaging in good faith efforts to obtain documentation.[64]

If an employer believes that the provided documentation is insufficient, the employer must request additional documentation, or, upon the consent of the employee, speak with the health care provider who provided the documentation before denying the request based on insufficient documentation. An employer must always allow an employee to submit sufficient written verification should an employee not want their employer speaking with their medical provider.

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57 *Id*. § 8-107(28)(a).
58 *See* N.Y. EXEC. L. § 296(3)(c) (requiring employees to provide medical or other information that is "necessary" to the accommodation request); *see also* 9 NYCRR § 466.11(j)(5). 47 R.C.N.Y. § 2-09(g).
59 47 R.C.N.Y. § 2-09(g)(2).
60 New York State Insurance Fund allows up to eight weeks as presumptive recovery period for uncomplicated childbirth. *See* New York State Insurance Fund, "About Your Disability Benefits Claim," https://ww3.nysif.com/Home/Claimant/DBClaimant/AboutYourClaim (last visited May 12, 2021); "The New Mother: Taking Care of Yourself After Birth," STANFORD CHILDREN'S HEALTH, https://www.stanfordchildrens.org/en/topic/default?id=the-new-mother---taking-care-of-yourself-after-birth-90-P02693 (last visited June 26, 2021).
61 47 R.C.N.Y. § 2-09(g)(2).
62 *Id*. § 2-09(g)(1). *See* N.Y. EXEC. L. § 296(3)(c).
63 47 R.C.N.Y. § 2-09(g)(1).
64 *Id*.

3. Common Types of Accommodations Based on Pregnancy, Childbirth, or Related Medical Conditions

Many pregnant employees or employees who have recently experienced childbirth or a related medical condition require only modest and/or temporary accommodations to allow them to continue working while maintaining a healthy pregnancy or recovery. Such accommodations will rarely pose an undue hardship on an employer and may include, without limitation:

- adjustments to uniform requirements or dress codes;
- additional or longer food, drink, bathroom, or rest breaks;
- allowing an individual to sit or eat at their workstation or other locations where eating or drinking is not typically allowed;
- moving a workstation to permit movement or stretching of extremities, or to be closer to a bathroom;
- minor physical modifications to a workstation, including the addition of a fan or seat; and
- periodic rest.[65]

Schedule modifications, job restructuring, and temporary reassignment to a vacant position may also qualify as a reasonable accommodation which will allow an employee to continue working despite a limitation based on pregnancy, childbirth, or a related medical condition.[66] Examples of such accommodations include, without limitation:

- adjustment of start or end time;
- reduced or modified work schedule;
- assistance with manual labor or limits on lifting;
- desk duty or light duty; and
- temporary transfer to an alternative position.[67]

In considering such accommodations, an employer's first obligation is to accommodate an employee so that they may remain in their current position.[68] When that is not possible, an employer may then consider whether the employee could be temporarily reassigned to a vacant position.[69] In considering alternative positions, an employer may consider the qualifications necessary for the position and whether the pay, status, and benefits are equivalent to the employee's current position.[70] When a comparable position is unavailable, an employer may then explore alternative positions that are not comparable.[71] As a last resort, when no other accommodation can be made, an unpaid leave of absence may be offered as a temporary accommodation.[72]

a. Leave Related to Childbirth

Leave requests to recover from childbirth must be granted absent an undue hardship. Should the leave request present an undue hardship, the employer must consider whether another accommodation, such as a shortened leave time, a reduced or modified work schedule, or working from home, would alleviate the hardship. As noted above, an employer may only request medical documentation for post-partum leave requests beyond eight weeks for childbirth.[73]

Once an accommodation of leave has been granted, employers must reinstate workers returning from leave related to childbirth to their original job or to an equivalent position with equivalent pay and comparable seniority, retirement benefits, and other fringe benefits.

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65 47 R.C.N.Y. § 2-09(e)(1).
66 *Id*.
67 *Id*.
68 *Id*. § 2-09(e)(2).
69 *Id*.
70 *Id*.
71 *Id*.
72 *Id*.
73 *Id*. § 2-09(g)(2).

b. Accommodations Related to Abortions and Miscarriages

Miscarriages and abortions are directly related to pregnancy and childbirth and can impact an individual's health and wellbeing. Individuals who have experienced a miscarriage or terminated a pregnancy are entitled to reasonable accommodations from their employers. An individual who has miscarried or terminated a pregnancy may, for example, require a period of unpaid leave or paid sick leave, if available, to recover, or a more flexible schedule for a period of time to account for additional appointments related to the procedure or experience. If the request involves time away from work, an employer may request documentation from a medical or other service provider.[74]

c. Accommodations Related to Fertility Treatments

Fertility treatment directly relates to the state of seeking to become pregnant and therefore employers must provide reasonable accommodations for such treatment. Individuals undergoing fertility treatment may need modified or flexible work schedules or leave to allow them to attend appointments. If the request involves time away from work to attend appointments, employers may require medical documents of appointments related to fertility.[75] Employers must accommodate these requests absent an undue hardship.

4. Lactation Accommodations

Under the NYCHRL, employers must provide a reasonable accommodation for any employee needing to express breast milk.[76] The law requires employers to provide, in close proximity to the employee's work area: a lactation room; a refrigerator suitable for breast milk; and access to running water.[77] In addition, the law specifies that, absent an undue hardship, the lactation room must be a clean, sanitary, and private space, other than a bathroom, that is shielded from view and free from public intrusion from coworkers and includes at minimum an electrical outlet, a chair, a surface on which to place a breast pump and other personal items, and nearby access to running water.[78]

An employer should always ensure that the employee is aware of their rights to pump while working, including their right to request an accommodation, to pump for a reasonable amount of time, and to use established break times to pump.

a. Lactation Room

If there is a room that is exclusively used for lactation, the employer must ensure that the room is shielded from view[79] and should ensure that the door of the room has a lock and that employees who need access are provided the key or code needed for entry.[80] If the door cannot have a lock, a "Do Not Disturb" sign or other appropriate signage should be placed on the door or entrance of the space.[81]

If there is no dedicated lactation room, the employer must make a multi-purpose space available for lactation unless doing so poses an undue hardship.[82] The multi-purpose room must be used only as a lactation room while an employee is using the room to express breast milk.[83] The employer must communicate to other employees through appropriate signage or other means of communication that

74 *Id*.
75 *Id*.
76 N.Y.C. Admin. Code § 8-107(22)(b); 47 R.C.N.Y. § 2-09(h).
77 N.Y.C. Admin. Code §§ 8-102, 8-107(22)(b).
78 *Id*. § 8-102.
79 *Id*.
80 47 R.C.N.Y. § 2-09(h)(1)(i).
81 *Id*.
82 *Id*. § 2-09(h)(1)(ii).
83 N.Y.C. Admin. Code § 8-107(22)(b)(ii); 47 R.C.N.Y. § 2-09(h)(1)(ii).

when the room is being used as a lactation room it may not be used for other purposes at that time.[84] The employer should also ensure that individuals expressing breast milk in the multi-purpose space can do so without intrusion and that the space has an electrical outlet, a chair, a surface, and nearby access to running water.[85]

If there is no dedicated lactation room and no multi-purpose room available because it poses an undue hardship, the employer must engage in a cooperative dialogue with the employee and discuss options to ensure employees are able to express breast milk at work.[86]

Though not required under the law, employers may consider providing additional amenities to improve the dedicated space for lactation. Such amenities may include dish soap and paper towels for cleaning and drying pump parts and bottles, storage space for pump kits, hooks for hanging clothes, cleaning supplies for pumps and sink areas, additional refrigerators if it is a large building with many employees, a dedicated refrigerator for breast milk, and a microwave for sterilizing pump parts. The better and more comfortable the space, the more efficiently the employee may pump, and the more promptly the employee can return to work.

b. Lactation Time

Employers must provide a reasonable amount of break time for an employee to express breast milk.[87] An employer may not limit the amount of time that an employee uses to express milk unless the employer can demonstrate that the time needed presents an undue hardship to the employer.[88] Where an employer already provides compensated breaks, an employee who uses that break time to express milk must be compensated in the same way that other employees are compensated for break time.[89] There is no limit to the number of breaks an employee can take to pump.[90] An employee who wishes to express milk at their usual workstation must be permitted to do this so long as it does not create an undue hardship for the employer, regardless of whether a coworker, client, or customer expresses discomfort.[91] While an employee cannot be forced to work while pumping, if an employee is not fully relieved of their work duties while pumping, they must be compensated for the time they are working while pumping.

c. Other Lactation Accommodations

If an employer is unable to provide one or more of the required components of a lactation room because of an undue hardship, the employer must engage in a cooperative dialogue with the employee to determine alternative accommodations that meet the employee's needs for each component that the employer cannot provide.[92] This includes when there is no dedicated lactation room or no multi-purpose room available, when a temporary partition cannot be provided to create a lactation space, and providing such a room or space would pose an undue hardship, or if other requirements tied to providing a lactation room cannot be met.[93]

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84 N.Y.C. Admin. Code § 8-107(22)(b)(ii); 47 R.C.N.Y. § 2-09(h)(1)(ii).
85 N.Y.C. Admin. Code § 8-102; 47 R.C.N.Y. § 2-09(h)(1)(ii).
86 47 R.C.N.Y. § 2-09(h)(1)(iii).
87 N.Y.C. Admin. Code §§ 8-107(22)(b)–(c); 47 R.C.N.Y. § 2-09(h)(2). New York State Law does not have an undue hardship exception for lactation accommodations. *See* N.Y. LAB. L. § 206-c. Under the Fair Labor Standards Act (FLSA), only employers with fewer than fifty employees have an undue hardship exception. 29 U.S.C. § 207(r)(3).
88 *See* N.Y.C. Admin. Code §§ 8-107(22)(b)–(c); 47 R.C.N.Y. § 2-09(h)(2); N.Y. LAB. L. § 206-c.
89 FLSA and New York State Labor Law also require employers to provide certain accommodations for employees to express breast milk. *See* U.S. Dep't of Labor, Wage and Hour Div., *Fact Sheet #73: Break Time for Nursing Mothers under the FLSA*, https://www.dol.gov/whd/regs/compliance/whdfs73.pdf (last visited June 26, 2021); N.Y. LAB. L. § 206-c.
90 47 R.C.N.Y. § 2-09(h)(2).
91 *Id*. § 2-09(h)(3)(iv).
92 N.Y.C. Admin. Code § 8-107(22)(c)(i)(5); 47 R.C.N.Y. §§ 2-09(f)(4), 2-09(h)(3)(i).
93 47 R.C.N.Y. § 2-09(h)(3)(i).

Employers may also need to provide additional or different lactation accommodations in order to meet additional or different needs of an employee beyond the accommodations statutorily required in Sections 8-107(22)(b) and 8-107(22)(c) of the NYCHRL.[94]

If the nature of the employee's job is mobile such that they do not have daily access to the employer's lactation room, the employer must ensure that the employee is aware of their right to express breast milk at work.[95] The employer must also engage in a cooperative dialogue with the employee to determine how to accommodate the employee's need to express milk, such as ensuring the employee has adequate equipment, space, and time for pumping while mobile.[96] For example, if providing a refrigerator poses an undue hardship for the employer, the employer must discuss reasonable alternative options for the employee to store their breast milk, which may include providing a cooling device or a container and ice packs. In addition, employers with employees who travel often must be able to provide basic lactation accommodations by thinking creatively and planning ahead. Below are a few examples of alternative lactation accommodations.

- An employer's office space does not have infrastructure to provide a lactation room nearby running water. An employer may offer sanitizing wipes and towels in the lactation room and indicate to its employees where the closest source of running water is, such as an office kitchen or bathroom.
- An employer cannot provide a lactation room with an electrical outlet. Instead, an employer may offer to provide an extension cord or other alternative power source for the designated lactation room.
- Due to the mobile nature of the employee's work, an employer cannot provide a lactation room for its employee. Instead, the employer gives the employee portable privacy screens, agrees to allow the employee to pump in the employer-provided vehicle between site visits, and provides sanitizing wipes and a cooler to store breast milk.
- An employee has been using their employer's lactation room for their pumping needs since recently returning from pregnancy leave. However, the employee has noticed that their work on some projects is disrupted by the time it takes to go to and come back from the lactation room. The employee requests a privacy screen from the employer so that they can pump from their desk. There is no undue hardship on the employer, and the employer provides the privacy screen for the employee to use while pumping.[97]

5. Examples of Pregnancy-Related Accommodations

- A pregnant employee requests to be put on light duty during her pregnancy because she is worried that lifting packages over twenty pounds may compromise her pregnancy. In making this request, the employee is initiating the cooperative dialogue. She informs her employer that she is pregnant and does not wish to lift packages over twenty pounds, which is a task she is frequently required to do. The employer concludes the cooperative dialogue by offering the accommodation of putting the employee on light duty for the remainder of the employee's pregnancy, which the employee accepts. The employer provides the employee with written notice that the accommodation has been granted.
- An employee's work uniform interferes with their ability to express breast milk during pumping breaks. As a reasonable accommodation, their employer provides a modified uniform and gives written notice that the accommodation has been granted.
- An employer notices that an employee has been leaving work early and not finishing tasks as quickly as usual. The employer heard a rumor that the employee is pregnant. The employer approaches the employee and initiates a cooperative dialogue. The employer says, "I have noticed you are struggling to finish your tasks as quickly as usual, is there something I can do to help?" The employee says no. The problem persists, and the employer again approaches the employee and offers assistance, but also notifies the employee that the tasks need to be completed more quickly

94 *Id*. § 2-09(h)(3)(ii).
95 *Id*. § 2-09(h)(3)(v).
96 *Id*.
97 *Id*. § 2-09(h)(3)(vi).

and something needs to change. The employer tells the employee that they will check in again in a week or so and reiterates that they will work to accommodate or otherwise support the employee if there is anything going on, reminding her of the company's policy of providing reasonable accommodations related to pregnancy and disability. The employer never mentions pregnancy specifically because they do not know with any certainty that the employee is pregnant. During the next follow-up conversation, the employer tells the employee that the employee will be written up if the behavior does not improve and again asks if the employee needs assistance and offers to set up a meeting to discuss the issue. The employee declines, and after another week, the employer issues a disciplinary notice. The employer attempted to engage the employee in a cooperative dialogue because they believed the employee may have needed accommodations based on pregnancy. Despite repeated attempts to engage the employee in a cooperative dialogue, the employee was not responsive. Under these circumstances, the employer was justified in taking disciplinary action.

- All employees must participate in a mandatory meeting every Thursday morning. An employer notices that one employee has been consistently missing the weekly meetings or joining late. The employer approaches the employee, admonishes them, and says if this happens again, they will be written up. The employee is eight weeks pregnant and has been missing the meetings because they have not been feeling well; however, due to the early stages of their pregnancy, they do not share this information with their boss. Two weeks later, after continued lateness, the employee is disciplined. The employee would have been entitled to a reasonable accommodation if they had requested one or if their employer had been on notice of their pregnancy. However, because the employer had no reason to know that the employee was pregnant, the employer was under no obligation to initiate a cooperative dialogue.
- An employee who does data entry at a small company initiates a cooperative dialogue with her employer by asking the employer if she can take unpaid leave every Friday morning to attend medical appointments related to her pregnancy. The employee is the only person who does the data entry at the office. Although the employee's absence would not create an undue hardship for the employer as the immediate impact on the business would be minimal, the employer is concerned about the long-term cumulative effect of getting behind on the data entry. The employer suggests as an alternative that the employee make up the hours that she needs for the appointment on another day, so that she can attend her appointments but still get the work done. The employee accepts the alternative change in schedule. The employer, through a cooperative dialogue, was able to offer an alternative accommodation that met the employee's need for time off to attend appointments. The employer provides written notice to the employee that the cooperative dialogue has concluded and the proposed accommodation accepted.
- An employer notices that an individual who is employed as a bus driver has been uncharacteristically behind schedule for the last few weeks. The employer is concerned and approaches the employee to ask what is going on. The employee confides in the employer that she is pregnant and, due to extreme nausea, the employee has to frequently pull over and exit the bus. The employer initiates a cooperative dialogue with the employee by offering to sit down with her and think about whether there are ways to accommodate her during this time. During a cooperative dialogue, the employer and the employee are unable to find an accommodation that would enable the employee to keep driving the bus and also manage her nausea. The employer considers whether there are any comparable alternative jobs available that would accommodate the employee's needs. However, the only non-driving positions are at the dispatch center and they are currently filled. As a last resort, the employer offers the employee unpaid leave until the nausea subsides. The employee accepts and the employer provides notice of the agreed-upon accommodation. The employer offers to notify the employee if and when an alternative position becomes available. After a month, a position opens up at the dispatch center, and the employer notifies the employee that she could be moved temporarily to this position. The employee is no longer feeling nauseous, declines the accommodation, and requests to return to her prior position without an accommodation. The employee is reinstated to her prior position. The employer met its obligation to engage in a cooperative dialogue by considering alternative positions, offering interim unpaid leave, and reaching out to the employee when a vacant position became available.

- An employee notifies an employer that she is five months pregnant and would like to work from home for the remainder of her pregnancy due to her lengthy commute and lower back pain, which is exacerbated by sitting in her car for long periods of time. No employee in her position has ever worked from home before. The employer requests that the employee obtain documentation from a medical provider confirming the need for the accommodation. The following week, the employee produces a note from her doctor saying that she cannot commute for the remainder of her pregnancy due to extreme lower back pain associated with her pregnancy. The employer sits down with the employee and has a conversation about the various tasks and functions the employee performs on a daily basis and determines what the employee will need to be able to access from home in order to do the work. The employer offers the employee the option of working from home for two weeks to determine if the employee will be able to adequately do the job from home. The employer confirms the accommodation in writing. After two weeks, the employer determines that the arrangement is workable because the employee is able to attend meetings remotely and generate the same work product she did in the office. After six weeks, the employee notifies the employer that her lower back pain has subsided and she no longer needs the accommodation. The employer requests a doctor's note confirming that the employee may return to work. Because this is disability-related, the employer can rightfully request a medical note from the employee. Upon receiving the required medical confirmation, the employee returns to the office the following week.
- An employee has exhibited poor performance for a period of nine months. During that time, the employer has issued two warnings that failure to improve her performance may result in termination. The employee now tells the employer that she is three months pregnant. The employer provides the employee with the employer's policy on requesting accommodations based on pregnancy and states, "Please let me know if there is anything we can do to help you improve your performance." The employee does not request an accommodation and her performance does not improve. The employer has no reason to believe that the pattern of poor performance relates to the pregnancy, particularly given that the poor performance predated the pregnancy. After providing the employee with a final warning, the employer terminates the employee for poor performance. The employer attempted to initiate a cooperative dialogue with the employee after learning of the employee's pregnancy, but the employee never requested an accommodation. Given the circumstances, and that the employee's poor performance predates the pregnancy, the employer's termination of the employee was not unlawful.
- An employee notifies an employer that she needs a lactation accommodation. The employee's job is mobile in nature, and she is unable to use the employer's designated lactation room in the company's headquarters while she is out in the field during the day as part of her essential job duties. The employer and employee engage in a cooperative dialogue and discuss providing portable privacy screens, and the employer agrees to allow the employee to pump in the employer-provided vehicle between site visits and provides sanitizing wipes and a cooler to store breast milk. The employee accepts these accommodations.
- An employee is returning to work in two weeks after leave for recovery from childbirth. The employee intends to express milk throughout the day, but is concerned about taking unpaid break time, considering the time it takes to get to the lactation room in addition to the time to express milk. The employee reaches out to her employer to see if there is space for a lactation room closer to her workstation. The employer is unable to identify a closer location for a lactation room. The employer, however, offers to construct a partition between the employee's workstation and the rest of the office to offer her privacy at her own desk if she would like to express milk there, which would enable the employee to express milk without taking a break. The employee accepts the offered accommodation and the employer provides notice to the employee that they have concluded the cooperative dialogue and reached an acceptable accommodation. By engaging in the cooperative dialogue, the employer was able to consider an accommodation that the employee had not realized was available.

6. Employer Defenses to a Claim of Failure to Provide a Pregnancy-Related Accommodation

a. Undue Hardship

In determining what constitutes an undue hardship, the NYCHRL specifies the following factors to be considered: (1) the nature and cost of the accommodation; (2) the overall financial resources of the facility or the facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (3) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and (4) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.[98]

b. Essential Requisites of the Job

An employer may raise the affirmative defense that, even with a reasonable accommodation, the employee would not be able to satisfy the essential requisites of their job.[99] This means that even when the accommodation does not create an undue hardship for the employer, if it would not enable the employee to eventually perform the basic duties and responsibilities required of the position, the employer may deny the accommodation. A temporary modification of duties, reassignment to another position, or period of leave that the employer is able to provide as a reasonable accommodation for pregnancy, childbirth, or a related medical condition does not constitute evidence that the employee cannot return to performing the essential requisites of their job when their need for a reasonable accommodation has ended.[100]

In raising the defense of inability to perform the essential requisites of the job, an employer must also show that there are no comparable positions available for which the employee is qualified that would accommodate the employee and that a lesser position or an unpaid leave of absence is either not acceptable to the employee or would pose an undue hardship.[101]

D. Failure to Post or Provide Notice Regarding Pregnancy-Related Protections

The NYCHRL requires that employers provide all employees with written notice of their right to be free from discrimination in relation to pregnancy, childbirth, and related medical conditions.[102] The employer may comply with this requirement by: (1) conspicuously posting the notice in its place of business in an area accessible to employees, which may include on a company intranet; or (2) providing the notice to new employees at the start of employment and to all other employees who have not otherwise received notice.[103] Failure to comply with the notice requirement violates the NYCHRL. Employers may use Commission's Pregnancy and Employment Rights poster, available on the Commission's website, to provide notice to their employees. The notice should be available to employees at all times during their employment.[104]

Employers should develop a written policy to provide information to employees on the cooperative dialogue process as it relates to accommodations for pregnancy, childbirth, or related medical conditions.

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98 N.Y.C. Admin. Code § 8-102.
99 *Id.* § 8-107(22)(a).
100 47 R.C.N.Y. § 2-09(e)(2).
101 *See supra* p. 11 for a discussion on when an employer may offer an alternative position or unpaid leave as a reasonable accommodation.
102 N.Y.C. Admin. Code § 8-107(22)(d).
103 *Id.*; 47 R.C.N.Y. § 2-09(d).
104 47 R.C.N.Y. § 2-09(d).

The policy should include information about how employees may request accommodations and what a cooperative dialogue looks like. Such policies should be distributed to all employees. In addition, any time an employee notifies an employer about their pregnancy, the employer should provide that employee with a copy of the policy and remind them of the availability of accommodations.

E. Failure to Have and Provide Policy Regarding Lactation Accommodations

The NYCHRL also requires that employers provide all new employees with a written policy stating that employees have a right to request a lactation accommodation and explain the process for making such a request.[105] The law requires that the employer's policy and process: (A) specify how an employee may submit a request for a lactation room; (B) require that the employer respond to a request for a lactation room as quickly as possible, but, under no circumstances, no later than five business days; (C) provide a procedure to follow when two or more employees need to use the lactation room at the same time; (D) explain that the employer shall provide reasonable break time for an employee to express breast milk pursuant to section 206-c of the labor law; and (E) state that if providing any aspects of the lactation room required by law would create an undue hardship for the employer, the employer shall engage in a cooperative dialogue with the employee.[106]

Employers must distribute the policy to all employees when they start their employment.[107] Employers should also give the policy to employees when they return from parental leave. Employers may comply with this requirement by customizing one of the model policies available on the Commission's website.[108]

IV Discrimination Based on Sexual or Reproductive Health Decisions

A. Disparate Treatment

It is a violation of the NYCHRL for an employer to treat a person less well because of their actual or perceived sexual or reproductive health decisions.[109] Subjecting an employee to adverse treatment because of their decision to receive, or not receive, services related to sexual or reproductive health, including when based on assumptions or stereotypes related to ability, behavior, or what is or is not healthy for an individual, violates the NYCHRL.[110]

Examples of Violations

- An employer repeatedly chastises an employee for pursuing in vitro fertilization treatment, which the employer says is not "natural."
- An employer repeatedly denigrates an employee who is undergoing treatment related to his infertility, joking about how the employee cannot get his wife pregnant.
- A supervisor avoids meetings with one of the employees on their team after learning the employee sought preventative treatment for the human immunodeficiency virus (HIV).
- An employer fires an employee after learning that the employee had an abortion.
- Multiple employees openly treat their coworker with disgust after learning that the coworker is receiving treatment for a sexually transmitted infection. The employer is aware of this conduct but does nothing to address it.
- An employee advises a supervisor that their partner is pregnant with their fourth child. The supervisor begins to routinely tell the employee they should have had a vasectomy and emails them links to doctors who specialize in the surgery.

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105 N.Y.C. Admin. Code § 8-107(22)(c); 47 R.C.N.Y. § 2-09(h)(4)(i).
106 N.Y.C. Admin. Code § 8-107(22)(c)(i); 47 R.C.N.Y. § 2-09(h)(4)(i).
107 N.Y.C. Admin. Code § 8-107(22)(c)(i); 47 R.C.N.Y. § 2-09(h)(4)(ii).
108 N.Y.C. Comm'n on Human Rights, *Lactation Accommodations*, https://www1.nyc.gov/site/cchr/law/lactation.page (last visited May 12, 2021).
109 N.Y.C. Admin. Code § 8-107(1); 47 R.C.N.Y. § 2-10(a)
110 47 R.C.N.Y. § 2-10(a).

B. Discriminatory Policies or Practices Related to Sexual or Reproductive Health Decisions

Employers may not have policies or practices that treat employees less well because of their actual or perceived sexual or reproductive health decisions.[111]

Examples of Violations

- A doctor's office requires all staff to undergo testing for HIV. An employee refuses to get tested and is fired for their decision.
- An employer requires new hires to sign a pledge that they have not used and will not use birth control.

V Retaliation

A covered entity may not retaliate against an individual because they: (1) oppose a discriminatory practice prohibited by the NYCHRL; (2) make a charge or file a complaint with the Commission, the employer, or any other agency; (3) testify, assist, or participate in an investigation, proceeding, or hearing related to an unlawful practice under the NYCHRL; or (4) request an accommodation in employment.[112] In order to establish a *prima facie* claim for retaliation, an individual must show: (1) that the individual engaged in protected activity; (2) the employer was aware of the activity; (3) that the individual suffered an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action.[113] The purpose of the retaliation provision is to enable individuals to speak out against discrimination and to freely exercise their rights under the NYCHRL. Freedom from retaliation helps ensure that individuals needing accommodations will request them, and promotes a culture where people are less afraid to exercise their rights. When an individual opposes what they believe in good faith to be unlawful discrimination, it is illegal to retaliate against the individual, even if the underlying conduct they opposed is not ultimately determined to violate the NYCHRL.

In the context of employment, the act of requesting a reasonable accommodation based on pregnancy, childbirth, or a related medical condition, or engaging in a cooperative dialogue with an employer based on such request, is protected activity under the NYCHRL. An adverse employment action based on such activity is therefore retaliation under the NYCHRL. A worker needing an accommodation based on pregnancy, childbirth, or a related medical condition must be able to seek assistance and engage in the cooperative dialogue with employers without fear of adverse consequences for making the request.

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The Commission is dedicated to eradicating discrimination based on pregnancy, childbirth, related medical conditions, and sexual or reproductive health decisions in New York City. If you believe you have been subjected to unlawful discrimination, please contact the Commission at 311 or at (212) 416-0197 to file a complaint of discrimination with the Commission's Law Enforcement Bureau.

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111 *Id*. § 2-10(b).
112 N.Y.C. Admin. Code § 8-107(7).
113 *Id.*

S T A T E O F N E W Y O R K

8

2015-2016 Regular Sessions

I N S E N A T E

January 9, 2015

Introduced by Sens. HANNON, CARLUCCI, ROBACH -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the executive law, in relation to reasonable accommodation

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Subdivision 21-e of section 292 of the executive law, as added by chapter 269 of the laws of 1997, is amended and a new subdivision 21-f is added to read as follows:

21-e. The term "reasonable accommodation" means actions taken which permit an employee, prospective employee or member with a disability, OR A PREGNANCY-RELATED CONDITION, to perform in a reasonable manner the activities involved in the job or occupation sought or held and include, but are not limited to, provision of an accessible worksite, acquisition or modification of equipment, support services for persons with impaired hearing or vision, job restructuring and modified work schedules; provided, however, that such actions do not impose an undue hardship on the business, program or enterprise of the entity from which action is requested.

21-F. THE TERM "PREGNANCY-RELATED CONDITION" MEANS A MEDICAL CONDITION RELATED TO PREGNANCY OR CHILDBIRTH THAT INHIBITS THE EXERCISE OF A NORMAL BODILY FUNCTION OR IS DEMONSTRABLE BY MEDICALLY ACCEPTED CLINICAL OR LABORATORY DIAGNOSTIC TECHNIQUES; PROVIDED, HOWEVER, THAT IN ALL PROVISIONS OF THIS ARTICLE DEALING WITH EMPLOYMENT, THE TERM SHALL BE LIMITED TO CONDITIONS WHICH, UPON THE PROVISION OF REASONABLE ACCOMMODATIONS, DO NOT PREVENT THE COMPLAINANT FROM PERFORMING IN A REASONABLE MANNER THE ACTIVITIES INVOLVED IN THE JOB OR OCCUPATION SOUGHT OR HELD; AND PROVIDED FURTHER, HOWEVER, THAT PREGNANCY-RELATED CONDITIONS SHALL BE TREATED AS TEMPORARY DISABILITIES FOR THE PURPOSES OF THIS ARTICLE.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD01025-01-5

S 2. Paragraph (a) of subdivision 3 of section 296 of the executive law, as added by chapter 269 of the laws of 1997, is amended and a new paragraph (c) is added to read as follows:

(a) It shall be an unlawful discriminatory practice for an employer, licensing agency, employment agency or labor organization to refuse to provide reasonable accommodations to the known disabilities, OR PREGNANCY-RELATED CONDITIONS, of an employee, prospective employee or member in connection with a job or occupation sought or held or participation in a training program.

(C) THE EMPLOYEE MUST COOPERATE IN PROVIDING MEDICAL OR OTHER INFORMATION THAT IS NECESSARY TO VERIFY THE EXISTENCE OF THE DISABILITY OR PREGNANCY-RELATED CONDITION, OR THAT IS NECESSARY FOR CONSIDERATION OF THE ACCOMMODATION. THE EMPLOYEE HAS A RIGHT TO HAVE SUCH MEDICAL INFORMATION KEPT CONFIDENTIAL.

S 3. Severability clause. If any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein.

S 4. This act shall take effect on the ninetieth day after it shall have become a law.

NEW YORK STATE | Division of Human Rights

GUIDANCE ON PREGNANCY DISCRIMINATION AND REASONABLE ACCOMMODATION OF PREGNANCY-RELATED CONDITIONS FOR EMPLOYERS IN NEW YORK STATE

STATUTORY REQUIREMENTS

Sex discrimination, ***disability discrimination,*** and ***familial status discrimination*** are unlawful pursuant to the New York State Human Rights Law § 296.1 (codified as N.Y. Executive Law, Article 15). Sex discrimination is also unlawful pursuant to the federal Civil Rights Act of 1964, Title VII (codified as 42 U.S.C. § 2000e et seq.). Disability discrimination is also unlawful pursuant to the federal Americans with Disabilities Act, Title I (codified as 42 U.S.C. § 12101 et seq.). The Human Rights Law applies to all employers, even if there is only one employee.

Pregnancy discrimination is a form of sex discrimination. It can also be a form of familial status discrimination.

Treating ***pregnancy-related conditions*** differently from other medical conditions is also disability discrimination. Furthermore, the Human Rights Law was amended by the Laws of 2015, chapter 369, to make explicit that employers are required to provide ***reasonable accommodation of pregnancy-related conditions***. Employers' obligation to provide reasonable accommodation applies to all needs and restrictions related to an employee's pregnancy.

WHAT IS PREGNANCY DISCRIMINATION?

Pregnancy discrimination means taking any adverse action against an employee (or contract worker in the workplace, pursuant to Human Rights Law § 296-d) because the employee is pregnant, intends to become pregnant, recently was pregnant, or recently gave birth.

Such adverse actions would include termination, demotion, unwanted transfer, denial of overtime, unwanted reduction of work schedule, harassment or any other adverse action relating to the terms, conditions or privileges of employment. It is also unlawful to have a policy that penalizes employees, by a point system or otherwise, if they take lawful sick leave because of disabilities or pregnancy related conditions.

Since 1974, the Human Rights Law has been interpreted, by the State's highest court, to mean that the medical needs of women who are pregnant, or who have recently given birth, must be treated the same as the medical needs of all other employees. *Union Free School District No. 6 v. N.Y. State Human Rights App. Bd.*, 35 N.Y.2d 371, 362 N.Y.S.2d 139 (1974). Failure to do so is considered sex discrimination.

Under the Human Rights Law, employers are required to reasonably accommodate the medical needs of employees with disabilities, including temporary disabilities. Pregnancy-related disabilities are considered temporary disabilities. (With regard to reasonable accommodation in general, see the attachments to this guidance.)

Therefore, denial of reasonable accommodation of a pregnancy-related medical condition may constitute sex and/or disability discrimination.

In addition, the Human Rights Law was amended in 2015 to include familial status as a protected basis under the Human Rights Law. The definition of familial status includes the status of being pregnant, and thus pregnancy discrimination may also be considered familial status discrimination.

REASONABLE ACCOMMODATION OF PREGNANCY-RELATED CONDITIONS

The requirement that pregnancy-related medical conditions must be accommodated was made explicit by a 2015 amendment. That amendment added the following definition to the Human Rights Law at § 292.21-f:

> The term "pregnancy-related condition" means a medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques; provided, however, that in all provisions of this article dealing with employment, the term shall be limited to conditions which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held; and provided further, however, that pregnancy-related conditions shall be treated as temporary disabilities for the purposes of this article.

Pregnancy-related conditions need not meet any definition of disability to trigger an employer's obligation to accommodation under this Law. Any medically-advised restrictions or needs related to pregnancy will trigger the need to accommodate, including such things as the need for extra bathroom breaks, or increased water intake.

Temporary disabilities generally may be accommodated by the grant of a reasonable amount of time off for recovery, as noted in the attached regulations at 9 NYCRR 466.11(i). However, requiring involuntary leaves of absence will normally not be acceptable unless all other avenues of reasonable accommodation have been explored.

As with temporary disabilities, the Human Rights Law may require no more than de minimis accommodations for pregnancy-related conditions in the areas of worksite accessibility, acquisition or modification of equipment, or job restructuring. However, reasonable accommodation might include such minor workplace modifications as permitting an employee to sit to do a job normally done standing, or similar adjustments to the workplace.

The Human Rights Law may require reasonable accommodation of pregnancy-related conditions by reassignment to an available position, available light duty, or transfer away from hazardous duty, as medically advised. Reasonable accommodation may also include modified or adjusted work schedules, for needs such as (but not limited to) doctor visits, frequent restroom breaks, shorter shift assignments, or time off during pregnancy or for childbirth recovery, as may be medically advised.

As indicated in the reasonable accommodation regulations at 9 NYCRR 466.11(j) and (k), the employer and employee should engage in an interactive process to determine what reasonable accommodation can be provided by the employer that will permit the employee to perform in a reasonable manner the activities involved in the job. In this regard, the "employee must cooperate in providing medical or other information that is necessary to verify the existence of the disability or pregnancy-related condition, or that is necessary for consideration of the accommodation. The employee has a right to have such medical information kept confidential." Human Rights Law § 296.3(c).

RETALIATION IS UNLAWFUL

It is unlawful for any employer, or any agent or employee of the employer, to retaliate against an employee (or contract worker in the workplace, pursuant to Human Rights Law § 296-d) who has complained of pregnancy discrimination, or who has sought and/or been granted a reasonable accommodation for a pregnancy-related condition.

The Human Rights Law protects any individual who has engaged in "protected activity." Protected activity occurs when a person has

- filed a formal written complaint of pregnancy discrimination, either internally with management or human resources, or with any anti-discrimination agency,
- testified or assisted in a proceeding involving pregnancy discrimination under the Human Rights Law,
- opposed pregnancy discrimination by making a verbal or informal complaint to management,
- requested a reasonable accommodation,
- complained that another employee has been subjected to pregnancy discrimination, or
- encouraged a fellow employee to report pregnancy discrimination or request a reasonable accommodation.

(Retaliation also applies to opposition to any other actions forbidden by the Human Rights Law.)

If the employee has participated in a proceeding before the Division of Human Rights, or in a court of law, that complainant or witness is absolutely protected against retaliation for any oral or written statements made to the Division or a court in the course of proceedings, regardless of the merits or disposition of the underlying complaint.

Even if the alleged discrimination does not turn out to rise to the level of a violation of the Human Rights Law, the individual is protected if he or she had a good faith belief that the practices were unlawful. However, the retaliation provision is not intended to protect persons making intentionally false charges of discrimination, or who intentionally falsify a need for a reasonable accommodation.

WHAT IS RETALIATION?

Retaliation consists of an adverse action or actions taken against the employee by the employer. The action need not be job-related or occur in the workplace. Unlawful retaliation can be any action, more than trivial, that would have the effect of dissuading a reasonable worker from making or supporting a charge of harassment or any other practices forbidden by the Law.

Actionable retaliation by an employer can occur after the individual is no longer employed by that employer. This can include giving an unwarranted negative reference for a former employee.

A negative employment action is not retaliatory merely because it occurs after the employee engaged in protected activity. Employees continue to be subject to all job requirements and disciplinary rules after having engaged in such activity. In order to make a claim of retaliation, the individual must be able to substantiate the claim that the adverse action was retaliatory.

EMPLOYER POLICY ON REASONABLE ACCOMMODATION

It is recommended that an employer have a written policy, which includes a plan and procedures for reasonable accommodation of employees with disabilities and employees with pregnancy-related conditions. The policy should be provided to all employees upon hire, and periodically thereafter.

Attached are the Division regulations, 9 NYCRR 466.11, which explain in detail how to comply with the reasonable accommodation provisions of the Human Rights Law. Also attached is the appendix to these regulations, which provides a sample reasonable accommodation plan and procedure.

REASONABLE ACCOMMODATION

9 New York Code of Rules and Regulations (NYCRR) §466.11

466.11 Provision of "reasonable accommodation" by employers, pursuant to Human Rights Law §292.21, §292.21-e, §295.5, §296.3 and §296.3-a.

(a) Reasonable accommodation.

(1) Reasonable accommodation is defined in the Human Rights Law at §292.21-e, as follows:

> The term "reasonable accommodation" means actions taken which permit an employee, prospective employee or member with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held and include, but are not limited to, provision of an accessible worksite, acquisition or modification of equipment, support services for persons with impaired hearing or vision, job restructuring and modified work schedules; provided, however, that such actions do not impose an undue hardship on the business, program or enterprise of the entity from which action is requested.

(2) Reasonable accommodations may include, but are not limited to: making existing facilities more readily accessible to individuals with disabilities; acquisition or modification of equipment; job restructuring; modified work schedules; adjustments to work schedule for treatment or recovery; reassignment to an available position; adjustment of examinations, training materials or policies; providing readers or interpreters.

(3) Reasonable accommodation does <u>not</u> include among other things: providing for personal care needs, such as a personal care assistant, although such a personal care assistant should be accommodated where provided by the employee at no cost to the employer; providing non-work-related aids, such as a personal hearing aid or wheelchair, which are the employee's own responsibility.

(b) Determination of reasonableness.

(1) Whether an accommodation that has been requested or is under consideration is a "reasonable accommodation" required by the Human Rights Law will turn on a balancing of the following factors:

(i) efficacy or benefit provided by the accommodation toward removing the impediments to performance caused by the disability,

(ii) convenience or reasonableness of the accommodation for the employer, including its comparative convenience as opposed to other possible accommodations, and

(iii) the "hardships", costs, or problems it will cause for the employer, including those that may be caused for other employees.

(2) Accommodations that pose an "undue hardship" on the employer will not be required. "Undue hardship" means significant difficulty or expense to the employer. In determining whether an accommodation would result in undue hardship, consideration will be given to any relevant factor. Relevant factors can include, but are not necessarily limited to, those set forth in the Human Rights Law, at §296.3(b):

(i) The overall size of the business, program or enterprise with respect to the number of employees, number and type of facilities, and size of budget;

(ii) The type of operation which the business, program or enterprise is engaged in, including the composition and structure of the workforce; and

(iii) The nature and cost of the accommodation needed, including consideration of any money available from other sources to assist the employer in paying the cost.

(c) Covered disabilities.

(1) The Human Rights Law protects from discrimination those individuals with disabilities which, with or without reasonable accommodation, do not prevent the individual from performing the duties of the job in a reasonable manner. The definition of "disability" in the Human Rights Law is more comprehensive than that under federal law in that it covers many conditions that have been found to be not a disability under the federal Americans with Disabilities Act.

(2) The term "disability" is defined in the Human Rights Law at §292.21 to mean:

(i) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or

(ii) a record of such an impairment or

(iii) a condition regarded by others as such an impairment.

With regard to employment, the term is limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

(3) Not every disability covered by the Human Rights Law will require the consideration of reasonable accommodations. Only those disabilities which actually impede, as a matter of fact, the individual in performing the job will give rise to a consideration of accommodation. This is understood to include those situations in which the job impedes the individual's recovery or ability to obtain treatment, and accommodation can make recovery or treatment possible while the individual continues to be employed.

(d) Who is entitled to a reasonable accommodation.

(1) To be entitled to the protection of the Human Rights Law, the disabled individual must have the requisite job qualifications as well as be able to satisfactorily perform in the job.

(i) The disabled individual must be otherwise qualified for the job by education, skill, experience, ability, etc., to the same extent that such education, skill, experience, ability, etc., are required as bona fide job qualifications for nondisabled applicants or employees. See further, paragraph (f)(4) of this section.

(ii) The disabled individual must be able, with or without accommodation, to attain "reasonable performance". Reasonable performance is not perfect performance or performance unaffected by the disability, but reasonable job performance, reasonably meeting the employer's needs to achieve its business goals. See further, paragraphs (f)(1)-(3) of this section.

(2) To be entitled to a reasonable accommodation, the individual must meet the qualification and performance standards set forth in paragraph (1) of this subdivision, and must have a disability and a need for an accommodation which are known, or are made known, to the employer.

(e) Circumstances giving rise to the requirement that the employer consider reasonable accommodation, in accordance with the factors set forth in subdivision (b) of this section.

(1) Reasonable accommodation must be considered where the disability and need for accommodation are known to the employer.

(2) Reasonable accommodation must be considered when a qualified applicant or employee with a disability informs the employer of the disability (if the employer does not already know of its existence) and requests an accommodation.

(3) Reasonable accommodation must be considered when a current employee with a disability informs the employer of the disability (if the employer does not already know of its existence) and requests an accommodation, even if there has been no change in the employee's medical condition.

(f) Ability to reasonably perform the "activities involved in the job or occupation"; job restructuring.

(1) Ability to reasonably perform the "activities involved in the job or occupation" means the ability, with or without accommodation, to satisfactorily perform the essential functions of the job or occupation. See further, subparagraph (d)(1)(ii) of this section.

(2) Satisfactory performance means minimum acceptable performance of the essential functions of the job as established by the employer. The employer's judgment as to what is minimum acceptable performance will not be second-guessed, so long as standards for performance are applied equivalently to all employees in the same position. Such standards for satisfactory performance may include minimum productivity standards or quotas.

(3) Essential functions are those fundamental to the position; a function is essential if not performing that function would fundamentally change the job or occupation for which the position exists. What is an essential function is a factual question to be resolved by all relevant evidence. Evidence for determining the essential functions of a particular position would include, but would not be limited to, the following:

(i) the employer's judgment as to which functions are essential, particularly where so indicated in a pre-existing written job description;

(ii) how often the function is actually performed by other employees in the position;

(iii) how many other employees are available to whom the function could be reallocated by job restructuring;

(iv) the direct and specific consequences to the employer's business if the function is not performed by the particular disabled individual;

(v) the terms of a collective bargaining agreement. (Labor organizations are also required to reasonably accommodate the disabilities of a member, pursuant to §296.3.)

(4) When an employer fills a position with a specific purpose of acquiring special ability or expertise (for example: technical expertise, foreign language skill, physical strength in a firefighter), even if the amount of time actually spent on the job using the special ability or expertise is small, this ability or expertise is a bona fide qualification for the job. See further, subparagraph (d)(1)(i) of this section.

(5) As is true in any area covered by the Human Rights Law, the employer may hire the applicant who is most qualified with regard to the bona fide job qualifications, and is not required to hire a disabled applicant simply because the applicant meets the minimum job qualifications if there are other more qualified applicants.

(6) The Human Rights Law does not require, as a reasonable accommodation in the form of job restructuring, the creation of a completely unique position with either qualifications or functions tailored to the disabled individual's abilities.

(7) Reasonable accommodation, in the form of job restructuring, is required if a disabled individual meets the bona fide job qualifications, and can satisfactorily perform the essential functions of the position; the duties that the disabled individual cannot perform due to the disability, and that are not essential to the position, must not be required of the disabled individual.

(g) Safety concerns; objectionable behaviors.

(1) The Human Rights Law does not require accommodation of behaviors that do not meet the employer's workplace behavior standards that are consistently applied to all similarly situated employees, even if these behaviors are caused by a disability. This would include, but not be limited to:

(i) dress codes, grooming standards and time and attendance policy, though reasonable and necessary deviations must be allowed as accommodations;

(ii) conduct standards, including those which prohibit aggressive or threatening behavior;

(iii) discipline for theft of company property by a kleptomaniac;

(iv) discipline for intoxication or impairment on the job by an alcoholic.

(2) Reasonable accommodation is not required where the disability or the accommodation itself poses a direct threat.

(i) "Direct threat" means a significant risk of substantial harm to the health or safety of the employee or others that cannot be eliminated or reduced by reasonable accommodation.

(ii) In determining whether a direct threat exists, the employer must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective information, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable accommodations, such as modification of policies, practices, or procedures, will mitigate the risk.

(iii) Some jobs may have a bona fide classification as "safety sensitive", such as, for example, vehicle operators or persons who work with children. Heightened consideration of direct threat is to be encouraged in bona fide safety sensitive jobs.

(h) Drug addiction and alcoholism.

(1) Alcoholism and drug addiction are diseases. However, an individual who is currently using drugs illegally (see paragraph (4) of this subdivision), is not protected in this regard by the Human Rights Law. The Law does protect an individual who is a recovered/recovering alcoholic or drug addict.

(2) Adjustments to the work schedule, where needed to allow for ongoing treatment, must be allowed as an accommodation where reasonable, if the individual is still able to perform the essential functions of the job including predictable and regular attendance.

(3) The recovered/recovering alcoholic or drug addict should be expected to perform job tasks just as anyone else with similar skills, experience and background.

(4) Where the employer has knowledge of the current illegal use of drugs, the employee is not entitled by law to accommodation, and may be terminated.

(i) "Current illegal use of drugs" means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

(ii) In determining whether recent use is enough to justify a reasonable belief in current use, the individual's successful participation in a program for rehabilitation or recovery since the recent use is relevant.

(5) Employers are encouraged, where the employer knows of current illegal use of drugs, or where job performance of an alcoholic or drug addict deteriorates to below acceptable standards, to utilize the practice of leave of absence and required attendance at a rehabilitation program, along with a "last chance" agreement requiring acceptable performance and attendance upon return. If an employee denies the problem and refuses the leave, treatment and last chance agreement, the employee may be terminated or disciplined for the documented performance problems.

(6) Drug testing.

(i) A test to determine the illegal use of drugs is not to be considered a medical test.

(ii) Nothing in these regulations is to be construed to encourage, prohibit, or authorize the conducting of drug tests for the illegal use of drugs by job applicants or employees, or the making of employment decisions based on the test results.

(iii) Nothing in these regulations is to be construed to encourage, prohibit, restrict or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the United State Department of Transportation, of authority to test applicants for or employees in safety sensitive positions for the illegal use of drugs or for on-duty impairment by alcohol, or to remove persons who test positive from safety sensitive duties.

(iv) Any information regarding the medical condition or history of any applicant or employee obtained from a drug test, except information regarding illegal use of drugs, must be kept confidential, and may not be used in any way to the disadvantage of the applicant or employee.

(i) Temporary disabilities.

(1) A current employee experiencing a temporary disability is protected by the Human Rights Law where the individual will be able to satisfactorily perform the duties of the job after a reasonable accommodation in the form of a reasonable time for recovery.

(2) The Human Rights Law requires no more than de minimis accommodations for temporary disabilities in the areas of worksite accessibility, acquisition or modification of equipment, job restructuring, or support services for persons with temporarily impaired hearing or vision.

(3) The Human Rights Law may require reasonable accommodation of temporary disabilities in the areas of modified work schedules, reassignment to an available position or available light duty, or adjustments to work schedules for recovery. The employer's past practice, pre-existing policies regarding leave time and/or light duty, specific workplace needs, the size and flexibility of the relevant workforce, and the employee's overall attendance record will be important factors in determining reasonable accommodation in this context.

(j) Rights and duties of the employer.

(1) The employer must not make pre-employment inquiries with regard to the existence of a disability or need for accommodation. The employer should provide information to applicants and new employees as to their rights with regard to reasonable accommodation of disability, and as to procedures to be followed in requesting reasonable accommodation.

(2) The employer should advise all current employees on a regular basis as to their rights with regard to reasonable accommodation of disability, and as to procedures to be followed in requesting reasonable accommodation.

(3) The employer has the duty to reasonably accommodate known disabilities, where the need for the accommodation is known.

(4) The employer has a duty to move forward to consider accommodation once the need for accommodation is known or requested. The employer has the duty to clearly request from the applicant or employee any documentation that is needed.

(5) Once an accommodation is under consideration, the employer has the right to medical or other information that is necessary to verify the existence of the disability or that is necessary for consideration of the accommodation. The employer must maintain the confidentiality of individuals' medical information.

(6) The employer has the right to select which reasonable accommodation will be provided, so long as it is effective in meeting the need.

(7) It is recommended that the employer have a written policy and procedure for reasonable accommodation of disability. A sample procedure is available from the Division.

(k) Rights and duties of the employee.

(1) The employee must make the disability and need for accommodation known to the employer.

(2) An employee with a disability has a right to request an accommodation at any time, even if his/her medical condition has not changed.

(3) The employee must cooperate with the employer in the consideration and implementation of the requested reasonable accommodation.

(4) The employee must cooperate in providing medical or other information that is necessary to verify the existence of the disability or that is necessary for consideration of the accommodation. The employee has a right to have his/her medical information kept confidential.

(5) The employee has the right to refuse an accommodation despite the existence of a disability, if the employee can perform the job in a reasonable manner without the accommodation.

APPENDIX
to 9 New York Code of Rules and Regulations (NYCRR) §466.11

SUGGESTIONS FOR A REASONABLE ACCOMMODATION PLAN AND PROCEDURE

For implementation of the employer's duty to reasonably accommodate employees and applicants with disabilities, pursuant to Executive Law (Human Rights Law) §296, §292.21, and §292.21-e.

A written policy or plan with regard to reasonable accommodation is not required by law. However, it is recommended that employers develop a Reasonable Accommodation Plan. Use of such a procedure will not provide a guarantee against a later finding that a denial was in violation of the law, but should guard against inadvertent or uninformed denials of reasonable accommodations, and will provide a record that will be useful to the employer in establishing factually why a denied accommodation was unreasonable. The Plan should contain at a minimum, three elements:

- a formal statement that it is the policy of the employer to provide reasonable accommodations to employees and applicants with disabilities,
- an written "Procedure for Processing Reasonable Accommodation Requests" which is disseminated to all staff, and
- a program designed to provide information to managers, supervisors, and staff about the concept of, and legal requirement for, reasonable accommodation.

Various resources are available, in the local community or from various state agencies, to help provide staff training, at little or no cost.

Sample Procedure

Employers may find that a uniform set of guidelines for reviewing reasonable accommodation requests will serve the best interests of the company and its employees. A procedure will also provide a framework with a definite beginning and end; if the employer proceeds with the procedure with reasonable diligence, questions of whether an accommodation has been denied or is still under consideration will not arise, and filing of unnecessary complaints will be forestalled. Taking time to consider a request may appear as a denial and generate conflict, if the steps in a procedure cannot be referenced. The following sample procedure assumes the request is from a current employee, but the procedure should be adapted for use also by an applicant who wishes to request an accommodation.

The process of accommodation starts when the employee makes his/her request in writing and returns the request to the supervisor. If the employee has difficulty with written communication, or is not sure how to explain the impediment to job performance he/she is experiencing, or is unsure of what accommodation to request, the supervisor should assist the employee in an initial consultation. The employee's initial inquiry about accommodation or disability-related performance difficulties puts the employer on notice, and triggers the requirement to seek accommodation. Therefore, the technicality of filling out the request adequately to start the process cannot be allowed to block the employee's access to accommodation. Once the request has been submitted, adequately identifying the accommodation requested, or at least the problem to be addressed, the supervisor evaluates the request and either approves or is unable to make a decision.

If the supervisor approves the request, the accommodation is made and an approval memorandum is sent to the designated company representative, (e.g., human resources representative or EEO Coordinator). The process is ended. If the supervisor is unable to make a decision, the request, with the supervisor's comments, is sent to the designated company representative who will conduct a comprehensive review of the request. The employee should be notified of this next step by the supervisor.

It is anticipated that most requests for accommodation can be approved at the supervisory level. Some accommodation requests are very simple and can easily be accomplished by the supervisor. Some examples may include the removal of barriers from aisles for an employee who is blind, raising a desk with small blocks if an employee uses a wheelchair, or granting permission for extended break times if the employee requires a longer rest period, with the time charged, or made up, in some agreed-upon manner.

There may be times, however, when a supervisor lacks the authority or the needed information to recommend that a particular accommodation be made. For example, these accommodations may require monetary expenditures, such as when adaptive equipment needs to be purchased or when requests are made for shift changes or flextime or part-time schedules. In these instances, the supervisor may choose to defer to the designated company representative for further review.

In instances where further review is required, the designated company representative must then assess all relevant documentation. *This may include asking for additional medical and/or other documentation from the employee*, meeting with the employee and/or the supervisor, contacting the Job Accommodation Network, or other source of experience and expertise, for specific accommodation information, arranging for a job analysis, or consulting with community-based organizations who provide services to people with disabilities. *It is important to note that medical documentation should be received by the designated company representative and not the supervisor. This will help avoid breach of the employee's privacy.*

The designated company representative may also at times need to obtain input from the company's fiscal officer or legal counsel. In a word, all available resources should be used at this stage to resolve the accommodation request.

If the accommodation is to be provided, the designated company representative consults with the supervisor and informs the employee in writing.

If the accommodation is to be denied, the designated company representative consults with the supervisor and notifies the employee in writing. In the notification, the employee is informed that this decision will be automatically reviewed by a compliance review committee. This committee consist of a representative from human resources, counsel's office, an employee work group or organization, or any other representative deemed to be appropriate. This review body is advisory in nature and the final decision to grant or deny the accommodation rests with the *company owner or the CEO or other highest level managing officer.*

After completion of the review, the final decisionmaker informs the employee in writing of the final decision. If the decision is to deny the accommodation, additional recourse should be delineated to the employee such as filing a discrimination complaint with state or federal agencies if the employee believes the company's denial was based on discrimination.

To summarize:

Step 1: Employee requests an accommodation by submitting the request for accommodation to the supervisor.

Step 2: Supervisor approves, and the process is completed. Or, Supervisor does not approve, and the request is forwarded to the designated company representative.

Step 3: The designated company representative conducts a comprehensive review and analysis, including gathering information from the employee (including medical certification where needed) and from other sources.

Step 4: The designated company representative approves, and the process is completed. Or, the representative does not approve, and advises the employee of the denial, and of the reasons for the denial, and informs the employee that there will be a review of this decision by the compliance review committee and the owner, CEO or other managing officer of the company.

Step 5: The compliance review committee reviews the results of designated company representative's review, analysis and decision, and reports to the owner, CEO or managing officer.

Step 6: The owner, CEO or managing officer of the employer advises the employee of the employer's final decision, and if it is to confirm the denial, the employee is advised of his/her legal rights.

The above sample procedure will of course need to be modified to suit the needs, size, and structure of particular employers.

PREGNANCY DISCRIMINATION IS AGAINST THE LAW

All pregnant people are protected against discrimination under the New York State Human Rights Law. **It is against the law** to terminate an employee or refuse to hire an applicant because they are pregnant or because of a pregnancy-related condition, or to cut an employee's hours, pay or otherwise discriminate in the terms, conditions, and privileges of employment because of pregnancy or childbirth.

- **It is also unlawful** to penalize employees, by a point system or otherwise, for taking lawful time off due to pregnancy, childbirth, or a related condition. Employers may charge employees' accrued leave as necessary but may not discipline or take any other negative action against an employee for taking time off for pregnancy related conditions.
- **It is unlawful to** involuntarily change an employee's work assignments or responsibilities due to their pregnancy. It is also unlawful to require a pregnant worker to take a mandatory leave of absence, unless the employee is prevented by the pregnancy from performing the essential activities involved in the job in a reasonable manner.
- **An employer must provide reasonable accommodations** to allow an employee or job applicant with a pregnancy-related condition to perform their job in a reasonable manner, unless doing so would impose an undue hardship on the employer. Any medically-advised need or restriction related to pregnancy will trigger the need to accommodate. Examples of accommodations include but are not limited to: extra breaks to rest, use the bathroom, drink, or eat; temporary assignment to a less physically demanding role; and a modified job schedule. It is unlawful to retaliate against a person for needing, requesting, or using a reasonable accommodation. An employer may require medical documentation only if necessary for consideration of the accommodation and must keep that documentation confidential.

Employers are required to hold jobs and maintain health insurance coverage for workers who are absent due to pregnancy, recovery from childbirth, or a related condition, as they do for employees who take leave for other reasons.

For up to three years following childbirth, employees have the right to take reasonable unpaid break time or use paid break time or meal time each day to express breast milk at work. Employers must make reasonable efforts to provide a room or another non-bathroom location, in close proximity to the employee's work area, where the employee can express breast milk in private. It is unlawful to discriminate against or harass a person for their decision to express breast milk at work.

Employees may also have rights under the NYS Paid Family Leave, NYS Paid Sick Leave, federal Family and Medical Leave Act, federal Americans with Disabilities Act and state disability accommodations law, and local law.

New York State's Lawful Absence Law: Rights, Remedies, and What It Means for Abusive Attendance Policies

A new law in New York State guarantees workers expanded remedies if their employer penalizes them for any absence that is legally protected under federal, state, or local law, including time off covered by New York State Paid Family Leave or New York State's or City's Paid Safe and Sick Time Laws. This includes being penalized under absence control policies (also known as "no-fault" attendance policies). Such policies unlawfully discipline workers for legally-protected absences, including those related to pregnancy, sickness, disability, and caregiving responsibilities, chilling workers from exercising their legal rights.

What does New York's new law do?

The new law (A8092B, which amends N.Y. Labor Law § 215) makes clear that it is illegal to fire, threaten, penalize, discriminate, or otherwise retaliate against a worker for an absence that is legally protected by federal, state, or local law.

This includes, but is not limited to, assigning points (or deducting from an allotted bank of time) under an absence control policy or system for legally-protected absences, such as those related to disability, pregnancy, sickness, and caregiving obligations. **For example:**

- It is unlawful to assign a point to a worker for taking time off as a reasonable accommodation for their disability or pregnancy-related health needs.
- It is unlawful to fire a worker for using New York State Paid Family Leave.
- It is unlawful to demote a worker for using New York State or New York City Paid Safe and Sick Leave to take a child to the doctor.
- It is unlawful to deduct points from a worker's allotted bank of time for an absence protected by the Family and Medical Leave Act (FMLA).

These are just some examples. Other examples of unlawful retaliation may include penalizing a worker for using legally-protected jury duty leave, voting leave, donor leave, domestic violence leave, and more. Contact A Better Balance's helpline for additional information.

What if my employer violates the law?

- If your employer penalizes you for legally-protected absences — such as by assigning you points, disciplining you, or firing you — you can sue in court for "all appropriate relief." That can include back pay, front pay, damages (including liquidated damages), reinstatement, and attorneys' fees. You have two years to bring a lawsuit.
- You can also file an administrative complaint with the New York State Department of Labor (DOL). The DOL can award back pay, front pay, liquidated damages, and attorneys' fees, and order you reinstated to your job. The DOL can also fine your employer up to $20,000. You are not required to file with the DOL before bringing a lawsuit.
- Your employer may be charged with a misdemeanor.
- You may have additional rights and remedies under other federal, state, or local laws.

Does this law apply to me?

The new law applies to workers in New York State regardless of their citizenship or immigration status.

When does this law go into effect?

February 20, 2023.

Where can I learn more or get help?

Contact A Better Balance's free, confidential legal helpline at 1-833-NEED-ABB (1-833-633-3222) or visit https://www.abetterbalance.org/get-help/.

This fact sheet is for informational purposes only and does not constitute legal advice.
It is advisable to consult an attorney for additional information and tailored advice.