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# LONG OVER DUE: EXPLORING THE PREGNANT WORKERS' FAIRNESS ACT (H.R. 2694)

## HEARING

BEFORE THE

SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES

## COMMITTEE ON EDUCATION AND LABOR U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, OCTOBER 22, 2019

**Serial No. 116–44**

Printed for the use of the Committee on Education and Labor

Available via the World Wide Web: www.govinfo.gov
or
Committee address: https://edlabor.house.gov

U.S. GOVERNMENT PUBLISHING OFFICE
39–487 PDF WASHINGTON : 2021

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# LONG OVER DUE: EXPLORING THE PREGNANT WORKERS' FAIRNESS ACT (H.R. 2694)

**Tuesday, October 22, 2019**
**House of Representatives,**
**Subcommittee on Civil Rights and Human Services,**
**Committee on Education and Labor,**
**Washington, DC**

The subcommittees met, pursuant to call, at 10:15 a.m., in Room 2175, Rayburn House Office Building. Hon. Suzanne Bonamici (Chairwoman of the subcommittee) presiding.

Present: Representatives Bonamici, Schrier, Hayes, Lee, Comer, Thompson, Stefanik, and Johnson.

Also Present: Representatives Scott, McBath, Underwood, Foxx and Cohen.

Staff Present: Tylease Alli, Chief Clerk; Phoebe Ball, Disability Counsel; Ilana Brunner, General Counsel – Health and Labor; Eli Hovland, Staff Assistant; Eunice Ikene, Labor Policy Advisor; Stephanie Lalle, Deputy Communications Director; Richard Miller, Director of Labor Policy; Max Moore, Office Aid; Udochi Onwubiko, Labor Policy Counsel; Veronique Pluviose, Staff Director; Carolyn Ronis, Civil Rights Counsel; Banyon Vassar, Deputy Director of Information Technology; Courtney Butcher, Minority Director of Member Services and Coalitions; Cate Dillon, Minority Staff Assistant; Rob Green, Minority Director of Workforce Policy; Jeanne Kuehl, Minority Legislative Assistant; John Martin, Minority Workforce Policy Counsel; Hannah Matesic, Minority Director of Operations; Audra McGeorge, Minority Communications Director; Carlton Norwood, Minority Press Secretary; Brandon Renz, Minority Staff Director; and Ben Ridder, Minority Professional Staff Member.

Chairwoman BONAMICI. The Committee on Education and Labor will come to order. Welcome, everyone. I note that a quorum is present. The Committee is meeting today in a legislative hearing to hear testimony on H.R. 2694, the Pregnant Workers Fairness Act.

I know for the subcommittee that Ms. McBath of Georgia, Ms. Underwood of Illinois and Mr. Cohen of Tennessee are permitted to participate in today's hearing. Members who sit on the Subcommittee and are present shall have first priority to ask questions, followed by Members who sit on the Full Committee and are

present and only after all Committee Members who are present have gone, shall Members who are not on the Committee on Education and Labor ask questions.

Pursuant to Committee Rule 7(c), opening statements are limited to the Chair and the Ranking Members. This allows us to hear from our witnesses sooner and provides all Members with adequate time to ask questions.

I recognize myself now for the purpose of making an opening statement.

As a mom and a policymaker, I know how important it is to protect the economic security of pregnant women in working families. Unfortunately, our current laws are inadequate, and many pregnant workers are placed on unpaid leave or forced out of work when they only need a simple accommodation to stay on the job during their pregnancy.

Today, we are holding a legislative hearing on H.R. 2694, the Pregnant Workers Fairness Act.

This bill takes an important step to guarantee that pregnant women will get reasonable accommodations that will allow them to stay in the workplace. I would like to thank our witnesses for being here to provide important insight on the discrimination and hardship pregnant women face when they are denied reasonable accommodations in the workplace.

I also want to thank judiciary committee Chairman Jerrold Nadler, the lead sponsor of this bill for taking time to join us this morning.

According to A Better Balance, 75 percent of women will be pregnant while employed at some time in their life. Women are increasingly either the primary or co-breadwinners of households and as a result, more pregnant women work later into their pregnancies.

In fact, research suggests that more than 80 percent of first-time mothers work until their final month of pregnancy; I know I did.

Pregnant workers may need reasonable accommodations to protect the health of both mother and baby. Reasonable accommodations can range from providing seating, water, and light duty to excusing pregnant workers from tasks involving dangerous substances.

They do not need to be, nor are they typically complicated or costly, but when pregnant workers do not have access to the reasonable workplace accommodations they need, they are often forced to choose between their financial security and their pregnancy.

The consequences can be devastating to their health and security. It's also important to note that women of color are overrepresented in low-wage, physically demanding jobs and are therefore disproportionately affected by a lack of access to reasonable accommodations.

In 1978, Congress first recognized the responsibility to provide pregnant women with fair and equal treatment in the workplace when they passed the Pregnancy Discrimination Act. The law clarified the discrimination against pregnant workers is discrimination on the basis of sex under Title VII of the Civil Rights act of 1964.

The law also requires businesses to treat pregnant workers as they would other physically impaired workers; yet, 41 years after the passage of the Pregnancy Discrimination Act, Federal law still

falls short of guaranteeing that all pregnant workers have reasonable workplace accommodations. Under current law, a pregnant worker must show that her employer accommodated similarly-situated coworkers, a burdensome, and often impossible, standard to meet.

Similarly, the Americans with Disabilities Act covers pregnancy related impairments but leaves women with less serious, pregnancy-related impairments or who simply need accommodations without legal recourse. Even the Supreme Court's decision in Young v. UPS, which affirmed pregnant workers' rights to reasonable accommodations under the Pregnancy Discrimination Act, has not provided workers or businesses the clarity or legal certainty they need.

In fact, since Young v. UPS, approximately 70 percent of courts have denied reasonable accommodations for pregnant workers. Pregnant women today continue to suffer workplace discrimination at an alarming rate. According to a 2012 survey, more than 60 percent of workers have seen pregnancy discrimination on the job.

For these women, being pregnant can mean losing a job, being denied a promotion or not being hired in the first place. Guaranteeing that pregnant workers have reasonable accommodation in the workplace is a crucial step to eradicating pregnancy discrimination, and without federal protections for pregnant workers, several states from across the geographic and political spectrum have taken action to fill the void.

My home state of Oregon is one of those helping to lead the way. Earlier this year, the state legislature passed a bipartisan bill to require employers to provide reasonable accommodations to applicants who are employees with known limitations related to pregnancy, childbirth, or related medical condition unless it would impose undue hardship. And as of this month, 27 states and the District of Columbia and four cities have required employers with more than 15 employees to provide accommodations, bringing certainty to business, preventing costly disputes and importantly, keeping pregnant women safely on the job.

But without a federal benchmark, workers and employers are left with a patchwork of laws that provide strong protections for some and no protections for others. We need to make sure that all pregnant workers, regardless of where they live, can access the protections they need to stay in the workplace and that's why we are discussing the Pregnant Workers Fairness Act today.

This bipartisan bill would establish a pregnant worker's right to reasonable accommodations and guarantee that pregnant workers can seek those accommodations without facing discrimination and retaliation in the workplace. The Pregnant Workers Fairness Act is an opportunity for Congress to finally fulfill the promise of the Pregnancy Discrimination Act and take an important step towards workplace gender equity, healthy pregnancies and the economic security of all pregnant and parenting women and their families. I welcome this opportunity to work with my Republican colleagues to move this bill forward in a bipartisan manner. I request unanimous consent to enter two letters into the record: one from the International Brotherhood of Teamsters and more than 100 stakeholders' groups—another one from more than 100 stakeholder

groups, both in support of the Pregnant Workers' Fairness Act without objections to order.

Thank you, and I now yield to the Ranking Member, Mr. Comer, for an opening statement.

[The statement of Chairwoman Bonamici follows:]

**Prepared Statement of Hon. Suzanne Bonamici, Chairwoman, Subcommittee on Civil Rights and Human Services**

As a mom and a policy maker, I know how important it is to protect the economic security of pregnant women and working families. Unfortunately, our current laws are inadequate, and many pregnant workers are placed on unpaid leave or forced out of work when they only need a simple accommodation to stay on the job during their pregnancy.

Today, we are holding a legislative hearing on H.R. 2694, the Pregnant Workers Fairness Act. This bill takes an important step to guarantee that pregnant women will get reasonable accommodations that will allow them to stay in the workplace.

I would like to thank our witnesses for being here to provide important insight on the discrimination and hardship pregnant women face when they are denied reasonable accommodations in the workplace. I also want to thank Judiciary Committee Chairman Nadler, the lead sponsor of this bill, for taking time to join us this morning.

According to A Better Balance, seventy-five percent of women will be pregnant while employed at some time in their life. Women are increasingly either the primary or co- breadwinners of households, and as a result more pregnant workers work later into their pregnancies. In fact, research suggests that more than 80 percent of first- time mothers work until their final month of pregnancy.

Pregnant workers may need reasonable accommodations to protect the health of both mother and baby. Reasonable accommodations can range from providing seating, water, and light duty, to excusing pregnant workers from tasks involving dangerous substances. They do not need to be, nor are they typically complicated or costly.

But when pregnant workers do not have access to the reasonable workplace accommodations they need, they are forced to choose between their financial security and their pregnancy. The consequences can be devastating to their health and their security. It is also important to note that women of color are overrepresented in low-wage, physically demanding jobs and are therefore disproportionately affected by a lack of access to reasonable accommodations.

In 1978, Congress first recognized the responsibility to provide pregnant women with fair and equal treatment in the workplace when they passed the Pregnancy Discrimination Act. The law clarified that discrimination against pregnant workers is discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964. The law also requires businesses to treat pregnant workers as they would other physically impaired workers.

Yet, 41 years after the passage of the Pregnancy Discrimination Act, federal law still falls short of guaranteeing that all pregnant workers have reasonable workplace accommodations. Under current law, a pregnant worker must show that her employer accommodated "similarly situated" co-workers—a burdensome and often impossible standard to meet. Similarly, the Americans With Disabilities Act covers pregnancy-related impairments but leaves women with less serious pregnancy-related impairments, or who need accommodations, without legal recourse.

Even the Supreme Court's decision in Young vs. UPS, which affirmed pregnant workers' right to reasonable accommodations under the Pregnancy Discrimination Act, has not provided workers or businesses the clarity or legal certainty they need. In fact, since the Young v. UPS decision, approximately 70 percent of courts have denied reasonable accommodations for pregnant workers.

Pregnant women today continue to suffer workplace discrimination at an alarming rate. According to a 2012 survey, more than 60 percent of Americans have seen pregnancy discrimination on the job. For these women, being pregnant can mean losing their job, being denied a promotion, or not being hired in the first place. Guaranteeing that pregnant workers have a reasonable accommodation in the workplace is a crucial step in eradicating pregnancy discrimination.

Without strong federal protections for pregnant workers, several states from across the geographic and political spectrum have taken action to fill the void.

My home state of Oregon is one of those helping to lead the way. Earlier this year, the state legislature passed a bipartisan bill to require employers to provide reasonable accommodations to applicants or employees with known limitations re-

lated to pregnancy, childbirth, or a related medical condition unless it would impose an undue hardship.

And as of this month, 27 states, the District of Columbia and four cities require employers with more than 15 employees to provide accommodations, bringing certainty to businesses, preventing costly disputes, and, importantly, keeping pregnant women safely on the job.

But without a federal benchmark, workers and employers are left with a patchwork of laws that provides strong protections for some, and no protections for others. We need to make sure that all pregnant workers, regardless of where they live, can access the protections they need to stay in the workplace.

That is why we are discussing the Pregnant Workers Fairness Act today. This bipartisan bill would establish a pregnant worker's right to reasonable accommodations, and guarantee that pregnant workers can seek those accommodations without facing discrimination or retaliation in the workplace.

The Pregnant Workers Fairness Act is an opportunity for Congress to finally fulfill the promise of the Pregnancy Discrimination Act and take an important step toward workplace gender equity, healthy pregnancies, and the economic security of all pregnant and parenting women and their families. I welcome the opportunity to work with my Republican colleagues to move this bill forward in a bipartisan manner.

I request unanimous consent to enter two letters into the record from the International Brotherhood of Teamsters and more than 100 stakeholder groups in support of the Pregnant Workers Fairness Act.

Thank you and I now yield to the Ranking Member, Mr. Comer, for an opening statement.

---

Mr. COMER. Thank you, Madam Chairman, and I want to welcome all the witnesses who are here today, including my friend and fellow Kentuckian, Iris Wilbur.

Committee Republicans have long been committed to policies and laws that empower all Americans to achieve success. Discrimination of any type should not be tolerated, and no one should ever be denied an opportunity because of unlawful discrimination. That is why there are important protections under Federal law to prevent workplace discrimination, including Federal laws that protect pregnant workers. The Americans with Disabilities Act, or ADA, provides protections to pregnant workers. The Pregnancy Discrimination Act outlaws pregnancy discrimination. A 2015 Supreme Court ruling affirmed that employers must treat pregnant workers equally and fairly, and states, including my state of Kentucky, have passed laws protecting pregnant workers.

The Equal Employment Opportunity Commission, the primary federal agency that enforces civil rights laws against workplace discrimination, has stated that ADA requires employers to accommodate pregnancy-related limitations. Republicans in Congress have long supported meaningful and clearly-defined protections for pregnant workers that ensure they are not being unlawfully discriminated against as it relates to pregnancy, childbirth or related medical conditions. We should promote policies in Washington that encourage a strong family, allow families to flourish and protect life at all stages.

The purpose of America's nondiscrimination laws and the agencies enforcing them is to give all Americans equal opportunities to succeed. That being said, overzealous government intervention often causes more harm than good. While we are committed to preventing and combating unlawful discrimination, we should carefully examine legislation that could cause confusion and prove difficult to implement.

We should prioritize discrimination policies that are responsible and effective so our nation's workers and job creators can flourish, and America's workplaces can be free from discrimination.

The committee should review and evaluate the federal laws already on the books that provide protection for pregnant workers as well as the specific provisions of H.R. 2694 before advancing legislation that could have unexpected consequences. The hearing today is a starting point in this regard.

Bottom line, pregnant workers should be protected and reasonably accommodated in the workplace. So I look forward to hearing from our witnesses today as we examine the Pregnant Workers Fairness Act. Madam Chair, I yield back.

[The statement of Mr. Comer follows:]

**Prepared Statement of Hon. James Comer, Ranking Member, Subcommittee on Civil Rights and Human Services**

I want to thank all the witnesses, including my fellow Kentuckian, for being here today.

Committee Republicans have long been committed to policies and laws that empower all Americans to achieve success.

Discrimination of any type should not be tolerated, and no one should ever be denied an opportunity because of unlawful discrimination. That is why there are important protections under federal law to prevent workplace discrimination, including federal laws that protect pregnant workers. The Americans with Disabilities Act (ADA) provides protections to pregnant workers; the Pregnancy Discrimination Act outlaws pregnancy discrimination; a 2015 Supreme Court ruling affirmed that employers must treat pregnant workers equally and fairly; and states, including my state of Kentucky, have passed laws protecting pregnant workers. The Equal Employment Opportunity Commission, the primary federal agency that enforces civil rights laws against workplace discrimination, has stated that the ADA requires employers to accommodate pregnancy-related limitations.

Republicans in Congress have long supported meaningful and clearly-defined protections for pregnant workers that ensure they are not being unlawfully discriminated against as it relates to pregnancy, childbirth, or related medical conditions. We should promote policies in Washington that encourage a strong family, allow families to flourish, and protect life at all stages.

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Bottom line, pregnant workers should be protected and reasonably accommodated in the workplace.

So, I look forward to hearing from our witnesses today as we examine the Pregnant Workers Fairness Act.

---

Chairwoman BONAMICI. Thank you. Without objection, all other Members who wish to insert written statements into the record may do so by submitting them to the Committee electronically in Microsoft Word format by 5:00 pm on November 4th, 2019.

I will now introduce our witness for the first panel. Congressman Jerrold Nadler represents New York's 10th Congressional district. Congressman Nadler is the Chairman of the House Committee on

the Judiciary. For more than 30 years, Chairman Nadler has been on the frontlines in the fight for civil rights, and he has been a relentless defender of our country's fundamental promise of equality for all.

Congressman Nadler has played a significant role in the fight for women's rights, serving as a central figure in the reauthorization of the Violence Against Women Act, and he is the author of the Pregnant Workers Fairness Act.

We appreciate the witness for being here today and look forward to your testimony. Let me remind the witness that we have read your written statement and it will appear in full in the hearing record, pursuant to Committee Rule 7(d) and committee asks to limit your oral presentation to a five minute summary of your written statement.

Before you begin your testimony, please remember to press the button on the microphone in front of you. We know you know this. And as you begin to speak, the light in front of you will turn green and after four minutes it will be yellow to signal you have one minute remaining and when it turns red, your five minutes have expired and we ask that you wrap up. And I now recognize Chairman Jerrold Nadler for your testimony.

**TESTIMONY OF THE HONORABLE JERROLD NADLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK**

Mr. NADLER. Thank you, Chair Bonamici and Ranking Member Comer for holding this hearing today and inviting me to testify about my bill, the Pregnant Workers Fairness Act. This hearing is, as its title indicates, long overdue. Pregnancy discrimination is not a new issue. For as long as women have been in the workforce, they have been fired, passed over for promotion or hiring, had their work cut back or forced to leave when they became pregnant or started the family.

In the last six months, we have seen multiple media reports about workers forced off the job while pregnant because they needed a simple fix to keep working.

Pregnancy is not a disability. Sometimes, due to complications or even in healthy pregnancies, workers need a reasonable accommodation from their employer, such as a stool, an extra bathroom break, limiting contact with certain chemicals or reducing the amount of lifting they do.

These accommodations are short in duration and typically cost very little to provide. However, for millions of pregnant workers, they are critical.

A simple accommodation could mean the difference between staying on the job or being forced out on leave. The difference between keeping the health insurance and paycheck or putting their pregnancy at risk. In 1978, Congress passed the Pregnancy Discrimination Act in an effort to stop employers from treating their pregnant employees this way. The law prohibited discrimination on the basis of pregnancy, childbirth or related conditions.

Over the last 40 years, courts have interpreted the law to mean that if you treat your non-pregnant employees well, you have to treat your pregnant employees well.

Of course, the inverse is also true. If you treat your non-pregnant employees terribly, you have every right under the law to treat your pregnant employees terribly. In 2015, the Supreme Court attempted to address how the Pregnancy Discrimination Act interacted with the need for pregnancy accommodation in the workplace.

But the court's decision only exacerbated the problem in the end. In Young v. UPS, the Court found that in order to receive an accommodation, a pregnant worker has to prove that her employer accommodated non-pregnant employees who are similar in their ability or inability to work. That test places a huge burden on pregnant workers. It requires them to have detailed knowledge of the medical and employment history of every other employee. Women must prove that their need for an accommodation is just as valid as their male counterpart who, for example, had a hernia.

For most workers in this country, especially low wage workers, there is simply no way to get that information and prove that case.

That is why a recent report from A Better Balance found that courts sided with employers in two thirds of pregnancy accommodation cases post Young.

The burden the Young decision places on pregnant workers to prove their case, is, for most pregnant women, insurmountable. Since Young, other Members of Congress have introduced legislation to address pregnancy accommodation, including a bill introduced last week by my Republican colleagues, Mr. Walberg and Ms. Wagner.

This new legislation appears to be based on the Young test and requires that employers provide an accommodation for some of their non-pregnant employees. They must do so for pregnant employees in similar working conditions. I am happy to see this additional interest in ensuring that pregnant workers have the accommodations they need to stay on the job, but the problem with Young and therefore the problem with Mr. Walberg and Ms. Wagner's proposal, is that they require pregnant workers to prove that they have been discriminated against in order to access accommodations, but it doesn't have to be that complicated. That is why I introduced the bipartisan Pregnant Workers Fairness Act. The bill is simple and creates an affirmative right to an accommodation, rather than relying on a model of discrimination. Using the framework and language of the ADA, it requires employers to provide reasonable accommodations to pregnant workers as long as the accommodation does not impose an undue hardship on the employer. Those accommodations would be available for pregnancy, childbirth or related conditions including lactation.

Courts know exactly how to interpret that language. There are three decades of ADA case law to guide them. Employers similarly have worked within ADA's requirements for decades and know exactly what their responsibilities will be. But most importantly, women who have the certainty—they can safely stay on the job, as long as they choose, during their pregnancy, and keep their paycheck and their health insurance throughout.

We know that this framework for pregnancy accommodation works because we have seen it in action. To date, 27 states around the country have passed pregnancy accommodation laws similar to

the Pregnant Workers Fairness Act. States like New York, Nebraska, Washington state, most recently South Carolina and Kentucky have all passed legislation to provide reasonable accommodation in a bipartisan manner.

Here in the House, the bill has over 100 bipartisan cosponsors and is supported by a broad range of health, labor, business and women's rights' organizations. Thank you again, Chair Bonamici and Ranking Member Comer. I look forward to continuing to work with you and this committee to move this critical piece of legislation forward.

[The statement of Mr. Nadler follows:]

**U.S. REPRESENTATIVE JERROLD NADLER**

**Opening Statement for Member Panel**

**"Long Over Due: Exploring the Pregnant Workers Fairness Act"**

Education and Labor Committee

Civil Rights and Human Services Subcommittee

October 22, 2019

10:15 AM

Thank you, Chair Bonamici and Ranking Member Comer, for holding this hearing today and inviting me to testify about my bill, the Pregnant Workers Fairness Act.

This hearing is, as its title indicates, long overdue. Pregnancy discrimination is not a new issue; for as long as women have been in the workforce, they have been passed over for promotion or hiring, fired, had their work cut back, or forced out on leave when they became pregnant or started a family. In the last six months, we have seen multiple media reports about workers forced off the job while pregnant because they needed a simple fix to keep working. Pregnancy is not a disability, but sometimes due to complications or even in healthy pregnancies, workers need a reasonable accommodation from their employer such as a stool, an

extra bathroom break, limiting contact with certain chemicals, or reducing the amount of lifting they do.

These accommodations are short in duration and typically cost very little to provide. However, for millions of pregnant workers they are critical. A simple accommodation can mean the difference between staying on the job or being forced out on leave, the difference between keeping their health insurance and paycheck or putting their pregnancy at risk.

In 1978, Congress passed the Pregnancy Discrimination Act, or PDA, in an effort to stop employers from treating their pregnant employees this way. The law prohibited discrimination on the basis of pregnancy, childbirth, or related conditions. Over the last 40 years, courts have interpreted the law to mean that if you treat your non-pregnant employees well, you have to treat your pregnant employees well. Of course, the inverse is also true: if you treat your non-pregnant employees terribly, you have every right to treat your pregnant employees terribly.

In 2015, the Supreme Court attempted to address how the PDA interacted with the need for pregnancy accommodations in the workplace. But the Court's

decision only exacerbated the problem in the end. In *Young v. UPS*, the Court found that in order to receive an accommodation, a pregnant worker has to prove that her employer accommodated non-pregnant employees who were similar in their ability or inability to work.

That test places a huge burden on pregnant workers: it requires them to have detailed knowledge of the medical and employment history of every other employee. Women must prove that their need for an accommodation is just as valid as their male counterpart who, for example, had a hernia. For most workers in this country, especially low-wage workers, there is simply no way to get that information and prove their case. That is why a recent report from A Better Balance found that courts sided with employers in two-thirds of pregnancy accommodation cases post-*Young.* The burden the *Young* decision places on the pregnant worker to prove their case is, for most pregnant women, insurmountable.

Since *Young,* other Members of Congress have introduced legislation to address pregnancy accommodation, including a bill introduced last week by my Republican colleagues Mr. Walberg and Ms. Wagner. This new legislation appears to be based on the *Young* test and requires that if employers provide an

accommodation for some of their non-pregnant employees they must do so for pregnant employees in similar working conditions. I am happy to see this additional interest in ensuring that pregnant workers have the accommodations they need to stay on the job. But the problem with *Young,* and, therefore, the problem with Mr. Walberg and Ms. Wagner's proposal, is that they require pregnant workers to prove they have been discriminated against in order to access accommodations.

But it doesn't have to be that complicated. That is why I introduced the bipartisan Pregnant Workers Fairness Act. The bill is simple, and creates an affirmative right to an accommodation rather than relying on a model of discrimination. Using the framework and language of the ADA, it requires employers to provide reasonable accommodations to pregnant workers as long as the accommodation does not impose an undue hardship on the employer. These accommodations would be available for pregnancy, childbirth, or related conditions, including lactation.

Courts know exactly how to interpret that language – there are decades of ADA case law to guide them. Employers, similarly, have worked within ADA's

requirements for decades and know exactly what their responsibilities will be. But most importantly, women will have the certainty they can safely stay on the job as long as they choose during their pregnancy and keep their paycheck and their health insurance throughout.

We know that this framework for pregnancy accommodation works because we have seen it in action. To date, 26 states around the country have passed pregnancy accommodation laws similar to the Pregnant Workers Fairness Act – states like New York, Nebraska, Washington State, and most recently South Carolina and Kentucky have all passed legislation to provide reasonable accommodation in a bipartisan manner. Here in the House, the bill has over 100 bipartisan cosponsors and is supported by a broad range of health, labor, business, and women's rights organizations.

Thank you again, Chair Bonamici and Ranking Member Comer and I look forward to continuing to work with you and this Committee to move this critical piece of legislation forward. I yield back the balance of my time.



Chairwoman BONAMICI. Thank you, Chairman Nadler. I want to thank you for taking your time to testify before the committee today. Your testimony is a valuable piece of legislative record. We will now seat the second panel. Thank you.

Thank you to the witnesses and the committee staff for that smooth transition. I will now introduce our witnesses for the second panel. Ms. Kimberlie Michelle Durham is from is from Arab, Alabama. Ms. Durham made the trip here to Washington D. C. to share her story. Formerly, an emergency medical technician in Alabama, Ms. Durham was forced off the job when she became pregnant.

Next, Ms. Iris Wilbur, joined Greater Louisville Inc., the Metro Chamber of Commerce in 2016. She serves as their vice president of government affairs and public policy. In her role, she works on policy and legislation at the local, state and federal levels to help advocate for the region's business community.

Ms. Ellen McLaughlin is a partner in the Chicago office of Seyfarth Shaw LLP and former Chair of the Labor and Employment Law Department.

Ms. McLaughlin is engaged in a broad-based employment law practice, specializing in Federal and state court and administrative agency employment litigation.

Ms. Dina Bakst is co-founder and co-President of A Better Balance. A leading national legal advocacy organization headquartered in New York City. A Better Balance is dedicated to advancing the rights of working families, promoting fairness in the workplace and helping workers across the economic spectrum care for themselves and their families without risking economic security.

We appreciate all of the witnesses for being here today and we look forward to your testimony. Let me remind the witnesses that we have read your written statements and they will appear in full in the hearing record. Pursuant to Committee Rule 7(d) and committee practice, each of you is asked to limit your oral presentation to a five minute summary of your written testimony.

Let me remind the witnesses that pursuant to title 18 of the US Code, Section 1001, it is illegal to knowingly, willfully falsify any statement, representation, writing, document or material fact presented to Congress or otherwise conceal or cover up material fact.

Before you begin your testimony, please remember to press the button on the microphone in front of you so that it will turn on and Members can hear you.

As you begin to speak, the light in front of you will turn green. After four minutes, the light will turn yellow to signal that you have one minute remaining and when the light turns red, your five minutes have expired and we ask that you please wrap up your testimony.

We will let the entire panel make their presentations before we move to Member questions. When answering a question, please again remember to turn your microphone on. So I will first recognize Ms. Durham. Welcome to the committee. You are recognized for five minutes for your testimony.

## TESTIMONY OF KIMBERLIE MICHELLE DURHAM

Ms. DURHAM. Good morning, my name is Michelle Durham and I am a mom from Arab, Alabama. I want to thank Congresswoman Bonamici, Congressman Comer and the subcommittee Members for having me here today.

I've lived my whole life in Alabama and yesterday was the first time I've ever been on a plane. It was a little scary, but I was glad to make the trip. I want you to know what happened when I became pregnant four years ago. They say that pregnancy is supposed to be a time of happiness, but my pregnancy was filled with anxiety and fear because my employer sent me home without pay right when I needed a paycheck the most.

That's not the way things should be. In March 2015, when I was 22 years old, I began working for Rural Metro Corporation in Gadsden, Alabama. I was an EMT, or an emergency medical technician.

It was my first job after getting my certificate and I was excited to work. My plan was to gain experience and save up so I could continue my training and eventually become a paramedic. About six months after I started working for Rural Metro, I learned I was pregnant with my first child. During one of my first prenatal appointments, I was told that I shouldn't lift anything over 50 pounds, a standard across the board.

Because my job required me to lift patients in stretchers which weighed 100 pounds without a patient on them, I knew that I would have to ask Rural Metro to temporarily reassign me so I could follow my healthcare provider's orders. I didn't think it was a problem because I knew that Rural Metro had a policy of giving light duty jobs to EMTs when they had problems, like a back injury.

I also knew that they had dispatcher jobs available that I could do and that wouldn't involve any lifting, but I was very wrong. My manager told me that the company only gave light duty jobs to EMTs who were injured while working. He told me my only option was to take an unpaid leave of absence.

The H.R. department backed him up and told me I had to go home. I was shocked. I wanted to work. I loved my job. I really wanted to be an EMT and I needed my paycheck. All I could think about was how I was supposed to live for six months without income of any sort. How was I supposed to prepare for my son to come home? I was afraid for him and for me. I soon realized that I needed help and I called a lawyer in Birmingham, Heather Leonard. She contacted the company and told them what they were doing was illegal and that a recent Supreme Court decision was on my side. Rural Metro never even responded to her.

After that, we went to the EEOC and then to court. My experience in the court system has been tough. The judge ruled against me and my case is on appeal and I've got the ACLU helping me and I am very grateful for them. But the truth is I didn't want to hire a lawyer, I didn't want to go to court, I just wanted to keep working.

After Rural Metro forced me to take leave in September of 2015, I was unemployed for about 7 months. I looked really hard for a job and I couldn't find one. I couldn't pay my rent. I had to move back home with family. I was excited about meeting my new baby, but his birth was terrifying. I was worried all the time about how I would provide for him and I racked up a lot of credit card debt trying to take care of us and pay off for my EMT certifications.

I actually still have a hospital bill from when I gave birth to him in March of 2016 because I didn't have health coverage. I eventually found a job in a factory, but it didn't come with overtime or benefits like my Rural Metro job did and I later had to take a second job in a fast food restaurant to help pay my bills.

Recently, I had to change jobs again and I am now a manager in a pet store. I still don't have health insurance though and my son is on Medicaid.

My son is three and he is my greatest joy and I wouldn't trade being his mom for anything, but I'll never get back those months before he was born and after—all I could think about was what I was losing while I was pregnant. The worry and the fear.

I hope that Congress passes the Pregnant Workers Fairness Act because what happened to me was wrong. Women and families need a law that tell their employer that they have to explore different options that will help pregnant workers keep their job. Employers should not just be able to say no when a pregnant worker asks for a temporary change. They should have that right to work it out.

Please, use your power to help pregnant workers take care of themselves, their babies and their families and I want to thank you for listening to my story today.

[The statement of Ms. Durham follows:]

STATEMENT OF

**KIMBERLIE MICHELLE DURHAM**

FOR THE HEARING ON

**LONG OVER DUE:**
**EXPLORING THE PREGNANT WORKERS' FAIRNESS ACT (H.R. 2694)**

BEFORE

**UNITED STATES HOUSE OF REPRESENTATIVES**
**COMMITTEE ON EDUCATION AND LABOR**

**CIVIL RIGHTS AND HUMAN SERVICES SUBCOMMITTEE**

OCTOBER 22, 2019

My name is Michelle Durham, and I'm a mom from Arab, Alabama. Arab is a small city in the northeast corner of the state, near the Tennessee and Georgia borders. I have lived my whole life in Alabama. In fact, before yesterday I had never been on a plane before. But I made the trip here to Washington, DC because I wanted to tell you my story. I wanted you to know what happened to me when I became pregnant for the first time four years ago. No one should go through what I did when starting a family.

Pregnancy should be a time of joy. A time of anticipation, and of possibility. But for me, pregnancy was a time of anxiety, fear, and sadness. Those negative emotions replaced the positive ones for the simple reason that my employer refused to let me keep working during my pregnancy. Instead, it sent me home, without pay, right at the time I needed a paycheck the most. That just isn't the way it should be.

In March 2015, when I was 22 years old, I began working for Rural/Metro Corporation in Gadsden, Alabama, about an hour outside Birmingham. My job was Emergency Medical Technician, or EMT. Rural/Metro is a company that provides emergency medical care to people living in areas that lack basic medical services. In that role, I served Gadsden and the surrounding areas in Etowah County, and St. Clair County, a rural county of poultry, livestock, and crop farms.

Rural/Metro was my first job after becoming licensed as an EMT, and I was so excited to start my career. I had worked so hard to get there. After finishing my Associate's degree, I earned my EMT certificate from Wallace State Community College. During the clinical part of my training, spending 12-hour shifts riding in the ambulance with EMTs and paramedics, I learned I loved creating that direct relationship with people in need. I felt a calling to help others, and I wasn't put off by taking care of people going through real trauma. It's not a role that's right

for everyone, but it was exactly what I wanted to do. I was so happy when I learned, the day before Christmas Eve in 2014, that I'd passed the national EMT certification exam. A few months later, I interviewed at Rural/Metro, and they hired me on the spot. My plan was to get some experience as an EMT and save up so that I could continue my training, with an eye toward eventually becoming a paramedic.

About six months after I started working for Rural/Metro, I learned I was pregnant with my first child. I had always wanted to be a mom, but doctors had led me to believe that I might not be able to have kids. So although the pregnancy was a surprise, it was a very happy one.

During one of my first pre-natal appointments, I was told that I should not lift anything over 50 pounds. Because my job required that I lift patients and stretchers on a pretty regular basis, I knew that I would need to ask Rural/Metro to temporarily reassign me so that I could follow my health provider's orders and have a healthy pregnancy.

It was important to me to do whatever my medical provider told me was necessary to stay safe while pregnant, but continuing to work, and earn, was a necessity, too. I wasn't worried about asking for a temporary break from lifting because everyone knew that Rural/Metro had a policy of giving "light duty" or "modified duty" job assignments to EMTs when they had lifting restrictions due to reasons other than pregnancy, like a back injury. I also checked the company's job listings and saw that there were vacant dispatcher jobs that I could do and would not involve any lifting, either. With all of these options, I was sure that it would not be a problem for me to keep on working until my due date.

I was so wrong. Instead of spending the next few months working for Rural/Metro in an alternative position, and then returning to continue the EMT career I had just begun, my life derailed the moment I told my employer that I was pregnant.

My manager, Mr. Crowell, told me that the company only gave light or modified duty jobs to EMTs who had been injured while working, and that pregnant workers didn't qualify. He later told me that he had checked with Rural/Metro's Human Resources Department, and that HR confirmed that pregnant EMTs were not eligible for alternative assignments. HR also told Mr. Crowell that because I had a medically-imposed lifting restriction, Rural/Metro would not allow me to keep working as an EMT, either. Instead, HR said that my only option was to take an unpaid leave of absence.

I was stunned. At that point, I was about six months away from my due date. How was I supposed to live for six months without a paycheck? How could I buy what I needed to prepare for my baby's arrival? How would I support my son after he was born? When I got the leave paperwork from the company, the news got even worse: Rural/Metro's policy did not allow employees who were on leave to work for another company, either. Also under that policy, leave was only approved up to 90 days, which would expire long before my due date. (Because I had not worked at the company for a year, I was not yet entitled to Family and Medical Leave Act (FMLA) leave – although even if I were, that would expire before I gave birth, too.) The reality was that I not only was going to lose my paycheck temporarily; I also was at risk of losing my job forever.

I decided to follow up with HR myself to try to convince Rural/Metro not to force me out. After all, the company had a policy of letting other EMTs work when they had restrictions, and I was in good standing as an employee. I couldn't believe the company would not let me work when I wanted to so badly. But the HR representative I spoke to, Ms. Harmon, wouldn't budge. She repeated the policy that Mr. Crowell had told me: only EMTs with on-the-job injuries could get light or modified duty jobs, and all the company did for pregnant employees

was to put them on unpaid leave. After that, I again called Mr. Crowell, begging for some way to keep working. He told me that he would check with HR again – but this time, he never called me back.

I soon realized that I needed help, and that's when I called a lawyer in Birmingham, Heather Leonard. I was sure Rural/Metro's position was due to a misunderstanding, and that Heather could help me get my job back. She wrote Rural/Metro a letter, telling them that the Supreme Court recently had decided a case like mine. She explained that under the federal Pregnancy Discrimination Act, the company was not allowed to have one policy for EMTs injured on the job and a different, worse one for pregnant EMTs. That seemed sensible to me. It shouldn't matter *why* another EMT needed an alternative assignment. Those other EMTs and I were in the same position: we all had some limitations that meant it we temporarily couldn't do all of our job duties. If the company made it possible for those other EMTs to keep working, why should pregnant EMTs get any less?

The company never answered Ms. Leonard. After a month of silence, I filed for unemployment benefits so that I could at least pay my bills. *That's* what got a response from Rural/Metro: the company opposed my application, telling the state that I still worked there – even though it had refused to schedule me for any shifts. After that, I had no choice but to file a charge of discrimination with the Equal Employment Opportunity Commission, followed by a lawsuit in federal court in the fall of 2016.

Unfortunately, my experience in the court system has been an uphill battle. The judge who heard my case said that it did not matter what Rural/Metro did for EMTs with on-the-job injuries, because those workers were not "similar" to me, a pregnant person. For that reason, she ruled that the law against pregnancy did not require I be treated the "same" as those EMTs. The

company also had a policy for "accommodating" my co-workers with qualifying disabilities, but the judge didn't even discuss that policy at all. The lower court's decision is now on appeal to the Eleventh Circuit, and the case will be heard this January. I'm grateful that the ACLU Women's Rights Project has joined my legal team for this phase of the case. But the truth is, I didn't want to hire a lawyer or go to court. I just wanted to keep my job and keep working.

Even if I win my case, so much damage already has been done. After Rural/Metro forced me to take leave in September 2015, I was unemployed for about seven months, despite diligently looking for a job. Without an income, I couldn't pay my rent, and had to move in with my grandmother. As excited as I was about meeting my baby, his approaching birth terrified me. I worried all the time how I would provide for him. I am incredibly lucky that I had a place to live, and family and friends who helped with hand-me-down supplies and clothes. But I couldn't depend on them for everything, and racked up credit card debt covering necessities for my son and me, and repaying the loans I'd taken out to finance my EMT training. Because I'd lost health coverage when I lost my job, I still have a hospital bill from when I gave birth in March 2016 to my son, Aedan.

My career as an EMT ended the day Rural/Metro put me on leave. I tried finding other emergency care jobs in my community, but there just aren't many options in my neck of the woods. I eventually found a job in a factory, although it didn't come with overtime or benefits like my Rural/Metro position did, and I later supplemented that income with a second job in a fast-food restaurant. Recently I changed jobs again, and am now manager of a pet store. I'm still uninsured, and my son receives health coverage through Medicaid. I hope one day to return to school and continue toward my goal of becoming a paramedic, but that will take more savings, which will take more time.

Aedan is now three years old. He is my greatest joy, and I wouldn't trade the experience of being his mom for anything. But I will never be able to get back those months before and after he was born, when all I could think about was what I was losing by being pregnant – not what I was gaining. At this point, all these years later, I'm fighting only for a principle. Pregnant workers need to be able to point to the law, in real time, to make their employers do the right thing so that a long-fought lawsuit isn't necessary. I wish I'd been able to point to a law that stood just for me and my rights as a pregnant worker. As is clear from how my employer worked with EMTs with on-the-job injuries who needed temporary accommodations, it would have been easy for us to come up with a solution.

I hope that Congress passes the Pregnant Workers' Fairness Act because what happened to me was wrong. It's wrong that something as normal and natural as becoming a parent cost me a career that I loved and was good at, and cost me my financial well-being. My employer could have kept me on the job, but it didn't – because it didn't think it had to. You have the power to change that. Please use that power to help millions of pregnant workers across the country. Starting a family should not come at the price I was forced to pay.



Chairwoman BONAMICI. Thank you so much for your testimony and for making your first plane trip here. We are glad you did. I now recognize Ms. Wilbur for five minutes for your testimony.

**TESTIMONY OF IRIS WILBUR, VICE PRESIDENT OF GOVERNMENT AFFAIRS & PUBLIC POLICY, GREATER LOUISVILLE INC.**

Ms. WILBUR. Good morning. I am Iris Wilbur and I represent Greater Louisville Inc., the Metro Chamber of Commerce. Thank you, Chair Bonamici, Ranking Member Comer and the subcommittee for the opportunity to explain why GLI strongly supports the Pregnant Workers Fairness Act. Today, we live in a world

where businesses need every person who can work, participating in the labor force. On behalf of our 1,700 plus small, medium and large companies our chamber represents, this is the most pressing topic among our membership.

We must do what is necessary to attract and retain employees and sometimes that means working around their personal situations like pregnancies.

This is particularly true for the 58 percent of women in Kentucky's labor force who are of childbearing age. Businesses also want healthy workforces, especially in Kentucky where healthcare is a major industry.

Healthcare is a female dominated sector, so we not only want to retain women workers, but we want to keep them healthy and advancing in their careers.

Over the last year, GLI worked with our membership and helped pass Kentucky legislation called the Pregnant Workers Act, a law designed to help combat discrimination and promote women's labor force participation. What we discovered among our membership was that most large company HR departments had the resources to stay current on changes in the law but many small to midsize companies were forced to navigate complex circumstances like pregnancy and related medical conditions without the aid of a robust H.R. department or in house counsel. We saw an opportunity to search for a solution and prevent problems before they start and found the state proposal to be a strong pro-business bill that will have a positive impact on Kentucky's economy.

The Kentucky law parallels the proposed Federal Pregnant Workers Fairness Act in that it applies to employers with 15 or more employees and how to provide accommodations for pregnant workers, unless it constitutes an undue hardship for the employer. The Kentucky law defines reasonable accommodations and provides businesses with guidance about when an employer is and is not obligated to provide them. Our pro-business, pro-workforce bill not only earned endorsements from the Kentucky chapters of March of Dimes, United Way, Fraternal Order of Police and Nurses Association but also passed with overwhelming bipartisan support in the general assembly with over 80 percent of our legislators voting yes and then signed into law. The bill was championed by Republican Senator Alice Forgy Kerr with bipartisan co-sponsors.

Although we passed the law in Kentucky, we still need the Federal PWFA. GLI covers 15 counties, 5 in southern Indiana, home to many multistate businesses and headquarters so the ability to have uniformity related to these accommodations throughout the country is important. This is why we urge Congress to take action.

Just like the Kentucky law, the much-needed clarity outlined in the PWFA will increase the potential to resolve reasonable accommodation requests quickly and informally and reducing the potential for costly litigation. We believe that the Act will lead to reduction, non-increase in litigation for precisely this reason.

At least two states with these laws have reported reduction in litigation since these laws went into effect. For our members, uncertainty means dollars. A consistent and predictable legal landscape means a business-friendly environment. Before Kentucky's law was enacted this Summer, our employers were forced to navi-

gate a complex web of Federal laws and court decisions to figure out their obligations. And now this guidance is especially beneficial for the smaller companies we represent who cannot afford expensive legal advisors.

Additionally, the Act will help boost our country's workforce participation rate among women. In states like Kentucky, which ranks 44th in the nation for female labor participation, we know one contributor to this abysmal statistic is a pregnant worker who is forced out or quits a job due to a lack of reasonable workplace accommodations.

By clearly laying the groundwork for an informed dialogue between employers and employees, women can continue working safely and productively throughout the course of a pregnancy and afterwards.

Finally, the Act includes pro-business safeguards to ensure these accommodations will not cause financial harm to a business or significantly interfere with day to day operations.

While most pregnancy accommodations are low cost, a stool to sit on, access to water to stay hydrated or a modified work schedule like the ADA, the law includes an undue hardship standard that would exempt employers if the accommodation would cause significant difficulty or expense. There is a clear bottom line here. The Act is pro-business and pro-workforce and GLI urges Congress to pass the Pregnant Workers Fairness Act. Thank you.

[The statement of Ms. Wilbur follows:]

[GLI] GREATER LOUISVILLE INC.
The Metro Chamber of Commerce

GreaterLouisville.com

**Testimony of Iris Wilbur**
**Vice President of Government Affairs & Public Policy**
**Greater Louisville Inc., The Metro Chamber of Commerce**

**Subcommittee on Civil Rights and Human Services**
Committee on Education and Labor
U.S. House of Representatives

**"Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694)"**

**October 22, 2019**

My name is Iris Wilbur and I am representing Greater Louisville Inc. (GLI), the Louisville, Kentucky Metro Chamber of Commerce. Thank you to Chair Bonamici, Ranking Member Comer, and the Members of the Education & Labor Subcommittee on Civil Rights and Human Services for allowing me the opportunity to provide my testimony today. On behalf of our regional chamber of commerce, I am here to share why GLI **strongly supports H.R. 2694, The Pregnant Workers' Fairness Act.**

Greater Louisville Inc. (GLI) is focused on growing the regional economy. As the region's largest convener of business leadership, with over 1,700 small, medium, and large-sized employer investors, GLI leads economic and global outreach strategies focused on business attraction, nurtures the entrepreneurial eco-system, and champions the development of the community's talent base. As the voice of Greater Louisville's business community, GLI advocates for a pro-business environment and facilitates businesses engagement on issues that impact regional competitiveness. GLI is the 2019 national Chamber of the Year and is one of only three percent of chambers nationally certified with 5-star accreditation status by the U.S. Chamber of Commerce, based on GLI's dedicated policy efforts, effective operations, beneficial programs, and overall positive community impact.

Over the last year, GLI aided in passing state legislation in Kentucky, called the Pregnant Workers Act (PWA), a law designed to help combat discrimination and promote women's labor force participation. The PWA parallels the proposed federal Pregnant Workers' Fairness Act (PWFA) in that it applies to employers with 15 or more employees and how to provide reasonable accommodations for pregnant workers, unless it would constitute an undue hardship for the employer. The PWA **clearly defines what constitutes "reasonable accommodations" in the pregnancy context and when an employer is and is not obligated to provide them**. Like the PWFA, Kentucky's law explicitly prohibits requiring an employee to take leave if another reasonable accommodation can be provided. Additionally, the Kentucky PWA and PWFA both include specific provisions about the interactive process that employers and employees utilize to reach agreement on a workable reasonable accommodation.

These efforts were made possible after GLI worked with our region's business community and the Kentucky General Assembly once our membership found the proposal to be a strong, pro-business bill that will have a positive impact on Kentucky's economy.

Today, we live in a world where businesses need every person who can work participating in the labor force. As employers, we must do what is necessary to attract and retain employees, and sometimes that means working around their personal situations, particularly pregnancies.

Federal laws like the Family and Medical Leave Act, the Pregnancy Discrimination Act, and the Americans with Disabilities Act have long been on the books but provide little or mixed guidance on what is allowed or required

in the workplace in situations where a pregnant worker needs accommodations to stay healthy. This is particularly true for the 58 percent of women in Kentucky's labor force who are of childbearing age.[1]

What we discovered among our chamber membership was that most large company HR departments long ago enacted policies to retain their valuable female employees through their pregnancies, but many small-to-midsize Kentucky businesses were forced to navigate complex circumstances like pregnancy, childbirth, and related medical conditions without the aid of a robust HR department or in-house counsel. On behalf of our region's business community, we saw an opportunity to search for a solution to address this uncertainty and help **prevent** problems before they start.

This pro-business, pro-workforce bill not only earned the endorsement from various community non-profits, labor, health, and faith-based organizations throughout Kentucky but also **passed with overwhelming bipartisan support** (25-7 Senate, 87-5 House) in the Kentucky General Assembly, and was then signed by our Governor. The bill was championed by a Republican sponsor, Kentucky State Senator Alice Forgy Kerr.

Now that we have successfully secured the passage of this important law in the Commonwealth, we urge Congress to take action to provide **clarity and uniformity** on this issue. As a bi-state chamber of commerce, we support legislative efforts that bring regional alignment, especially related to labor laws. Greater Louisville is home to many multi-state businesses and corporate headquarters, so the ability to have uniformity related to pregnant worker accommodations throughout our region and entire country is important. Therefore, GLI urges Congress to advance the PWFA at the federal level.

The PWFA also gives much-needed clarity because it explicitly provides "reasonable accommodations" for pregnant and new mothers, in addition to the proper procedures for providing them, **thereby increasing the potential to resolve requests for accommodations quickly and informally (as employers have done for decades for workers with disabilities) and reducing the potential for costly litigation**. We believe that the Act will lead to a reduction, not an increase, in litigation for precisely this reason. At least two states with pregnant worker accommodation laws have reported a reduction in litigation since the laws went into effect.[2] Before Kentucky's law was enacted this summer, our employers were forced to navigate a complex web of federal laws and court decisions to figure out what their obligations are when it comes to appropriately accommodating pregnant workers and new mothers. **Clearly defining what constitutes "reasonable accommodations" and when an employer is and is not obligated to provide them will establish important guidance for businesses, especially the smaller and mid-size companies we represent who cannot afford expensive legal advisors.**

You may ask, doesn't federal law cover pregnant workers? The Americans with Disabilities Act does not require accommodations for pregnancies that do not qualify as disabilities under the Act, like a worker with a healthy pregnancy who seeks to prevent medical problems before they start. Regarding the federal Pregnancy Discrimination Act, it contains no explicit right to reasonable accommodations since it only requires employers to accommodate a pregnant worker if they do so for others under a complex and inconsistently applied legal standard.

Second, the **Act would help boost our country's workforce participation rate among women.** In states like Kentucky, which ranks 44th in the nation for female labor force participation,[3] we know one contributor to this abysmal statistic is a mother or soon-to-be mother who is forced out or quits a job due to a lack of reasonable

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[1] U.S. Census Bureau, *Sex by Age by Employment Status for the Population 16 Years and Over*, (2017), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_1YR_B23001&prodType=table.

[2] Bakst, Dina, Gedmark, Elizabeth, and Brafman, Sarah, *Long Overdue* (New York, NY: A Better Balance, 2019), p. 27 n. 149.

[3] Institute for Women's Policy Research, "Status of Women in the States: The Economic Status of Women in Kentucky," March 2018, https://statusofwomendata.org/wp-content/themes/witsfull/factsheets/economics/factsheet-kentucky.pdf.

workplace accommodations. We can help prevent such situations by clearly laying the groundwork for an informed dialogue between employers and employees on how these employees can continue working safely and productively throughout the course of a pregnancy and afterwards. In 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.

Third, the **Act could result in important health and safety benefits and could 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.[4]

Finally, it is important to note that the **Act includes pro-business safeguards** to ensure the obligation to provide reasonable accommodations will not cause financial harm to a business or significantly interfere with a business's day-to-day operations. Some examples of workplace adjustments to address medical conditions related to pregnancies are a stool to sit on, access to water to stay hydrated, or temporary relief from heavy lifting. An employer is obligated to provide an accommodation only so long as it does not constitute an "undue hardship" on the business, and **the provisions of the Act only apply to businesses with 15 or more employees**. Our members appreciate that the PWFA borrows the familiar ADA framework that they have decades of experience successfully implementing.

There's a clear bottom line here: **the Act is pro-business and pro-workforce.** Now that we have made gains in Kentucky and join 26 other states, we urge Congress to pass H.R. 2694, the bipartisan Pregnant Workers' Fairness Act, without delay. The business community and elected leaders must work together to ensure that working women can participate fully and equally in the workplace.

Sincerely,

Iris Wilbur
Vice President of Government Affairs & Public Policy

[4] Job Accommodation Network, "Accommodation and Compliance: Low Cost, High Impact," (accessed October 16, 2019), https://askjan.org/topics/costs.cfm.

Chairwoman BONAMICI. Thank you for your testimony. I now recognize Ms. McLaughlin for five minutes for your testimony.

## TESTIMONY OF ELLEN MCLAUGHLIN, PARTNER, SEYFARTH SHAW LLP

Ms. MCLAUGHLIN. Thank you, Chair Bonamici, Ranking Member Comer and Members of the subcommittee. Thank you for giving me the opportunity to testify here today on the Pregnant Workers Fairness Act. My name is Ellen McLaughlin, I am a partner in the law firm Seyfarth Shaw although today I testify on my own behalf.

I have practiced law exclusively in the employment arena for over 38 years defending employers before administrative agencies

as well as in state and Federal courts. A significant portion of my practice is dedicated to providing advice and counsel on accommodation and leave issues.

I have coauthored comments to the EEOC's proposed regulations to the ADA as well as the amendments Act. I also coauthored comments to the DOL's FMLA proposed regulations back in 2008 and even this year when DOL has proposed using new forms.

Finally, in June 2011, I was one of two management attorneys in the country invited by the EEOC to testify at a public hearing on the issue of leave as an accommodation. The purpose of my testimony is not to take a position on this bill but rather to briefly describe the protections currently afforded to workers who are pregnant and raise questions that I hope the subcommittee will consider regarding the proposed legislation.

There are three primary laws at the level affording protection to pregnant workers. The Pregnancy Discrimination Act, which provides that an employer violates Title VII if it intentionally discriminates against an employee due to their pregnancy. If a worker is temporarily unable to perform her job duties due to a medical condition related to that pregnancy or childbirth, the PDA mandates that an employer must treat her in the same way as it treats other temporarily disabled employees.

The ADA Amendments Act broadened the definition of disability such that pregnancy related restrictions may constitute a disability, thus triggering the employer's duty to reasonably accommodate and Federal court decisions have specifically held that pregnancy related medical conditions are disabilities. And finally, the FMLA provides that a pregnant employee can take 12 weeks of job protected leave in a 12 month period due to pregnancy, including on an intermittent basis.

State laws, there are approximately 25 of them. I guess 27 now that do provide protection, but they have varying definitions of what a known limitation is, ranging from New York's law that references inhibiting the exercise of a normal bodily function to the Illinois law, my home state that references any medical or common condition that relates to pregnancy. It is against this existing legal landscape that have this present bill that talks about mandating reasonable accommodations to the known limitations related to pregnancy, absent undue hardship.

But the phrase "know limitations" is not defined in the bill. It is clearly different than the definition of a covered disability under the ADA and while the definition of the disability under the ADA may not be perfect, it has been interpreted by courts over a period of years and employers are familiar with its standards. Given the bill's language, it appears that any limitation of any type for any duration may be covered as long as the employer is aware of it.

The bill also does not address another key provision from the ADA, which is a reasonably accommodation statute and that is essential job functions. Under the ADA, an employer need not provide the accommodation when an employee remains unable to perform the essential functions of the job, even with the accommodation by eliminating the essential function criteria, the bill appears to require that employers keep the employee on the job, regardless of their ability to continue to perform the core functions.

Finally, the bill does not address other key issues that are explicitly addressed by the ADA such as not including a defense that an employee may not pose a direct threat to the health and safety of themselves or others and it is also unclear as to what happens if the accommodations sought by the employee creates an undue hardship and weather the employer would then be able to put the employee on leave. In conclusion, I believe the legislation does not address some key issues and questions that are important, especially the lack of a definition for its most fundamental term, known limitations, and the lack of any reference to essential job functions.

I believe the issues I have raised are appropriate as this committee works through this legislation and considers the purpose and practical effect of this bill on the already complex matrix of federal and state laws on this subject, thank you.

[The statement of Ms. McLaughlin follows:]

**October 20, 2019**

**Statement of Ellen McLaughlin, Partner, Seyfarth Shaw LLP**
**Subcommittee On Civil Rights And Human Services**
**Hearing on "Pregnant Workers Fairness Act"**
**October 22, 2019**

**BACKGROUND**

Chair Bonamici, Ranking Member Comer, and Members of the Subcommittee, thank you for giving me the opportunity to testify on the Pregnant Workers Fairness Act, H.R. 2694.[1]

Under the current legal landscape, protections afforded pregnant workers largely fall under the Pregnancy Discrimination Act, the Americans With Disabilities Act, and the Family and Medical Leave Act. Each of these protections are different but can overlap in any given situation depending on the underlying facts. In addition to these federal laws, there are approximately 25 states that have enacted specific legislation to protect pregnant workers.

The Pregnant Workers Fairness Act (Bill) purports to provide new and distinct protections for pregnant individuals in the workplace in addition to the current system of federal and state legislation. The purpose of this submission is not to take a position on the Bill, but rather to

(i) describe the protections currently afforded workers who are pregnant and/or experience pregnancy-related conditions which impact their ability to work;

(ii) review the provisions of H.R. 2694 against the current legal protections; and

(iii) raise questions that the Subcommittee should consider regarding the proposed legislation, especially with regard to the practical application of its terms.

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[1] I would like to acknowledge Seyfarth Shaw LLP attorneys Randel K. Johnson, Gillian B. Lepore, Lawrence Z. Lorber, and Gina R. Merrill for their invaluable assistance in the preparation of this testimony.

**DISCUSSION**

**The Current Statutory Scheme**

As previewed, below is an overview of the current federal laws applicable to pregnant workers, as well as examples of the 25 state laws protecting pregnant workers. This overview is designed to provide context for the proposed legislation and does not attempt to cover the nuances of each law with respect to coverage, qualifications, employee thresholds or enforcement.

*Pregnancy Discrimination Act.* Congress responded to a series of confusing Supreme Court decisions in 1978 by amending Title VII of the 1964 Civil Rights Act with the Pregnancy Discrimination Act (PDA). The PDA covers a broad set of medical conditions relating to pregnancy and/or childbirth:

> 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…

42 U.S.C. § 2000e(k). Under the PDA, an employer violates Title VII if it intentionally discriminates against pregnant employees due to their pregnancy or maintains a policy that adversely affects pregnant employees. Intentional discrimination is punishable under Title VII by punitive and compensatory damages, capped depending on the size of the company, with jury trials.

If a worker is temporarily unable to perform her job due to a medical condition related to pregnancy or childbirth, the employer must treat her in the same way as it treats any other temporarily disabled employee. As the EEOC notes in its guidance on pregnancy discrimination,

"For example, the employer may have to provide light duty, alternative assignments, disability leave, or unpaid leave to pregnant employees if it does for other temporarily disabled employees."[2] On the other hand, if an employer does not accommodate other temporarily disabled employees under its policies, it need not do so for an individual whose pregnancy results in similar disabilities. In other words, the treatment is the same for similar conditions across all employees, whether or not related to pregnancy.

*Americans with Disabilities Act.* The employment protections of the Americans with Disabilities Act (ADA) were negotiated on a bipartisan basis by Congress from 1989-1990 and carefully balance the rights of disabled workers with the recognition that employers cannot remedy or address every medical condition experienced by workers.

Under the ADA, pregnancy in and of itself is not a disability. Significantly, however, under the ADA Amendments Act of 2008 (ADAAA), limitations experienced by pregnant workers that are not of short term duration are covered under the law, triggering the employer's duty to provide reasonable accommodation unless there is undue hardship. *See, e.g.*, *Oliver v. Scranton Materials, Inc.,* 3:14-CV-00549, 2016 WL 3397679, at *10 (M.D. Pa. June 13, 2016) ("Thus, while pregnancy in and of itself may not constitute a disability under the ADA, courts interpreting the [ADA] in light of the 2008 amendments have found that *complications arising out of pregnancy* can constitute disability sufficient to invoke the ADA.") (emphasis in original) (internal citations omitted); *Mayorga v. Alorica, Inc.*, No. 12-21578-CIV, 2012 WL 3043021, at *5 (S.D. Fla. July 25, 2012) ("[W]here a medical condition arises out of a pregnancy and causes an impairment separate from the symptoms associated with a healthy pregnancy, or significantly intensifies the symptoms

[2] https://www.eeoc.gov/laws/types/pregnancy.cfm

associated with a healthy pregnancy, such medical condition may fall within the ADA's definition of a disability.")[3] Even where pregnancy-related conditions are of short term duration, they may still be covered if "sufficiently severe.[4] "For example, this means that a woman experiencing debilitating nausea for just a few weeks (or even less) may be found to have an impairment."[5]

The fact that the ADAAA broadened the definition of disability to include impairments of short-term duration has the practical effect of expanding the number of comparators available to pregnant workers when asserting a claim under the PDA. For example, where an employer approves a request for more frequent breaks and a stool for the employee recovering from knee replacement surgery, it must also provide similar assistance to the pregnant employee.

*FMLA.* Turning to the Family and Medical Leave Act (FMLA), when an employee experiences conditions arising from pregnancy that meet the definition of a "serious health condition," the employee has the right to take 12 weeks of job-protected leave within a 12-month period. The applicable regulation is quite broad:

> (4) The expectant mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work. The expectant mother is entitled to leave for incapacity due to pregnancy even though she does not

[3] *See also Colas v. City of University of New York,* 17-CV-4825, 2019 WL 2028701 (E.D.N.Y. May 7, 2019) (denying defendants motion to dismiss and finding that plaintiff had alleged sufficient facts to state a plausible claim for relief under the ADA for a pregnancy-related medical complication); *Wadley v. Kiddie Academy International, Inc.*, No. 17-05745, 2018 WL 3035785 at*5 (E.D. Pa. June 19, 2018) ("a high-risk pregnancy may, in some instances, constitute a disability if it substantially limits a woman's reproductive functions or other major life activity"); *Nayak v. St. Vincent Hosp. and Health Care Center, Inc.*, 1:12-cv-0817, 2013 WL 121838 (S.D. Ind. Jan. 9, 2013) (upholding a claim for disability discrimination under the ADAAA where plaintiff, a medical resident, experienced pregnancy related issues, including morning sickness and was placed on bed rest).

[4] According to the implementing regulations of the ADAAA, "[i]mpairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe." 29 C.F.R. § 1630.2(j)(1)(ix) app.

[5] Joan C. William, et al., *A Sip Of Cool Water: Pregnancy Accommodation After The ADA Amendments Act*, 32 Yale L. & Pol'y Rev. 97, 114 (Fall 2013) (emphasizing that post-ADAAA the demise of the duration requirement, a more expansive definition of "major life activities" and a more employee favorable "substantially limits" standard, makes it easier for pregnant employees to establish their status as disabled.

> receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days. For example, a pregnant employee may be unable to report to work because of severe morning sickness.

29 CFR 825.120(e).

The FMLA also allows for a pregnant employee to take intermittent leave or reduced schedule leave. 29 C.F.R. § 203. For example, a worker with pregnancy-related nausea that lasts only in the mornings can take FMLA leave for the first four hours of her shift and then come to work for the later part of the day. Another example is a pregnant worker who takes intermittent FMLA leave to attend prenatal doctor's appointments. Intermittent leave may be taken in the smallest increment the employer uses for other types of leave, which for many employers can be 15 minutes or less. 29 C.F.R. § 825.205(a ).

*State laws.* There are approximately 25 states that currently have legislation governing leave or accommodations relating to pregnancy. Within these state laws, there is a vast array of definitions and requirements for accommodations. For example, in Kentucky, an employer must make reasonable accommodations to employees "who are limited due to pregnancy, childbirth, and related medical conditions." KRS Chapter 344.040(1)(c). In West Virginia, it is unlawful for an employer to "not make reasonable accommodations to the known limitations related to the pregnancy...of an employee." W. Va. Code § 5-11B-2. Colorado requires employers to provide reasonable accommodations "for health conditions related to pregnancy," Colo Rev. Stat. § 24-34-402.3, and New York law requires accommodation of a "medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function." N.Y. Exec. Law § 296. In Illinois, employers are required to make reasonable accommodations for "any medical or common condition of a job applicant or employee related to pregnancy or childbirth." 775 Ill. Comp. Stat.

5/2-102(I)-(J). And, in the District of Columbia, employers must provide reasonable accommodations to employees "with known limitations related to pregnancy." D.C. Code § 2-1401.05(b).

**The Pregnant Workers Fairness Act**

*Provisions.* The core protection of H.R. 2694 is that it should be an unlawful employment practice for a covered employer to "not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a job applicant or 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." PWFA § 2(1) (emphasis added). The Bill also notes that a job applicant or employee may choose not to accept a proffered accommodation from the employer if "such accommodation is unnecessary to enable the applicant or employee to perform her job" and that it is unlawful to require an 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 an employee." *Id.* § 2(2).

The Bill prohibits retaliation and makes clear that employment opportunities cannot be denied on the basis of an employee or a job applicant requesting a reasonable accommodation. *Id.* § 3(f). The Bill further invokes the enforcement mechanisms of Title VII of the 1964 Civil Rights Act, which, as noted above, provide for compensatory and punitive damages capped at certain levels depending on the size the employer, with jury trials. *Id.* § 3(a)(1).

The terms "reasonable accommodation" and "undue hardship" would have the same meanings as defined under the ADA, incorporating the interactive process in which the employer and employee typically discuss what an appropriate reasonable accommodation might be under the

circumstances. *Id.* § 5(5). Lastly, state and local laws would not be preempted by the federal legislation. *Id.* § 7.

*Analysis.* The phrase "known limitations" is clearly different than the definition of a covered disability under the ADA, and appears to be an express rejection of that term. While the definitions of the ADA may be imperfect, they have been interpreted and analyzed by courts over a period of years, and employers are familiar with and have been applying the ADA standards for some time. The decision to not cross-reference the ADA indicates that a different scope of coverage is intended by the drafters of the Bill. It is entirely unclear, however, what scope of coverage is intended, and precisely how that coverage differs from a covered disability under the ADA. Given the language of the Bill, it appears that any limitation of any type is covered, as long as the employer is aware of it.

Some might argue that the Bill's incorporation of the concepts of "reasonable accommodation" and "undue hardship" under the ADA incorporate, by inference, the definition of a covered disability under the ADA. To the contrary, the overt reference to certain ADA concepts while excluding any reference to covered disabilities suggests the opposite – that the Bill rejects the standard of a covered disability under the ADA in favor of "known limitations." If in fact the drafters intend to incorporate the ADA definition of a covered disability, that could be accomplished by clearly cross-referencing the ADA, but that is not the case in the legislation as currently proposed.

Setting aside the differences between a known limitation and covered disability, the Bill also dispenses of another key provision of the ADA: that while an employer must provide a reasonable accommodation to a disabled employee, that employee must still be able to do the "essential functions" of the job with that accommodation. The types of accommodation that an employer

must provide under the ADA are numerous and defined, but they do not extend to accommodating an employee who remains unable to perform the essential functions of the job even with those accommodations. By eliminating the essential function criteria, the Bill appears to require employers to take steps to keep the employee on the job regardless of her ability to continue to perform the core functions of the job. The consequences for employers – and employees – are unclear. Does this require an employer to keep an employee in a position despite being unable to perform the core tasks associated with that position – effectively allowing the employee to report for work but not do the job? If an employee cannot work mandatory overtime due to pregnancy and mandatory overtime is clearly an essential job function, is the pregnant employee – unlike the employee with a disability under the ADA – excused from working the mandatory overtime? Or does it require an employer to reassign the employee to a totally different position and, if so, can the employer make appropriate wage adjustments to reflect the compensation in that new job?

The Bill also includes a provision that allows an employee to *not* accept an accommodation offered by the employer. *Id.* § 2(2). Does this provision really contemplate that the employee can veto an accommodation proposed by the employer? Are there any limits to that veto right? For example, what if the employer believes in good faith that the employee cannot safely perform the job, for herself or others, without that specific accommodation? For example, an employer may want to impose a restriction on the amount of weight that can be lifted by an employee in the second or third trimester of pregnancy based on medical documentation. Can the employer only do so with the employee's approval?

Similarly, the Bill contemplates that a pregnant employee cannot be required to go on leave if another accommodation would address the "known limitation" of that employee. PWFA § 2(4). What if the pregnant worker is still physically capable of performing the job, but it would expose

the fetus to unsafe conditions, such as lead or radiation? Under circumstances such as those, employers should be able to require that the pregnant worker not report to the job site, but the Bill appears to prohibit such a requirement.

It is also unclear what happens if the accommodation sought by the employee creates an undue hardship on the employer. Using the ADA scheme, the employer would be able to place the worker on leave, but Section 2(4) of the Bill suggests that the employer cannot place the worker on leave if an accommodation exists that would address the "known limitation," even if that accommodation results in an undue hardship.

Finally, the Bill does not address key issues and questions that are explicitly addressed by the ADA as part of that legislation (and which were heavily negotiated after many months and countless meetings). By way of example:

- The Bill does not address medical examinations, even though the need to attend prenatal doctor's appointments is perhaps the most common issue that pregnant workers will experience;
- The Bill does not address an employer's ability to require medical documentation verifying the employee's medical status and proposed accommodations;
- The Bill does not exclude from coverage applicants who are engaging in the illegal use of drugs;
- The Bill does not include any requirement that an individual not pose a direct threat to the health or safety of other individuals in the workplace.

There are likely many more examples of specific issues that are not addressed by the Bill, although it is impossible to identify all of those issues without knowing what is included in "known limitations," which is undefined in the Bill.

**CONCLUSION**

While the current statutory framework protecting pregnant workers may not be perfect, any legislation purporting to close gaps in coverage should be carefully crafted. It is not clear from the proposed legislation precisely what the drafters of the Bill perceive the gaps to be, or how this proposed legislation purports to close them. Moreover, the legislation does not address key questions and issues that will certainly face employers as they seek to implement the requirements of the Bill, nor does it provide a definition for the Bill's most fundamental term. Employers are already faced with differing regulatory schemes under the ADA, FMLA and state laws when analyzing a pregnant employee's request for accommodation. Does the employee have a disability (ADA), serious health condition (FMLA), or medical or common condition related to pregnancy (N.Y. Exec. Law § 296)? The Committee and Congress should carefully consider the purpose and practical effect of the proposed legislation before imposing another layer on the already complex matrix of federal and state laws that employers must contend with.

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Chairwoman BONAMICI. Thank you for your testimony. I now recognize Ms. Bakst for five minutes for your testimony.

## TESTIMONY OF DINA BAKST, J.D., CO–FOUNDER & CO–PRESIDENT, A BETTER BALANCE: THE WORK & FAMILY LEGAL CENTER

Ms. BAKST. Thank you, Chair Bonamici, Ranking Member Comer and Members of the subcommittee for the opportunity to testify today.

Almost 41 years ago, Congress passed the Pregnancy Discrimination Act to guarantee equal opportunity for millions of working

women, but I am here to tell you that pregnant women in this country are still often treated as second class citizens.

Despite the promise of the PDA, pregnancy discrimination remains rampant in America and a key barrier to gender equality. One very common form, especially impacting women in low wage and physically demanding jobs, predominantly women of color, is when pregnant women are fired or forced out rather than provide temporary job modifications that would allow them to keep working.

Women often face an impossible choice: stay on the job and risk their health or lose their paycheck when they need it most. And unfortunately, at A Better Balance, we have heard hundreds of these stories from workers we have spoken with over the years. Women like our former client, Betsada Cruz-Cardona, a cashier from upstate New York, who was told she should just "Stay home. Take care of pregnancy and rest" after handing in a doctor's note with a lifting restriction, even though she could have easily been accommodated and desperately wanted to continue working. With no paycheck, Betsada wound up homeless and had to rely on family and friends for shelter, living from couch to couch as she prepared to become a mom.

The economic wellbeing of most Americans' families today is dependent on working mothers.

When women like Betsada lose out on critical income, they not only suffer in the short term, they forfeit other long term benefits earned on the job, contributing to their economic inequality and exacerbating the wage gap. When pregnant women are denied workplace accommodations, we know their health often suffers too.

I'll never forget one pregnant cashier who was told she could not carry a water bottle on the job. She wound up in the ER due to severe dehydration after fainting and collapsing on the retail floor.

Other health risks associated with failure to accommodate include urinary tract infections, fainting, preterm birth, low birth weight and even miscarriage as evidenced by the experience of our client Tasha Morelle, who was featured in a front page New York Times story last year. These options risk your health or lose your paycheck reinforce the stereotype that pregnancy, motherhood and employment are irreconcilable and defy the purpose of the Pregnancy Discrimination Act. Almost 5 years ago, the Supreme Court addressed the application of the PDA to workplace accommodations in Young. Unfortunately, the multistep evidentiary framework established by the Court's majority and the unique burden it places on pregnant workers to provide a wide range of evidence of non-pregnant comparators to prove their employer's intention was discriminatory has made it difficult and often impossible for pregnant workers to succeed in court post Young and get the accommodations they need. This standard is also tone deaf to the realities of the American workplace where pregnant workers typically lack access to their coworkers' workplace accommodation requests, personnel files and simply lack the luxury of time and certainly the resources to sort out these questions. The ADA by contrast offers workers with disabilities the explicit right to accommodations absent undue hardship.

They can completely bypass this burden of proving that a co-worker was accommodated first however most pregnant workers with medical needs are not deemed disabled under the ADA and failed to trigger its protections.

There is a solution. The bipartisan PWFA would address this gap in the law and fulfill the intent of the PDA. Specifically, the PWFA would require employers to make reasonable accommodations for employees who have a limitation stemming from pregnancy, childbirth or related medical condition unless the requested accommodation would impose an undue hardship.

The same familiar process in place for workers with disabilities. The PWFA would also ensure that a worker cannot be forced to take leave if another accommodation can keep her worker and healthy. Like the ADA, the law would encourage a productive and formal dialogue between employee and employer rather than stressful and time-consuming litigation, as we know firsthand this is precisely what most pregnant women need and want. They need clear rights and an immediate solution to stay that allows them to follow their doctor's orders and stay attached to the workforce.

Requiring a pregnant worker to jump through legal hoops to get a medically necessary accommodation is a fundamental deterrent to justice and equality. State legislators on both sides of the aisle have recognized that accommodating pregnant workers is smart public policy as well and are taking action.

As you heard, there are now 27 states from New Jersey to Kentucky that provide it. At ABB we see these laws are working. For example, thanks to New Jersey's law, a public employee, Takira Woods was quickly able to follow her doctor's orders and return to work in a light duty position. Yet while states have improved workplace conditions for thousands of women, job protection and a healthy work environment should not depend on luck or location.

The PWDFA would finally ensure that pregnant workers in every corner of the country stand on equal footing in the workplace. No one should have to choose between her job and a healthy pregnancy. It's time for Congress to step up and pass this critical legislation. It's long overdue, thank you.

[The statement of Ms. Bakst follows:]

**Testimony of Dina Bakst, J.D.**
**Co-Founder & Co-President**
**A Better Balance: The Work and Family Legal Center**

**Subcommittee on Civil Rights and Human Services**
**Committee on Education and Labor**
**U.S. House of Representatives**

**"Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694)"**

**October 22, 2019**

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My name is Dina Bakst and I am a Co-Founder and Co-President of A Better Balance: The Work & Family Legal Center. Thank you to Chair Bonamici, Ranking Member Comer, and the Members of the Education & Labor Subcommittee on Civil Rights and Human Services for allowing me the opportunity to provide my testimony today.

A Better Balance is a national non-profit legal organization that advocates for women and families so they can care for themselves and their loved ones without sacrificing their financial security. Since our founding, we have heard from hundreds of women across the country whose employers either fired or forced them onto unpaid leave when they requested modest, temporary job adjustments to remain healthy and on the job. As we see up close through our free legal hotline and direct services work, this failure to accommodate often results in devastating economic and health consequences for working women and their families.

Gaps in federal law permit too many pregnant workers in need of accommodation, especially women in low-wage and physically demanding jobs, to fall through the cracks and face denial of the law's protection. I wrote about this phenomenon in my 2012 Op-Ed in *The New York Times*, "Pregnant, and Pushed Out of a Job,"[1] which inspired the introduction of the federal Pregnant Workers Fairness Act ("PWFA"),[2] and has bipartisan support in this chamber. We have led and assisted other campaigns at the state and local level to provide PWFA protections to workers across the country.

**Introduction: No Woman Should Have to Choose Between Her Job and A Healthy Pregnancy**

The Pregnancy Discrimination Act ("PDA") of 1978[3] was designed to provide equal opportunity for women by barring employers from discriminating against pregnant women and specifying that pregnant workers should be treated the same as those who are "similar in their ability or inability to work." Over the last forty-one years, narrow interpretation of this comparative framework, whereby a pregnant worker must compare herself to others in order to obtain a workplace accommodation for her health, fails to adequately ensure that pregnant workers are treated fairly and equally on the job. This phenomenon is rooted in gender bias because it forces women, especially low-wage workers and those in physically demanding jobs, to make an impossible choice between earning a paycheck and maintaining a healthy pregnancy. This choice is predicated on the notion that women are somehow unable to both work and be mothers.

The Americans with Disabilities Act ("ADA"),[4] by contrast, has provided an explicit right to accommodation for workers with disabilities since its passage in 1990 but most pregnancy-related conditions are not deemed "disabilities" as required to trigger protection under the law.[5]

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[1] Dina Bakst, Opinion, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES, Jan. 30, 2012, at A25.
[2] H.R. 2694, 116th Cong. (2019) [hereinafter H.R. 2694].
[3] 42 U.S.C. § 2000e(k) (2012).
[4] 42 U.S.C. §§ 12101–12213 (2012).
[5] *See infra* Part III.

Therefore, although workers with disabilities have this explicit right, pregnant workers remain unequal and left behind.

In 2015, in *Young v. UPS,* the Supreme Court attempted to address the second clause of the PDA for the first time since the law's passage.[6] While the Supreme Court's ruling in *Young* in some ways reaffirmed the purpose of the PDA, in A Better Balance's groundbreaking report, "Long Overdue," we found a staggering statistic: over two-thirds of women lost their PDA pregnancy accommodation claims post-*Young*.[7]

There is a simple solution. H.R. 2694, the Pregnant Workers Fairness Act, would ensure pregnant workers are not forced off the job and denied the reasonable accommodations they need to protect their health and support their families. The PWFA would explicitly require employers to provide reasonable accommodations for pregnant workers unless doing so would pose an undue hardship to the employer—the same familiar standard in place for workers with disabilities.[8]

Over the last few years, states have been stepping in with a groundswell of support for this issue.[9] Legislators on both sides of the aisle are recognizing the health and business benefits of accommodation; however, we still need a uniform federal standard to level the playing field for women in every corner of the country.

Part I of my testimony lays out the devastating biases and economic impacts pregnant workers face when they are denied modest accommodations and pushed off the job.

Part II explains how this reality defies the purpose and intent of the Pregnancy Discrimination Act—to ensure equal treatment for women—and how the 2015 *Young v. UPS* Supreme Court decision has failed to put in place a pregnancy accommodation framework that meets the PDA's goal.

Part III turns to the Americans with Disabilities Act, and details why this law, too, has failed to provide adequate protections to pregnant workers with medical needs arising from pregnancy despite the ADA Amendments Act.

Part IV clarifies why the Family and Medical Leave Act is also an inadequate legal mechanism for many pregnant workers.

Part V then turns to the Pregnant Workers Fairness Act and details the practical and familiar framework it seeks to put in place, providing pregnant workers with an explicit right to reasonable accommodations.

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[6] *See Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1345 (2015).
[7] *See* DINA BAKST, ELIZABETH GEDMARK & SARAH BRAFMAN, A BETTER BALANCE, LONG OVERDUE 13 (2019) [hereinafter LONG OVERDUE], https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf.
[8] *See* H.R. 2694, *supra* note 2 (defining "reasonable accommodation" and "undue hardship" the same way those terms are defined in the ADA).
[9] *See* A BETTER BALANCE, FACT SHEET: STATE AND LOCAL PREGNANT WORKERS FAIRNESS LAWS [hereinafter ABB FACT SHEET: STATE AND LOCAL PWFAS], https://www.abetterbalance.org/resources/fact-sheet-state-and-local-pregnant-worker-fairness-laws/ (last updated June 28, 2019).

Part VI details how this framework has proven workable in the states that have passed similar measures to H.R. 2694 and why legislators across the political spectrum have supported the issue: because it increases women's labor force participation, improves health outcomes, leads to potential Medicaid savings, provides clarity to businesses, and more. My testimony concludes by highlighting the stories of workers who exemplify all the benefits this law can provide.

## I. Failure to Accommodate Pregnant Workers Is Rooted in Explicit Bias, Unconscious Bias, And Structural Bias and Has Lasting Economic Impacts on Women and Families

Today, women make up almost half of the workforce and are the primary or co-breadwinner in almost two-thirds of families.[10] Three-quarters of women will be both pregnant and employed at some point.[11] When women face a physical conflict between work and childbearing, the health and economic consequences, especially for women in low-wage and non-traditional jobs, are often profound.[12] We have worked firsthand with many of these women, just a few of whose stories are detailed below.

For example, **ARMANDA LEGROS**, A Better Balance Community Advocate, previously testified before the United States Senate's Health, Education, Labor and Pensions ("HELP") Committee.[13] Armanda, a single mother, was pushed out of her job at an armored truck company even though she could have been accommodated, when she requested to avoid heavy lifting after pulling a muscle in her stomach while six and a half months pregnant. After one look at her note, her manager sent her home and she lost her health insurance at eight and a half months pregnant. Her manager explained that, as a matter of company policy, she could work only if she had no restrictions. As she testified:

> "Once my baby arrived, just putting food on the table for him and my four-year-old was a challenge. I was forced to use water in his cereal at times because I could not afford milk."

She ended up needing to rely on public benefits like food stamps just to get by. All of this happened when her employer could have simply kept her employed and earning a paycheck with a reasonable accommodation.

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[10] *See* SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, BREADWINNING MOTHERS CONTINUE TO BE THE U.S. NORM, (May 2019), https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm/.

[11] ALEXANDRA CAWTHORNE & MELISSA ALPERT, CTR. FOR AM. PROGRESS, LABOR PAINS: IMPROVING EMPLOYMENT AND ECONOMIC SECURITY FOR PREGNANT WOMEN AND NEW MOTHERS 2 (2009), https://www.americanprogress.org/issues/women/report/2009/08/03/6599/labor-pains/.

[12] *See, e.g.*, Am. Coll. of Obstetricians & Gynecologists, *ACOG Committee Opinion No. 733: Employment Considerations During Pregnancy and the Postpartum Period*, 131 OBSTETRICS & GYNECOLOGY e115, e119–120 (Apr. 2018) [hereinafter *ACOG Committee Opinion No. 733*], https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Obstetric-Practice/Employment-Considerations-During-Pregnancy-and-the-Postpartum-Period?IsMobileSet=false.

[13] *Economic Security for Working Women: Briefing Before the S. Comm. On Health, Educ., Labor & Pensions*, 113th Cong. (2014) (testimony of Armanda Legros, A Better Balance Community Advocate), https://www.help.senate.gov/imo/media/doc/Legros2..pdf.

Police Officers **LYNDI TRISCHLER AND SAMANTHA RILEY** were pushed off their jobs with the Florence, Kentucky Police Department when they requested light duty, robbing them of critical income when they needed it most.[14] Because of the heavy equipment and physical demands of patrolling, their healthcare providers both recommended the officers seek light duty, but their requests were denied because the City maintained a discriminatory policy that provided light duty only for those with on-the-job injuries. When they were forced out of work, it took an emotional and economic toll on their families. Officer Trischler was even told that she would lose her health insurance in the middle of a very complicated pregnancy—her son was diagnosed with a rare genetic disorder and would not survive long after birth.[15]

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[14] Lyndi Trischler, Opinion, *Don't Make Women Choose Between A Job or Pregnancy*, THE CINCINNATI ENQUIRER (Mar. 23, 2018), https://www.cincinnati.com/story/opinion/2018/03/23/opinion-dont-make-women-choose-between-job-pregnancy/440077002/.

[15] Pregnancy discrimination is pervasive in the public sector. Public sector workers are routinely denied modest workplace accommodations, such as lifting restrictions, schedule adjustments, and time off, for pregnancy and related medical conditions, oftentimes in compliance with a formal policy or pattern and practice. *See, e.g.*, *Freppon v. City of Chandler*, 528 F. App'x 892 (10th Cir. 2013) (police officer denied light duty pursuant to City's policy of offering accommodations only to employees with on-the-job injuries); *Tysinger v. Police Department*, 463 F.3d 596, 575 (6th Cir. 2006) (pregnant police officer denied light duty); *Waite v. Bd. of Trustees of Univ. of Alabama*, No. 2:16-cv-01244-JEO, 2018 WL 5776265 (N.D. Ala. Nov. 2, 2018) (graduate student and university employee denied modified schedule following childbirth); *Nagle v. E. Greenbush Cent. Sch. Dist*., No. 116CV00214BKSATB, 2018 WL 4214362 (N.D.N.Y. Feb. 21, 2018) (applying PDA standard to § 1983 claim in a pregnancy discrimination case); *Jones v. Brennan*, No. 16–CV–0049–CVE–FHM, 2017 WL 5586373 (N.D. Okla. Nov. 20, 2017) (postal worker denied standing restriction); *Vidovic v. City of Tampa*, No. 8:16-cv-T-17AAS, 2017 WL 10294807 (M.D. Fla. Oct. 12, 2017) (firefighter denied light duty); *Webster v. U.S. Dep't. of Energy*, 267 F.Supp.2d 246 (D.D.C. 2017) (attorney denied a different chair and modified schedule); Consent Decree, *United States v. City of Florence*, No. 2:16-cv-00190 (E.D. Ky. December 20, 2016) (City's policy of limiting light duty to officers injured on the job challenged after police officers denied pregnancy accommodations); *Diaz v. Florida*, 219 F.Supp.3d 1207 (S.D. Fla. 2016) (administrative assistant denied request to move a bit more slowly on the job); *Mercer v. Government of the Virgins Islands Dep't of Educ.*, No. 2014-50, 2016 WL 5844467 (D.V.I. Sept. 30, 2016) (compliance manager denied accommodations following a stillbirth); *Johnson v. Univ. of Alabama Health Servs. Found.*, PC, No. 2:13-CV-00512-MHH, 2016 WL 705962 (N.D. Ala. Feb. 23, 2016) (medical records specialist denied lifting restriction); *Lawson v. City of Pleasant Grove*, No. 2:14-CV-0536-JEO, 2016 WL 2338560, (N.D. Ala. Feb. 16, 2016), *report and recommendation adopted*, No. 2:14-CV-536-KOB, 2016 WL 1719667 (N.D. Ala. Apr. 29, 2016) (police officer denied light duty); *Wilson v. Ontario Cty. Sheriff's Dep't,* No. 12-CV-06706 EAW, 2014 WL 3894493 (W.D.N.Y. Aug. 8, 2014) (Sec. 1983 claim brought by pregnant police officer denied reassignment request analyzed under PDA standard); *Mocic v. Sumner Cty. Emergency Med. Servs.*, 929 F. Supp. 2d 790 (M.D. Tenn. 2013) (EMT denied maternity-sized uniform and light duty); *Falk v. City of Glendale*, No. 12-CV-00925-JLK, 2012 WL 2390556 (D. Colo. June 25, 2012) (police dispatcher denied breaks to express breast milk); *Jeudy v. Holder*, No. 10-22873-CIV, 2011 WL 5361076 (S.D. Fla. Nov. 7, 2011), *aff'd sub nom. Jeudy v. Attorney Gen., Dep't of Justice*, 482 F. App'x 517 (11th Cir. 2012) (corrections officer denied reassignment to night shift and climbing restriction); *Zambrano-Lamhaouhi v. N.Y. City Bd. of Educ*., 866 F.Supp.2d 147 (E.D.N.Y. 2011) (applying PDA standard to § 1983 claim in a pregnancy discrimination case); *Nelson v. Chattahoochee Valley Hosp. Soc.,* 731 F. Supp. 2d 1217 (M.D. Ala. 2010) (nurse denied alternative on call schedule that would have reduced her hours); *Burnett v. Univ. of Tenn. Knoxville*, No. 3:09-CV-017, 2010 WL 1687062 (E.D. Tenn. Apr. 26, 2010) (veterinary assistant denied request to have reduced contact with diseased animals); *Blado v. City of Milan, Tennessee*, No. 06-1185-T-AN, 2007 WL 9710034 (W.D. Tenn. Oct. 19, 2007) (pregnant patrol officer denied light duty); *Dimino v. N.Y.C. Transit Authority* 64 F. Supp. 2d 136, 153 (E.D.N.Y. 1999) (pregnant officer denied restricted duty); *Davis v. State of California Dep't of Corr.*, No. CIV. S-93-1307DFLGGH, 1996 WL 271001 (E.D. Cal. Feb. 23, 1996) (corrections officers denied light duty); *Roller v. City of San Mateo*, 399 F. Supp. 358 (N.D. Cal. 1975), *aff'd*, 572 F.2d 1311 (9th Cir. 1977) (police officer denied light duty).

**BETZAIDA CRUZ CARDONA** of Rochester, NY worked as a customer service cashier for a large national retail chain. She performed typical cashier's duties and sometimes cleaned the store's bathrooms and floors. When she was pregnant, she met with her manager and a higher-level company representative, and brought with her a doctor's note listing her restriction: she could not lift anything over 25 pounds. She did not think this would be a problem because she had never been asked to lift over 25 pounds. In fact, even before her pregnancy, the employer told her that if she ever needed to lift anything heavy, she should call someone in the furniture department to do it for her. But during this meeting, she was told that she "can't work" and that she should "stay home, take care of her pregnancy, and rest." An hour after this meeting her manager called to tell her she was officially terminated. With no paycheck, she became homeless and had to rely on family and friends for shelter, moving from couch to couch as she was preparing to be a mom.[16]

A Better Balance Community Advocate **NATASHA JACKSON** was the highest-ranking account executive and the only female employee at the business where she worked. When she became pregnant, Human Resources called her into a meeting and forced her onto leave because they maintained a policy of not accommodating off-the-job injuries and refused to accommodate her need for occasional help with lifting, even though she only rarely lifted and her co-workers were willing to assist her. Ultimately, the employer terminated her. Appearing before the South Carolina legislature, Natasha testified on the devastating financial impact of losing her job while pregnant:

> "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."[17]

Failure to provide accommodations or retaliating against accommodation requests for pregnant workers like Armanda, Lyndi, Betzaida, Natasha, and so many others, is rooted in gender bias in all of its various forms, which often overlap and present themselves in nuanced and layered ways.

First, employers act out of conscious bias when they assume that pregnant women are a liability, are fragile, or are unable to work because they are pregnant. When employers tell workers like Betzaida that they need to go home and "rest," they are relying on paternalistic attitudes toward pregnant women. Rather than engaging in an individualized inquiry to determine if an accommodation is possible, as employers do for workers with disabilities and as required under the ADA, they too often resort instead to one-size-fits-all solutions about what *they* perceive

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[16] *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].

[17] *Hearing on H. 3865 Before the H. Comm. on Judiciary*, 122nd Gen. Assemb. (S.C. Mar. 22, 2017) (testimony of A Better Balance Community Advocate Natasha Jackson in Support of South Carolina Pregnancy Accommodations Act), https://www.abetterbalance.org/resources/natasha-jackson-testimony-south-carolina-pregnancy-accommodations-act/.

pregnant workers need or want for their health.[18] It may be surprising to some, but these forms of explicit bias against pregnant women and mothers continue to be rampant in the workplace.[19]

Secondly, it is well documented that unconscious bias also plays a role in sex stereotyping of pregnant women and mothers in the workplace.[20] Employers assume that pregnant women and mothers are not competent or dedicated to their work, as exemplified by the stories of Armanda, Natasha, and the many workers we hear from who are fully able to continue their employment with modest accommodations but face significant roadblocks from their employers. Employers use accommodation requests as excuses to push out pregnant workers whom they would prefer not to have to deal with based on stereotypes that they will no longer be "ideal" workers.[21]

Other pregnant women find their work product overly scrutinized by managers shortly after requesting accommodations; suddenly their best is no longer good enough for these managers who seem unable to believe that pregnant workers are capable employees.[22]

Finally, failure to provide pregnancy accommodations can also come from a perpetuation of structural bias.[23] This can occur especially in traditionally male-dominated jobs where longstanding policies and practices designed for men fundamentally close off the possibility of combining pregnancy with work for almost all women.[24] The experiences of police officers Trischler and Riley, discussed above, are strong examples. For low-wage workers, this manifests

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[18] It is important to note that the Pregnancy Discrimination Act has always prohibited explicit intentional bias of this form, but unfortunately this evidence is not always easily obtainable in failure to accommodate cases.

[19] Joan C. William & Amy J.C. Cuddy, *Will Mothers Take Your Company to Court*, HARV. BUS. REV. (Sept. 2012), https://hbr.org/2012/09/will-working-mothers-take-your-company-to-court ("Maternal wall bias stems from the ways we think: from old-fashioned beliefs about what makes a good mother (someone who is always available to her children) and a good father (a good provider). Extensive research shows that these kinds of assumptions are widely shared and will persist unless they are brought into the light and challenged" and finding that such bias "often feels more like a sledgehammer than a paper cut" and citing Shelley Correll, Stephen Benard, & In Paik, *Getting a Job: Is There a Motherhood Penalty*?, AM. J. OF SOC. (2007) who found that a woman with children was 79% less likely to be hired than one without children).

[20] *See, e.g.*, ACT/EMP: THE BUREAU FOR EMPLOYER'S ACTIVITIES, INT'L LAB. ORG., BREAKING BARRIERS: UNCONSCIOUS GENDER BIAS IN THE WORKPLACE (Aug. 2017), https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---act_emp/documents/publication/wcms_601276.pdf (finding through survey data that "[f]ive of the barriers to women's leadership were related to discrimination and unconscious gender bias").

[21] *See* JOAN WILLIAMS, UNBENDING GENDER IN SOCIAL LIFE: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT, 69–70 (2000) (noting "[t]he assumption that motherhood does, and should, preclude women from performing as ideal workers""); *see also* Eden B. King, *What Mothers Face at Work: Why the "Opt Out" Explanation is Insufficient*, 29 PSYCH. SCI. AGENDA (2015), https://www.apa.org/science/about/psa/2015/09/mothers-work.

[22] *See, e.g.*, Stephen Benard, In Paik & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1368-72 (2008) (citing Jane A. Halpert, Midge L. Wilson & Julia L. Hickman, *Pregnancy as a Source of Bias in Performance Appraisals*, 14 J. ORG. BEHAV. 649, 652–53 (1993) (detailing an experiment in which, despite all other variables remaining constant, men gave lower performance rating to visibly pregnant women over non-visibly pregnant women)).

[23] *Id.* at 1366 (citing Monica Biernat, *Toward a Broader View of Social Stereotyping*, 58 AM. PSYCHOLOGIST 1019, 1023 (2003) (evaluating the different standards by which men and women are judged in stereotypically male professions)).

[24] *Id.*

via restrictive and rigid rules that prohibit workers from receiving even the most modest accommodations even though they could easily be made.[25]

This bias in the form of being pushed out of the workforce during pregnancy disproportionately affects low-wage workers and women of color,[26] who are less likely to qualify for Family and Medical Leave Act ("FMLA") protections, less able to find replacement income, less likely to have benefits like temporary disability insurance or paid time off, and who generally have less bargaining power and financial cushion when they must forgo income for months. Seventy-eight percent of Americans live paycheck to paycheck[27]—so losing out on even one paycheck, let alone several, can place a family in a precarious financial situation. Women who are let go do not just lose out on critical income; they must also fight to re-enter a job market that is especially brutal on the unemployed. Worse yet, they confront a bias against hiring pregnant women and new mothers.[28]

Some women lose their health benefits when they are fired or forced onto unpaid leave and then must switch providers and/or delay medical care while securing health insurance. For women who lose their health insurance shortly before going into labor, they could be looking at staggering healthcare costs for childbirth, which average $30,000 for a vaginal delivery and $50,000 for a C-section in the U.S.[29]

Of course, those facing pregnancy complications may face even higher healthcare costs. One woman who called our hotline lost her health insurance while eight months pregnant after her employer cut her hours. She requested that her doctor induce her labor early while she still had insurance so that she would not have to face exorbitantly expensive hospital bills.

Women who are forced out of the workplace when pregnant also forfeit other long-term benefits earned on the job, such as 401K or other retirement contributions, short-term disability benefits, seniority, pension, social security contributions, life insurance, and others.[30] Depriving women of these benefits when they become pregnant contributes to their economic inequality over the long run, exacerbating the wage gap,[31] and negatively affecting families as a whole, not to mention

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[25] SARAH JANE GLYNN & JOANNA VENATOR, CTR. FOR AM. PROGRESS, FACT SHEET: WORKPLACE FLEXIBILITY 1 (2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/08/pdf/flexibility_factsheet.pdf.
[26] *See* LONG OVERDUE, *supra* note 7, at 26.
[27] *Living Paycheck to Paycheck Is a Way of Life for Majority of US Workers, According to New Career Building Survey*, CAREERBUILDER (Aug. 24, 2017), http://press.careerbuilder.com/2017-08-24-Living-Paycheck-to-Paycheck-is-a-Way-of-Life-for-Majority-of-U-S-Workers-According-to-New-CareerBuilder-Survey.
[28] *See* Bakst, *supra* note 1.
[29] PREGNANT AND JOBLESS, *supra* note 16, at 10 (citing Elisabeth Rosenthal, *American Way of Birth, Costliest in the World*, N.Y. TIMES (June 30, 2013), http://www.nytimes.com/2013/07/01/health/american-way-of-birth-costliest-in-the-world.html?hp&_r=2&).
[30] *See, e.g.*, *Orr v. Albuquerque*, 531 F.3d 1210 (10th Cir. 2008) (police officers were forced to exhaust accrued sick leave and were not allowed to use accrued compensatory time for their pregnancy-related leaves, affecting their eligibility for early retirement).
[31] *See* 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/ (citing Michelle J. Budig, Third Way NEXT, *The Fatherhood Bonus & the Motherhood Penalty: Parenthood and the Gender Gap in Pay* 7–8, 13–14 (2014) ("There is a wage penalty for motherhood of 4% per child that cannot be explained by

the harm it causes the economy as a whole in its effect on women's labor force participation.[32] The result is that a woman who requires, but is refused, a simple accommodation for just a few weeks or months of her pregnancy could end up suffering the financial effects of that denial for years, as Natasha Jackson's story illustrates.

## II. Congress Intended to Eradicate Pregnancy Discrimination and Economic Harms in Passing the Pregnancy Discrimination Act, But That Goal Remains Unmet

The devastating economic consequences and gender inequality highlighted above are precisely what Congress sought to avoid in passing the Pregnancy Discrimination Act.

In 1977, thirty-nine million women were employed in the American workforce, seventy-percent of whom were their family's sole breadwinner or higher earner.[33] Yet when women became pregnant, rampant discrimination imperiled their economic security.[34] Employers refused to hire, and routinely fired, women simply because they were pregnant or intended to become pregnant. Many employers provided non-essential benefits to employees including cosmetic surgery but categorically excluded pregnancy from disability or fringe benefit plans.[35] The Supreme Court offered little remedy to pregnant women when, relying on faulty reasoning, it failed to recognize pregnancy discrimination as sex discrimination under the Equal Protection Clause in *Geduldig v. Aiello*.[36] Two years later, in *Gilbert v. General Electric*, following the same reasoning used in *Geduldig*, the Court held sex discrimination did not include pregnancy discrimination under Title VII of the Civil Rights Act of 1964.[37]

After the *Gilbert* decision, Congress acted swiftly to explicitly outlaw pregnancy discrimination by passing the Pregnancy Discrimination Act of 1978 ("PDA"). Prior to the bill's passage, Senator Harrison Williams, the sponsor of the PDA, spoke on the Senate floor about the critical need to end discrimination against, and ensure equal treatment of, pregnant workers. "The central

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human capital, family structure, family-friendly job characteristics, or differences among women that are stable over time" and "[e]vidence from experimental and audit studies support arguments of employer discrimination against mothers in callbacks for job applications, hiring decisions, wage offers, and promotions").

[32] *See, e.g.*, INT'L MONETARY FUND, WORLD ECONOMIC OUTLOOK: CYCLICAL UPSWING, STRUCTURAL CHANGE 23 (2018), https://www.imf.org/en/ Publications/WEO/Issues/2018/03/20/world-economic-outlook-april-2018#Chapter%202 (finding, in Chapter 2, that female labor force participation rates have plateaued in the United States over the last two decades); KWEILIN ELLINGRUD, ANU MADGAVKAR, JAMES MANYIKA, JONATHAN WOETZEL, VIVIAN RIEFBERG, MEKALA KRISHNAN, & MILI SEONI, MCKINSEY GLOBAL INST., THE POWER OF PARITY: ADVANCING WOMEN'S EQUALITY IN THE UNITED STATES 2 (2016), https://www.mckinsey.com/featured-insights/employment-and-growth/the-power-of-parity-advancing-womens-equality-in-the-united-states (finding the U.S. could add between $2.1 trillion and $4.3 trillion in annual GDP by 2025 through policies that help increase the number of women in the workforce).

[33] 123 Cong. Rec. E1487 (daily ed. Mar. 15, 1977) (remarks of Sen. Williams).

[34] *Id.*

[35] 123 Cong. Rec. S4142 (daily ed. Mar. 15, 1977) [hereinafter *March 1977 PDA Hearing*] (statement of Sen. Williams).

[36] *Geduldig v. Aiello*, 417 U.S. 484 n. 20 (1974) (finding that "[t]he California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification").

[37] *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (relying on *Geduldig* in upholding GE's exclusion of pregnancy coverage from its disability insurance policy).

purpose of the bill," Senator Williams said, "is to require that women workers be treated equally with other employees on the basis of their ability or inability to work. The key to compliance in every case will be equality of treatment."[38] Senator Williams emphasized women were not in the workforce merely for "pin money" or as a stop-gap before they "return[ed] home to raise children full-time," and the law must step in to remedy employers' antiquated views.[39] As such, he explained the PDA would "protect women from the full range of discriminatory practices which have adversely affected their status in the workforce."[40]

Legislators also emphasized the "unjust and severe economic [and] social…consequences that "countless women and their families" had to "suffer" as a result of being "forced to take leave without pay" and temporarily "disabled by pregnancy and childbirth."[41] The devastating effects[s]" included "loss of income," impairing the ability of families with working mothers "to provide their children with proper nutrition and healthcare," dissipating family savings and security and being forced to go on welfare."[42]

To that end, the PDA updated Title VII to recognize pregnancy discrimination as a form of sex discrimination. The first clause of the law updated the definition of "because of sex" and "on the basis of sex" under Title VII to include "pregnancy, childbirth, and related medical conditions," which meant employers could not discriminate again pregnant women when it came to hiring, firing, hours, and other employment decisions.[43] The second clause required that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes…as other persons not so affected but similar in their ability or inability to work."[44] The legislative record of the PDA is 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."[45]

Thus, when Congress mandated that employers treat pregnant women the same as "other persons similar in their ability or inability to work" the intended result was, and continues to be, that such treatment would lead to women's equality in the workplace. While the comparative standard has led to positive results for some pregnant workers, for far too many, equality in the workplace remains elusive.

As outlined below, not only have courts failed to correctly understand and apply the "similar in ability or inability to work" standard and its application to pregnancy accommodations, but even as workers with disabilities gained the right to explicit accommodations with the passage of the Americans with Disabilities Act in 1990 and the Americans with Disabilities Amendments Act

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[38] 123 Cong. Rec. S14989 (daily ed. Sept. 15, 1977) [hereinafter *September 1977 PDA Hearing*] (statement of Sen. Williams).
[39] *See March 1977 PDA Hearing, supra* note 35 (statement of Sen. Williams).
[40] *See September 1977 PDA Hearing, supra* note 38 (statement of Sen. Williams).
[41] *See* Young Amicus Brief, *supra* note 31, at 14 (citing 123 Cong. Rec. E1487 (daily ed. Mar. 15, 1977) (remarks of Sen. Williams)).
[42] *Id.*
[43] *See* 42 U.S.C. § 2000e(k) (2012).
[44] *Id.*
[45] 123 Cong. Rec. S15057 (daily ed. Sept. 16, 1977) (statement of Judy Hefner, staffer of Sen. Leahy).

in 2008, pregnancy discrimination law has remained unchanged and stagnant since 1978, leaving pregnant women behind.

The PDA's comparator standard has proven incapable of achieving full equality for pregnant workers. As legal scholar Johanna Grossman has explained, "Equal citizenship requires not only legal protection from unjustified exclusion from the workforce, but also protection for a pregnant woman's right to continue working despite the potential temporary physical limitations of pregnancy."[46]

Failing to update the law to provide explicit accommodations to pregnant workers with medical needs even though workers with disabilities now have those rights runs directly afoul of Congress's intended purpose of "accord[ing] the same rights" to pregnant women as provided to "other workers who are disabled from working."[47] By putting in place an explicit right to accommodations for pregnancy, childbirth, and related medical conditions, the Pregnant Workers Fairness Act provides the long overdue update the law needs.[48]

### A. The PDA Prior to *Young v. UPS*: Pregnant Workers in Need of Accommodation Face a Losing Battle in the Courts Because of the Comparator Framework

While the second clause of the PDA requiring equal treatment may have seemed fairly straightforward, decades of interpretation by courts eroded the law's promise of equality.[49] Courts said employers could lawfully deny workplace adjustments to pregnant workers, even while granting the same to co-workers, as long as any difference in treatment was "pregnancy-blind."[50] For example, light duty for on-the-job injuries, but not for injuries incurred off the job, was deemed perfectly permissible under the PDA in case after case,[51] despite the fact that such policies imposed the "very same harmful economic and health consequences for women as the ones Congress sought to prevent in 1978."[52] As a result, instead of standing on equal footing with their peers, pregnant women often found themselves at the bottom of the heap.

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[46] Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L. J. 567, 570 (2010).
[47] S. Rep. No. 95-331, at 4 (1977).
[48] Related medical conditions can include, but are not limited to, lactation and the need to express breast milk. *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); *E.E.O.C. v. Houston Funding II, Ltd.*, 717 F.3d 425, 427 (5th Cir. 2013) (holding that firing a woman because she is expressing milk at work violates Title VII).
[49] Of course, many pregnant women have found recourse over the years utilizing the PDA's second clause and many will in the future. We do not wish to convey that employers may fail to accommodate all pregnant workers with impunity, but rather to expose the fact that this standard is failing most women and presents practical challenges even for those who would be successful in court.
[50] *See, e.g.*, *Reeves v. Swift Transp. Co., Inc.*, 446 F.3d 637, 641 (6th Cir. 2006).
[51] *See, e.g.*, *Sagliano v. Ulta Salon, Cosmetics & Fragrance, Inc.*, No. 3:12-CV-01503 JAM, 2015 WL 150276, at *4 (D. Conn. Jan. 11, 2015); *Abbott v. Elwood Staffing Servs., Inc.*, 44 F.Supp.3d 1125, 1158–59 (N.D. Ala. 2014); *Urbano v. Cont'l Airlines*, 138 F.3d 204, 206 (5th Cir. 1998) ("As long as pregnant employees are treated the same as other employees injured off duty, the PDA does not entitle pregnant employees with non-work related infirmities to be treated the same under Continental's light-duty policy as employees with occupational injuries.").
[52] *See* PREGNANT AND JOBLESS, *supra* note 16, at 5.

Using similar methodology to that used in the "Long Overdue" report,[53] we reviewed 200 Pregnancy Discrimination Act cases in the two years leading up to the *Young* decision and found that of those cases that dealt with an issue of pregnancy accommodation, in nearly two-thirds of cases, courts rejected the plaintiff's PDA claim largely because the pregnant worker could not provide adequate comparators.[54] Unfortunately, even after *Young v. UPS,* the comparator standard remains the dominant hurdle for workers in proving their PDA claims and the main reason pregnant workers are still losing their cases two-thirds of the time, just as they were before *Young*.

For example, pre-*Young* courts frequently interpreted the PDA to permit employers to categorically provide light duty for on-the-job injuries, but not for limitations incurred off the job.[55] Post-*Young* courts are still incorrectly permitting employers to push pregnant women off the job even if they categorically accommodate on-the-job injuries.[56] As the next section elucidates, this all points to the fact that *Young* did little to assist pregnant workers in need of accommodation and pregnant women remain as unequal as ever in the workplace.

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[53] As part of our methodology we included cases where an accommodation (including on-the-job accommodations and leave or time off) was sought, but not where the only PDA claim is a traditional disparate treatment claims (e.g., where a pregnant employee was fired simply for being pregnant). We included leave cases only if they involved leave for a pregnancy-related complication or time off to recover from childbirth but not leave for bonding purposes. We did not include cases with state law claims only, unless the court is explicit that it is using federal law/interpreting the state law consistent with the PDA. We also excluded cases that were dismissed for procedural reasons (e.g., timeliness) and included published and unpublished opinions. Similar to *Long Overdue*, 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.

[54] *See, e.g.*, *Shay v. RWC Consulting Grp.,* No. CIV 13-0140 JB/ACT, 2014 WL 3421068 (D.N.M. June 30, 2014) (granting employer's motion to dismiss plaintiff's PDA claim because she could not produce evidence that similarly-situated employees were treated better); *Reynolds v. Shady Brook Animal Hosp., Inc.*, No. 4:12-CV-2258, 2013 WL 5964564 (S.D. Tex. Nov. 7, 2013) (granting employer's motion to dismiss plaintiff's PDA claim because there was no evidence that the employer allowed "non-pregnant employees to change jobs due to other health concerns"); *Metzler v. Kentuckiana Med. Ctr.,* No. 4:11-CV-00101-TWP, 2013 WL 1619592 (S.D. Ind. Apr. 15, 2013) (granting summary judgment for employer and finding the comparator plaintiff produced insufficient to support her claim).

[55] *See, e.g.*, *Sagliano*, 2015 WL 150276, at *4, *Abbott*, 44 F.Supp.3d at 1158–59.

[56] *See 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 the Equal Employment Opportunity Comm'n as Amici Curiae Supporting Plaintiff-Appellant, *Durham v. Rural/Metro Corp.*, No. 18-14687, at 7–8 (11th Cir. Feb. 22, 2019), https://www.eeoc.gov/eeoc/litigation/briefs/durham.html (highlighting that not only did the company maintain a light duty policy for workers with on-the-job injuries but "the record also shows that Rural/Metro accommodated employees who were disabled under the ADA, as reflected in its employee handbook and the testimony of its senior human resources manager.").

### B. The PDA Post-*Young v. UPS*: Groundbreaking A Better Balance Report, "Long Overdue" Reveals Pregnant Workers Are Still Losing Over Two-Thirds of Their Pregnancy Accommodation Cases Because of the Comparator Framework and Other Barriers

In May, 2019, A Better Balance released a report, "Long Overdue," detailing the numerous ways pregnant workers are still routinely jeopardizing their health—and economic security—when denied medically necessary reasonable accommodations. The report highlights that, in spite of *Young v. UPS*,[57] the 2015 U.S. Supreme Court decision that set new standards for pregnant workers' federal protections, today's pregnant workers are still forced to choose between a paycheck and a healthy pregnancy. This comprehensive and first-of-its-kind review of relevant cases found that more than two-thirds of women needing accommodations while pregnant lost their court cases under the Pregnancy Discrimination Act, leaving the pregnancy accommodation landscape much the same as it was before the *Young* case.

#### a. Revisiting the PDA in *Young v. UPS*

In 2015, the Supreme Court took up the question as to when and how employers must provide accommodations to pregnant workers under the Pregnancy Discrimination Act. While the Court's decision proved to be a victory for Peggy Young, the opinion created uncertainty for employers and employees alike.

The most salient aspect of Justice Breyer's opinion for the majority rested on a new modified *McDonnell Douglas* burden-shifting framework that pregnant women must use to prove individual unlawful treatment when an employer fails to accommodate her pregnancy and there is no other clear evidence of wrongdoing on the employer's part.[58]

The three-step disparate treatment test first requires a plaintiff to show that she was protected under the law (i.e. pregnant), that she sought, and was denied, an accommodation, and that her employer accommodated others "similar in their ability or inability to work."[59] If a worker can meet this first step—which even after *Young* often proves insurmountable—the employer may then counter the plaintiff's claim by putting forward a "legitimate, non-discriminatory reason for denying the accommodation," though the court clarified that expense and inconvenience do not independently qualify as legitimate justifications.[60] Finally, the plaintiff can respond to the employer's justification by offering evidence that said reasoning was simply pretext for intentional discrimination.[61] One way a plaintiff can prove pretext, the Court said, is by a showing that an employer's policy placed a "significant burden" on women in the workplace, and that the employer's justification was not "sufficiently strong" to justify that burden.[62]

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[57] *Young v. United Parcel Serv., Inc.,* 135 S. Ct. 1338, 1354 (2015).
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*

The new test laid out in *Young* has done little to create more clarity in the law or to benefit pregnant workers in need of immediate accommodation to stay healthy and working. Post-*Young*, pregnant women are facing three main problems in these cases:

1. the "**comparator**" problem, in which pregnant workers must show other employees are being accommodated by their employer in order to obtain their own accommodations;
2. the "**significant burden**" problem, in which pregnant workers are forced to discredit their employer's justification for failing to accommodate them under a confusing legal standard; and
3. the "**costly and time-consuming litigation**" problem, whereby most pregnant workers simply cannot afford to wait for medically necessary accommodations they need immediately.

The result is not just that a high percentage of pregnant workers are losing these cases due to a uniquely stringent standard imposed on them, but that women and families across the country are losing because pregnant workers are continually forced to risk their health on the job or lose out on a paycheck because the framework set out by the Supreme Court is insufficient. The following section details how the outdated PDA framework, even after *Young,* is leading to an unsafe and unequal workplace for pregnant women.

**b. The "Comparator" Problem: Women Should Not Have to Compare Themselves to Others to Stay Healthy and Working**

The first step of the *Young* test includes reinforcement of the second clause of the PDA requiring workers to show that others in the workplace were accommodated in order to receive accommodations. Our research for "Long Overdue" revealed that meeting this first step of the *Young* test—a step that Justice Breyer said should not be "onerous"[63]—is still the primary impediment to workers in need of accommodations because courts are still stringently applying the comparator standard. This standard—which places a unique burden on pregnant workers that is not placed on workers with disabilities—is also tone deaf to the realities of the American workplace, where workers lack clout, bargaining power, and access to their co-workers' accommodations requests or personnel files.

Our analysis in "Long Overdue" revealed that over two-thirds of workers lost their pregnancy accommodation cases. Nearly seventy percent of those losses can be traced to courts' rejection of women's comparators or inability to find comparators.[64] First, even after *Young,* courts are still incorrectly imposing categorical bans on certain types of comparators. For instance, in 2018, a federal court in Alabama rejected EMT **KIMBERLIE MICHELLE DURHAM'S** PDA claim that her employer failed to accommodate her lifting restriction even though she presented evidence that the employer accommodated three other people in her workplace with lifting restrictions. In *Durham*, the court reasoned that since those three co-workers were

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[63] *Id.*

[64] *See* LONG OVERDUE, *supra* note 7, at 14–16 (laying out all the cases post-*Young* in which courts held employers were permitted to deny pregnant workers accommodations under the PDA and finding nearly seventy percent of these cases failed because of the comparator standard).

accommodated for on-the-job injuries Durham was not "similarly situated" and the employer was not legally required to accommodate her.[65]

Like Durham, **CASSANDRA ADDUCI**, who worked part-time at a warehouse in Tennessee, also requested a temporary re-assignment after her doctor told her she should lift no more than 25 pounds. Though the employer had a "Temporary Return to Work" program and Adduci provided the court with a spreadsheet of 261 employees that the company provided with temporary work or light duty assignments, the court, post-*Young*, rejected those employees as valid comparators even though some of those accommodated were part-time, like Adduci, and occupied *the same exact position* as Adduci. In another case out of Florida, a court rejected a firefighter's claim that the city failed to provide her light duty because she could not produce a "nearly identical" comparator. This also presents women with a catch-22; since courts often insist that comparators be non-pregnant persons, it is virtually impossible to find a "nearly identical" comparator.[66]

In case after case we reviewed, women in jobs ranging from nursing[67] to law enforcement[68] and in both the public[69] and private sector[70] were denied accommodations because courts found they could not produce valid comparators. We also found these cases spanned the nation, with women denied accommodations everywhere from Michigan[71] to Pennsylvania[72] to Oklahoma.[73]

Even in the months since we published "Long Overdue," courts are continuing to hand down opinions against pregnant workers because the standard remains so oppressive. For instance, in August 2019, the Fifth Circuit rejected **MICHELLE SANTOS'S** PDA claim in *Santos v. Wincor-Nixdorf.* Santos requested a modified work schedule and was terminated a few days before giving birth, but the court sided with the employer because she could not provide "nearly identical" comparators, proving yet again how much of a blockade the comparator framework presents.[74]

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[65] *See Durham v. Rural/Metro Corp.*, No. 4:16-CV-01604-ACA, 2018 WL 4896346, at *4 (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), https://www.abetterbalance.org/resources/brief-of-amici-curiae-a-betterbalance-center-for-worklife-law-et-al-in-support-of-plaintiff-appellant-urging-reversal/.

[66] *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).

[67] *See Luke v. CPlace Forest Park SNF*, 747 Fed. App'x. 978, 980 (5th Cir. 2019); *Turner v. Hartford Nursing and Rehab,* No. 16 Civ. 12926, 2017 WL 3149143, at *6 (E.D. Mich. July 25, 2017).

[68] *See 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).

[69] *See e.g., Vidovic v. City of Tampa*, No. 8:16-cv-T-17AAS, 2017 WL 10294807, at *9 (M.D. Fla. Oct. 12, 2017); *Diaz v. Florida,* 219 F. Supp. 3d 1207, 1218 (S.D. Fla. 2016).

[70] *See, e.g.*, *Swanger-Metcalfe v. Bowhead Integrated Support Servs.*, LLC, No. 1:17-cv-2000, 2019 WL 1493342, at *8 (M.D. Pa. Mar. 31, 2019); *LaCount v. South Lewis SH OPCO*, No. 16-CV-0545-CVE-TLW, 2017 WL 2821814, at *2 (N.D. Okla. June 29, 2017); *Anfeldt v. United Parcel Serv., Inc.,* No. 15 Civ. 10401, 2017 WL 839486, at *3 (N.D. Ill. Mar. 3, 2017).

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

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

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

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

Workers with disabilities have an explicit right to engage in a discussion with their employer to seek reasonable accommodations absent undue hardship. Pregnant women should be afforded the same right. As I have emphasized before, "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,"[75] and need immediate relief to stay healthy and working. Forcing women to go through evidentiary hoops to try to find a co-worker to whom they can compare themselves is not only Sisyphean but is also unequal to their counterparts with disabilities who need not jump through the same hoops to remain equal in the workplace.

**c. The "Significant Burden" Problem**

While the comparator standard has proven to be the main roadblock to pregnant women receiving workplace accommodations, the "significant burden" standard the Court laid out in *Young* as part of the pretext analysis in the third step of the test, has also proven harmful to women. If workers are even able to make it to this step in the analysis, the "significant burden" analysis remains an additional hurdle.

For instance, when corrections officer **ANNE MARIE LEGG** requested light duty to avoid having to work with violent offenders during her pregnancy, the jail refused to accommodate her because it accommodated only on-the-job injuries. At trial, the judge instructed the jury that her PDA claim could succeed only 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."[76] The judge misapplied the *Young* standard by conflating the first and third steps of the *Young* test. While the first step of the test requires a worker to show she "was similar in her ability or inability to work" to other employees who were accommodated, by the time the worker reached the significant burden test, she should no longer need to provide a comparator. Effectively, the court added an additional hurdle for Legg to surmount, one she did not meet. Legg lost at trial.

**d. The "Costly and Time-Consuming Litigation" Problem**

*Young* also presents a practical problem. Litigation is often the only way to parse pregnancy accommodation issues through the existing PDA standard. In order to state a claim under the three-part *Young* test, one has to show that the employer did not accommodate the worker. That effectively means *Young* is designed to be a litigation standard, not a standard in which an employer and employee could resolve an accommodation request informally before a denial has been made. As we hear through our free legal hotline, many pregnant workers do not want to litigate pregnancy accommodation claims. They want to follow their doctor's orders, have a healthy pregnancy, and continue working so that they can put food on the table for their growing family. They want to be able to have a conversation with their employer to resolve accommodation requests informally.

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[75] Dina Bakst, Opinion, *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.

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

Furthermore, not only are pregnant workers expected to produce enough evidence to prove their employer's intention was discriminatory, they must do so, in many cases, under challenging circumstances where they're often unfamiliar with company policies and simply do not have the luxury of time to sort out these questions. Pregnant women need an immediate remedy to stay employed—they simply cannot rely on a protracted, stressful, and highly uncertain legal process to get the relief they need. The *Young* standard is only designed to address problems long after they have occurred, rather than facilitating timely resolutions. This is demonstrated by the fact that many of the workers who call us needing an immediate accommodation have spoken with other attorneys who simply tell them to call back once they have been terminated.

With a clearer pregnancy accommodation framework in place employers and employees can resolve accommodation requests informally and expediently. The current standard simply does not allow for quick resolution and, as such, everyone loses. As the next section reveals, the Americans with Disabilities Act Amendments Act has also done little to protect pregnant workers with medical needs arising from pregnancy.

### III. The ADAAA Still Fails to Adequately Protect Workers in Need of Accommodations for Their Health or to Prevent Pregnancy-Related Complications

In 2008, the Americans with Disabilities Act—which, since its passage in 1990 provides the explicit right to reasonable accommodations—was amended to expand its reach, becoming the Americans with Disabilities Act Amendments Act ("ADAAA"). Still, pregnant workers in need of accommodation are facing two main issues with the ADAAA.

First, courts consistently make clear that pregnancy itself is not a disability and does not merit reasonable accommodations under the ADAAA.[77] That means that if a physician recommends an accommodation in order for a pregnant worker to maintain a healthy pregnancy or avoid serious pregnancy-related complications (e.g., preterm labor), the worker may not be covered under the ADAAA.[78] Second, while the ADAAA intended to expand the types of pregnancy-related

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[77] *See, e.g.*, *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 553 (7th Cir. 2011) (citing EEOC guidance, that remains in place to this day in holding "[c]ourts that consider these regulations consistently find that pregnancy, absent unusual circumstances, is not a physical impairment"); *Brown v. Aria Health*, No. CV 17-1827, 2019 WL 1745653, at *4 (E.D. Pa. Apr. 17, 2019) ("A routine pregnancy is not considered a disability within the meaning of the ADA."); *Hannis-Miskar v. N. Schuylkill Sch. Dist.*, No. 3:16CV142, 2016 WL 3965209, at *3 (M.D. Pa. July 22, 2016) ("Because plaintiff fails to assert complications with her pregnancy, she has failed to plead a disability under the ADA."); *Selkow v. 7-Eleven, Inc.*, No. 11-456, 2012 WL 2054872, at *14 (M.D. Fla. June 7, 2012) ("Absent unusual circumstances, pregnancy is not considered a disability . . . ."); *see also* 29 C.F.R. pt. 1630 app. ("Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments.").

[78] Furthermore, courts are still relying on pre-ADAAA case law in concluding that pregnancy-related impairments do not qualify as pregnancy-related disabilities. *See, e.g.*, *Serednyj*, 656 F.3d at 554 (relying on pre-ADAAA case law in holding that plaintiff's ADA claim failed because her "lifting restriction was of limited duration, and not an abnormal condition of her pregnancy. Indeed, the inability to do heavy lifting is not a substantial limitation as compared to the average person"); *see also Wonasue v. University of Maryland Alumni Association,* 984 F. Supp. 2d 480, 490 (D. Md. 2013) (relying on pre-ADAAA case law in finding that even though the plaintiff had "hyperemesis

impairments that may qualify as a disability,[79] and indeed some courts have heeded that directive,[80] other courts have been unwilling to extend ADAAA coverage for pregnancy-related disabilities, even in cases where workers have presented serious pregnancy complications.

**a. Pregnancy Itself is Not Considered A Disability Under the ADAAA**

In *Brown v. Aria Health*, decided in April 2019, the Eastern District of Pennsylvania held an employer did not violate the ADA when an operating room nurse was forced out onto unpaid leave after her doctor wrote a note stating that she should avoid exposure to fluoroscopy, a type of x-ray, and bone cement during her pregnancy "because it is unsafe for her" to be in those rooms.[81] The court found that because Brown did not have pregnancy-related complications, and because a "routine pregnancy is not considered a disability within the meaning of the ADA," she had no right to accommodations under the ADAAA.[82]

In yet another example, when **WHITNEY LACOUNT**, a certified nursing assistant, asked to refrain from lifting only one particular patient during her pregnancy, had five other employees willing to help her, and brought in a doctor's note with a 25-pound lifting restriction, her employer pushed her out onto unpaid leave, finding her to be a "liability."[83] The court dismissed her ADA claim because "Plaintiff has not alleged that she was pregnant and that she had a related mental or physical impairment. Instead, she alleges that she was pregnant and her doctor imposed a lifting restriction, but she does not claim that she had an abnormal or high-risk pregnancy. This does not constitute a disability."[84]

In *Swanger-Metcalfe v. Bowhead Integrated Support Services*, decided in March 2019, **ELIZABETH SWANGER-METCALFE** was an automotive worker whose job entailed working in a poorly ventilated sand room part of the time.[85] When she became pregnant, her doctor gave her a note recommending that she work only in well-ventilated areas, which she gave to her supervisors.[86] Her employers said they were not required to accommodate her because pregnancy is not a disability, and said she could either work in the sand room or take unpaid leave. When she became distressed at this impossible choice, her supervisors mocked her,

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of pregnancy, a severe form of morning sickness, where the vomiting is excessive and may cause dehydration in the body," she did not have a disability for the purposes of the ADA).

[79] *See* 29 C.F.R. pt. 1630 app.; *see also* Equal Emp. Opportunity Comm'n, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (2015).

[80] *See, e.g.*, *Mayorga v. Alorica, Inc.,* No. 12-21578-CIV, 2012 WL 3043021, at *5 (S.D. Fla. July 25, 2012) (finding that "premature uterine contractions, irritation of the uterus, increased heart rate, severe morning sickness, severe pelvic bone pains, severe back pain, severe lower abdominal pain, extreme headaches, and other pregnancy-related conditions" qualified as a disability under the ADAAA).

[81] *Brown*, 2019 WL 1745653, at *2.

[82] *Id.* at *4–5.

[83] *LaCount v. S. Lewis SH OPCO, LLC*, No. 16-CV-0545-CVE-TLW, 2017 WL 1826696, at *1 (N.D. Okla. May 5, 2017).

[84] *Id.* at *3 (emphasis in original).

[85] *Swanger-Metcalfe v. Bowhead Integrated Support Servs., LLC*, No. 1:17-CV-2000, 2019 WL 1493342, at *2 (M.D. Pa. Mar. 31, 2019).

[86] *Id.*

saying, "they want women's equal rights, they got 'em!"[87] She was ultimately pushed out onto unpaid leave.

The court rejected Swanger-Metcalfe's ADA claim. She argued that "because breathing constitutes a major life function…breathing of 'debris filled air' while working in the sand room could have caused her to sustain serious pregnancy complications."[88] The court was unpersuaded by that argument finding that because she was trying to avoid a pregnancy-related complication but did not currently have a complication, she was not entitled to ADA accommodations.[89]

**b. Courts Are Still Narrowly Interpreting the Scope of Pregnancy-Related Impairments That Qualify as a Disability Under the ADAAA**

In *Colon v. Sabic Innovative Plastics*, the Northern District of New York found that "even after the ADAAA, courts in the Second Circuit have held that short-term impairments do not render a person disabled within the meaning of the statute."[90] In *Colon*, the court found that even though the plaintiff had documented evidence of a "high-risk pregnancy" from her medical provider that was not enough to meet the definition of a disability under the ADAAA. The court stated: "The only evidence that Plaintiff presented in support of her position that her high-risk pregnancy was a disability is the fact that her doctor diagnosed her with a high risk [sic] pregnancy."[91] Thus, despite presenting a written diagnosis from her doctor, Colon did not qualify as disabled under the ADAAA.[92]

Similarly, in *Oliver v. Scranton Materials,* the court found that "medical complications associated with [] high risk pregnancy with triplets and the medical impairments caused by both the complications and … need for surgery at the time of birth" did not meet the definition of "disability" under the ADA because "complications" and "surgery" were not specific enough.[93] Three years later, in the 2018 case *Arozarena v. Carpenter Co*, when a machine operator "began to have complications with her pregnancy and in the last two months of her pregnancy found herself having to see her doctor twice a week to be monitored" the court cited *Oliver* in holding that even though she submitted doctor's notes, she did not provide enough specificity in her complaint to prove that she had an ADA-qualifying disability.[94]

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[87] *See* Complaint, *Swanger-Metcalfe v. Bowhead Integrated Support Servs*., LLC, No. 1:17-CV-2000, 2019 WL 1493342 (M.D. Pa. Mar. 31, 2019), ECF No. 1.
[88] *Swanger-Metcalfe*, 2019 WL 1493342, at *11.
[89] *Id.*
[90] *Colon v. Sabic Innovative Plastics US, LLC,* No. 115CV651MADDJS, 2017 WL 3503681, at *7 (N.D.N.Y. Aug. 15, 2017).
[91] *Id.* (quoting *Wanamaker v. Westport Bd. of Educ.*, 899 F. Supp. 2d 193, 211 (D. Conn. 2012) ("[T]emporary, non-chronic impairments of short-duration, with little or no long term or permanent impact, are usually not disabilities.")).
[92] Note that while this case may have presented certain complicated factual issues, the court's analysis regarding qualifying disabilities, especially vis a vis high-risk pregnancy, is instructive and stands to impact future courts' interpretations as to what qualifies as an ADAAA-qualifying pregnancy-related impairment.
[93] *Oliver v. Scranton Materials, Inc*., No. 3:14-CV-00549, 2015 WL 1003981, at *8 (M.D. Pa. Mar. 5, 2015).
[94] *Arozarena v. Carpenter Co.,* No. 5:17-CV-05457, 2018 WL 2359143, at *1 (E.D. Pa. May 24, 2018); *see also Alger v. Prime Rest. Mgmt., LLC*, No. 1:15-CV-567-WSD, 2016 WL 3741984, at *8 (N.D. Ga. July 13, 2016) (although the court acknowledged the plaintiff experienced "severe complications" and bleeding, the court found

Outside of the pregnancy context, too many times, the ADAAA has fallen short in expanding protections to workers with temporary impairments, which bodes poorly for pregnant workers who are often in need of only short-term accommodations.[95]

Congress should be concerned with preventing health problems before they start, rather than forcing a pregnant worker to injure herself or risk injuring herself in order to obtain ADAAA coverage for a new complication. Prevention is not only worth a pound of cure, but in too many instances where the health and economic harms are virtually irreparable, prevention is the *only* tool we have.

The PWFA would help to protect healthy pregnancies even in scenarios where a woman does not yet have any medical complications and simply requires some modest accommodations, like being able to use the restroom frequently, to stop health problems before they start.

## IV. The FMLA is Also Inadequate in Providing Protections for Pregnant Workers in Need of Accommodations

Although a very important protection, the Family and Medical Leave Act ("FMLA")[96] is not the statutory scheme pregnant workers need when they require reasonable accommodations, like a stool to sit on, a water bottle, or light duty, to continue working. The FMLA provides workers with up to twelve weeks of unpaid leave for pregnancy-related illness, recovery from childbirth, and other pregnancy-related incapacity. More than forty percent of workers are ineligible for

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that Alger failed to show her pregnancy-related complications constituted a disability under the ADA); *Llano v. New York City Health & Hosps. Corp.,* No. 13 CIV. 5820 RJS, 2014 WL 1302654, at *2 (S.D.N.Y. Mar. 31, 2014) (pregnancy-related nausea did not qualify as a disability under the ADA).

[95] Given the short-term nature of pregnancy, courts' broader rejection of temporary disabilities as ADA-qualifying disabilities means that many pregnancy-related impairments, even those that may significantly compromise a pregnant employee's health, will likely not constitute ADAAA qualifying disabilities. *See, e.g.*, *Leone v. All. Foods, Inc.*, No. 8:14-CV-800-T-27TBM, 2015 WL 4879406, at *7 (M.D. Fla. Aug. 14, 2015) (holding that the plaintiff's eye injury, which required two weeks' treatment, was not a disability since the impairment was short in duration); *Willis v. Noble Envt'l Power, LLC* 143 F. Supp. 3d 475, 483 (N.D. Tex. 2015) (holding that the plaintiff's dehydration and heat stroke, which required him to go to the emergency room and prevented him from walking, communicating, and concentrating, was not a disability because the impairment "spanned no more than a few days"); *Mastrio v. Eurest Services* No. 3:13-CV-00564 VLB, 2014 WL 840229, at *6 (D. Conn. Mar. 4, 2014) *(*holding the plaintiff's kidney stones, which required him to miss work for a month, where he was restricted to his bedroom and suffered excruciating pain, was not a disability because it was only temporary); *Butler v. BTC Foods Inc.,* No. CIV.A. 12-492, 2012 WL 5315034, at *3 (E.D. Pa. Oct. 19, 2012) (holding a double hernia did not constitute a disability because it was only a "one-time occurrence"); *see also Feldman v. Law Enf't Assocs. Corp.,* 955 F. Supp. 2d 528, 539 (E.D.N.C. 2013) ("[Plaintiff] has not offered any evidence beyond his overnight visit to the hospital to show that the [mini-stroke] substantially impaired the major life activity of working or any other major life activity."); *Lewis v. Fla. Default Law Grp., P.L.*, No. 8:10-CV-1182-T-27EAJ, 2011 WL 4527456, at *5 (M.D. Fla. Sept. 16, 2011) (holding that "the fact that Lewis could not perform those functions for a period of one to two weeks does not mean her symptoms 'substantially limited' those activities" and quoting from the EEOC's ADA guidance that "*[i]mpairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe*" 29 C.F.R. pt. 1630 app. (citing Joint Hoyer–Sensenbrenner Statement, p. 5)).

[96] 29 U.S.C. §§ 2601–2654 (2012).

FMLA protections and many more cannot afford to take time off unpaid.[97] Workers who are forced to use up their FMLA leave entitlement when forced off the job during pregnancy are then often unable to use its protections to care for their new baby, one of the intended uses of the FMLA.

## V. Pregnant Workers Need the Pregnant Workers Fairness Act to Guarantee an Explicit Right to Reasonable Accommodations

As discussed above, under the framework established by the court's majority in *Young*, a pregnant worker who wants to prove unlawful treatment based on her employer's failure to accommodate her pregnancy must go through a multi-step process that can only be fleshed out through lengthy litigation. Yet most workers we hear from simply want an accommodation to continue working and comply with their doctor's orders. They cannot afford to wait weeks, months, or years for a court decision. Once their baby has started elementary school, it is obviously too late to ensure the pregnancy is healthy at the outset and to prevent a downward spiral of financial woes. Workers need an explicit right to accommodations, not a standard that forces them into a years-long spiral of chasing down co-workers to meet a uniquely burdensome standard.

As A Better Balance has said before, "when employees and employers sit down together, they have the opportunity to come up with solutions that meet everyone's needs. No lawyers need be involved. The reasonable accommodations standard also encourages precisely the kind of dialogue that can lead to greater understanding of workers as complete human beings, and acceptance of difference in the workplace."[98]

### A. An Explicit Right to Accommodations for Pregnancy Fulfills the Intent of the Pregnancy Discrimination Act

The PWFA fulfills the intent of the PDA—to provide equal treatment to pregnant women—by making it unmistakably clear that employers have to make reasonable accommodations for pregnant workers, just like they do for workers who need accommodation because of disability.

As described in our joint amicus brief with the American Civil Liberties Union in the *Young v. UPS* Supreme Court case:

> "Congress enacted the PDA to end longstanding practices by which employers forced women out of the workplace as a matter of course when they became pregnant. These practices were based on the notions that pregnancy is incompatible with work, that a pregnant woman's proper place was at home, and that pregnancy should signal the end of a woman's working life. See, e.g., 123 Cong. Rec. 7,539 (1977) (statement of Sen. Williams) (PDA intended to address "the outdated notion that women are only supplemental or temporary workers-earning 'pin money' or waiting to return home to

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[97] *See* HELEN JORGENSON & EILEEN APPELBAUM, CTR. FOR ECON. & POLICY RESEARCH, EXPANDING FEDERAL FAMILY AND MEDICAL LEAVE COVERAGE: WHO BENEFITS FROM CHANGES IN ELIGIBILITY REQUIREMENTS? 3 (Feb. 2014), http://cepr.net/documents/fmlaeligibility-2014-01.pdf.
[98] PREGNANT AND JOBLESS, *supra* note 16, at 7.

> raise children full-time"). These stereotypes implicated all women and emanated from the belief that women are, "and should remain, 'the center of home and family life.'" Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 729 (2003) (quoting Hoyt v. Florida, 368 U.S. 57, 62 (1961))."[99]

The Pregnancy Discrimination Act sought to challenge these pernicious sex role stereotypes.[100] In line with this original intent driving the PDA, the PWFA will remedy the various forms of gender bias discussed above, and that persist for pregnant women today. This is because the PWFA provides the explicit right to accommodation, so all of the reasons why employers deny those accommodations would no longer be permitted. Additionally, for those dealing with conscious bias, such as paternalistic assumptions, the PWFA explicitly prohibits forcing a pregnant worker in need of accommodations onto leave if another reasonable accommodation can be provided. Any intentional bias unleashed against a worker who requests accommodations would be protected by the statute's retaliation protections. Finally, even structural bias would be corrected by the PWFA because workplaces would no longer be permitted to get away with so-called "pregnancy blind" policies or practices—they would simply have to provide reasonable accommodations breaking down structural barriers in the workplace and paving the way for equal opportunities.

### B. What Does the Pregnant Workers Fairness Act Do?

The Pregnant Workers Fairness Act's express purpose is to eliminate discrimination and promote women's health and economic security. The law applies to employers with fifteen or more employees and would ensure that pregnant workers can stay safe and healthy at work. The law would require employers to provide reasonable accommodations to employees who have known limitations stemming from pregnancy, childbirth, and related 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, or the ability to carry 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. The PWFA uses an existing reasonable accommodations framework, closely modeled after the Americans with Disabilities Act, that is familiar to employers.

Specifically, as written in the text of the federal Pregnant Workers Fairness Act, "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)."[101] The text also specifies that the terms "shall be construed as such terms have been construed under such Act and as set forth in the regulations required by this Act, including with regard to the interactive process that will typically be used to determine an appropriate reasonable accommodation."[102]

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[99] *See* Young Amicus Brief, *supra* note 31, at 8.
[100] *See* Reva B. Siegel, *Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination,* 59 WM. & MARY L. REV. 971, 995–999 (2018).
[101] *See* H.R. 2694, *supra* note 2.
[102] *See* 42 U.S.C. § 12111(9)–(10). According to the ADA, "The term "reasonable accommodation" may include—(A)making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B)job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or

Most pregnancy accommodations are fairly inexpensive and time-limited.[103] For instance, a pregnant cashier may require a stool to sit on so as to prevent swelling and circulatory problems. A pregnant retail worker may require additional bathroom breaks so that she does not develop a urinary tract infection. A pregnant police officer may request a light duty re-assignment so that she does not have to wear a constricting uniform that could imperil her pregnancy. A warehouse worker who received a doctor's note indicating she should not lift over 50 pounds may seek temporary re-assignment.

The undue hardship standard is designed to ensure that employers are not required to stretch their business operations too thin in order to provide an accommodation.

These standards are time-tested, familiar to employers, and based in ensuring every worker receives an individualized inquiry rather than a blanket, one-size-fits-all policy. As indicated, the bill's language states that regulations and case law from courts interpreting these definitions will be pulled in for the Pregnant Workers Fairness Act as well. Additionally, language was added to ensure that the interactive process is very clearly stated in the law, in response to a request from business groups. Businesses and employees alike appreciate the interactive process precisely because it encourages a conversation, rather than contentious litigation.

In determining appropriate accommodations, the PWFA contemplates an individualized inquiry into the pregnant worker's needs. In doing so, it ensures pregnant workers receive only the accommodations they actually need, which deters employers from resting on traditional stereotypes of pregnant workers. Many women will never need accommodations for their pregnancy, even at later stages and even for those in physically strenuous work. Accommodation needs and requests not only vary from woman to woman, but even from pregnancy to pregnancy. The beauty of the flexible reasonable accommodation standard within the PWFA is that it makes no assumptions about what pregnant workers may need or not need, and therefore it ensures that the law does not perpetuate gender inequality by providing women with overly broad and unnecessary protections. Instead, in recognition that every pregnancy and workplace is different, the PWFA requires only an interactive process between employer and employee to determine whether a reasonable accommodation will allow the worker to continue working without jeopardizing her health.

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policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." The term "undue hardship" means "(A)In general The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B). (B)Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include— (i)the nature and cost of the accommodation needed under this chapter; (ii)the overall financial resources of the facility or 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; (iii)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 (iv)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.

[103] JOB ACCOMMODATION NETWORK, ACCOMMODATION AND COMPLIANCE SERIES, WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT 4 (2015), https://askjan.org/publications/Topic-Downloads.cfm?pubid=962628.

Finally, because reasonable accommodations for pregnant workers are time limited, they are not very costly and are unlikely to constitute an undue hardship on the employer. The bill also explicitly states that employers cannot deny employment opportunities for workers who request reasonable accommodations. Employers would also not be permitted to force an employee to accept an unnecessary reasonable accommodation that they do not want or need, in order to combat paternalism. The PWFA explicitly mentions that employers may not force an employee out onto leave unless no other reasonable accommodation would work, since that is a very common scenario under the status quo. Finally, employers cannot take other adverse action, against employees who request a reasonable accommodation, such as cutting their hours or demoting them.

The PWFA pulls in the exact same remedies as are already provided under Title VII, so as to ensure consistency with the current Pregnancy Discrimination Act. This, too, is familiar to employers.

### C. Why Is the Pregnancy Discrimination Amendment Act an Inadequate Solution?

In June 2015, some members of Congress introduced the Pregnancy Discrimination Amendment Act as an alternative to the PWFA.[104] While we applaud them for recognizing the shortcomings of the PDA, this alternative proposal leaves pregnant workers and their health behind, and is likely worse than the status quo. The PWFA uses a familiar framework from the Americans with Disabilities Act, but the PDAA inserts new language and confusing legal standards into an already problematic statutory framework.

The PDAA says that pregnant women should be treated the same as other non-pregnant employees who are working under "similar working conditions" and with "temporary" limitations. However, these terms are confusing and undefined. Under the PDAA, a pregnant woman who needs a water bottle not only still has to struggle to find another coworker who also receives a water bottle under the current problematic comparative framework. She also has to find a coworker in "similar working conditions" to her who is only temporarily impaired. "Similar working conditions" is a phrase borrowed from the federal Equal Pay Act.[105] Unfortunately, this term has been defined very narrowly by courts and has been used repeatedly to deny women their equal rights.[106] For example, "similar working conditions" takes into

[104] H.R. 2800, 114th Cong. (2015).
[105] 29 U.S.C. § 206(d)(1) (2012).
[106] *See, e.g.*, *See Timmon v. Servicemaster Co.*, No. 96-1655, 1997 WL 306778, at *1 (6th Cir. Jun. 5, 1997) (finding working conditions of female telephone sales representative were not similar to those of male residential sales representative); *Stanley v. Univ. of S. California*, 13 F.3d 1313, 1323-24 (9th Cir. 1993) (holding that higher pay for male coach of men's basketball team compared to female coach of women's basketball team was justified by "substantial differences between their responsibilities and working conditions" because the men's basketball team earned more revenue for the school, and therefore the male coach "was under greater pressure . . . to promote his team and to win"); *Gerbush v. Hunt Real Estate Corp.*, 79 F.Supp.2d 260, 263-64 (W.D.N.Y. 1999) *aff'd*, 234 F.3d 1261 (2d Cir. 2000) (holding that working conditions of female real estate branch manager were not similar to those of male managers of other branches because female manager's branch was less profitable); *Berry v. Bd. of Sup'rs of Louisiana State Univ. & Agr. & Mech. Coll.*, No. CIV.A. 81-0178 L, 1985 WL 6149, at *1-2 (W.D. La. Feb. 27, 1985) *aff'd sub nom. Berry v. Bd. of Sup'rs of Louisiana State Univ.*, 783 F.2d 1270 (5th Cir. 1986) (finding that a female university professor's working conditions were dissimilar to those of male professors in her department

consideration the surroundings in a work environment, such as the temperature.[107] Under the PDAA, a pregnant indoor cashier at a garden shop would not get a stool when an outdoor cashier with a broken foot is provided with one.

The term "temporary" is also undefined. It is unclear if it means less than a month, six months, a year, or two years. A pregnant woman could be denied an accommodation because her counterpart is permanently, not temporarily disabled. Even worse, she may end up waiting months to see whether her coworker recovers or whether his or her condition is more prolonged.

The PDAA also lacks many important provisions that the PWFA contains. As will be discussed in further detail below, the PWFA explicitly states that employers cannot push employees onto unpaid leave when another accommodation would allow them to keep working and stay healthy. The PWFA also makes sure that an employee will not have to accept an employer's suggested accommodation that is unnecessary.[108]

## VI. State Pregnant Workers Fairness Act Laws Demonstrate That This Standard Is a Workable Solution to Keep Pregnant Women Healthy and On the Job

This has been an overwhelmingly bipartisan issue at the state level—over half of all states, twenty-seven in total, now provide stronger legal protections for pregnant workers who require some reasonable accommodations to stay healthy and employed.[109] A Better Balance is proud to have worked on almost all of the recently enacted state-level laws as well as many campaigns that have supported the introduction of similar legislation.

Every one of the state-level accommodation laws enacted since 2013 passed with bipartisan, and in many cases, unanimous support. The new wave of laws tracks the ADA reasonable accommodation framework – indeed, all post-2013 state laws use this familiar reasonable accommodation/undue hardship framework. Across the country, state legislators have taken action on this issue to strengthen their state economies, improve health outcomes, and reduce the burden on Medicaid and other social programs.

### A. Legislators Recognize Opportunity to Increase Women's Labor Force Participation And Strengthen Economic Security for Families

State legislators understand the importance of reasonable accommodations in order to ensure women remain in the workforce and promote economic security for families.

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because the majority of her time was spent on instruction, whereas none of her male comparators spent more than 50% of their time on instructional duties); *Grier v. Rumsfeld*, 466 F.Supp. 422, 425 (S.D. Tex. 1979) (holding that the working conditions of a female supply clerk were not similar to those of male members of the National Guard performing "functionally the same task" because male Guard members were subject to potential mobilization).

[107] *Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974).

[108] *See* H.R. 2694, *supra* note 2.

[109] *See* ABB FACT SHEET: STATE AND LOCAL PWFAS *supra* note 9.

In Illinois, Democratic sponsor Toi Hutchinson put it succinctly: "We don't want to be in a situation where women have to choose between having a healthy pregnancy and going to work. This is to keep women working, so they can support their families."[110]

In Kentucky, Republican State Senator Alice Forgy Kerr, who championed the Kentucky Pregnant Workers Act, was inspired to act after hearing the stories of police officers Lyndi Trischler and Sam Riley, mentioned above. Sen. Kerr took their stories to heart and recognized Kentucky's low rank in labor force participation for women. She understood that providing reasonable accommodations would encourage women's participation in not only non-traditional occupations like policing, but other realms as well, benefitting the state's economy.[111]

Speaking in support of the New York Pregnant Workers Fairness Act, Republican State Senator Kemp Hannon stated, "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."[112]

Keeping pregnant workers attached to the workforce has also been a key reason for business support of state pregnant worker fairness legislation. For example, the Associated Industries of Massachusetts ("AIM"), which represents 3,500 member employers, took a strong statement in support of the Massachusetts Pregnant Workers Fairness Act. In a letter to Governor Baker urging his signature of the bill, AIM stated that "[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."[113]

### B. **Legislators Recognize the Health Benefits of Accommodating Pregnant Workers**

In a letter to legislators advocating for the New York City Pregnant Workers Fairness Act, Dr. Lucy Willis, an Emergency Department physician in New York City, testified in support of the city's Pregnant Workers Fairness Act. She explained that she had treated a 16-week pregnant patient who arrived by ambulance after collapsing at work.[114] The patient was so severely dehydrated that she had to be treated with intravenous fluids. Dehydration is dangerous early in pregnancy because of the risk of miscarriage from fainting. Although the worker had asked her supervisor if she could carry a water bottle during the early and risky stages of her pregnancy (based on her doctor's orders), her supervisor denied the request because of a store-wide policy: no water bottles were allowed on the retail floor. In another example of a worker forced to risk her health, one fast food worker was even denied breaks to use the bathroom more frequently, as

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[110] *See Ill. S. Floor Deb.*, 98th Gen. Assemb. (May 20, 2014) (statement of Sen. Toi Hutchinson).
[111] Hearing on S.B. 18 Before the S. Comm. on the Judiciary, 2019 Gen. Assemb., Reg. Sess. (Ky. Feb. 14, 2019) (statement of Sen. Alice Forgy Kerr), https://www.ket.org/legislature/?archive&nola=WGAOS+020057&part=2.
[112] *N.Y. S. Floor Deb.*, 2013–2014 Leg. Sess. (June 12, 2014) (statement of Sen. Kemp Hannon).
[113] Letter from Richard C. Lord, President and CEO of Associated Industries of Massachusetts, to Massachusetts Governor Charlie Baker (July 24, 2017) (on file with author).
[114] Letter from Wendy Chavkin, MD, MPH, Professor of Population and Family Health and Obstetrics-Gynecology, Columbia University, to James Vacca, New York City Council Member (Nov. 29, 2012) [hereinafter Chavkin Letter], https://www.abetterbalance.org/resources/chavkin-letter/.

is often necessary during pregnancy.[115] Not being able to use the bathroom can result in serious infections in pregnancy.[116]

No pregnant woman should have to endure a trip to the emergency room when such a scare could easily be prevented. Furthermore, many pregnant women are too fearful to ask for an accommodation for fear of retaliation, presenting yet another scenario where workers are forced to risk their health because they do not have an explicit right to pregnancy accommodations and anti-retaliation protections for such requests.[117]

Legislators were also moved by Dr. Wendy Chavkin's testimony on preterm birth: "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 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."[118] These consequences are not only devastating for workers, but also quite costly for society. On average, each premature/low birth weight baby costs employers and employees an additional $58,917 in newborn and maternal health care costs, according to the March of Dimes.[119] Today, one in ten live births is preterm and prematurity is the leading cause of infant mortality nationwide.[120] While premature delivery does not always cause problems for the child, it does increase the likelihood of serious medical complications.

In a Health Impact Assessment of the Kentucky Pregnant Workers Act, the Louisville Department of Public Health and Wellness wrote, "Accommodating pregnant workers, upon their request, is critical for reducing poor health outcomes . . . . Improving birth outcomes makes a sustainable impact for a lifetime of better health."[121] Those poor outcomes, the report highlighted, can include miscarriage, preterm birth, low birth weight, preeclampsia, and birth defects, among other issues.[122] Thus, ensuring healthy pregnancies and babies can result in long-term savings for the healthcare system. Providing reasonable accommodations also allows

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[115] A BETTER BALANCE & NAT'L WOMEN'S LAW CTR., IT SHOULDN'T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS 4 (2013), https://www.abetterbalance.org/resources/it-shouldnt-be-a-heavy-lift/.
[116] LOUISVILLE DEP'T OF PUBLIC HEALTH AND WELLNESS, PREGNANT WORKERS HEALTH IMPACT ASSESSMENT 2019, at 6–7 (2019 [hereinafter PREGNANT WORKERS HEALTH IMPACT ASSESSMENT], https://louisvilleky.gov/sites/default/files/health_and_wellness/che/pregnant_workers_hia_final_02182019.pdf.
[117] *ACOG Committee Opinion No. 733*, *supra* note 12, at e117.
[118] *See* Chavkin Letter, *supra* note 114.
[119] MARCH OF DIMES, PREMATURE BIRTH: THE FINANCIAL IMPACT ON BUSINESS (2013), https://www.marchofdimes.org/materials/premature-birth-the-financial-impact-on-business.pdf.
[120] *Preterm Birth*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pretermbirth.htm (last visited Oct. 14, 2019).
[121] PREGNANT WORKERS HEALTH IMPACT ASSESSMENT, *supra* note 116, at 7.
[122] *Id.* We have seen these devastating health impacts firsthand. *See* 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 (highlighting A Better Balance client Tasha Murrell who miscarried while working at a warehouse in Tennessee after her manager denied her medically-advised lifting restriction).

women to work later into their pregnancies and save any leave time until after childbirth, allowing them more time to recover and establish breastfeeding.[123]

### C. Legislators Acknowledge the Related Savings for Other Government Assistance Programs

As Armanda Legros's story highlighted, many pregnant workers who are pushed onto unpaid leave or fired from their jobs often have no choice but to resort to public assistance in order to stay afloat. Women we have spoken to in these circumstances must rely on food stamps, Medicaid, unemployment insurance benefits, disability benefits, Temporary Assistance for Needy Families, rental assistance, and other government programs to make ends meet. These vitally important safety nets should not have their resources stretched by recipients who would prefer to continue working in a safe environment with minor accommodations from their employers.

State lawmakers have repeatedly acknowledged that when employers can cheaply provide accommodations and keep a valued worker out of poverty, it only makes sense to avoid added financial stress on individuals and taxpayers.

Speaking in support of Delaware's pregnancy accommodation legislation that passed unanimously in 2014, Republican State Senator Colin Bonini said, "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."[124]

In Utah, Republican State Senator Todd Weiler explained, "We had a woman who lost her job testify in committee and is now on state assistance because of that with a small baby. And so there is a need here."[125] Weiler's colleague, Republican State Representative Rebecca Edwards, agreed, stating, "Our economy benefits when women are able to keep working, continue supporting their families, and avoid getting on public assistance programs."[126]

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[123] A medical condition related to pregnancy can also include, but is not limited to, limited time off to recover from childbirth. It is well-established that time off or a period of leave can constitute a reasonable accommodation under the ADA. *See, e.g., Garcia-Ayala v. Lederle Parenterals, Inc*., 212 F.3d 638, 647 (1st Cir. 2000) ("This court and others have held that a medical leave of absence—[plaintiff's] proposed accommodation—is a reasonable accommodation under the Act in some circumstances." ); *Haschmann v. Time Warner Entertainment Co*., 151 F.3d 591, 601 (7th Cir. 1998) ("[T]here was sufficient evidence from which a reasonable juror could conclude that [plaintiff's] medical leave, as requested, would have been a reasonable accommodation."); *Rascon v. U S West Communications, Inc.*, 143 F.3d 1324, 1333–34 (10th Cir. 1998) ("An allowance of time for medical care or treatment may constitute a reasonable accommodation."). Many state pregnant workers fairness statutes explicitly require time off to recover from childbirth as a reasonable accommodation. *See, e.g.*, Ky. Rev. Stat. Ann. § 344.030(6)(b) (2019); Mass. Gen. Laws ch. 151B, § 4(1E) (2018); Conn. Gen. Stat. § 46a-60(a)(2) (2017); Neb. Rev. Stat. § 48-1102(11) (2015).

[124] *See* Marsha Mercer, *States Go Beyond Federal Law to Protect Pregnant Workers*, PEW CHARITABLE TRUSTS (Jan. 7, 2015), https://www.pewtrusts.org/en/ research-and-analysis/blogs/stateline/2015/1/07/states-go-beyond-federal-law-to-protect-pregnant-workers.

[125] *See Utah S. Floor Deb*., 61st Leg., 2016 Gen. Sess. (Feb. 2, 2016), (statement of Sen. Todd Weiler), https://le.utah.gov/av/floorArchive.jsp?markerID=94586,

[126] *See Utah H. of Rep. Floor Deb.*, 61st Leg., 2016 Gen. Sess. (Feb. 25, 2016) (statement of Rep. Rebecca Edwards), https://le.utah.gov/av/floorArchive.jsp?markerID=95717.

### D. State Officials Recognize That Reducing Litigation Saves State Agency Enforcement Dollars

After California passed similar legislation, litigation of pregnancy cases decreased, even as pregnancy discrimination cases around the country were increasing.[127] The same study further found that the number of published and unpublished court and administrative decisions involving California's pregnancy accommodation law was very low.[128] The Hawaii Civil Rights Commission reported a similar reduction in pregnancy discrimination complaints and litigation after enactment.[129]

Savings from reduced litigation are passed on to the state, whose enforcing agencies have limited resources. For example, Colorado's law estimated that any state expenditures to enforce the law, including increased workload from fielding inquiries, would be minimal and could be accomplished within existing appropriations.[130] Minnesota's law was determined to have no fiscal impact, and enforcing agencies did not believe that the volume of new complaints would result in quantifiable additional costs.[131] A fiscal review of Nebraska's 2015 law explained:

> Ten other states with proposed or enacted legislation similar to this bill have all indicated little to no fiscal impact. Since other states have experienced only minor increases or no increases in case filings attributed to similar legislation and a small increase in caseloads can be absorbed with existing resources, there is no fiscal impact.[132]

New York's bill was found to have no budget implications for the state.[133] Oregon found no significant fiscal impact, stating: "Costs related to the measure are anticipated to be minimal."[134] Utah similarly found the bill to have no significant fiscal impact.[135]

In states where legislation has been introduced, but not yet passed, there is a similar theme. In Tennessee, for example, the 2019 bill was found to have no significant fiscal impact because "there will not be a sufficient number of civil cases for state or local government to experience

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[127] NOREEN FARRELL, JAMIE DOLKAS & MIA MUNRO, EQUAL RIGHTS ADVOCATES, EXPECTING A BABY, NOT A LAY-OFF: WHY FEDERAL LAW SHOULD REQUIRE REASONABLE ACCOMMODATION OF PREGNANT WORKERS 25 (2013), http://www.ncdsv.org/images/ERA_ExpectingABabyNotALay-off_2012.pdf.
[128] *See id.* at 15.
[129] *See* Letter from Linda Hamilton Krieger & William D. Hoshijo, Hawai'i Civil Rights Commission, to A Better Balance (Feb. 1, 2013) (on file with author).
[130] COLO. GEN. ASSEM. LEGIS. COUNCIL STAFF, FISCAL NOTE, H.B. 16-1438, 69th Leg., Reg. Sess. (2016), https://leg.colorado.gov/sites/default/files/documents/2016A/bills/fn/2016a_hb1438_f1.pdf.
[131] MINN. LEG., CONSOLIDATED FISCAL NOTE, H. 2371, 88th Leg. (2014).
[132] NEB. LEG., FISCAL NOTE, L.B. 627, 104th Leg., 1st Sess. (2015).
[133] N.Y. STATE ASSEMB., MEMORANDUM IN SUPPORT OF LEGISLATION, A. 4873, 2015–2016 Leg. Sess. (2015), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A04873&term=2015&Summary=Y&Memo=Y.
[134] OR. LEGIS. ASSEMB. LEGIS. FISCAL OFFICE, FISCAL IMPACT OF PROPOSED LEGISLATION, H.B. 2341, 80th Leg., 2019 Reg. Sess. (2019), https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureAnalysisDocument/48416.
[135] UTAH LEG., FISCAL NOTE, S.B. 59, 61st Leg., 2016 Gen. Sess. (2016), https://le.utah.gov/~2016/bills/static/SB0059.html.

any significant increase in revenue or expenditures."[136] Moreover, they found that "... this legislation is not expected to result in any significant impact to commerce or jobs in Tennessee."

E. **Legislators Understand That Greater Clarity Benefits Businesses**

As mentioned earlier, the current patchwork of federal law and case law around this issue creates confusion for employers and leaves too many employees without the accommodations they desperately need. At the state level, lawmakers have recognized the urgent need to provide greater clarity for employers and employees, which allows issues to be resolved quickly and informally.

Speaking in favor of the proposed Illinois accommodation law that passed unanimously in 2015, Democratic State Representative Carol Sente said:

> 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. So, over the years, 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.[137]

Describing the broad business support for Nebraska's legislation, State Senator Heath 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.[138]

F. **Despite Progress at the State Level, the Need Remains for A Federal Fix**

The progress on pregnancy accommodations at the state level has been encouraging, and state legislative records provide strong arguments in favor of strengthening protections for pregnant workers. But even state legislators understand that the ultimate goal is a federal law. As former Republican 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

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[136] TENN. GEN. ASSEMB. FISCAL REVIEW COMM., FISCAL NOTE, H.B. 986–S.B. 758, 111th Leg. (2019), http://www.capitol.tn.gov/Bills/111/Fiscal/SB0758.pdf.
[137] *Ill. H. of Rep. Floor Deb.*, 98th Gen. Assemb. (Apr. 10, 2014) (statement of Rep. Carol Sente).
[138] *Neb. Leg. Floor Deb.*, 104th Leg., 1st Sess. (Mar. 12, 2015) (statement of Sen. Heath Mello).

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."[139]

Providing one clear, uniform standard for businesses is absolutely critical, so as to allow for informal resolution of accommodation requests between employer and employee. The federal PWFA would help facilitate communication between the employer and employee so they are on the same page about a worker's health needs.

Propel HR, a business industry website based in Greenville, South Carolina, said in praising the state's new pregnancy accommodations law that it creates "clearer expectations" as to employer's obligations and "employers have learned that it makes good business sense to create a work environment where expectant and nursing mothers feel valued and respected."[140]

Federal law providing a clear right to reasonable accommodations is especially critical for the 23 states that have not enacted stronger protections, many of which are in the Southeast and the Midwest. These are often states with higher proportions of low-wage workers and weaker protections for working families.

G. **Pregnant Workers Thrive in States With PWFA Laws On the Books**

We see the difference this law makes in the twenty-seven states that have Pregnant Workers Fairness Acts, or similar protections, on the books compared to states without those protections. In states with strong protections, women's experiences show a clear standard can make all the difference in a worker's life and the health of a pregnancy. The PWFA would ensure all pregnant workers—no matter where they live—are able to stay healthy and working when they need income the most.[141]

For example, thanks to New York City's law, **ANGELICA VALENCIA** was reinstated to her job after being pushed out because she asked to avoid overtime. Angelica, who worked at a packing facility in NYC, was three months pregnant when her doctor advised that she avoid heavy lifting, as she had suffered a miscarriage the year before. She requested to be placed on desk duty, which she knew was available. Instead, her manager assigned her grueling overtime hours. With the help of the NYC Pregnant Workers Fairness Act, she was able to work and get the accommodation she needed.[142]

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[139] *Sen. Bonini Testifies in Support of Pregnant Workers Fairness Act*, CAPE GAZETTE (Apr. 2, 2016), https://www.capegazette.com/article/sen-boninitestifiessuport-pregnant-workers-fairness-act/101508.
[140] Jada Jacobs, *New South Carolina Law Protects Pregnant and Nursing Employees*, PROPELHR (June 20, 2018), https://www.propelhr.com/blog/new-sc-law-protects-pregnant-employees-and-nursing-mothers.
[141] A BETTER BALANCE, THE CASE FOR THE PREGNANT WORKERS FAIRNESS ACT, IN STORIES (Sept. 2019), https://www.abetterbalance.org/resources/the-case-for-the-pregnant-workers-fairness-act-in-stories/.
[142] *Id.*

Additionally, thanks to New Jersey's law, **TAKIRAH WOODS** was able to return to work with light duty and avoid complications. At 14 weeks pregnant, Takirah, a family services worker in New Jersey, was advised by her doctor not to lift over 15 pounds, something she only rarely did. When she requested the accommodation, her employer forced her to take unpaid leave. Desperate to keep her job, she asked her doctor to lift the restriction, even though it could compromise her health and pregnancy. But then, she learned about her rights under New Jersey's Pregnant Worker Fairness Act. After asserting her rights, she was reinstated with light duty for the rest of her pregnancy.[143]

Angelica and Takirah, along with many other women we speak with, have a vastly different experience from those who lose out in states without a Pregnant Workers Fairness Act, like Armanda, Lyndi, and Natasha mentioned above. The contrast is profound—one road leads to dialogues and a healthy worker, the other to protracted litigation.

As discussed above, the driving force behind the PWFA is to ensure clarity where there is currently a web of confusion, which would allow for informal resolutions when a pregnant worker needs them, not when it is too late. One major point of the law is to *prevent* problems before they occur, especially for low-wage workers with little resources or bargaining power. The PWFA would benefit employers and employees, not lawyers.

**VII. Conclusion**

In 2019 it is simply outrageous that pregnancy discrimination is rampant and that workers are pushed off their jobs when a simple, reasonable accommodation would allow them to continue working without jeopardizing the health of their pregnancy. No one should have to make that impossible choice. The time is now. The Pregnant Workers Fairness Act is long overdue.

[143] *Id.*



Chairwoman BONAMICI. Thank you for your testimony. Under Committee Rule 8(a), we will now question witnesses under the five minute rule, alternating between the parties and I recognize myself for five minutes.

Ms. Durham, I understand that you demonstrated to the court that your employer was accommodating your similarly situated co-workers who had similar light duty lifting restrictions but they didn't offer the same accommodations to you while you were pregnant so what did you think? How did you feel when you learned that even though you proved that others got accommodations, it wasn't enough for you to win your case?

Ms. DURHAM. Honestly, it felt very discouraging. It felt like it was a misunderstanding which is why I contacted the lawyer in Birmingham about it. The original intent in what we had done was to send them a letter to hopefully clear this up because it really did just seem like it was a big misunderstanding. They were already accommodating others who had restrictions.

Chairwoman BONAMICI. Ms. Bakst, is Ms. Durham's experience common and if so, how would the Pregnant Workers Fairness Act address the issues she faced in court?

Ms. BAKST. Yeah, unfortunately it's all too common and our recent report, Long Overdue, as you mentioned earlier, we found that in over two thirds of cases, pregnant workers are losing their accommodation cases post Young and in over 70 percent of those cases, they are losing their cases because they are unable to identify a sufficiently valid comparator or a comparator at all. And that is a real barrier to equality and justice for pregnant women. There is another worker, her name is Cassandra Aducci. One of her cases that really stands out, Cassandra worked part time loading and unloading boxes in Tennessee. She requested light duty also per her doctor's orders and the company refused to also accommodate her and pushed her out on unpaid leave.

She presented the court a spreadsheet of 261 other employees that were provided light duty and also pointed to a coworker that was provided light duty. The court rejected this evidence since the spreadsheet did not have detailed information about other employees' ability or inability to work. And so therefore, they were insufficient comparators. This is truly an insurmountable and extraordinarily difficult burden for a pregnant worker to meet.

Chairwoman BONAMICI. Thank you and Ms. Bakst, I want to follow up on some testimony from Ms. McLaughlin. Ms. McLaughlin, in her testimony was expressing concern about the Pregnant Workers Fairness Act, the use of the term known limitation and Ms. McLaughlin stated that "the phrase no limitation is clearly different than the definition of a covered disability under the ADA" so I wonder if you could take a minute and respond to that concern and what pregnancy related impairments or disabilities have the courts deemed not covered under the ADA or the ADA Amendment Act and how would the Pregnant Workers Fairness Act address this?

Ms. BAKST. Sure, so to take the first question, I would say yes. I mean the intent of the Pregnant Workers Fairness Act is precisely to ensure coverage for pregnant workers with limitations or medical needs stemming from pregnancy that don't qualify as covered disabilities under the ADA.

Those limitations that could jeopardize a pregnant worker's health but that aren't deemed disabilities yet. That's why it's not a covered disability under the ADA but please note that the PWFA borrows very familiar standards from the ADA like reasonable accommodations on undue hardship and the interactive process so the fundamental nature of the law, the fundamental framework is similar but covered disabilities, no, it's not in the PWFA context precisely because those are the women that pregnant workers are often not found to have qualified disabilities. And to answer the question, the question about the ADA and who was not covered: we

have seen that courts interpret the ADA—even though it was amended in 2008 and I will say that there are a pool of workers—let's say a worker with gestational albuminuria and there have been courts that have ruled that there are workers with pregnancy related complications that should be covered under the ADA and that are but there are a lot that we have reviewed that are not and it's actually quite alarming.

For example, Tanya Oliver from Pennsylvania had high risk medical complications associated with high risk pregnancy with triplets and needing surgery at the time of birth and the courts said no the ADAAA doesn't protect her because high risk pregnancy is not enough. Or Silvier Won-Anusi who went to the ER while pregnant, was diagnosed with hyperemesis of pregnancy, a form of morning sickness and hypokalemia, a low level of potassium. The court also said not a disability. Jennifer Alger, she experienced severe complications and bleeding at work but in 2016 the court said she failed to show that her pregnancy related complications constituted a disability under the Americans with Disabilities Act. That is unacceptable. Those women need clear rights to accommodations so they can follow their doctors' orders and stay healthy and on the job.

Chairwoman BONAMICI. Thank you, I see my time is just about to expire. I just wanted to thank Ms. Wilbur for bringing the business perspective. I spoke with our state labor commissioner and that was part of a conversation when Oregon passed its bill too that the business community really wanted that certainty so I don't have time for a question but I wanted to thank you for bringing that perspective and I now yield five minutes to Mr. Thompson from Pennsylvania for your question.

Mr. THOMPSON. Thank you, Madam Chair. Thank you, ladies, for being here. It's a really important hearing and topic. Ms. McLaughlin, thank you for being here. Discrimination of any type should not be tolerated, and I certainly should strongly support the federal laws that protect pregnant workers such as Pregnancy Discrimination Act, PDA of 1978 and the American Disabilities Act. The PDA forbids discrimination based on pregnancy when it comes to any aspect of employment and furthermore, the ADA requires that employers make reasonable accommodations for individuals who have a physical or mental impairment that substantially limits one or more major life activities.

Major life activities include performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting or bending. Now while pregnancy is not apparently in itself—the ADA covers impairments related to pregnancy which can affect major life activities such as walking, standing and certainly lifting.

Ms. McLaughlin, under the ADA, employers may have qualification standards such as physical, medical, safety and other requirements that may negatively impact certain individuals. Is there a similar provision in H.R. 2694?

Ms. MCLAUGHLIN. No, there is not.

Mr. THOMPSON. What is the purpose of the ADA provision?

Ms. MCLAUGHLIN. So under the ADA, a qualification standard would basically mean that you have a job standard that applies equally to everyone but may have some sort of an impact on a pro-

tected group of under the ADA, disabled individuals and then the employer needs to make certain that standard is job related and consistent with business necessity. By way of example, if you had a police department that required all of its officers to be able to respond to a forcible arrest call and perform those job functions, that's a very physical attribute and it may have an impact on somebody who has a disability. And likewise, frankly, it may have an impact on a pregnant worker who was unable to respond to their essential function of responding to a forcible arrest so the qualification standard is very much like the essential job functions. It's just kind of a different way of putting it in terms of impact but not included in this current bill.

Mr. THOMPSON. H.R. 2694 includes the term "known limitations" as we've heard relating to pregnancy. How does the bill define "known limitations?"

Ms. MCLAUGHLIN. And this is one of my big concerns with the bill. It's that known limitations is not defined so if it is going to be defined as not a disability, not a physical or mental impairment that substantially limits a major life activity that is the ADA definition, what is it? I really think employers need to know that so both the employer and the employee community going forward understand what their obligations are.

Mr. THOMPSON. Are there any restrictions to these limitations?

Ms. MCLAUGHLIN. There are none.

Mr. THOMPSON. Outside this bill, is this a well-defined legal term?

Ms. MCLAUGHLIN. I think you can tell by the various definitions that all of these states have used that it isn't. All of the states use very different words to express what they mean by known limitation and at least as far as I know, it's not a term of art that is known by either the employer or the employee community.

Mr. THOMPSON. In the effort to prevent discrimination of pregnant workers, which I am fully supportive of, does H.R. 2694 improve clarity for protections of these employees or does H.R. 2694—in its current form with—

Ms. MCLAUGHLIN. I mean I think in its current form, it is missing some key terms. Definition of known limitations, essentially job functions, qualification standards, what if the pregnant worker is a direct threat in certain safety sensitive jobs, do the health and safety of themselves or maybe to others—so I think because it could be improved, it is not as clear as it could be.

Mr. THOMPSON. Once again, I really want to make sure that we do everything we can to prevent discrimination for pregnant workers. I think that's incredibly important and it's important enough that we get it right. I am not sure that H.R. 2694 in its current form provides that type of clarity. Thank you, Madam Chair and I yield back.

Chairwoman BONAMICI. Thank you. I now yield five minutes to Dr. Schrier from Washington for your questions.

Dr. SCHRIER. Thank you, Madam Chair. First, I would like to submit for the record a letter from the National Women Infant and Children Association or WIC endorsing Pregnant Workers Fairness Act into the record.

Chairwoman BONAMICI. Without objection.

Dr. SCHRIER. I had a high-risk pregnancy, complicated by both advanced maternal age which I call elderly mom syndrome at age 40 and 24 years of Type I diabetes and I worked until two days before my C-section. This is because I was fortunate that my employer allowed for minor accommodations, very minor accommodations that allowed me to continue to work. And we need to remember that women are half of our workforce and I would add to that they tend to do better in college and are excellent in their jobs. 75 percent of those women will become pregnant at some point and it should be plainly obvious that we should support pregnant people in their pregnancies just like we should support prenatal care, immunizations, affordable child care and public education. This is just how we make our society better.

In healthcare it is wildly understood that preventative measures and addressing smaller issues before they escalate are ways to lessen the cost of care.

Hospital bills can cost between 5,000 and 11,000 dollars just for a regular pregnancy labor delivery plus all the costs that come from preparing for and taking care of the baby.

Now it costs all of us, when we don't do that and when a baby is born at 24 weeks and requires months in the NICU. I have taken care of those babies. It costs us all when a fetus is exposed to toxins in utero and that results in an unhealthy child who might need public support for the rest of his or her life because we couldn't protect the mother from an unhealthy environment and it cost us all when we lose our workforce because pregnant women and mothers are not welcomed and supported in the workplace.

So Ms. Durham, my first question is to you and first, thank you so much for sharing your story and I am so sorry for the pain and the anxiety and the financial hardship that you had to go through really unnecessarily. I also, as you heard, had a high-risk pregnancy and in your remarks, you discussed how losing your job did not just affect planning for the birth but also for your plans to support your child long term. There are a lot of costs in pregnancies that aren't even related to the birth. Car seats, diapers, doctor appointments, et cetera. Would you speak to your experience? What did you have to do to support your son since losing your job at rural metro?

Ms. DURHAM. Actually, I have changed a lot of jobs recently trying to keep up with that pay and everything else that I need to support him. I have been very fortunate. I have a very good support system back home between my family and my friends and I have gotten several gifts and hand me downs and help in that department, but it has been very hard.

Childcare, in and of itself is expensive, even in my state where a lot of costs are lower. It's just been a rough trip and we take it day by day and we do what we have to do to get there.

Dr. SCHRIER. Thank you. And Ms. Bakst, thank you so much for your work to strengthen protections for pregnant workers. In your remarks, you stated that two thirds of women have lost their PDA pregnancy accommodation claim post the 2015 court case Young v. UPS. Accommodations are important. Heavy lifting can result in those pre term births. Exposure to environmental toxins can result

in harm to the mother and the fetus, pregnancy reduced hypertension can have devastating outcomes, including maternal death.

They used to say that pregnancy was like having one foot in the grave. In your opinion, how will adequate accommodations improve the life outcomes of the pregnant worker and do you foresee a direct relationship between maternal death rates and pregnant worker protections?

Ms. BAKST. Yeah, I think that time and time again we see how affording pregnant workers temporary and modest accommodation serves to keep them healthy and maintain a healthy pregnancy and prevent complications down the road, keeping them out of the hospital, exacerbating healthcare savings costs. As you said, a minor, temporary accommodation, whether that's a stool, extra bathroom break, temporary relief from heavy lifting, which let me clarify is not a disability but is often something—a need that arises from pregnancy where women don't have a disability yet but why should a woman have to risk her health and potentially develop a complication or a qualified disability in order to trigger the law's protection. That does not—it defies common sense in a time where we are so concerned about maternal mortality and maternal health, especially for low income women, women of color where they know that these problems are really severe. We should be doing everything in our power to make sure that these women can maintain healthy pregnancies and prevent complications before they start.

Dr. SCHRIER. Thank you. I think I am out of time.

Chairwoman BONAMICI. I now recognize the Ranking Member of the full committee, Dr. Foxx from North Carolina for five minutes for your questions.

Mrs. FOXX. Thank you, Madam Chairman and I want to thank our panel for being with us today. I want to say that I worked when I was pregnant up to the very day that I delivered my daughter and went to the hospital at midnight. I actually went to class that night from 7–10 and then went to the hospital at midnight so I was very active up until the moment she was born. Ms. McLaughlin, you discussed in your testimony the Pregnancy Discrimination Act and the Americans with Disabilities Act as amended. Were these laws broadly written to cover a wide range of experiences and circumstances? In your opinion, has the ADA provided protections to pregnant workers?

Ms. MCLAUGHLIN. Both of these laws—

Mrs. FOXX. Would you turn your microphone on?

Ms. MCLAUGHLIN. I do think both of these laws were very broadly written. The PDA has very broad language about anti-discrimination and how, again, post Young, an individual would prove that there has been discrimination but more so the ADAAA back in 2008 when it was amended—and I think it's best said in a law review article that I did cite in my written testimony by Joan C. Williams, A Sip of Cool Water: Pregnancy Accommodation after the ADA Amendments Act. That's a Yale law review article that basically focuses on the fact that the amendments Act pretty much did away with the duration requirement and there is a specific reference to that in both EEOC guidance on pregnancy discrimination as well as regulation under the ADA that says impairments of short term duration under six months can be impairments and you

combine that with the expansion of the definition of major life activities to add more major life activities, including bodily functions and then finally a more favorable and employee friendly substantially limits standard.

You put all those together and pregnant workers with limitations even if they are of more short-term duration, are covered disabilities and that is borne out by cases but certainly by the law as it exists.

Mrs. FOXX. Thank you and I want to say from the very beginning I believe that all members of Congress, Democrats and Republicans want to see all workers protected from any harm that could occur to them and especially pregnant women and I think our record proves that.

Ms. McLaughlin, H.R. 2694 applies to "known limitations related to pregnancy, childbirth or related medical conditions, workers." Your testimony notes that the term known limitations is not defined in H.R. 2694 in contrast to the detailed definition of disability in the ADA. If H.R. 2694 is enacted, will the EEOC, or the courts or both have to define known limitations? Would there be more certainty for workers and employers if Congress defined this key term in the bill?

Ms. MCLAUGHLIN. It would certainly be more beneficial for Congress to define known limitations so that moving forward, as both employers and employees know their rights and obligations under this law. They know what that term means.

While there is a provision in the bill that talks about within the two years after enactment, the EEOC should implement regulations. Two years is a long time to wait and my fear is that lack of definition would result in litigation just as we had when the ADA was originally passed about what the definition of disability was.

Mrs. FOXX. Thank you. Ms. McLaughlin, to qualify for ADA protections, a worker must be able to perform the essential functions of the job with a reasonable accommodation. My understanding is that H.R. 2694 does not include this provision from the ADA. What is your view about this discrepancy?

Ms. MCLAUGHLIN. I think it's one that needs to be seriously reviewed and from my perspective should be included in any bill that passes so that if a pregnant worker is accommodated, they still need to be able to perform the essential functions of their job and if they can't, some indication as to what the employer is then permitted to do, would it be, for example, to put them on leave, which seems to be prohibited by the bill in its current state in many circumstances so I think the essentially function concept is critical to have in this bill.

Mrs. FOXX. Thank you very much, I yield back, Madam Chairman.

Chairwoman BONAMICI. Thank you, I now recognize Ms. Hayes from Connecticut for five minutes for your questions.

Ms. HAYES. Thank you, Madam Chair for holding this hearing and thank you to all the witnesses who are here today. As I am listening to all of you talk, especially you, Ms. Durham, I am reminded of my own experiences. I was a working mom, an educator who had an uneventful pregnancy. I was not older, or I did not

have any complications and what I thought was a reasonable accommodation because a tremendous inconvenience. I was a classroom teacher and all I needed was to go to the bathroom which I thought was a reasonable request to ask but you can imagine in a high school with more than 1,000 kids, to get coverage, I was often told "well you just had your break" or "we only have two more periods before it's time for lunch." And thinking that I have to go right now was just something that I just dealt with which led to further complications with bladder issues so what started out as an uneventful pregnancy ended up having complications as a result of this minor accommodation not being met. I delivered my son on the last day of school so all I wanted to do was work but part of that was not that I was so brave or strong or altruistic, I was thinking about I need to save my time for the other side of this pregnancy because I can't afford to be out of work without pay.

So I absolutely get it. What I don't get is the idea that pregnancy is some kind of unforeseen limitation for a company. We have heard that the majority of women work, and that 75 percent of those women will likely become pregnant while in the workplace.

So I want to get to the point about just the ability to perform essential job functions and what that means because we are hearing a lot about workers that need to be treated equally. I don't think this is an equality issue, this is an equity issue because last I checked, men can't get pregnant so the only people who will be affected by this are women who get pregnant on the job and are asking for something that other employees will never have a need for.

Ms. Bakst, would you mind responding—I'm sorry, one second. I always forget to do this. Madame Chair, I have two documents I need to submit for the record. A document from the National Women's Law Center and a letter from Senator Elizabeth Warren in support of Pregnant Workers Fairness Act.

Chairwoman BONAMICI. Without objection.

Ms. HAYES. Thank you. Back to you, Ms. Bakst. Would you mind responding to the concerns around known limitations in this bill? Because I—in my experience—you've heard just from the people in this panel, every pregnancy is different so how do you define the experience of a pregnancy as a known limitation?

Ms. BAKST. So in most of the states that we have worked in, it's been rather easy to define and to be able to explain that this—the pregnancy itself is not a disability but limitations or medical needs arising from pregnancy could trigger the need for an accommodation so the law uses the term—so the PWFA uses no limitations to reflect those scenarios where there is a physical or medical need for an accommodation and it must be known to the employer and do you want—the essential functions question, was that a related—so—

Ms. HAYES. Because I didn't hear going to the bathroom in that list of essential life functions.

Ms. BAKST. Right, so you make an important point that pregnancy is only temporary. That is for sure. We know that. So needing to have some essential functions temporarily excused for a limited duration is reasonable and in fact there are some cases in the ADA context that say just that because we would have a reason-

able timeframe which in some instances, and certainly not all, where a woman would not be able to perform the essential functions of her job. I mean do you really think a pregnant worker who can't lift over 40 pounds for a few months should be sent home and lose her health insurance? Even though it would be reasonable and not an undue hardship for her to have help lifting or transfer to another department when there are open position or when their coworkers often want to help them? I mean that's what we see all the time.

The coworkers want to work it out and then H.R. gets involved and points to a piece of paper and says oops, you can't do the essential functions of your job, you're out. That doesn't make sense. We need a way to keep pregnant workers working and on occasion, if they need a transfer or because in the near future they will be able to perform their essential functions of their job, that should be workable and again, if this is all an undue hardship, the employer need not provide the accommodation but the law would require the employer to consider the accommodation request, rather than just pushing the pregnant worker out and then all the devastating economic consequences that often flow from that.

Ms. HAYES. Thank you. I see my time is about to expire so I'll yield back. Thank you.

Chairwoman BONAMICI. Thank you. I now recognize Representative Stefanick from New York for five minutes for your questions.

Ms. STEFANIK. Thank you, Chairwoman and thank you to all of our witnesses who are here today to discuss a really important issue. Discrimination against pregnant women in the workplace is an indefensible practice and I am very pleased to see Congress take such an active role in ensuring that our laws provide robust protections for pregnant workers.

I was proud to recently introduce the pregnancy discrimination Amendment Act with my colleagues, Tim Walberg, Anne Wagner and Jackie Wolorski that would enhance protections for pregnant women in the workplace.

We all agree that pregnant workers should be protected and reasonably accommodated in the workplace and as we consider further changes to the law, it's important to take a step back to ensure we have a better sense of what has and has not been working. So Ms. McLaughlin, the ADA includes a comprehensive definition of disability, does H.R. 2694 need to include more guidance on what limitations are covered or not covered by the bill?

Ms. MCLAUGHLIN. Again, I think that would be extremely helpful to understand is no limitation as I am hearing today. Does it mean any and all limitations always, no matter how short. If that is the intent of the bill, it would be very helpful certainly to employers to understand that. But that phrase, no limitations, at this point is not well defined and I believe should be.

Ms. STEFANIK. And Ms. McLaughlin, the bill also incorporates the definitions of reasonable accommodation and undue hardship from the ADA, does H.R. 2694 incorporate any other terms or concept from the ADA and if this bill is considered by the committee, should other features of the ADA be considered for inclusion in the bill?

Ms. MCLAUGHLIN. So the bill does reference reasonable accommodation and undue hardship and says it should be similar to the ADA. It references using the interactive process and that's really where it stops, I would say, other than the damages and schemes are the same.

What it should include, because they are both accommodation statutes is a better built out definition of no limitations as well as a reference to a central functions and well as a reference to the direct threat defense and qualification standards. That would be a good start to really pattern the ADA.

It may be different, but those concepts are the same because they are both accommodation statutes and I would just end with saying any employers and employees are used to working with the concepts and definitions under the ADA.

Ms. STEFANIK. Thank you, that's very helpful to provide that feedback and I yield back.

Chairwoman BONAMICI. Thank you, representative. I now recognize Ms. Lee from Nevada for five minutes for your question.

Ms. LEE. Thank you, Madam Chair. Before I get started, I'd like to enter into the record a letter from the National Partnership for Women and Families in support of this bill.

Chairwoman BONAMICI. Without objection.

Ms. LEE. This bill is incredibly personal to me. I am the mother of two children, however I had several unsuccessful pregnancies and in fact, when I had my son, I spent three months on bedrest before he was born, and dehydration was the factor that was cited in pushing me into premature labor. There were other factors but I sit here today as a witness of staying off your feet, staying hydrated or avoiding heavy lifting can be the difference between having a healthy baby or going into premature labor and possibly having a severely premature baby which is what I was at risk of and you know, just thinking about all the costs and complications associated with that or even having a miscarriage. The bottom line is that women should never have to make the choice between ignoring a doctor's orders or keeping a job and sadly it's low income families that are most vulnerable when these simple protections don't exist. That's why the Pregnant Workers Fairness Act is so important.

In Nevada, where I come from, over 64 percent of women are the primary or co-breadwinners and these women are more likely to work low wage jobs. A woman in Nevada is over 60 percent more likely to work a low wage job than a man. When a pregnant woman is forced to leave her job because she didn't receive reasonable accommodations at work, it's their families that are forced to live without health insurance or income during a time when they need it the most as Ms. Durham had explained.

The current legal loopholes have already been highlighted here today and it's clear that working mothers and businesses need the clarity to ensure that pregnant women can be accommodated. These accommodations are simple, like a stool to sit on, an extra bathroom break, perhaps a larger uniform to accommodate a growing baby or even carrying a water bottle onto the floor.

Working women who are pregnant don't have the time or the resources to take these matters to court and work through this litigation to receive these accommodations.

Ms. Durham, I am sorry that you had to go through that process and I personally get frustrated thinking about the life that you could have had in the job that you trained for, had these accommodations been made to you so thank you for that testimony, I appreciate it.

Ms. Wilbur, I just wanted. You described how Kentucky had passed a version of this bill and it was supported by businesses who recognized the economic benefits of providing clarity and uniformity on the issue of reasonable accommodation. Can you tell us what were the employers' initial worries about the costs of providing these accommodations?

Ms. WILBUR. Thank you for your question and so this was sort of a long journey for our metro chamber of commerce and I always like to kind of set the stage. We have heard about these issues bubbling up across the country and some folks had approached our metro chamber to explore this issue and so after some conversations among our membership of all sizes, of all different sectors and industries, we learned pretty quickly that because we had a whole list of questions, that we needed this type of clarity.

For our membership, when you have a bunch of questions, a bunch of concerns, a lot of uncertainty, that means dollars in a bad way and so being able to work on the Kentucky legislation to provide the framework of when an employer is and is not obligated to provide accommodations was extremely significant. Like I said, in my testimony earlier, particularly for small to midsized businesses that can't afford a robust H.R. department or a large legal counsel, our people just want to run their businesses and so being able to work on the Kentucky legislation with our general assembly to define the undue hardship was extremely significant because we are talking about providing a stool. Are we talking about a $4,000? No we are not. We are talking about providing access to water so having a water bottle at a station. These are low cost reasonable accommodations. And guess what? They are temporary. And so when we were able to message that, not only to law makers but also the business community. You know, we've got the feedback, we're sort of already doing this because we want to do the right thing as a business community but if we can get it so framework and state statute to clearly define when we are or are not obligated to do these things, that's a welcomed addition to Kentucky law.

Ms. LEE. Thank you. You also highlighted the economic benefits of helping women remain in the workforce and the benefits of employers when women are able to continue to work safely. How is ensuring pregnant workers having reasonable accommodations a tool to increase women's labor participation and what does that mean for the economic outcomes not just to both businesses but also their employees?

Ms. WILBUR. So in Kentucky, unfortunately we have one of the lowest workforce participation rates among women and when we looked at the population that are currently in the labor force, we know that over 58 percent of them are of childbearing age so these are conversations that are happening already and so we ask our-

selves, particularly as a chamber of commerce, if one of our top priorities and initiatives that we are hearing from the business community is that talent pipeline, workforce development and talent attraction. We need to have certainty in statutes to allow employers to know when they are or are not obligated to provide these accommodations but also to ensure that women that are pregnant or new mothers that want to work are able to work and so we think that this was a reasonable law, particularly at the federal level to provide the uniformity and clarity across the board is significant, particularly for our chamber of commerce or a bi-state chamber of commerce. We represent 5 counties in southern Indiana so being able to have that clarity across the board is significant.

Ms. LEE. Thank you. My time is up. I yield back, thank you.

Chairwoman BONAMICI. Thank you. I now recognize representative Johnson from South Dakota for five minutes for your questions.

Mr. JOHNSON. I want to start by thanking everybody, including some of my colleagues for sharing some of their stories. I think it's a good learning opportunity for a lot of us to better understand what issues can be addressed in the modern workplace. Ms. McLaughlin, there will be times when some employees will be unable to perform the essential duties of their job even after reasonable accommodation. Under H.R. 2694, what are the employers' obligations in that situation?

Ms. MCLAUGHLIN. Well you just don't really know because essential functions is not a term in the bill so it is very unclear if somebody cannot perform their job even with the accommodation, what should happen. Is it as situation where there's a mandate similar to the ADA where the accommodation of last resort under the ADA is job reassignment and if you're reassigned to a job that pays less or pay is less or is it that you do put somebody out on leave or do you have to make work for that individual? And many employers I work with don't have make work. That's what we call light duty sometimes, removing essential functions. We try to assist somebody to perform their essential functions but sometimes they are just unable to even with the accommodation. It's just not anywhere in this bill and needs to be further clarified, including some of those things that I just talked about, job reassignment, putting somebody on leave.

Mr. JOHNSON. So I wanted to feed back to you what I think I have heard. The ADA has a clear and easier to understand set of accommodation processes. This bill lacks that, is that right?

Ms. MCLAUGHLIN. That's correct.

Mr. JOHNSON. So, you ran through some options under the ADA. I just want to make sure that you understand them. So there could be, of course, reasonable accommodations is sort of the first tier among things that can be done there would be reassignment if reasonable accommodation at the current set of job duties doesn't work is sort of the next option, reassignment?

Ms. MCLAUGHLIN. That's always the accommodation of last resort under the ADA. The goal is to keep somebody in their position.

Mr. JOHNSON. But does leave come after that, then?

Ms. MCLAUGHLIN. The way I would tier it is can we accommodate, if not we try to reassign if there is an open job and the indi-

vidual is otherwise qualified for the job and then if neither of those two work, it would be leave.

Mr. JOHNSON. There has been some testimony today regarding the loss of benefits, if somebody was on FMLA. What is the legal framework there look like?

Ms. MCLAUGHLIN. So under the FMLA, you have 12 weeks of job protection when you go out on leave and there is a requirement that the individual's health insurance needs to remain in effect for the 12 weeks that the individual is on leave which could be a continuous leave or could be an intermittent leave.

Mr. JOHNSON. Is there any—after that 12 week period, there is no job protection. Sounds as though there is no particular benefit protection either?

Ms. MCLAUGHLIN. That's correct, not under the FMLA.

Mr. JOHNSON. There would be a COBRA opportunity, I assume?

Ms. MCLAUGHLIN. Yes. So there could be a COBRA triggering event. Many employers I work with would just continue to have the individual's health insurance remain in effect as if they were actively employed but that's not a legal requirement.

Mr. JOHNSON. I don't want to put words in your mouth, Ms. McLaughlin but I get the sense that you are concerned about—you said some of this, but you are concerned about the lack of definition with some of the terms and the likely higher rates of litigation that would trigger. Am I saying that right?

Ms. MCLAUGHLIN. You are. I think any time in a law that things are unclear, then people fight about it, right? People bring claims and we want to avoid that.

Mr. JOHNSON. Thank you very much. Madam Chair, I yield back.

Chairwoman BONAMICI. Thank you, I now recognize the Chairman of the full Education Labor committee, Congressman Scott from Virginia for five minutes for your questions.

Mr. SCOTT. Thank you, Madam Chair. Ms. Bakst, under present law, different workers are treated differently. For example, if one employer makes an accommodation to a similarly situated worker but the next employer does not provide that same accommodation, under present law, do the pregnant women have different rights to the accommodation?

Ms. BAKST. Right now we are in a world where many employers have clear policies, provide accommodations for workers with disabilities, workers with on the job injuries and other scenarios but yet pregnant workers aren't offered, afforded, those accommodation protections so we are in a world where pregnant workers are not achieving most favored nation status; they are achieving least favorite nation status. They are being left out, unprotected and denied the equal opportunity that the Pregnancy Discrimination Act intended when the law was enacted to open doors for pregnant workers and ensure fairness and a level playing field.

Mr. SCOTT. Under the Young decision, if you have a similarly situated employee, then you would get the same accommodation that employee got, is that right?

Ms. BAKST. Well if you are similarly situated then you have—it's a multi-step evidentiary burden that a pregnant worker has to prove, and an employer has his showing and then the plaintiff has another showing. I mean the point with Young is that a pregnant

worker needs to produce evidence of intentional discrimination in order to get a basic accommodation like a stool, a water bottle, an extra bathroom break to prevent a urinary tract infection. That's outrageous.

Mr. SCOTT. And how does this work if there are no similar employees?

Ms. BAKST. Well they lose because not only does it say you need to provide a comparator but if you, yourself just need, which is often the case of workers that we hear from at A Better Balance, they don't have a comparator, they may be new to the job. For low wage women, they don't have full access to their company policies often if there are any that they are willing to share with their workers and so what that means is that they can't point to a comparator and you know, they just need their own medically necessary accommodation and they are running against the clock to get one and they are out of luck.

They often find themselves out of luck.

Mr. SCOTT. And does the Americans with Disabilities Act require you to find a similarly situated employee?

Ms. BAKST. No. So the Americans with Disabilities Act bypasses this arduous journey of proof and simply says you are entitled to a reasonable accommodation absent undue hardship to the employer. The law requires a good faith interactive process to figure out if you can make it work and if you can't, it's an undue hardship. That is the standard.

Mr. SCOTT. How long has the Americans with Disabilities Act been around?

Ms. BAKST. Since 1990 and amended in 2008 with bipartisan support.

Mr. SCOTT. And has this been a very complicated process for people to work with? When you say reasonable accommodation?

Ms. BAKST. Well in all the states that we have worked with and legislators, everybody says that this is a familiar—this is familiar, this is going to provide clarity for H.R. because they know what reasonable accommodations and undue hardships mean. They are already doing this in the ADA context.

Mr. SCOTT. If someone is unable to perform the essential elements of the job, even with an accommodation, what happens?

Ms. BAKST. Well if someone is unable to perform these under the Pregnancy Discrimination Act—under PWFA or—

Mr. SCOTT. Under present law.

Ms. BAKST. Under the Americans with Disabilities Act?

Mr. SCOTT. Right.

Ms. BAKST. If someone is unable to perform the essential functions of their job, they are not deemed qualified and they are typically put out on leave.

Mr. SCOTT. Ms. Wilbur, can you remind us what the value is of having one Federal Standard? You have a law in Kentucky, a different law in Ohio. What would be the value of one federal standard?

Ms. WILBUR. I mean we work in a global economy. Louisville, where we are based, is very fortunate to have multi state businesses and corporate headquarters based in our region and so being able to have that uniformity at the federal level is signifi-

cant. Yes, we've made gains in the commonwealth of Kentucky and GLI is committed to working on similar legislation in the Hoosier state, right across the river, which we cover 5 counties in southern Indiana. You know, there are 27 versions that are out there. 27 states that have a version of this and so employers, the businesses that I represent that have that multi state presence—federal uniformity and clarity is significant so we don't have to guess in piece by piece in all the states.

Mr. SCOTT. Thank you. Madam Chair, I ask you—a statement for the record submitted by the March of Dimes in support of the legislation be introduced.

Chairwoman BONAMICI. Without objection.

Mr. SCOTT. Thank you.

Chairwoman BONAMICI. I now recognize the Ranking Member of the subcommittee, Mr. Comer from Kentucky for five minutes for your questions.

Mr. COMER. Well thank you and Ms. McLaughlin, I certainly concur with what Chairwoman Foxx said. We all want pregnant workers to be treated fairly by their employers and we support vigorous enforcement of the pregnancy discrimination act and the Americans with Disabilities Act.

In your experience, do employers have policies to provide reasonable accommodations to pregnant workers?

Ms. MCLAUGHLIN. So many employers that I work with have extended their reasonable accommodation policy utilized for the ADA to pregnant workers using the same framework under the ADA for the pregnancy accommodations.

Mr. COMER. What approach do employers take when a pregnant worker seeks an accommodation?

Ms. MCLAUGHLIN. So really it does mirror the ADA so there is a request for an accommodation and the interactive process begins. There is the ability under ADA and I would assume it should be also under this bill to have medical information with respect to the condition which wouldn't really be necessary with pregnancy but more so what accommodation is needed and to work through whether the accommodation can be put in place absent undue hardship so it's a dialogue between H.R. and the individual as well as the healthcare provider.

Mr. COMER. Ms. McLaughlin, in your testimony, you noted that a careful balance was struck in the ADA between the right to workers with disabilities and the recognition that employers cannot remedy every situation that arises. Does the federal framework proposed by H.R. 2694 strike a similar careful balance?

Ms. MCLAUGHLIN. I mean I think it's very difficult to tell frankly because in my opinion there are so many terms that are critical that are missing or not well defined, so I get back to the known limitations. We can't tell if a balance is struck like the ADA was struck—a balance was struck between whether the law covers anything and everything or it doesn't. it's simply not clear from the law as it's written.

Mr. COMER. What provisions of this proposal should we look at to ensure there is that balance?

Ms. MCLAUGHLIN. I mean I could tick them off here. It would be known limitations definition, it would be essential functions, it

would be helpful to know if somebody can't perform their essential functions, even with the accommodation, does it mirror the ADA with respect to job reassignment and then leave, the direct threat standard, the qualification standard, some of those very key terms under the ADA would be very helpful to be in this bill so that there is clarity for everyone.

Mr. COMER. Ms. McLaughlin, the EEOC states an enforcement guidance on pregnancy discrimination that the ADA can apply to pregnancy related impairments that are temporary, do you agree?

Ms. MCLAUGHLIN. Yes.

Mr. COMER. Does the ADA as amended in 2008 apply to temporary impairments?

Ms. MCLAUGHLIN. It absolutely does and in fact there is a regulation that states that impairments lasting fewer than six months can be disabilities. The reason that was put in there very specifically was because there was some other language in the Act about regarded as disabilities that made it sound like that was six months and above so this particular regulation to me makes it very clear that temporary impairments can be disabilities.

Mr. COMER. Okay. My last question. Ms. McLaughlin, as my friend Iris Wilbur stated, Kentucky recently enacted the Pregnant Workers Act to provide explicit protections for pregnant workers, are you familiar with the Kentucky bill?

Ms. MCLAUGHLIN. I am. I have read it.

Mr. COMER. You are? Are there differences between the Kentucky law and this proposal?

Ms. MCLAUGHLIN. There are. The Kentucky law references the employee's own limitations relating to her pregnancy so it's a little different but it does provide specific examples as to what reasonable accommodations should be and I think most importantly, it fleshes out undue hardship and states that a duration of the requested accommodation may be a factor to consider as well as whether similar accommodations have been made to non-pregnant workers. So it has many more definitions built out in it.

Mr. COMER. Well I really appreciate the testimony. Madam Chair, I appreciate the hearing today and I think that a lot of useful information has been retrieved from this. I look forward to working to ensure that all pregnant women are protected in the workforce. With that, I yield back.

Chairwoman BONAMICI. Thank you very much, Mr. Ranking Member. I now recognize—we are moving to the Members who are here who are not on the committee and I am pleased to recognize Congresswoman McBath from Georgia for five minutes for your questions.

Ms. MCBATH. Thank you so much, Madam Chairwoman and thank you to all the witnesses that are here today. I myself, having been a flight attendant for 30 years, before I came to Congress, I do understand specifics about workplace safety and I can tell you having worked in that industry, there are no particular safety measures put in place for flight attendants that are pregnant.

I myself continued to fly. While I was pregnant—after, however, three miscarriages and a fetal demise, my doctor took it upon herself to say "stay home. You can no longer work." And I was then placed on short term disability but there are no specific guidelines

giving to pregnant women, pregnant workers in the airline industry that I am completely aware of, but women shouldn't have to choose between a healthy pregnancy and a paycheck.

And almost 64 percent of American women are the primary, sole or co-breadwinners in their families but right now women can essentially be fired for being pregnant. The Pregnant Workers Fairness Act will ensure that the health of our women and their babies does not come at the expense of economic activity or economic security. This issue is especially pressing for low income women as it was mentioned, many of whom work on their feet in physically demanding jobs and cannot afford any lost wages.

27 states have already passed laws that require certain employers to provide accommodations to pregnant women and it's time for federal action that guarantees all pregnant women are protected from discrimination. We all want to support working mothers. I think that's been established here today. This is a bipartisan proposal that protects pregnant women by allowing them simple accommodations. Accommodations that will make our women safer and their children healthier.

I do have here a letter from leading private sector employers in support of this legislation and I ask unanimous consent that this letter be submitted for the record.

Chairwoman BONAMICI. Without objection.

Ms. MCBATH. Thank you. Ms. Wilbur, my question is for you and thank you so much for your testimony today. I believe that clarity in the law is good for both employers and for workers. Providing these protections is not only morally right but it makes good business sense, so I'd like to talk a little bit about the business of this Act.

How would federal legislation provide legal certainty and decreased legal fees for smaller and midsized employers that may not have legal departments?

Ms. WILBUR. Thank you for your question. Yes, so employers—companies of all sizes across the board demand clarity because as you mentioned in your question, when we have uncertainty in the market and the workplace, that means dollars for businesses and that's not in a good way. And so being able to have that clarity and how to handle situations involving pregnancy, child birth and related medical conditions is essential.

Many employers, people that run small midsized businesses want to focus on making investments in their companies. Most are not experts on dealing with conditions related to pregnancy so having this guidance where it is treated separately from the ADA—this legislation is separate from the ADA for that particular reason is important. That's why states like Kentucky have stepped up to put within state statute clarity and will continue and remain committed to working other states to do that as well but hoping for federal legislation to step in to provide that clarity across the board for all states but for us, for GLI, we worked on this issue. We learned that there is data showing. That at least two states that have implemented state law have not seen increases in litigation cost or litigation filings. They've actually seen decreases. Kentucky just passed the law this Spring and it became official law over the Summer and has now implemented. Still fairly new but the sky

has not fallen. We haven't seen sort of an overrun of cases being filed or unreasonable pregnancy accommodations being requested in Kentucky workplaces so that's why we are confident and fully support the Pregnant Workers Fairness Act.

Ms. MCBATH. Thank you and I have one more question for you. How will the Pregnant Workers Fairness Act help to reduce litigation?

Ms. WILBUR. So for the very—just as I mentioned, being able to have that clarity so employers know when they are and are not obligated to provide reasonable accommodations. The Federal law helps provide that framework. Employers are very familiar with ADA as we mentioned and have discussed today and so being able to lean on the undue hardship clause in particular is significant for employers because at the end of the day, these accommodations are temporary so we are talking about a bottle of water at their work station, at stool to sit on and so when employers know what that means, those standards, those reasonable flexible standards, we are confident that this will reduce litigation.

Ms. MCBATH. Thank you very much and I am out of time.

Chairwoman BONAMICI. Thank you. I now recognize another Member of the full committee, Ms. Underwood from Illinois for five minutes for your questions.

Ms. UNDERWOOD. Thank you, Madam Chair for calling this important hearing and thank you to all of our witnesses for joining us today. It's been 41 years since the Pregnancy Discrimination Act of 1978 became law. Despite its passage, women today continue to face discrimination and unfair treatment at work due to pregnancy.

Women are denied access to reasonable accommodations, forced to continue working under conditions that threaten their health or their pregnancy and they can even lose their jobs. Now I am a nurse, so I feel like it's really critical that we center today's discussion around the effects that pregnancy discrimination has on the health of the woman, her family and her pregnancy.

So Ms. Bakst, what are some of the physical requirements at work that pregnant women have been subject to?

Ms. BAKST. Some of the physical requirements?

Ms. UNDERWOOD. Mm-hmm.

Ms. BAKST. Can you clarify?

Ms. UNDERWOOD. Well we certainly have seen some allegations that people are not being given like stools and—

Ms. BAKST. Like what type of accommodations to pregnant workers need?

Ms. UNDERWOOD. That's right.

Ms. BAKST. So typical accommodations as we've heard, include, you know, more frequent restroom breaks, some modification of a work schedule temporarily, light duty, a water bottle. These are some of the most common workplace accommodations that pregnant workers need to prevent further complications down the roads. So those are the most common types and again, I just want to say that this is an interactive process. Undue hardship exists if those accommodations are not available but what we are really talking about are temporary de minimis accommodations.

Ms. UNDERWOOD. And what about the mental health stressors that pregnancy discrimination can cause a woman and her family. Can you tell us anything about those?

Ms. BAKST. Absolutely. I mean we have heard from so many women and I really bring those women here to this forum today who have suffered profound emotional stress from being forced off the job and worrying about how they are going to put food on the table, feed their families, stay afloat and sink into a poverty hole that they cannot climb out of and then they become mothers and find an extraordinarily difficult time trying to get rehired in an already pretty brutal job market and we wonder—and this is really a key trigger—a really important factor in the gender wage gap and so ensuring that women, for their own health, for the health of their pregnancy, can stay attached to the workforce and earn critical income is absolutely essential.

Ms. UNDERWOOD. So today women make up about half of the workforce, 71 percent of mothers actually work outside the home. Women are often crucial in families' economic security, according to the National Women's Law Center, 42 percent of working mothers were their families' primary breadwinner. And so you said that there is certainly an impact on the gender wage gap. Were there other economic impacts, Ms. Bakst, that you would like to share with the committee today?

Ms. BAKST. Well, I mean it exacerbates economic inequality as a whole. I mean these are disproportionately low-income women. I want to make the point on the FMLA. You talked—Ms. McLaughlin mentioned that the FMLA protects—provides some protection. We need to be clear that most of the women that we are talking about are not covered by the FMLA because the FMLA mostly covers you know, workers in higher wage positions. 40 percent of workers are not covered by that law and these are disproportionately low-income women and those are unpaid jobs. Unpaid regardless and so we—but if you are lucky enough, we hadn't heard from women who are lucky enough to be covered by the FMLA but when they are forced out on FMLA leave, they are often forced out, forced to use up their FMLA leave, whatever they have, before they give birth and then what?

Then either they're fired because they have no additional time or they have no time to recover from childbirth and no time to establish breastfeeding. It's just—it becomes really impossible to be able to support themselves and their families without risking their economic security.

Ms. UNDERWOOD. Wow. So that sounds like an additional level of stress that many of these mothers are facing.

Ms. BAKST. Absolutely.

Ms. UNDERWOOD. So we know that there are health complications as a result of these many physical stressors and mental health stressors, are you familiar with any health complications if pregnant workers are not provided these accommodations and have any women that you've worked with specifically faced those health risks?

Ms. BAKST. Yeah, I mean we have cited a couple of—oral testimony and I have my written testimony as well really talked about what kind of research is out there that connects a lack of accommo-

dation and health complications and a lot of those situations could simply be avoided and prevented if we guaranteed an explicit right to accommodations that's currently available to workers with disabilities and so it is just essential that we do everything to ensure that for women so they don't have to suffer those long term health consequences for themselves.

Ms. UNDERWOOD. Well we know that this is a potential public health crisis if we don't pass this Pregnant Workers Fairness Act. Madame Chair, I ask unanimous consent to enter a letter from healthcare providers and public health experts in support of the Pregnant Workers Fairness Act into the record.

Chairwoman BONAMICI. Without objection.

Ms. UNDERWOOD. Thank you so much for consideration of this important bill today. I yield back.

Chairwoman BONAMICI. Thank you and I now recognize Mr. Cohen from Tennessee for five minutes for your questions.

Ms. COHEN. Thank you, Madame Chair. Ms. McLaughlin, you have expressed concern that the Pregnant Workers Fairness Act application of the undue hardship provision might limit the employer's options and in your written testimony you state "but section 2(4) of the bill suggests that the employer cannot place the worker on leave if an accommodation exists that would address the known limitation, even if that accommodation results in undue hardship."

Would you agree that if pregnant employees placed on leave as an accommodation at the employer chooses, that it should be paid leave?

Ms. MCLAUGHLIN. Well, that would depend on the financial resources of the employer. Some employers can afford paid leave and others cannot.

Ms. COHEN. Do you believe that a woman who has a job who is pregnant who is doing the most essential thing on this earth which is reproduce and keep the human species going. Without that, none of us would be here. Do you believe that woman shouldn't get paid leave if the employer under a law or rule that you support suggested instead of doing an accommodation on her work, that the accommodation that best suits that employer is to put them on leave that they should not be paid?

Ms. MCLAUGHLIN. Well I guess the way I was interpreting your original question was should the employer have to pay for the leave. I would suggest that if Congress feels that those types of leaves should be paid, and I know there have been introductions of bills in the past that to me is something that Congress should mandate, rather than imposing the duty to pay on the employer.

Ms. COHEN. What if Congress imposes the duty on the employer? Bottom line is this question. Don't you think the woman should be paid?

Ms. MCLAUGHLIN. I don't really think that my personal opinion is relevant here—

Ms. COHEN. But your opinion is that the accommodation provision is wrong because it doesn't allow the employer to put the person on leave. If they put them on leave and they don't pay them, that's not an accommodation. That's a penalty.

Ms. MCLAUGHLIN. And at the end of the day, the employer needs to run its business too and also accommodate pregnant workers or disabled workers and there are circumstances that leave is going to be unpaid. If the government were to intervene and mandate paid leave for employers, whether it would be some sort of subsidy through unemployment, through the employer having to pay but I really think that's something that needs to be legislated.

Ms. COHEN. Thank you, Ms. McLaughlin. In 2014, Memphis has a plant that XPO ran. It was the subject of a major story in the New York Times concerning work conditions there and particularly pregnant women which I would like to have entered into the record.

Chairwoman BONAMICI. Without objection.

Ms. COHEN. Thank you. One of the former employees, Ms. Tasha Morelle brought her doctor's note instructing that she do no heavy lifting. The supervisor did not accommodate the doctor's note nor reassign her to a different area. Ms. Morelle continued doing her assigned work of lifting boxes weighing almost 50 pounds. As a result, she suffered a miscarriage.

Currently, employers can arbitrarily determine what is an unnecessary burden to accommodate. Ms. Bakst, what—how would the undue hardship standard under the Pregnant Workers Fairness Act come into play in this situation?

Ms. BAKST. Absolutely. So, Tash Morelle is actually A Better Balance client and she suffered profound health consequences as a result of being denied an accommodation and the way it would work would simply be that the employer would try to see if there was an alternative way to honor her doctor's notes or her restriction and if it was not reasonable or it would constitute an undue hardship, then the employer wouldn't need to accommodate her but what is happening is that women like Tasha are being forced off the job or forced to risk their health because employers are not simply engaging in that good faith interactive process that they are doing for workers with disabilities and so—and I just want to make the point, if I may back to that Walberg bill because any idea that bill would make the situation better is just completely untrue because once again, the bill requires pregnant workers to point to other workers to find a comparator but that basically pushes the comparative framework even in the wrong direction because it imports new definitions of who an appropriate comparator is from other statutes and so we have to—we need a clear standard for pregnant women so they can follow their doctors orders, remain healthy and on the job. If there is an accommodation, they can provide it. If it's an undue hardship, they don't have to, but they should have to jump through hoops and prove discrimination and wait until their kid is in preschool, maybe middle school until they find out if they can be accommodated. It's too late. The economic consequences are too profound, the health consequences are too profound.

Ms. COHEN. And if I may, and I am a waiver, if the accommodation was leave, would you agree it should be paid leave?

Ms. BAKST. Well, we at A Better Balance and my colleagues and advocates in the community strongly believe in paid family leave and so I think that every woman in America, every parent, every

caregiver, everyone should have access to paid family and medical leave, yes.

Ms. COHEN. Thank you and I yield back and appreciate the committee's indulgence.

Chairwoman BONAMICI. Thank you so much. I remind my colleagues that pursuant to committee practice, materials for submission for the hearing record must be submitted to the Committee Clerk within 14 days following the last day of the hearing, preferable in Microsoft Word format. The materials submitted must address the subject matter of the hearing. Only a Member of the committee or invited witness may submit materials for inclusion in the hearing record. Documents are limited to 50 pages each. Documents longer than 50 pages will be incorporated into the record via an internet link that you must provide to the Committee Clerk within the required timeframe but please recognize that years from now the link may not work.

Again, I want to thank the witnesses for their participation today. What we have heard is very valuable. Members of the committee may have some additional questions for you. We ask the witnesses to please respond to those questions in writing. The hearing record will be held open for 14 days to receive those responses.

I remind my colleagues that pursuant to committee practice, witness questions for the hearing record must be submitted to the Majority Committee Staff or Committee Clerk within seven days and the questions submitted must address the subject matter of the hearing.

And we have some closing statements. I recognize the distinguished Ranking Member for his closing statement.

Mr. COMER. Thank you, Madam Chair and I again want to thank all the witnesses for being here today. I think it's the goal of both parties in Congress to ensure that pregnant workers are protected in the workplace and I know on behalf of the Minority conference, we are going to do everything in our ability to see that every pregnant worker is protected in the workplace and hopefully we can work together as this bill moves forward and see that objective is achieved. With that, Madam Chair, I yield back.

Chairwoman BONAMICI. Thank you so much. I now recognize myself for the purpose of making a closing statement. Thank you again to the witnesses for being here. I want to add that I am very glad that everyone—every Member of the committee who has expressed an opinion agrees that pregnant workers should be protected in the workplace. I think that's a very positive step and your compelling testimony here today confirms that far too many pregnant workers are still denied access to reasonable workplace accommodations despite more than four decades of Federal law providing for equal treatment on the job and as the witnesses explained, workplace accommodations can be simple, inexpensive, not unlike the accommodations already required for individuals covered under the Americans with Disabilities Act. Some of the accommodations discussed today included simply providing seating and water at work sites, allowing additional break times to use the restroom.

Pregnant workers should not have to choose between a healthy pregnancy and financial stability. This bipartisan Pregnant Workers Fairness Act is our opportunity to fulfill the promise of the Pregnancy Discrimination Act and protect the health, wellbeing, and economic security of all pregnant and parenting workers and their families.

By clarifying the right of pregnant workers to fair treatment in the workplace, this legislation will finally guarantee pregnant workers the accommodation they need without fear of facing discrimination or retaliation and without waiting months or years to find out if an accommodation is going to be provided.

This bill focuses on prevention and accommodation and that is a positive step and again, this is not a partisan issue. Several state legislators across the country, including in the Ranking Member state of Kentucky and my home state of Oregon have already passed bipartisan legislation combating discrimination against pregnant workers and they have found that the certainty is good not just for the pregnant workers but also for businesses.

I hope that every committee member here today can agree that Congress must act now in a bipartisan manner to provide all pregnant workers access to workplace gender equity, healthy pregnancies, financial security regardless of where they live. I look forward to working with my colleagues to pass the Pregnant Workers Fairness Act and take a long overdue step on behalf of pregnant workers and their families. And with no further business, without objection, the committee stands adjourned.

[Additional submissions by Chairwoman Bonamici follow:]

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

JAMES P. HOFFA
General President

25 Louisiana Avenue, NW
Washington, DC 20001

KEN HALL
General Secretary-Treasurer

202.624.6800
www.teamster.org

October 22, 2019

The Honorable Frederica Wilson,
Chair
Subcommittee on Health, Education,
Labor and Pensions
2176 Rayburn House Office Building
Washington, DC 20515

The Honorable Tim Walberg,
Ranking Member
Subcommittee on Health, Education,
Labor and Pensions
2176 Rayburn House Office Building
Washington, DC 20515

Statement for the Record
U.S. House Committee on Education and Labor
Subcommittee on Health, Education, Labor and Pensions
Hearing on: "Long Overdue: Exploring the Pregnant Workers' Fairness Act (H.R. 2694)

Dear Chairwomen Wilson and Ranking Member Walberg:

On behalf of the 1.4 million members of the International Brotherhood of Teamsters, I want to thank you for holding today's hearing to examine the crisis of discrimination against pregnant women in the workplace. The Teamsters Union is proud to support H.R. 2694, the Pregnant Workers Fairness Act which would promote healthy pregnancies and economic security for pregnant women.

In the last few decades, there has been a demographic shift in the workplace. Women now make up almost half of the workforce. There are more pregnant workers than ever before and they are working later into their pregnancies. Yet, too often, instead of providing a pregnant worker with an accommodation, her employer will fire her or push her onto unpaid leave, depriving her of a paycheck and health insurance at a time when she needs them most.

While pregnancy discrimination affects women across race, ethnicity and economic status, women of color and low-wage workers are disproportionately impacted. Women of color are more likely to hold certain inflexible and physically demanding jobs that can present specific challenges for pregnant women making reasonable accommodations on the job even more important.

In 2018, the New York Times ran a front page article (attached) detailing the tragic loss experienced by a number of women working at a Verizon fulfillment center/warehouse in Memphis, TN operated by XPO Logistics. The women who worked at the warehouse generally spent twelve hour shifts moving boxes full of Verizon cell phones and other devices. Upon becoming pregnant, all had asked for reasonable accommodations, including light duty. Three of the women said that they even brought in doctors' notes recommending less taxing workloads and shorter shifts, but supervisors disregarded the letters.

Certainly, some of these women considered leaving their jobs with XPO, or taking unpaid leave to protect theirs and their unborn child's health, but at an average hourly wage of $11/hr, unpaid leave and elective terms of unemployment are entirely unrealistic.

In response to the New York Times article and additional coverage by the Los Angeles Times and the PBS Newshour, nearly 100 members of Congress submitted a letter (attached) to this Committee urging investigation into the disturbing treatment of workers at the XPO Memphis facility. With pressure mounting, XPO solicited the counsel of an outside expert to draft an internal policy to address the needs of pregnant workers. This was a step in the right direction, but it shouldn't take congressional action and national press coverage to compel an employer to do the right thing. Make no mistake, this new XPO policy only exists because of the women in Memphis who stood up and spoke out.

Unfortunately, XPO's new policy has zero chance of helping women at the Memphis facility. Two months after announcing the policy, XPO Logistics abruptly announced that it would shut down the warehouse where all of the women featured in the New York Times article had worked. This action creates a chilling effect on other workers who might choose to access reasonable accommodations at XPO. What pregnant worker is going to feel comfortable asking for reasonable accommodation when the end result of speaking up might be job loss?

Key among its many protections is that H.R. 2694 would prohibit retaliation against pregnant workers who request accommodation.

The Pregnant Workers Fairness Act will provide a clear, predictable rule: employers must provide reasonable accommodations for limitations arising out of pregnancy, childbirth, or related medical conditions, unless this would pose an undue hardship. No woman should have to choose between providing for her family and maintaining a healthy pregnancy. The Pregnant Workers Fairness Act would ensure that all women working for covered employers would be protected.

Thank you again for taking this time to hear directly from workers. Like the women testifying today, the women who spoke out in Memphis have suffered immeasurable loss and they are incredibly brave to now advocate for change that will prevent others from experiencing similar tragedy. The Teamsters Union is proud to stand with XPO workers and all pregnant workers demanding change. I urge you to stand up to unscrupulous employers like XPO and swiftly enact H.R. 2694, the Pregnant Workers Fairness Act.

Sincerely,

James P. Hoffa

James P. Hoffa
General President

# Miscarrying at Work: The Physical Toll of Pregnancy Discrimination

nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html

October 21, 2018

By JESSICA SILVER-GREENBERG and NATALIE KITROEFF OCT. 21, 2018

MEMPHIS — If you are a Verizon customer on the East Coast, odds are good that your cellphone or tablet arrived by way of a beige, windowless warehouse near Tennessee's border with Mississippi.

Inside, hundreds of workers, many of them women, lift and drag boxes weighing up to 45 pounds, filled with iPhones and other gadgets. There is no air-conditioning on the floor of the warehouse, which is owned and operated by a contractor. Temperatures there can rise past 100 degrees. Workers often faint, according to interviews with 20 current and former employees.

One evening in January 2014, after eight hours of lifting, Erica Hayes ran to the bathroom. Blood drenched her jeans.

She was 23 and in the second trimester of her first pregnancy. She had spent much of the week hoisting the warehouse's largest boxes from one conveyor belt to the next. Ever since she learned she was pregnant, she had been begging her supervisor to let her work with lighter boxes, she said in an interview. She said her boss repeatedly said no.

She fainted on her way out of the bathroom that day. The baby growing inside of her, the one she had secretly hoped was a girl, was gone.

"It was the worst thing I have ever experienced in my life," Ms. Hayes said.

Three other women in the warehouse also had miscarriages in 2014, when it was owned by a contractor called New Breed Logistics. Later that year, a larger company, XPO Logistics, bought New Breed and the warehouse. The problems continued. Another woman miscarried there this summer. Then, in August, Ceeadria Walker did, too.

The women had all asked for light duty. Three said they brought in doctors' notes recommending less taxing workloads and shorter shifts. They said supervisors disregarded the letters.

Pregnancy discrimination is widespread in corporate America. Some employers deny expecting mothers promotions or pay raises; others fire them before they can take

maternity leave. But for women who work in physically demanding jobs, pregnancy discrimination often can come with even higher stakes.

The New York Times reviewed thousands of pages of court and other public records involving workers who said they had suffered miscarriages, gone into premature labor or, in one case, had a stillborn baby after their employers rejected their pleas for assistance — a break from flipping heavy mattresses, lugging large boxes and pushing loaded carts.

They worked at a hospital, a post office, an airport, a grocery store, a prison, a fire department, a restaurant, a pharmaceutical company and several hotels.

But refusing to accommodate pregnant women is often completely legal. Under federal law, companies don't necessarily have to adjust pregnant women's jobs, even when lighter work is available and their doctors send letters urging a reprieve.

The Pregnancy Discrimination Act is the only federal law aimed at protecting expecting mothers at work. It is four paragraphs long and 40 years old. It says that a company has to accommodate pregnant workers' requests only if it is already doing so for other employees who are "similar in their ability or inability to work."

That means that companies that do not give anyone a break have no obligation to do so for pregnant women. Employees say that is how the warehouse's current owner, XPO Logistics, operates.

For example, last October, a 58-year-old woman died of cardiac arrest on the warehouse floor after complaining to colleagues that she felt sick, according to a police report and current and former XPO employees. In Facebook posts at the time and in recent interviews, employees said supervisors told them to keep working as the woman lay dead.

If companies "treat their nonpregnant employees terribly, they have every right to treat their pregnant employees terribly as well," said Representative Jerrold Nadler, Democrat of New York, who has pushed for stronger federal protections for expecting mothers.

In every congressional session since 2012, a group of lawmakers has introduced a bill that would do for pregnant women what the Americans With Disabilities Act does for disabled people: require employers to accommodate those whose health depends on it. The legislation has never had a hearing.

"We are deeply troubled by these allegations," said a Verizon spokesman, Rich Young. "We have no tolerance — zero tolerance — for this sort of alleged behavior." He said the company opened an internal investigation in response to The Times's inquiry. "None of these allegations are consistent with our values or the expectations and demands of contractors that work directly for us or have any affiliation with us."

Erin Kurtz, an XPO spokeswoman, said: "We're surprised by the allegations of conduct that either predate XPO's acquisition of the Memphis facility or weren't reported to management after we acquired it in 2014." She said the allegations "are unsubstantiated, filled with inaccuracies and do not reflect the way in which our Memphis facility operates." The company also disputed that the warehouse was windowless, noting that there were a number of interior windows.

Ms. Kurtz said XPO prioritized the safety of its workers, had "no tolerance for any type of discriminatory behavior" and has enhanced pay and benefits for employees in recent years.

Those improvements didn't help Ceeadria Walker when she got pregnant. The 19-year-old said she gave her XPO supervisor a doctor's letter from OB/GYN Centers of Memphis saying she should not lift more than 15 pounds. She said she asked to be assigned to an area with lighter items. Ms. Walker said her supervisor regularly sent her to a conveyor belt line where she had to lift more than she was supposed to. She miscarried the day after spending her shift handling those heavier boxes.

"We're saddened that Ms. Walker had a miscarriage over the summer," Ms. Kurtz said. "We're investigating these newly raised claims."

## The Risks of Lifting

For most women, it is safe to work while pregnant.

But there is "a slight to modest increased risk of miscarriage" for women who do extensive lifting in their jobs, according to guidelines published this year by the American College of Obstetricians and Gynecologists. The recommendations are intended to inform doctors about best practices.

Two decades of medical research have established a link between physically demanding work and fetal death, though there is debate about how strong the connection is. Part of the difficulty in measuring the relationship, researchers say, is that it's impossible to design a study that isolates the impact of heavy lifting versus other risk factors, like pre-existing conditions.

In a peer-reviewed study from 2013, researchers in Denmark found that the risk of fetal death increased as women lifted heavier objects more frequently. The researchers theorized that lifting and bending could reduce blood flow to the uterus.

Another possibility, doctors said, is that extreme physical exertion diverts blood from a woman's womb to her muscles.

The potential dangers are greatest for women whose pregnancies are already classified as high risk, which is why doctors often advise that they be given easier tasks.

"When employers ignore these medical recommendations, they are potentially jeopardizing patients' health," said Rebecca Jackson, the chief of obstetrics and gynecology at San Francisco General Hospital. "It's especially bothersome to me that this is occurring for women in strenuous jobs, given that they are at the most risk of injuring themselves or the pregnancy."

Warehouses are among the fastest growing workplaces in the country, employing more than a million Americans. Retailers, competing against the likes of Amazon, demand high speed at low costs.

On Memphis's east side, these are often the highest-paying jobs available for people without college degrees. Drawn by the proximity to rail lines and highways, some of the country's largest companies have set up distribution centers here. One dispatches Nike shoes. Another handles Disney toys. And a short drive from Graceland, Verizon has its hub.

XPO runs all of those warehouses. The Verizon facility, which XPO took over when it bought New Breed Logistics in 2014, is the only one where The Times interviewed workers about pregnancy discrimination. Shifts there can last 12 hours. Workers get 30 minutes for lunch and as many as three other 15-minute breaks.

XPO's 2017 employee handbook warns that taking unapproved breaks, arriving to work late or leaving early can result in "immediate termination," unless the reasons for the departures are "legally protected." The Pregnancy Discrimination Act does not guarantee women such protections.

## A Job on the Line

It was the fall of 2013, and Erica Hayes was convinced that she was having a girl. She daydreamed about the clothes she would buy and made a list of favorite names. Her friend was pregnant with a boy, and they talked about raising their children together.

At first, Ms. Hayes was processing individual shipments to Verizon customers — one phone, one charger, onto the next. Then, a crush of holiday orders hit the warehouse in December. She said that her boss began dispatching her to the area of the warehouse that handled bulk shipments, often destined for Verizon stores, where the warehouse was struggling to keep up. She often spent up to 12 hours a day lifting huge boxes, some with 20 iPads and 20 accessories.

She said she could have handled paperwork or stayed in the section of the warehouse devoted to small shipments. But she said her supervisor kept ordering her to work with the largest boxes. Ms. Hayes's mother said that her daughter talked to her about the rejected

requests at the time.

Ms. Hayes said she began to bleed regularly at work. She sometimes left early to go to the hospital. Each time, she said, her supervisor wrote her up. As the demerits accumulated, she stopped leaving. Instead, she bled through four maxi pads a day.

"My job was on the line," she said. At the end of a long shift in January 2014, she felt blood gushing into her jeans.

A co-worker fetched her a black peacoat to wrap around her waist to cover the spreading stain. Another grabbed plastic bags to line the leather driver's seat of her 2003 Hyundai. Ms. Hayes fainted before she could get to the car. An ambulance took her to the hospital.

A couple of weeks later, she said, her supervisor handed her a $300 invoice for the cost of the ambulance ride. (Ms. Hayes, who still works at the warehouse and is hoping for a promotion, said she never paid the bill.)

That spring, two more women had miscarriages at the warehouse. Both said that their supervisors rejected their requests to pack lighter boxes.

One of the women, who still works at the warehouse, declined to be identified for fear of losing her job.

The other was Tasha Murrell. She already had two boys and was praying for a girl. She planned to name the baby Dallas, after the Cowboys, her favorite football team. Ms. Murrell said that she told her boss she was pregnant and asked to leave work early one day that spring because the lifting had become painful.

Her supervisor told her to get an abortion, according to a discrimination complaint she filed with the Equal Employment Opportunity Commission in April 2018. Ms. Murrell woke up the next morning to find her mattress stained with blood. Her husband drove her to the emergency room, where doctors told her she had miscarried. Ms. Murrell left the job last year and is now an organizer with the Teamsters, which is trying to organize a union at the warehouse.

Ms. Hayes and Ms. Murrell had the same supervisor: Amela  Bukvic. Through her lawyer, Ms. Bukvic denied telling anyone to get an abortion. "I would never make such a horrible statement to anyone, especially an employee under my supervision," she said.

Ms. Bukvic said that she made sure that the pregnant women whom she managed had workloads that were not excessive. She said she never denied help to the pregnant employees. "If they had any work restrictions, I always took all steps to make sure their work duties never exceeded those restrictions," she said.

A few months later, in September 2014, it happened to another woman.

Chasisty Bee, 33, was four months pregnant. Hoping for a girl, she bought a newborn's blanket from Burlington Coat Factory.

Ms. Bee had miscarried in 2008 while working at the Verizon warehouse. This time, she said, she brought in a doctor's note recommending that she work shorter shifts, be given a chair and light duty. Supervisors rejected her requests. One afternoon, after almost 14 hours on her feet, she started feeling dizzy and crumpled to the warehouse floor. Her physician told her that she had miscarried.

After Ms. Bee got pregnant again in 2015, she found a new job. "I couldn't bear to lose another child," she said. The next February, she gave birth to a healthy girl.

Ms. Kurtz, the XPO spokeswoman, said: "The false and misleading allegations directed at our Memphis facility are fueled by the Teamsters and are part of their ongoing, but unsuccessful, attempts at organizing."

## Stalled Momentum

A bipartisan group of lawmakers has proposed upgrading the 1978 Pregnancy Discrimination Act. The bill would compel companies to accommodate pregnant women — for example, by offering extra breaks or the option of light duty — as long as it does not impose an "undue hardship" on their business. That is the same language used in the Americans With Disabilities Act.

Women "shouldn't have to choose between keeping a doctor appointment or their job," said Senator Dean Heller, Republican of Nevada, one of 125 co-sponsors of the Pregnant Workers Fairness Act in the House and Senate.

In 2015, it looked as if the bill might gain traction. The Supreme Court had just ruled in favor of Peggy Young, a UPS driver who was denied light duty after getting pregnant. Pregnancy discrimination was suddenly grabbing headlines.

But some Republicans, including Senator Lamar Alexander of Tennessee, where the XPO warehouse is, viewed that bill as adding a confusing new layer of regulations, according to Senate aides. Mr. Alexander, who is chairman of the Senate committee on health and labor, co-sponsored a competing bill. It expanded protections for pregnant women in some cases. But it still allowed employers to deny accommodations if they weren't being provided to other workers in similar situations.

"It was a useful mechanism in order to divert some of the momentum that was building," said Emily Martin of the National Women's Law Center, an advocacy group focused on women's rights.

Both bills stalled.

Outside Washington, there have been fewer roadblocks. At least 23 states have passed laws that are stronger than current federal protections (Tennessee is not among them). In Utah, Delaware, Colorado and New York, Republicans led the charge. In Nebraska, an anti-abortion Democrat pushed the measure.

"Women have lost their children due to the lack of robust pregnancy protections in the workplace," said Catherine Glenn Foster, the president of Americans United for Life, an anti-abortion group. "Anyone who can't get behind this or uses it as a political game — it's a travesty."

## 'I Watched Her Die'

The problems extend beyond the warehouse floor — to hotels, restaurants, fire stations and stores.

At the Albertsons grocery store in Atascadero, Calif., Reyna Garcia had one of the toughest jobs. She pushed 200-pound carts, dragged sacks of cat litter and climbed 10-foot ladders to stock goods.

Ms. Garcia got pregnant in July 2012, found out she was having a girl and decided to name the baby Jade.

Ms. Garcia told her boss that her pregnancy was high risk — she had previously given birth prematurely. She presented a doctor's note saying she should not lift more than 15 pounds. The boss ignored the recommendation, according to a lawsuit she filed against Albertsons in federal court in Los Angeles.

"She was feeling like she wasn't getting any response from her supervisor," her doctor, Mareeni Stanislaus, said in an interview. She said the restrictions were "even more important" because Ms. Garcia had a high-risk pregnancy. Heavy lifting can prompt smooth muscles like the uterus to contract, potentially inducing preterm labor, Dr. Stanislaus said.

The regular twisting and hoisting caused intense pain, but Ms. Garcia needed the paycheck and the health insurance. She requested any other position — in the Albertsons bakery or at the meat counter or as a fruit cutter or in the pharmacy or at the customer service desk.

Her boss turned her down, according to the lawsuit, which included corroborating statements from her colleagues.

Her doctors sent two more notes. "She should avoid prolonged standing without a break and should avoid excessive bending and reaching and balancing," Dr. Stanislaus wrote. Copies of the letters were included in the suit.

About three weeks later, in the middle of her shift, Ms. Garcia began feeling "pelvic pressure," according to her lawsuit. She asked her boss for permission to leave early; he gave her a long list of tasks that she needed to finish first.

Ms. Garcia ended up working overtime. By the time she got home, she could feel her amniotic sac bulging between her legs. It felt "like a balloon coming out of me," she said in a sworn statement. She went to the emergency room. She could feel something scratching from inside; her doctor told her it was the baby's fingernails. She was 20 weeks pregnant.

Five days later, Ms. Garcia gave birth to Jade. The baby lived less than 10 minutes.

"My husband and I watched her die," Ms. Garcia said in her statement. "It was the most painful thing I have ever experienced."

In 2014, Albertsons settled Ms. Garcia's lawsuit for an undisclosed amount; the deal prohibited her from speaking publicly about what happened. "The company has a policy against pregnancy discrimination, and we accommodate employees with pregnancy-related disabilities in accordance with state and federal law," said Christine Wilcox, an Albertsons spokeswoman.

Ms. Garcia's boss demoted her when she returned to work.

"I lost my baby for this job," Ms. Garcia said, according to her lawsuit. "Why didn't you give me help when I was pregnant and asked for it?"

## Hard to Breathe

Workers at the Memphis warehouse thought conditions might improve when XPO Logistics acquired New Breed in September 2014.

At the time, XPO and its chief executive, Bradley S. Jacobs, were on a buying spree. His strategy was simple: slash expenses and deliver quick profits. Today XPO, based in Greenwich, Conn., has a market value of $12 billion.

The company has had multiple run-ins with regulators. In one instance, the California Labor Commissioner's Office last year awarded four XPO truck drivers a total of $855,000 after finding that the company had misclassified them as independent contractors.

In Memphis, XPO's ownership changed the warehouse, but not the way workers had hoped. Over the next couple of years, pressure on employees intensified and working conditions deteriorated, according to the 20 current and former employees. Supervisors began demanding that they pack 120 boxes an hour instead of 60. Some bosses penalized employees for spending too much time in the bathroom or on breaks.

Summer temperatures inside the warehouse regularly exceeded 100 degrees, the current and former employees said. It was so hot and humid that workers sometimes found it hard to breathe.

Every week from June through September 2017, at least one worker collapsed on the warehouse floor, the employees said. Supervisors took to wheeling the sick workers to the break room, where they sometimes received an ice pop.

On the morning of Oct. 17, 2017, Linda Neal crashed to the warehouse floor, dead of cardiac arrest.

Ms. Neal, 58, had suffered from heart problems. She previously had complained to her son, Dean Turner, that XPO supervisors would not let her leave early when she was feeling unwell, Mr. Turner said in an interview. That day, she had told managers that she was short of breath and asked for an extra break, but her supervisor rejected the request, according to Lakeisha Nelson, who witnessed the exchange and still works there. When Mr. Turner arrived at the warehouse, he said, three of his mother's colleagues told him the same thing.

Managers told workers to keep moving boxes as her body lay on the floor, according to four employees who were at the warehouse that day, as well as contemporaneous Facebook posts.

Ms. Kurtz, the XPO spokeswoman, said the company did allow workers to leave for the day after Ms. Neal died. She added that the Teamsters "continue to shamefully exploit the passing of our colleague through the spreading of false information" in their effort to organize at the warehouse.

That same month, Ceeadria Walker joined XPO. The pay was decent, about $12 an hour, an upgrade from her last job at a car-parts warehouse. At first, she didn't mind the frequent 12-hour shifts. But she learned she was pregnant in June 2018 and started feeling nauseated and dizzy at the end of the long days.

Ms. Walker said she gave her supervisor a doctor's note saying she should reduce the number of hours on her feet to avoid hurting herself or endangering her pregnancy. "They looked at it like it was nothing," she said.

There were days when XPO let her work in the "pit," dealing with the paperwork for orders, but she said she spent most of July on the conveyor-belt line hoisting 45-pound boxes.

Ms. Walker toyed with leaving. But, she said, "I couldn't just quit my job." She was near the end of her first trimester and needed money. She planned to name the baby, her first child, after her boyfriend — Octavia for a girl, Octavius for a boy.

By the end of her shift on Aug. 4, Ms. Walker said she had handled hundreds of Verizon boxes. When she woke up bleeding at 6 a.m. the next day, her mother drove her to the doctor.

Two days later, Ms. Walker spoke with The Times. She was distraught. “This was going to be my first.”

Doris Burke contributed research.

# Congress of the United States
## House of Representatives
Washington, DC 20515

December 4, 2018

The Honorable Virginia Foxx
Chairwoman
Committee on Education and the Workforce
2176 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Bobby Scott
Ranking Member
Committee on Education and the Workforce
2101 Rayburn House Office Building
Washington, D.C. 20515

Chairwoman Foxx and Ranking Member Scott,

We, the undersigned Members of Congress, wish to raise concerns regarding a number of allegations and news reports exposing the alleged disturbing treatment of employees at facilities across the United States managed by a company named XPO Logistics, and we urge the Committee on Education and the Workforce to bring forth transparency for the public by looking into, investigating, and calling for, if deemed necessary, relevant stakeholders to testify before the Committee.

In two recent stories[1,2], *The New York Times* and *The Los Angeles Times* published the history of alleged pregnancy discrimination, sexual harassment, suppression of efforts to organize, efforts to evade labor regulations by misclassifying truck drivers, and unsafe and hazardous working conditions in violation of federal labor and safety standards at XPO Logistics.

An October 31, 2018 investigative report[3] by *PBS NewsHour* further corroborated the reporting of the *New York Times*.

In 2010, New Breed Logistics, a company that distributed Verizon products and that XPO subsequently acquired, was sued by the Equal Employment Opportunity Commission (EEOC) over sexual harassment claims and retaliation against workers in the Memphis facility where a jury rendered a verdict [4] that the company was in violation of Title VII and more than $1.5 million was awarded in back pay, compensatory damages, and punitive damages for the discrimination of victims. In just the last year, over a dozen individuals have filed EEOC claims against XPO Logistics, many of which are pending, on similar grounds lending credence to the concern that unsafe labor standards have continued under XPO's management.

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[1] Percannella, Aurora, *The Los Angeles Times*, "Under a new law, retailers share liability for misclassified truck drivers at California Ports", http://www.latimes.com/business/la-fi-truck-drivers-20180925-story.html
[2] Silver-Greenberg, Jessica, *The New York Times*, "Miscarrying at Work: The Physical Toll of Pregnancy Discrimination", https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html?action=click&module=Top%20Stories&pgtype=Homepage
[3] *PBS News House*, "When workplace conditions put women's pregnancies at risk", https://www.pbs.org/newshour/show/when-workplace-conditions-put-womens-pregnancies-at-risk
[4] U.S. Equal Employment Opportunity Commission, Press Release. "Jury Awards More Than $1.5 Million in EEOC Sexual Harassment and Retaliation Suit against New Breed Logistics", https://www.eeoc.gov/eeoc/newsroom/release/5-10-13a.cfm

In its October 21 article[2], *The New York Times* detailed several accounts of women who had received medical recommendations from their doctors urging their patients' employers to shift pregnant workers toward less physically strenuous work, specifically to reduce the risk of miscarriage. Still, a disturbing number of women have recounted their miscarriages after engaging in the work at XPO Logistics' facilities. As the *New York Times* also pointed out, current federal law falls short in ensuring clear protections for pregnant employees. We urge your committee to consider the Pregnant Workers Fairness Act, which would make clear that employers must provide reasonable accommodations to pregnant workers, unless it would pose an undue hardship on the business.

According to the *Los Angeles Times*[1], XPO Logistics at the ports of Los Angeles, Long Beach and Oakland, California is also alleged to be engaged in misclassifying short-haul truck drivers as independent contractors rather than employees, rendering thousands of truck drivers ineligible for unemployment benefits, disability pay or workers' compensation.

As one of the world's top ten logistics companies, XPO's footprint includes facilities across the United States including California, Tennessee, Connecticut, Arkansas, Michigan, Ohio, Illinois, North Carolina, Maryland, Pennsylvania, New York, New Jersey, South Carolina, Indiana, Florida, Mississippi, Louisiana, Wisconsin, Iowa, Texas, Washington, Utah, and Arizona. Their contracts span a wide array of clients that include Disney, Cummins and Verizon. Additionally, the company enjoys significant revenue from federal contracts including contracts with the United States Postal Service and the Department of Defense.

Hundreds and thousands of workers could be at risk at XPO Logistics facilities if the aforementioned allegations are accurate. While the current issues raised may be local and isolated, further investigation and oversight should be executed to ensure that hundreds and thousands of workers, nationwide, are not at further risk.

We strongly urge the House Committee on Education and the Workforce to investigate this matter swiftly, hold a hearing on the Pregnant Workers Fairness Act, take all necessary actions to provide XPO an opportunity for transparency to the American public, and ensure that XPO Logistics remains in full compliance with federal regulatory standards.

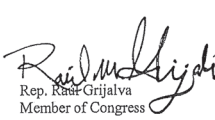
Sincerely,

Rep. Steve Cohen
Member of Congress

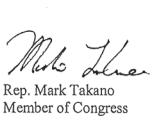
Rep. Rosa DeLauro
Member of Congress

CC:
House Judiciary Committee Ranking Member, Rep. Jerrold Nadler

[1] Percannella, Aurora, *The Los Angeles Times,* "Under a new law, retailers share liability for misclassified truck drivers at California Ports", http://www.latimes.com/business/la-fi-truck-drivers-20180925-story.html

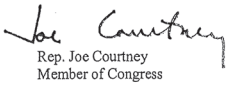


Rep. Raúl Grijalva
Member of Congress



Rep. Mark Takano
Member of Congress

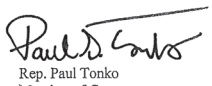
Rep. Adriano Espaillat
Member of Congress



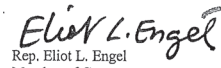
Rep. Joe Courtney
Member of Congress

Rep. Bennie G. Thompson
Member of Congress

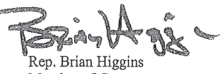
Rep. Jackie Speier
Member of Congress



Rep. Paul Tonko
Member of Congress

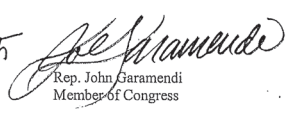


Rep. Eliot L. Engel
Member of Congress

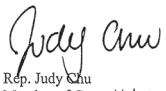


Rep. Brian Higgins
Member of Congress

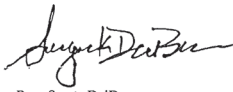
Rep. Theodore E. Deutch
Member of Congress



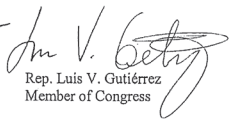
Rep. John Garamendi
Member of Congress



Rep. Judy Chu
Member of Congress

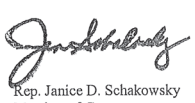


Rep. Suzan DelBene
Member of Congress

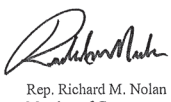


Rep. Luis V. Gutiérrez
Member of Congress

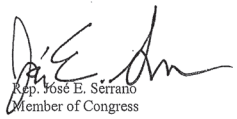
Rep. Bill Pascrell, Jr.
Member of Congress



Rep. Janice D. Schakowsky
Member of Congress

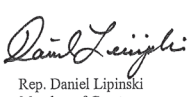


Rep. Richard M. Nolan
Member of Congress

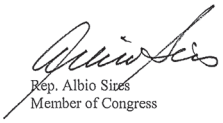


Rep. José E. Serrano
Member of Congress

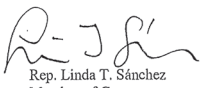
Rep. Alcee L. Hastings
Member of Congress



Rep. Daniel Lipinski
Member of Congress



Rep. Albio Sires
Member of Congress

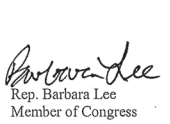


Rep. Linda T. Sánchez
Member of Congress

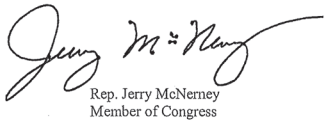
Rep. Carolyn B. Maloney
Member of Congress

Rep. Nydia M. Velázquez
Member of Congress

Rep. Stephen F. Lynch
Member of Congress



Rep. Barbara Lee
Member of Congress



Rep. Jerry McNerney
Member of Congress

Rep. Adam Smith
Member of Congress

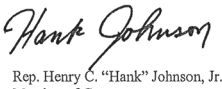
Rep. Keith Ellison
Member of Congress

Rep. Betty McCollum
Member of Congress

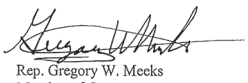
Rep. Gwen Moore
Member of Congress

Rep. David N. Cicilline
Member of Congress

Rep. Karen Bass
Member of Congress



Rep. Henry C. "Hank" Johnson, Jr.
Member of Congress



Rep. Gregory W. Meeks
Member of Congress

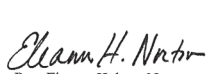
Rep. Bobby L. Rush
Member of Congress

Rep. Marcy Kaptur
Member of Congress

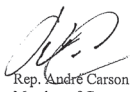
Rep. Brad Sherman
Member of Congress

Rep. Chellie Pingree
Member of Congress

Rep. Danny K. Davis
Member of Congress



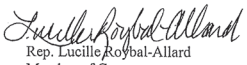
Rep. Eleanor Holmes Norton
Member of Congress



Rep. André Carson
Member of Congress

Rep. Peter A. DeFazio
Member of Congress

Rep. David E. Price
Member of Congress

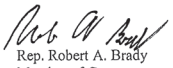


Rep. Lucille Roybal-Allard
Member of Congress

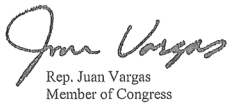
Rep. James R. Langevin
Member of Congress

Rep. Yvette D. Clarke
Member of Congress

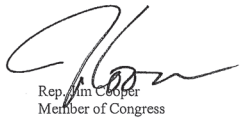
Rep. Kathy Castor
Member of Congress



Rep. Robert A. Brady
Member of Congress



Rep. Juan Vargas
Member of Congress

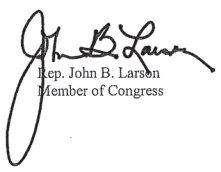


Rep. Jim Cooper
Member of Congress

Rep. Bonnie Watson Coleman
Member of Congress

Rep. David Loebsack
Member of Congress

Rep. Tony Cárdenas
Member of Congress



Rep. John B. Larson
Member of Congress

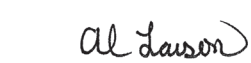
Rep. Darren Soto
Member of Congress

Rep. Mark Pocan
Member of Congress

Rep. Katherine M. Clark
Member of Congress

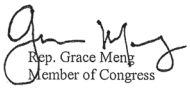
Rep. Seth Moulton
Member of Congress

Rep. Jared Huffman
Member of Congress



Rep. Al Lawson, Jr.
Member of Congress

Rep. Nanette Diaz Barragán
Member of Congress



Rep. Grace Meng
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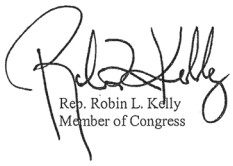
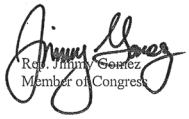


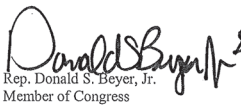
Rep. Robin L. Kelly
Member of Congress



Rep. Jimmy Gomez
Member of Congress

Rep. Bill Foster
Member of Congress

Rep. Brenda L. Lawrence
Member of Congress



Rep. Donald S. Beyer, Jr.
Member of Congress

Rep. Debbie Wasserman Schultz
Member of Congress

Rep. Earl Blumenauer
Member of Congress

Rep. Lois Frankel
Member of Congress

Rep. Sean Patrick Maloney
Member of Congress

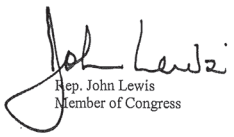
Rep. Ro Khanna
Member of Congress

Rep. James P. McGovern
Member of Congress

Rep. Joseph P. Kennedy, III
Member of Congress

Rep. Jamie Raskin
Member of Congress

Rep. Colleen Hanabusa
Member of Congress



Rep. John Lewis
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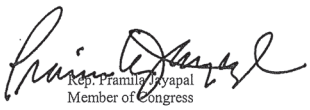
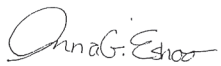
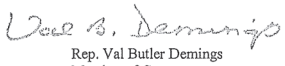


Rep. Pramila Jayapal
Member of Congress

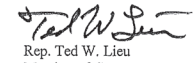


Rep. Anna G. Eshoo
Member of Congress

Rep. Michael F. Doyle
Member of Congress



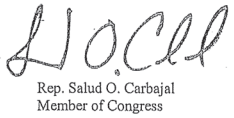
Rep. Val Butler Demings
Member of Congress



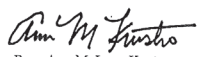
Rep. Ted W. Lieu
Member of Congress

Rep. Daniel T. Kildee
Member of Congress

Rep. Elizabeth H. Esty
Member of Congress

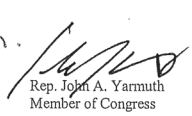


Rep. Salud O. Carbajal
Member of Congress



Rep. Ann McLane Kuster
Member of Congress

Rep. Donald M. Payne, Jr.
Member of Congress



Rep. John A. Yarmuth
Member of Congress

Rep. Alan S. Lowenthal
Member of Congress

Rep. Debbie Dingell
Member of Congress

Rep. Carol Shea-Porter
Member of Congress

Rep. Conor Lamb
Member of Congress

Rep. Julia Brownley
Member of Congress

Rep. Charlie Crist
Member of Congress

October 17, 2019

**Re. Pregnant Workers Fairness Act**

Dear Member of Congress:

As organizations committed to promoting the health and economic security of our nation's families, we urge you to support the Pregnant Workers Fairness Act, a crucial maternal and infant health measure. This bipartisan legislation promotes healthy pregnancies and economic security for pregnant women and their families and strengthens the economy.

In the last few decades, there has been a dramatic demographic shift in the workforce. Not only do women now make up almost half of the workforce, but there are more pregnant workers than ever before and they are working later into their pregnancies. The simple reality is that some of these women—especially those in physically demanding jobs—will have a medical need for a temporary job-related accommodation in order to maintain a healthy pregnancy. Yet, too often, instead of providing a pregnant worker with an accommodation, her employer will fire her or push her onto unpaid leave, depriving her of a paycheck and health insurance at a time when she needs them most.

Additionally, pregnancy discrimination affects women across race and ethnicity, but women of color and immigrants may be at particular risk. Latinas, Black women and immigrant women are more likely to hold certain inflexible and physically demanding jobs that can present specific challenges for pregnant workers, such as cashiers, home health aides, food service workers, and cleaners, making reasonable accommodations on the job even more important, and loss of wages and health insurance due to pregnancy discrimination especially challenging. American families and the American economy depend on women's income: we cannot afford to force pregnant women out of work.

In 2015, in Young v. United Parcel Service, the Supreme Court held that a failure to make accommodations for pregnant workers with medical needs will sometimes violate the Pregnancy Discrimination Act of 1978 (PDA). Yet, even after Young, pregnant workers are still not getting the accommodations they need to stay safe and healthy on the job and employers lack clarity as to their obligations under the law. The Pregnant Workers Fairness Act will provide a clear, predictable rule: employers must provide reasonable accommodations for limitations arising out of pregnancy, childbirth, or related medical conditions, unless this would pose an undue hardship.

The Pregnant Workers Fairness Act is modeled after the Americans with Disabilities Act (ADA) and offers employers and employees a familiar reasonable accommodation framework to follow. Under the ADA, workers with disabilities enjoy clear statutory protections and need not prove how other employees are treated in order to obtain necessary accommodations. Pregnant workers deserve the same clarity and streamlined process and should not have to ascertain how their employer treats others in order to understand their own accommodation rights, as the Supreme Court's ruling currently requires.

Evidence from states and cities that have adopted laws similar to the Pregnant Workers Fairness Act suggests that providing this clarity reduces lawsuits and, most importantly, helps ensure that

women can obtain necessary reasonable accommodations in a timely manner, which keeps pregnant women healthy and earning an income when they need it most. No woman should have to choose between providing for her family and maintaining a healthy pregnancy, and the Pregnant Workers Fairness Act would ensure that all women working for covered employers would be protected.

The need for the Pregnant Workers Fairness Act is recognized across ideological and partisan lines. Twenty-seven states have adopted pregnant worker fairness measures with broad, and often unanimous, bipartisan support. Twenty-two of those laws have passed within the last six years. These states include: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, Texas, Utah, West Virginia, Vermont, and Washington. Lawmakers have concluded that accommodating pregnant workers who need it is a measured approach grounded in family values and basic fairness.

The Pregnant Workers Fairness Act is necessary because it promotes long-term economic security and workplace fairness. When accommodations allow pregnant women to continue to work, they can maintain income and seniority, while forced leave sets new mothers back with lost wages and missed advancement opportunities. When pregnant women are fired, not only do they and their families lose critical income, but they must fight extra hard to re-enter a job market that is especially brutal on the unemployed and on pregnant women.

The Pregnant Workers Fairness Act is vital because it supports healthy pregnancies. The choice between risking a job and risking the health of a pregnancy is one no one should have to make. Women who cannot perform some aspects of their usual duties without risking their own health or the health of their pregnancy, but whose families cannot afford to lose their income, may continue working under dangerous conditions. There are health consequences to pushing women out of the workforce as well. Stress from job loss can increase the risk of having a premature baby and/or a baby with low birth weight. In addition, women who are not forced to use their leave during pregnancy may have more leave available to take following childbirth, which in turn facilitates breastfeeding, bonding with and caring for a new child, and recovering from childbirth.

For all of these reasons, we urge you to co-sponsor the Pregnant Workers Fairness Act. If you are interested in sponsoring this legislation, please contact Melissa Connolly (Melissa.Connolly@mail.house.gov) or Sara Maskornick (sara_maskornick@help.senate.gov).

We also welcome the opportunity to provide you with additional information. For more details, please contact Dina Bakst (dbakst@abetterbalance.org), Emily Martin (emartin@nwlc.org), Vania Leveille (vleveille@aclu.org), or Michelle McGrain (mmcgrain@nationalpartnership.org).

Sincerely,

A Better Balance
American Civil Liberties Union
National Partnership for Women & Families
National Women's Law Center

1,000 Days
9to5
9to5 California
9to5 Colorado
9to5 Georgia
9to5 Wisconsin
Advocates for Youth
AFL-CIO
African American Ministers In Action
All-Options
American Association of University Women (AAUW)
American Federation of State, County, and Municipal Employees (AFSCME)
American Federation of Teachers
Association of Maternal & Child Health Programs
Association of Women's Health, Obstetric and Neonatal Nurses
Breastfeeding Mother
Building Pathways
California Breastfeeding Coalition
California Women's Law Center
California Work & Family Coalition
Casa de Esperanza: National Latin@ Network for Healthy Families and Communities
Center for Reproductive Rights
Centro de Trabajadores Unidos (United Workers Center)
Child Care Law Center
Church World Service
Citizen Action of NY
CLASP
Clearinghouse on Women's Issues
Coalition on Human Needs
Coalition of Labor Union Women
Coalition of Labor Union Women, Philadelphia Chapter
Congregation of Our Lady of the Good Shepherd, U.S. Provinces
Disciples Center for Public Witness
Equal Rights Advocates
Family Equality
Family Values at Work
Farmworker Justice
Feminist Majority Foundation
Friends Committee on National Legislation
Hadassah, The Women's Zionist Organization of America, Inc.
Healthy Work Campaign, Center for Social Epidemiology
In Our Own Voice: National Black Women's Reproductive Justice Agenda
Indiana Institute for Working Families
Interfaith Worker Justice
Jewish Women International
Jobs With Justice

Justice for Migrant Women
Kansas Breastfeeding Coalition, Inc.
Kentucky Equal Justice Center
KWH Law Center for Social Justice and Change
Labor Council for Latin American Advancement (LCLAA)
Labor Project
Legal Aid at Work
Legal Momentum, The Women's Legal Defense and Education Fund
Legal Voice
Main Street Alliance
Maine Women's Lobby
MANA, A National Latina Organization
March of Dimes
Metro-Detroit Chapter of the Coalition of Labor Union Women (CLUW)
Michigan Immigrant Rights Center
MomsRising
MS Black Women's Roundtable
Mujeres Unidas y Activas
NAACP
NARAL Pro-Choice America
NARAL Pro-Choice Colorado
National Advocacy Center of the Sisters of the Good Shepherd
National Advocates for Pregnant Women
National Asian Pacific American Women's Forum (NAPAWF)
National Center for Lesbian Rights
National Center for Transgender Equality
National Council for Occupational Safety and Health (COSH)
National Council of Jewish Women
National Domestic Workers Alliance
National Employment Law Project
National Employment Lawyers Association
National Immigration Law Center
National Network to End Domestic Violence
National Organization for Women
National Resource Center on Domestic Violence
National WIC Association
NC National Organization for Women (NC NOW)
NEA
Nebraska Appleseed
NETWORK Lobby for Catholic Social Justice
NJ Citizen Action; NJ Time to Care Coalition
North Carolina Justice Center
Oxfam America
PA NOW
PathWays PA
Physicians for Reproductive Health

PowHer New York
Public Citizen
Restaurant Opportunities Centers United
RESULTS
RI CLUW
San Francisco CLUW Chapter
Service Employees International Union
SEIU 32BJ
Sexuality Information and Education Council of the United States (SIECUS)
Shriver Center on Poverty Law
Southern CA Coalition for Occupational Safety & Health
Southwest Pennsylvania National Organization for Women
Southwest Women's Law Center
The Leadership Conference on Civil and Human Rights
The Zonta Club of Greater Queens
UltraViolet
UnidosUS
Union for Reform Judaism
United Electrical, Radio and Machine Workers of America
United Food and Commercial Workers International Union (UFCW)
United for Respect
United State of Women
United States Breastfeeding Committee
United Steelworkers
University of Illinois at Chicago, School of Public Health, Division of Environmental & Occupational Health Sciences
Voices for Children in Nebraska
Warehouse Worker Resource Center
Western Center on Law and Poverty
William E. Morris Institute for Justice, Arizona
Women & Girls Foundation
Women Employed
Women of Reform Judaism
Women's Center for Education and Career Advancement
Women's Employment Rights Clinic Golden Gate University
Women's Law Project
Women's March
Women's Rights and Empowerment Network
Work Equity
Workers' Center of Central New York
Workplace Fairness
YWCA McLean County
YWCA New Hampshire
YWCA USA
ZERO TO THREE

SUZANNE BONAMICI
1ST DISTRICT, OREGON

2231 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
TELEPHONE: 202-225-0855
FAX: 202-225-9497

12725 SW MILLIKAN WAY, SUITE 220
BEAVERTON, OR 97005
TELEPHONE: 503-469-6010
TOLL FREE IN 1ST DISTRICT: 800-422-4003
FAX: 503-469-6018

http://Bonamici.house.gov

**Congress of the United States**
**House of Representatives**
**Washington, DC 20515–3701**

COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEES:
CIVIL RIGHTS AND HUMAN SERVICES, CHAIR
HIGHER EDUCATION AND WORKFORCE INVESTMENT

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
SUBCOMMITTEES:
ENVIRONMENT
INVESTIGATIONS AND OVERSIGHT

December 22, 2020

To Whom it May Concern:

As Chair of the Education and Labor Subcommittee on Civil Rights and Human Services, I would like to submit the attached article from The New York Times on behalf of Representative Steve Cohen.

Sincerely,

Suzanne Bonamici

Suzanne Bonamici
Member of Congress

# Miscarrying at Work: The Physical Toll of Pregnancy Discrimination

Women in strenuous jobs lost their pregnancies after employers denied their requests for
light duty, even ignoring doctors' notes, an investigation by The New York Times has found.

By JESSICA SILVER-GREENBERG and NATALIE KITROEFF Photographs by MIRANDA BARNES OCT. 21, 2018

MEMPHIS — If you are a Verizon customer on the East Coast, odds are good that your cellphone or tablet arrived by way of a beige, windowless warehouse near Tennessee's border with Mississippi.

Inside, hundreds of workers, many of them women, lift and drag boxes weighing up to 45 pounds, filled with iPhones and other gadgets. There is no air-conditioning on the floor of the warehouse, which is owned and operated by a contractor. Temperatures there can rise past 100 degrees. Workers often faint, according to interviews with 20 current and former employees.

One evening in January 2014, after eight hours of lifting, Erica Hayes ran to the bathroom. Blood drenched her jeans.

She was 23 and in the second trimester of her first pregnancy. She had spent much of the week hoisting the warehouse's largest boxes from one conveyor belt to the next. Ever since she learned she was pregnant, she had been begging her supervisor to let her work with lighter boxes, she said in an interview. She said her boss repeatedly said no.

She fainted on her way out of the bathroom that day. The baby growing inside of her, the one she had secretly hoped was a girl, was gone.

"It was the worst thing I have ever experienced in my life," Ms. Hayes said.

Three other women in the warehouse also had miscarriages in 2014, when it was owned by a contractor called New Breed Logistics. Later that year, a larger company, XPO Logistics, bought New Breed and the warehouse. The

problems continued. Another woman miscarried there this summer. Then, in August, Ceeadria Walker did, too.

The women had all asked for light duty. Three said they brought in doctors' notes recommending less taxing workloads and shorter shifts. They said supervisors disregarded the letters.

Pregnancy discrimination is widespread in corporate America. Some employers deny expecting mothers promotions or pay raises; others fire them before they can take maternity leave. But for women who work in physically demanding jobs, pregnancy discrimination often can come with even higher stakes.

The New York Times reviewed thousands of pages of court and other public records involving workers who said they had suffered miscarriages, gone into premature labor or, in one case, had a stillborn baby after their employers rejected their pleas for assistance — a break from flipping heavy mattresses, lugging large boxes and pushing loaded carts.

They worked at a hospital, a post office, an airport, a grocery store, a prison, a fire department, a restaurant, a pharmaceutical company and several hotels.

But refusing to accommodate pregnant women is often completely legal. Under federal law, companies don't necessarily have to adjust pregnant women's jobs, even when lighter work is available and their doctors send letters urging a reprieve.

The Pregnancy Discrimination Act is the only federal law aimed at protecting expecting mothers at work. It is four paragraphs long and 40 years old. It says that a company has to accommodate pregnant workers' requests only if it is already doing so for other employees who are "similar in their ability or inability to work."

That means that companies that do not give anyone a break have no obligation to do so for pregnant women. Employees say that is how the warehouse's current owner, XPO Logistics, operates.

For example, last October, a 58-year-old woman died of cardiac arrest on the warehouse floor after complaining to colleagues that she felt sick, according to a police report and current and former XPO employees. In

Facebook posts at the time and in recent interviews, employees said supervisors told them to keep working as the woman lay dead.

If companies "treat their nonpregnant employees terribly, they have every right to treat their pregnant employees terribly as well," said Representative Jerrold Nadler, Democrat of New York, who has pushed for stronger federal protections for expecting mothers.

In every congressional session since 2012, a group of lawmakers has introduced a bill that would do for pregnant women what the Americans With Disabilities Act does for disabled people: require employers to accommodate those whose health depends on it. The legislation has never had a hearing.

"We are deeply troubled by these allegations," said a Verizon spokesman, Rich Young. "We have no tolerance — zero tolerance — for this sort of alleged behavior." He said the company opened an internal investigation in response to The Times's inquiry. "None of these allegations are consistent with our values or the expectations and demands of contractors that work directly for us or have any affiliation with us."

Erin Kurtz, an XPO spokeswoman, said: "We're surprised by the allegations of conduct that either predate XPO's acquisition of the Memphis facility or weren't reported to management after we acquired it in 2014." She said the allegations "are unsubstantiated, filled with inaccuracies and do not reflect the way in which our Memphis facility operates." The company also disputed that the warehouse was windowless, noting that there were a number of interior windows.

Ms. Kurtz said XPO prioritized the safety of its workers, had "no tolerance for any type of discriminatory behavior" and has enhanced pay and benefits for employees in recent years.

Those improvements didn't help Ceeadria Walker when she got pregnant. The 19-year-old said she gave her XPO supervisor a doctor's letter from OB/GYN Centers of Memphis saying she should not lift more than 15 pounds. She said she asked to be assigned to an area with lighter items. Ms. Walker said her supervisor regularly sent her to a conveyor belt line where she had to lift more than she was supposed to. She miscarried the day after spending her shift handling those heavier boxes.

"We're saddened that Ms. Walker had a miscarriage over the summer," Ms. Kurtz said. "We're investigating these newly raised claims."

## THE RISKS OF LIFTING

For most women, it is safe to work while pregnant.

But there is "a slight to modest increased risk of miscarriage" for women who do extensive lifting in their jobs, according to guidelines published this year by the American College of Obstetricians and Gynecologists. The recommendations are intended to inform doctors about best practices.

Two decades of medical research have established a link between physically demanding work and fetal death, though there is debate about how strong the connection is. Part of the difficulty in measuring the relationship, researchers say, is that it's impossible to design a study that isolates the impact of heavy lifting versus other risk factors, like pre-existing conditions.

In a peer-reviewed study from 2013, researchers in Denmark found that the risk of fetal death increased as women lifted heavier objects more frequently. The researchers theorized that lifting and bending could reduce blood flow to the uterus.

Another possibility, doctors said, is that extreme physical exertion diverts blood from a woman's womb to her muscles.

The potential dangers are greatest for women whose pregnancies are already classified as high risk, which is why doctors often advise that they be given easier tasks.

"When employers ignore these medical recommendations, they are potentially jeopardizing patients' health," said Rebecca Jackson, the chief of obstetrics and gynecology at San Francisco General Hospital. "It's especially bothersome to me that this is occurring for women in strenuous jobs, given that they are at the most risk of injuring themselves or the pregnancy."

Warehouses are among the fastest growing workplaces in the country, employing more than a million Americans. Retailers, competing against the

likes of Amazon, demand high speed at low costs.

On Memphis's east side, these are often the highest-paying jobs available for people without college degrees. Drawn by the proximity to rail lines and highways, some of the country's largest companies have set up distribution centers here. One dispatches Nike shoes. Another handles Disney toys. And a short drive from Graceland, Verizon has its hub.

XPO runs all of those warehouses. The Verizon facility, which XPO took over when it bought New Breed Logistics in 2014, is the only one where The Times interviewed workers about pregnancy discrimination. Shifts there can last 12 hours. Workers get 30 minutes for lunch and as many as three other 15-minute breaks.

XPO's 2017 employee handbook warns that taking unapproved breaks, arriving to work late or leaving early can result in "immediate termination," unless the reasons for the departures are "legally protected." The Pregnancy Discrimination Act does not guarantee women such protections.

## A JOB ON THE LINE

It was the fall of 2013, and Erica Hayes was convinced that she was having a girl. She daydreamed about the clothes she would buy and made a list of favorite names. Her friend was pregnant with a boy, and they talked about raising their children together.

At first, Ms. Hayes was processing individual shipments to Verizon customers — one phone, one charger, onto the next. Then, a crush of holiday orders hit the warehouse in December. She said that her boss began dispatching her to the area of the warehouse that handled bulk shipments, often destined for Verizon stores, where the warehouse was struggling to keep up. She often spent up to 12 hours a day lifting huge boxes, some with 20 iPads and 20 accessories.

She said she could have handled paperwork or stayed in the section of the warehouse devoted to small shipments. But she said her supervisor kept ordering her to work with the largest boxes. Ms. Hayes's mother said that her daughter talked to her about the rejected requests at the time.

Ms. Hayes said she began to bleed regularly at work. She sometimes left early to go to the hospital. Each time, she said, her supervisor wrote her up. As the demerits accumulated, she stopped leaving. Instead, she bled through four maxi pads a day.

“My job was on the line,” she said. At the end of a long shift in January 2014, she felt blood gushing into her jeans.

A co-worker fetched her a black peacoat to wrap around her waist to cover the spreading stain. Another grabbed plastic bags to line the leather driver’s seat of her 2003 Hyundai. Ms. Hayes fainted before she could get to the car. An ambulance took her to the hospital.

A couple of weeks later, she said, her supervisor handed her a $300 invoice for the cost of the ambulance ride. (Ms. Hayes, who still works at the warehouse and is hoping for a promotion, said she never paid the bill.)

That spring, two more women had miscarriages at the warehouse. Both said that their supervisors rejected their requests to pack lighter boxes.

One of the women, who still works at the warehouse, declined to be identified for fear of losing her job.

The other was Tasha Murrell. She already had two boys and was praying for a girl. She planned to name the baby Dallas, after the Cowboys, her favorite football team. Ms. Murrell said that she told her boss she was pregnant and asked to leave work early one day that spring because the lifting had become painful.

Her supervisor told her to get an abortion, according to a discrimination complaint she filed with the Equal Employment Opportunity Commission in April 2018. Ms. Murrell woke up the next morning to find her mattress stained with blood. Her husband drove her to the emergency room, where doctors told her she had miscarried. Ms. Murrell left the job last year and is now an organizer with the Teamsters, which is trying to organize a union at the warehouse.

Ms. Hayes and Ms. Murrell had the same supervisor: Amela Bukvic. Through her lawyer, Ms. Bukvic denied telling anyone to get an abortion. “I would never make such a horrible statement to anyone, especially an employee under my supervision,” she said.

Ms. Bukvic said that she made sure that the pregnant women whom she managed had workloads that were not excessive. She said she never denied help to the pregnant employees. “If they had any work restrictions, I always took all steps to make sure their work duties never exceeded those restrictions,” she said.

A few months later, in September 2014, it happened to another woman.

Chasisty Bee, 33, was four months pregnant. Hoping for a girl, she bought a newborn’s blanket from Burlington Coat Factory.

Ms. Bee had miscarried in 2008 while working at the Verizon warehouse. This time, she said, she brought in a doctor’s note recommending that she work shorter shifts, be given a chair and light duty. Supervisors rejected her requests. One afternoon, after almost 14 hours on her feet, she started feeling dizzy and crumpled to the warehouse floor. Her physician told her that she had miscarried.

After Ms. Bee got pregnant again in 2015, she found a new job. “I couldn’t bear to lose another child,” she said. The next February, she gave birth to a healthy girl.

Ms. Kurtz, the XPO spokeswoman, said: “The false and misleading allegations directed at our Memphis facility are fueled by the Teamsters and are part of their ongoing, but unsuccessful, attempts at organizing.”

## STALLED MOMENTUM

A bipartisan group of lawmakers has proposed upgrading the 1978 Pregnancy Discrimination Act. The bill would compel companies to accommodate pregnant women — for example, by offering extra breaks or the option of light duty — as long as it does not impose an “undue hardship” on their business. That is the same language used in the Americans With Disabilities Act.

Women “shouldn’t have to choose between keeping a doctor appointment or their job,” said Senator Dean Heller, Republican of Nevada, one of 125 co-sponsors of the Pregnant Workers Fairness Act in the House and Senate.

In 2015, it looked as if the bill might gain traction. The Supreme Court had just ruled in favor of Peggy Young, a UPS driver who was denied light duty after getting pregnant. Pregnancy discrimination was suddenly grabbing headlines.

But some Republicans, including Senator Lamar Alexander of Tennessee, where the XPO warehouse is, viewed that bill as adding a confusing new layer of regulations, according to Senate aides. Mr. Alexander, who is chairman of the Senate committee on health and labor, co-sponsored a competing bill. It expanded protections for pregnant women in some cases. But it still allowed employers to deny accommodations if they weren't being provided to other workers in similar situations.

"It was a useful mechanism in order to divert some of the momentum that was building," said Emily Martin of the National Women's Law Center, an advocacy group focused on women's rights.

Both bills stalled.

Outside Washington, there have been fewer roadblocks. At least 23 states have passed laws that are stronger than current federal protections (Tennessee is not among them). In Utah, Delaware, Colorado and New York, Republicans led the charge. In Nebraska, an anti-abortion Democrat pushed the measure.

"Women have lost their children due to the lack of robust pregnancy protections in the workplace," said Catherine Glenn Foster, the president of Americans United for Life, an anti-abortion group. "Anyone who can't get behind this or uses it as a political game — it's a travesty."

## 'I WATCHED HER DIE'

The problems extend beyond the warehouse floor — to hotels, restaurants, fire stations and stores.

At the Albertsons grocery store in Atascadero, Calif., Reyna Garcia had one of the toughest jobs. She pushed 200-pound carts, dragged sacks of cat litter and climbed 10-foot ladders to stock goods.

Ms. Garcia got pregnant in July 2012, found out she was having a girl and decided to name the baby Jade.

Ms. Garcia told her boss that her pregnancy was high risk — she had previously given birth prematurely. She presented a doctor's note saying she should not lift more than 15 pounds. The boss ignored the recommendation, according to a lawsuit she filed against Albertsons in federal court in Los Angeles.

"She was feeling like she wasn't getting any response from her supervisor," her doctor, Mareeni Stanislaus, said in an interview. She said the restrictions were "even more important" because Ms. Garcia had a high-risk pregnancy. Heavy lifting can prompt smooth muscles like the uterus to contract, potentially inducing preterm labor, Dr. Stanislaus said.

The regular twisting and hoisting caused intense pain, but Ms. Garcia needed the paycheck and the health insurance. She requested any other position — in the Albertsons bakery or at the meat counter or as a fruit cutter or in the pharmacy or at the customer service desk.

Her boss turned her down, according to the lawsuit, which included corroborating statements from her colleagues.

Her doctors sent two more notes. "She should avoid prolonged standing without a break and should avoid excessive bending and reaching and balancing," Dr. Stanislaus wrote. Copies of the letters were included in the suit.

About three weeks later, in the middle of her shift, Ms. Garcia began feeling "pelvic pressure," according to her lawsuit. She asked her boss for permission to leave early; he gave her a long list of tasks that she needed to finish first.

Ms. Garcia ended up working overtime. By the time she got home, she could feel her amniotic sac bulging between her legs. It felt "like a balloon coming out of me," she said in a sworn statement. She went to the emergency room. She could feel something scratching from inside; her doctor told her it was the baby's fingernails. She was 20 weeks pregnant.

Five days later, Ms. Garcia gave birth to Jade. The baby lived less than 10 minutes.

"My husband and I watched her die," Ms. Garcia said in her statement. "It was the most painful thing I have ever experienced."

In 2014, Albertsons settled Ms. Garcia's lawsuit for an undisclosed amount; the deal prohibited her from speaking publicly about what happened. "The company has a policy against pregnancy discrimination, and we accommodate employees with pregnancy-related disabilities in accordance with state and federal law," said Christine Wilcox, an Albertsons spokeswoman.

Ms. Garcia's boss demoted her when she returned to work.

"I lost my baby for this job," Ms. Garcia said, according to her lawsuit. "Why didn't you give me help when I was pregnant and asked for it?"

## HARD TO BREATHE

Workers at the Memphis warehouse thought conditions might improve when XPO Logistics acquired New Breed in September 2014.

At the time, XPO and its chief executive, Bradley S. Jacobs, were on a buying spree. His strategy was simple: slash expenses and deliver quick profits. Today XPO, based in Greenwich, Conn., has a market value of $12 billion.

The company has had multiple run-ins with regulators. In one instance, the California Labor Commissioner's Office last year awarded four XPO truck drivers a total of $855,000 after finding that the company had misclassified them as independent contractors.

In Memphis, XPO's ownership changed the warehouse, but not the way workers had hoped. Over the next couple of years, pressure on employees intensified and working conditions deteriorated, according to the 20 current and former employees. Supervisors began demanding that they pack 120 boxes an hour instead of 60. Some bosses penalized employees for spending too much time in the bathroom or on breaks.

Summer temperatures inside the warehouse regularly exceeded 100 degrees, the current and former employees said. It was so hot and humid that workers sometimes found it hard to breathe.

Every week from June through September 2017, at least one worker collapsed on the warehouse floor, the employees said. Supervisors took to wheeling the sick workers to the break room, where they sometimes received an ice pop.

On the morning of Oct. 17, 2017, Linda Neal crashed to the warehouse floor, dead of cardiac arrest.

Ms. Neal, 58, had suffered from heart problems. She previously had complained to her son, Dean Turner, that XPO supervisors would not let her leave early when she was feeling unwell, Mr. Turner said in an interview. That day, she had told managers that she was short of breath and asked for an extra break, but her supervisor rejected the request, according to Lakeisha Nelson, who witnessed the exchange and still works there. When Mr. Turner arrived at the warehouse, he said, three of his mother's colleagues told him the same thing.

Managers told workers to keep moving boxes as her body lay on the floor, according to four employees who were at the warehouse that day, as well as contemporaneous Facebook posts.

Ms. Kurtz, the XPO spokeswoman, said the company did allow workers to leave for the day after Ms. Neal died. She added that the Teamsters "continue to shamefully exploit the passing of our colleague through the spreading of false information" in their effort to organize at the warehouse.

That same month, Ceeadria Walker joined XPO. The pay was decent, about $12 an hour, an upgrade from her last job at a car-parts warehouse. At first, she didn't mind the frequent 12-hour shifts. But she learned she was pregnant in June 2018 and started feeling nauseated and dizzy at the end of the long days.

Ms. Walker said she gave her supervisor a doctor's note saying she should reduce the number of hours on her feet to avoid hurting herself or endangering her pregnancy. "They looked at it like it was nothing," she said.

There were days when XPO let her work in the “pit,” dealing with the paperwork for orders, but she said she spent most of July on the conveyor-belt line hoisting 45-pound boxes.

Ms. Walker toyed with leaving. But, she said, “I couldn’t just quit my job.” She was near the end of her first trimester and needed money. She planned to name the baby, her first child, after her boyfriend — Octavia for a girl, Octavius for a boy.

By the end of her shift on Aug. 4, Ms. Walker said she had handled hundreds of Verizon boxes. When she woke up bleeding at 6 a.m. the next day, her mother drove her to the doctor.

Two days later, Ms. Walker spoke with The Times. She was distraught. “This was going to be my first.”

Doris Burke contributed research.

**Related Coverage**

- Pregnancy Discrimination Is Rampant Inside America’s Biggest Companies JUNE 15, 2018

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SUZANNE BONAMICI
1ST DISTRICT, OREGON

2231 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
TELEPHONE: 202-225-0855
FAX: 202-225-9497

12725 SW MILLIKAN WAY, SUITE 220
BEAVERTON, OR 97005
TELEPHONE: 503-469-6010
TOLL FREE IN 1ST DISTRICT: 800-422-4003
FAX: 503-469-6018

http://Bonamici.house.gov

Congress of the United States
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Washington, DC 20515–3701

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INVESTIGATIONS AND OVERSIGHT

December 22, 2020

To Whom it May Concern:

As Chair of the Education and Labor Subcommittee on Civil Rights and Human Services, I would like to submit the attached letter from 1,000 Days on behalf of Representative Lucy McBath.

Sincerely,

Suzanne Bonamici

Suzanne Bonamici
Member of Congress

October 22, 2019

The Honorable Bobby Scott
Chairman
Committee on Education & Labor
U.S. House of Representatives
Washington D.C. 20515

The Honorable Virginia Foxx
Ranking Member
Committee on Education & Labor
U.S. House of Representatives
Washington D.C. 20515

The Honorable Suzanne Bonamici
Chairwoman
Committee on Education & Labor
Subcommittee on Civil Rights & Human Services
Washington, D.C. 20515

The Honorable James Comer
Ranking Member
Committee on Education & Labor
Subcommittee on Civil Rights & Human Services
Washington, D.C. 20515

RE: "Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694)"

Chairwoman Bonamici, Ranking Member Comer, Members of the Committee,

On behalf of 1,000 Days, I am writing to express our support for the *Pregnant Workers Fairness Act* (H.R. 2694). 1,000 Days is the leading nonprofit organization working in the U.S. and around the world to ensure women and children have the healthiest first 1,000 days. The 1,000-day window between the start of a woman's pregnancy and her child's second birthday is a period of both tremendous potential and enormous vulnerability.

H.R. 2694 requires employers to make reasonable accommodations for pregnant employees and ensures that workers cannot be discriminated or retaliated against for seeking those accommodations. This commonsense, bipartisan bill is similar to legislation already in place in 27 states, building upon protections outlined in the *Pregnancy Discrimination Act* [P.L.95-555]. H.R. 2694 would create a national standard ensuring that a woman's safety and well-being at work are not dependent on her zip code.

The care and support a woman receives during her pregnancy has a profound impact on the health and well-being of both herself and her child. However, too many women – particularly low-income women and those who work in physically demanding occupations – are put in the impossible position of having to risk their health or their pregnancy in order to continue working so they can pay their bills and put food on the table. When women are unable to receive necessary accommodations at work or are obliged to forgo their salary during pregnancy, they increase the risk of pregnancy complications. Similarly, when pregnant women are pushed out of the workforce, their financial well-being and access to employer-provided health insurance and other important benefits are compromised. This can have a long-term impact on a mother's health and that of her child.

1,000 Days commends Chairmen Nadler and Scott, as well as Representatives Katko, Herrera Beutler, and McBath for their leadership on this important legislation. The *Pregnant Workers Fairness Act* is vital to ensuring the long-term health and economic security of pregnant workers, their families and our communities. Thank you for the opportunity to share our views.

Sincerely,

Kathryn Stephens

Interim Executive Director
1,000 Days

1,000 Days
1020 19th Street, NW Suite 250 ■ Washington, DC 20036
www.ThousandDays.org

SUZANNE BONAMICI
1ST DISTRICT, OREGON

2231 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
TELEPHONE: 202-225-0855
FAX: 202-225-9497

12725 SW MILLIKAN WAY, SUITE 220
BEAVERTON, OR 97005
TELEPHONE: 503-469-6010
TOLL FREE IN 1ST DISTRICT: 800-422-4003
FAX: 503-469-6018

http://Bonamici.house.gov

**Congress of the United States**
**House of Representatives**
**Washington, DC 20515–3701**

COMMITTEE ON EDUCATION AND LABOR
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COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
SUBCOMMITTEES:
ENVIRONMENT
INVESTIGATIONS AND OVERSIGHT

December 22, 2020

To Whom it May Concern:

As Chair of the Education and Labor Subcommittee on Civil Rights and Human Services, I would like to submit the attached letter from business groups on behalf of Representative Lucy McBath.

Sincerely,

Suzanne Bonamici

Suzanne Bonamici
Member of Congress

## An open letter in support of the Pregnant Workers Fairness Act from leading private-sector employers

May 14, 2019

Dear Members of Congress,

Women's labor force participation is critical to the strength of our companies, the growth of our economy and the financial security of most modern families. The private sector and our nation's elected leaders must work together to ensure that working women and families have the protections and opportunities they need to participate fully and equally in the workplace. This Mother's Day, eight leading companies have come together in support of working mothers and mothers-to-be by calling on Congress to pass the bipartisan Pregnant Workers Fairness Act, without delay.

More than 40 years ago, Congress passed the Pregnancy Discrimination Act of 1978, which made it illegal to discriminate against most working people on the basis of pregnancy, childbirth or related medical conditions. Since that time, 25 states have passed legislation expanding protections for pregnant workers – and many employers have done the same. It's now time to clarify and strengthen existing federal protections for pregnant workers by passing the Pregnant Workers Fairness Act. This bill would ensure that pregnant women who want to continue working receive reasonable accommodations so they can do so.

This past weekend, families across the nation honored the extraordinary mothers in their lives. As a business community, we strive to better support working mothers and mothers-to-be every day. We urge the passage of the Pregnant Workers Fairness Act as an important step toward ensuring the health, safety and productivity of our modern workforce – and the workforce of tomorrow that they will help raise.

*Signed*:

**Adobe**
San Jose, California

**Amalgamated Bank**
New York, New York

**ICM Partners**
Los Angeles, California

**L'Oréal USA**
New York, New York

**Levi Strauss & Co.**
San Francisco, California

**Microsoft Corporation**
Redmond, Washington

**Spotify**
New York, New York

**U.S. Women's Chamber of Commerce**
Washington, District of Columbia

SUZANNE BONAMICI
1ST DISTRICT, OREGON

2231 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
TELEPHONE: 202-225-0855
FAX: 202-225-9497

12725 SW MILLIKAN WAY, SUITE 220
BEAVERTON, OR 97005
TELEPHONE: 503-469-6010
TOLL FREE IN 1ST DISTRICT: 800-422-4003
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http://Bonamici.house.gov

**Congress of the United States**
**House of Representatives**
**Washington, DC 20515–3701**

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December 22, 2020

To Whom it May Concern:

As Chair of the Education and Labor Subcommittee on Civil Rights and Human Services, I would like to submit the attached letter from health care groups on behalf of Representative Lauren Underwood.

Sincerely,

Suzanne Bonamici

Suzanne Bonamici
Member of Congress

October 21, 2019

Subcommittee Chairwoman Bonamici and Ranking Member Comer
Civil Rights and Human Services Subcommittee
House Education and Labor Committee
2176 Rayburn House Office Building
Washington, DC 20515

**RE: Support the Pregnant Workers Fairness Act (H.R. 1975)**

Dear Chairwoman Bonamici and Ranking Member Comer:

As organizations that represent health care providers and public health professionals who strive to improve the health of women and babies across the country, we urge you to support the Pregnant Workers Fairness Act (H.R. 2694). This bill is critically important because no one should have to choose between having a healthy pregnancy and a paycheck.

Three-quarters of women will be pregnant and employed at some point in their lives. Most pregnant people can expect a normal pregnancy and healthy birth. However, some pregnant women will need to make minor adjustments in their work activities, as recommended by their health care providers, in order to sustain a healthy pregnancy. These medically necessary accommodations can include allowing frequent bathroom breaks, opportunities to stay hydrated, lifting restrictions, or access to a chair or stool to decrease time spent standing.

Unfortunately, too many pregnant workers face barriers to incorporating even these small changes to their workdays, changes that would help safeguard a healthy pregnancy or prevent harm to a higher-risk pregnancy. They are denied simple, no-cost or low-cost, temporary adjustments in their work settings or activities and instead risk being fired or forced to take unpaid leave. When that happens, the impact on both mother and baby may be long-lasting and severe. One of the main predictors of a healthy pregnancy is early and consistent prenatal care. Loss of employment and health benefits impact family resources, threatening the ability to access vital health care when a woman needs it the most.

The Pregnant Workers Fairness Act is a measured approach to a serious problem. Modeled after the Americans with Disabilities Act, the bill would require employers to provide reasonable, temporary workplace accommodations to pregnant workers as long as the accommodation does not impose an undue hardship on the employer.

As public health professionals and health care providers, we understand the importance of reasonable workplace accommodations to ensure that women can continue to care for their families and have safe and healthy pregnancies. As such, we pledge our support for the Pregnant Workers Fairness Act and urge you to cosponsor this critical legislation.

Sincerely,

American Academy of Family Physicians
American Academy of Pediatrics
American Public Health Association
American College of Nurse-Midwives
American College of Obstetricians and Gynecologists
Association of Women's Health, Obstetric and Neonatal Nurses
National Alliance to Advance Adolescent Health
Physicians for Reproductive Health

CC: Chairman Scott and Ranking Member Foxx

[Additional submissions by Ms. Fudge follow:]

NELA
Advocates for Employee Rights
National Employment Lawyers Association

October 18, 2019

Subcommittee Chairwoman Bonamici and Ranking Member Comer
Civil Rights and Human Services Subcommittee
House Education and Labor Committee
2176 Rayburn House Office Building
Washington, DC 20515

**Re: National Employment Lawyers Association Supports The Pregnant Workers Fairness Act**

Dear Member of Congress:

On behalf of the National Employment Lawyers Association (NELA), and its 4,000 circuit, state, and local affiliate members across the country, we write to express our strong support for passage of the Pregnant Workers Fairness Act (PWFA) (H.R. 2417).

NELA is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Our members have first-hand experience with the challenges faced by pregnant women who want nothing more than to keep working through a pregnancy and who often *must* keep working because they and their families need the income.

We urge you to support the Pregnant Workers Fairness Act, which is crucial to protecting working women who are pregnant. This bipartisan legislation is long overdue for the well-being and economic security of workers and the well-being of women and families, in particular. For many working women what is needed to be able to safely work through many months of pregnancy, is a reasonable accommodation.

There has been a dramatic shift in the demographic make-up of the workforce in the past few decades. Women now comprise almost half of the workforce. There are more pregnant workers than ever before and pregnant women are working later into their pregnancies. Some working women—especially those in physically demanding jobs—will have a medical need for a temporary job-related accommodation in order to maintain a healthy pregnancy. Yet, today, in 2019, it is all-too-common that instead of providing a pregnant worker with an accommodation, her employer will fire her or push her onto unpaid leave, and thereby deprive her of a paycheck and health insurance at a time when she needs them most. Equally problematic, is the fact that some women, because of the necessity of income and insurance, will continue to work in ways that are dangerous to her and to her pregnancy.

Pregnancy discrimination affects women across race and ethnicity, but women of color and immigrants are at particular risk. Latinas, Black women and immigrant women are more likely to

National Office • 2201 Broadway, Suite 310 • Oakland, California • 94612 • TEL 415.296.7629
Washington DC Office • 1828 L Street, NW, Suite 600 • Washington DC • 20036 • TEL 202.898.2880
email: nelahq@nelahq.org • www.nela.org • FAX 866.593.7521

hold low wage, physically demanding jobs that involve daily physical labor. Cashiers, food service workers, home health aides, and other domestic workers must do physically challenging work and the prevalence of women in these jobs is significant. Physically demanding jobs heighten the importance and urgency of a woman's ability to get a reasonable accommodation. Because many of these positions are low-wage jobs, *any* loss of wages and potential loss of health insurance due to pregnancy discrimination are likely to pose a serious economic threat to the worker and her family. American families and the American economy depend on women's income. We cannot afford to force pregnant women out of work.

In 2015, in *Young v. United Parcel Service*, the Supreme Court held that a failure to make accommodations for pregnant workers with medical needs will *sometimes* violate the Pregnancy Discrimination Act of 1978 (PDA). Even after *Young*, pregnant workers continue to be denied the accommodations they need and employers lack clarity as to their obligations under the law. The Pregnant Workers Fairness Act will provide a clear, predictable rule: employers *must* provide reasonable accommodations for limitations arising out of pregnancy, childbirth, or related medical conditions, unless this would pose an undue hardship. If this bill is passed, pregnant workers *and* their employers, will fare better. For pregnant women the bill will improve their working conditions and certainty of retaining income. For businesses that want to do the right thing, the clarity and streamlined process for providing a reasonable accommodation will simplify the decisions with which employers are faced.

The need for this legislation is recognized across ideological and partisan lines. Twenty-seven states have adopted pregnant worker fairness measures with broad, and often unanimous, bipartisan support. Twenty-two of those laws have passed within the last six years. These states include: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, Texas, Utah, West Virginia, Vermont, and Washington. Lawmakers have concluded that accommodating pregnant workers who need it is a measured approach grounded in family values and basic fairness.

The Pregnant Workers Fairness Act promotes long-term economic security and workplace fairness. The bill also promotes healthy women and babies. All of these should be considered vital goals.

The choice between risking a job and risking the health of a pregnancy is one no one should have to make. For all of these reasons, we urge you to co-sponsor the Pregnant Workers Fairness Act. If you have questions or cannot access this attachment, please feel free to reach out to me at lflegel@nelahq.org (202) 898-2880 ext. 115.

Sincerely,

Laura M. Flegel

Laura Flegel
Legislative & Public Policy Director
National Employment Lawyers Association
lflegel@nelahq.org



CC: Chairman Scott and Ranking Member Foxx

October 22, 2019

The Honorable Suzanne Bonamici
Chairwoman
Subcommittee on Civil Rights and Human Services
Education and Labor Committee
U.S. House of Representatives
Washington, D.C. 20515

Honorable James Comer
Ranking Member
Subcommittee on Civil Rights and Human Services
U.S. House of Representatives
Washington, D.C. 20515

ACLU
AMERICAN CIVIL LIBERTIES UNION

National Political Advocacy Department

915 15th Street NW
6th FL
Washington DC 20005
aclu.org

Susan Herman
*President*

Anthony Romero
*Executive Director*

Ronald Newman
*National Political Director*

RE: **Statement in Support of the "*Long Overdue: Exploring the Pregnant Workers' Fairness Act (H.R. 2694)*" Hearing**

Dear Chair Bonamici and Ranking Member Comer:

On behalf of the American Civil Liberties Union (ACLU), we submit this statement for the record and offer our thanks for convening this critical hearing to examine the plight of pregnant workers and the promise of the Pregnant Workers Fairness Act (H.R. 2694). We also extend our thanks to Rep. Bobby Scott, chair of the Education and Labor Committee, for his support of this hearing and of the Pregnant Workers Fairness Act.

The ACLU is a nonpartisan public interest organization with more than 4 million members and supporters, and 53 affiliates nationwide dedicated to protecting the principles of freedom and equality set forth in the Constitution. For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve individual rights and civil liberties.

We have long fought to advance women's equality and opportunity by challenging laws and policies that discriminate against women in the workplace and by dismantling the stereotypes that constrained women's full engagement and participation at work.[1] Although the Pregnancy Discrimination

[1] *See* Lenora Lapidus & Ariela Migdal, ACLU Women's Rights Project, *Fighting Sex Stereotypes in the Law: Reflections on 40 Years of the ACLU Women's Rights Project* (2012), at https://www.aclu.org/sites/default/files/field_document/2012.12.20_released_version_of_wrp_40th_report.pdf

Act has played a critical role over the past 40 years in securing women's place in the workforce, too many women continue to be marginalized at work because of their decision to become pregnant and have children. This kind of discriminatory treatment has become most obvious when pregnant workers – predominantly women in physically demanding or male-dominated jobs, low-wage workers, and women of color – request temporary accommodations to address a medical need and instead are terminated or placed on unpaid leave, causing devastating economic harm.

We strongly support the Pregnant Workers Fairness Act and urge Congress to step in and provide employers and pregnant workers the support and clarity that is needed.

### A. Pregnancy Discrimination, the PDA, and *Young v. United Parcel Service, Inc.*

Pregnancy and childbirth are often locus points for discrimination against women in the workforce. Policies excluding or forcing the discharge of pregnant women from the workplace were common in the 1970s and reflected the stereotype that a woman's primary or sole duties were to be a homemaker and raise children. The adoption of the Pregnancy Discrimination Act (PDA) in 1978, an amendment to Title VII of the Civil Rights Act of 1964, established that discrimination because of "pregnancy, childbirth, and related medical conditions" was a form of discrimination "because of sex."[2] It was intended to dismantle the stereotype, and the policies based on it, that viewed pregnant women's labor force participation as contingent, temporary, and dispensable without regard to their individual capacity to do the job in question.[3]

The PDA also mandated that pregnant workers "be treated the same for all employment-related purposes…as other persons not so affected but similar in their ability or inability to work."[4] This meant that employers were required to treat pregnant workers the same as other temporarily disabled workers because Congress recognized that working women contributed to their families' economic stability and should not have to choose between a career and continuing a pregnancy.[5]

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[2] 42 U.S.C. § 2000e(k).
[3] *See, e.g.*, Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 Harv. C.R.-C.L. L. Rev. 415, 484 (2011); Joanna Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 Geo L.J. 567 (2010).
[4] 42 U.S.C. § 2000e(k).
[5] Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 Yale J.L. & Feminism 15, 33 (2009) (the statute "specifically requires equal treatment with a defined comparison group – workers who are temporarily disabled by causes other than pregnancy, but 'similar in their ability or inability to

Despite the PDA, pregnancy discrimination persists[6] and for many years courts routinely ruled against workers who brought pregnancy accommodation cases where they alleged discrimination when an employer provided a job modification to an employee temporarily unable to work but failed to do the same for a pregnant worker. The most common fact pattern concerned an employer that maintained a policy of accommodating only employees whose impairments arose from on-the-job injuries – a definition that necessarily excluded pregnant workers. In most cases, courts determined that such workers were insufficiently "similar" to pregnant workers to warrant the "same" treatment, and thus failed to make out a *prima facie* case – *i.e.*, that similarly-situated non-pregnant workers were treated more favorably.[7] The exceptions to this negative track record chiefly were disparate treatment cases where an employer was shown to have granted accommodations to non-pregnant workers with non-work-related injuries or illnesses, notwithstanding its policy to the contrary.[8]

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work.'"); Daniela M. de la Piedra, *Flirting with the PDA: Congress Must Give Birth to Accommodation Rights that Protect Working Women,* 17 Colum. J. Gender & L. 275, 285-86 (2008).

[6] *See, e.g.*, U.S. Equal Employment Opportunity Commission, "Pregnancy Discrimination Charges, EEOC & FEPAs Combined: FY 1997-2011, available at https://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm; National Partnership on Women and Families, *Listening to Mothers: The Experiences of Expecting and New Mothers in the Workplace* (Jan. 2014), available at http://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf; Jessica Silver-Greenberg & Natalie Kitroeff, "Miscarrying at Work: The Physical Toll of Pregnancy Discrimination," *The New York Times* (Oct. 21, 2018), available at https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html; Natalie Kitroeff & Jessica Silver-Greenberg, "Pregnancy Discrimination is Rampant Inside America's Biggest Companies," *The New York Times* (June 15, 2018), available at https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html; Jessica Silver-Greenberg & Natalie Kitroeff, "Miscarrying at Work: The Physical Toll of Pregnancy Discrimination," *The New York Times* (Oct. 21, 2018), available at https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html.

[7] *Compare Ensley-Gaines v. Runyon*, 100 F. 3d 1220, 1226 (6th Cir. 1996) (reversing summary judgment for employer, finding favorable treatment of employees with on-the-job injuries sufficient to satisfy fourth prong of *prima facie* case) *with Serednyj v. Beverly Healthcare, LLC*, 656 F. 3d 540, 547, 552 (7th Cir. 2011) (affirming summary judgment where policy accommodated only workers injured on the job or workers qualifying for accommodation under the ADA; plaintiff could not make out fourth prong); *Reeves v. Swift Transp. Co.*, 446 F. 3d 637, 640, 643 (6th Cir. 2006) (affirming summary judgment; reserving accommodations for employees with occupational injuries showed no intent to discriminate); *Spivey v. Beverly Enterprises, Inc.*, 196 F. 3d 1309, 1312, 1314 (11th Cir. 1999) (affirming summary judgment where on-the-job injuries accommodated; plaintiff neither was "qualified" nor could show she was treated less well than co-workers with impairments incurred off-the-job); *Urbano v. Continental Airlines, Inc.*, 138 F. 3d 204, 206, 208 (5th Cir. 1998) (same).

[8] Additionally, with respect to lactating workers' need to pump breast milk at work, several courts even declined to find lactation a "medical condition" that is "related" to pregnancy under the PDA. *See, e.g.*, *Ames v. Nationwide Mutual*, 2012 WL 12861597 (S.D. Iowa Oct. 16, 2012), *aff'd* 747 F.3d 509 (8th Cir. 2014); *Martinez v. NBC,* 49 F. Supp. 2d 305, 309-10 (S.D.N.Y. 1999); *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869-70 (W.D. Ky. 1990), *aff'd*, 951 F.2d 351 (table), 1991 WL 270823

In *Young v United Parcel Service, Inc.*,[9] the Supreme Court granted certiorari to resolve a split in the Circuits and for the first time addressed the PDA's application in the context of an employee who needed an accommodation due to pregnancy. The Court concluded that the statute's mandate applied with equal force in these circumstances and articulated a modified analysis for failure-to-accommodate cases. Under the new standard, a plaintiff makes out a *prima facie* case if she shows that (1) she belongs to a protected class; (2) that she sought accommodation; (3) that the employer did not accommodate her; (4) that the employer did accommodate others similar in their ability or inability to work.[10]

The Court also offered a new pretext analysis that plaintiffs may rely on when litigating claims under the PDA's second clause. After the employer put forward "'legitimate, nondiscriminatory' reasons for denying her accommodation," the plaintiff could reach a jury "by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers and that the employer's . . . stated 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."[11] According to the Court, the key questions are feasibility and fairness: "[W]hy, when the employer accommodated so many, could it not accommodate pregnant women as well?"[12]

Since *Young*, the reflexive approval of employer policies favoring workers with occupational injuries has largely disappeared; indeed, the mere existence of such a policy has been found sufficient to satisfy the fourth prong of the *prima facie* case.[13] (The case of ACLU's client, Michelle Durham, is an unfortunate notable exception to this trend, and is discussed further *infra*.) However, the bright-line deference to employer policies, and the overbroad reading of such policies as "pregnancy-blind," has been replaced, in many instances, with an unduly

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(6th Cir. 1991) (*per curiam*); *see also* Stephanie Bornstein, Work, Family, and Discrimination at the Bottom of the Ladder, 19 Geo. J. on Poverty L. & Pol'y 1, 8, 11 (Winter 2012). And even when a landmark appellate decision rejected such precedent, it still stopped short of finding that the PDA required employers to *accommodate* lactating employees. *E.E.O.C. v. Houston Funding II Ltd.*, 717 F.3d 425, 429 n.6 (5th Cir. 2013).

[9] 135 S. Ct. 1338 (2015)
[10] *Id.* at 1354.
[11] *Id.* at 1343.
[12] *Id.* at 1355.
[13] *See Legg v. Ulster Cty.*, 820 F.3d 67, 70 (2d Cir. 2016) (citing *Young*, reversing judgment for employer because policy of accommodating employees injured on the job, while "facially neutral with respect to pregnancy," could support finding of intent if inadequately justified); *Bray v. Town of Wake Forest*, No. 5:14-CV-276, 2015 WL 1534515, at *6 (E.D.N.C. Apr. 6, 2015) (motion to dismiss denied where plaintiff alleged two male colleagues with similar physical limitations resulting from work-related injuries had been granted light duty); *Elease S., Complainant*, EEOC DOC 0120140731, 2017 WL 6941010, at *5 (Dec. 27, 2017).

demanding standard for plaintiffs in making a showing of differential treatment – even at the initial pleading stage, prior to having the benefit of discovery. These cases fall into three main categories: (1) the court finds the plaintiff has failed to identify individual comparators, even though the employer's stated policy (or past practice) shows accommodation of non-pregnant workers; (2) the plaintiff identifies comparators, but the court refuses to find them "comparable"; and/or (3) notwithstanding the merits of the plaintiff's comparator evidence, the court refuses to consider other probative, circumstantial evidence of discrimination. All of these trends undermine *Young*'s intent of demanding that employers justify failures to accommodate pregnancy. Instead, they impose unwarranted – and often insurmountable – burdens of proof on pregnant workers that increasingly confer "least favored nation" status on the protected trait of pregnancy.

Requiring individual comparators. Since *Young*, courts have granted motions to dismiss – that is, they have foreclosed pregnant workers' ability to challenge failures to accommodate prior to those workers even having the opportunity to conduct discovery – based on the plaintiff's failure to identify individual non-pregnant comparators who received accommodations.[14] Others have granted summary judgment for the same reason.[15] The burden of identifying specific individual comparators before discovery is an impossible one for many PDA plaintiffs. The plaintiff might be new to the work environment, or she may work in just one department or location of a large employer. In any event, accommodation decisions regarding her colleagues are likely to be (appropriately) confidential. And even after discovery, identification of comparators can be difficult; at a smaller employer, for instance, the plaintiff might be the first person, or one of the first, to seek an accommodation. Tethering a pregnant worker's ability to vindicate her statutory rights to the vagaries of her employer's workforce contravenes Congress's intent of assuring pregnancy does not drive women out of the workforce.

Overly restrictive standards for comparators. Courts have also taken an unduly narrow approach to the question of who can be a proper comparator under the PDA. Overly strict standards for comparators have included requiring a similar *source* of impairment,[16] similar *type* of impairment,[17] and the same supervisor or

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[14] *See LaCount v. S. Lewis SH OPCO, LLC*, No. 16-CV-0545, 2017 WL 1826696, at *5 (N.D. Okla. May 5, 2017), *reconsid. denied*, No. 16-CV-0545, 2017 WL 2821814 (N.D. Okla. June 29, 2017); *Anfeldt v. United Parcel Serv., Inc.*, No. 15 C 10401, 2017 WL 839486, at *3 (N.D. Ill. Mar. 3, 2017).
[15] *See Washington v. Donahoe*, No. CV-13-02444, 2016 WL 9455309, at *5 (D. Ariz. Mar. 31, 2016), *aff'd*, 692 F. App'x 486 (9th Cir. 2017); *Sanchez-Estrada v. MAPFRE PRAICO Ins. Co.*, 126 F. Supp. 3d 220 (D.P.R. 2015), *app. dismissed*, No. 15-2221 (1st Cir. Jan. 15, 2016).
[16] *See LaCount*, 2017 WL 1826696, at *5 (employees needing accommodation due to ADA-qualifying disabilities with no appropriate comparators); *Washington*, 2016 WL 9455309, at *5 (comparators granted time off for non-medical reasons not "similar").
[17] *See Jackson v. J.R. Simplot Co.*, 666 Fed. App'x 739, 743 (10th Cir. 2016) (employees needing light duty due to lifting restrictions not comparable to pregnant employee needing limited exposure to chemicals); *LaCount*, 2017 WL 1826696, at *5 (granting motion to dismiss because plaintiff did "not

work location.[18] This reasoning defies the Supreme Court's recognition in *Young* that the proper focus is on the comparator's ability or inability to work, full stop. Courts also have refused to consider as comparators pregnant workers whose pregnancies distinguished them from the plaintiff – such as by needing different accommodations, or needing no accommodations at all.[19]

Ignoring traditional evidence of pretext. As previously discussed, *Young* outlined a modified standard for proving pretext in failure-to-accommodate claims.[20] But in outlining this new pretext standard, the Court also left undisturbed the "longstanding rule that a plaintiff can use circumstantial proof" of an employer's discriminatory *animus*[21] – such as hostile statements, shifting reasons for its actions, or failure to comply with its own policies. Alarmingly, some post-*Young* courts alarmingly appear to consider comparator evidence now to be the predominant route, if not the *sole* one, by which a plaintiff may make out the fourth prong of the *prima facie* case or create a question of fact as to pretext.[22] This approach further narrows pregnant workers' protections, in plain contravention of the PDA's plain terms, PDA jurisprudence, and *Young*'s specific interpretive directives.

B. **ACLU Clients Harmed by the Failure to Accommodate Pregnancy**

Long before the Supreme Court took up the issue of pregnancy accommodation in *Young*, the ACLU represented pregnant workers denied the job modifications needed to continue doing their jobs. Unfortunately, since *Young*, our PDA docket on behalf of such clients – both as direct counsel and as lead *amicus* – has remained full. Below is a sampling of our past and recent cases.

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explain what physical or mental impairments the [other] employees had or how the employees were accommodated").

[18] *See Washington*, 2016 WL 9455309, at *5; *Lawson v. City of Pleasant Grove*, 2016 WL 2338560, at *10 n.6.

[19] *See Mercer v. Gov't of the Virgin Islands Dep't of Educ.,* No. 2014-50, 2016 WL 5844467, at *11 (D.V.I. Sept. 30, 2016); *Luke v. CPlace Forest Park SNF, LLC*, No. 12-00402, 2016 WL 4247592, at *3 (M.D. La. Aug. 9, 2016); *Lawson*, 2016 WL 2338560, at *9-10; *Frederick v. State of New Hampshire*, No. 14-cv-403, 2016 WL 4382692, at *9-10 (D.N.H. Aug. 16, 2016) (motion to dismiss granted where breastfeeding plaintiff pointed only to other lactating employees granted). *But see Martin v. Winn-Dixie Louisiana, Inc.*, 132 F. Supp. 3d 794, 819 (M.D. La. 2015) (favorable treatment of coworkers probative evidence of pretext); *Gonzales v. Marriott Int'l, Inc.*, 142 F. Supp. 3d 961 (C.D. Cal. 2015) (evidence that other workers, including other lactating employees, were provided accommodations was sufficient to establish *prima facie* case).

[20] *Young*, 135 S. Ct. at 1343.

[21] *Id.* at 1355.

[22] *Jackson*, 666 Fed. App'x at 742-43; *Jones v. Brennan*, No. 16-CV-0049, 2017 WL 5586373, at *8 n.8 (N.D. Okla. Nov. 20, 2017); *LaCount*, 2017 WL 1826696, at *5; *Luke*, 2016 WL 4247592, at *3; *Lawson*, 2016 WL 2338560, at *11; *Salmon v. Applegate Homecare & Hospice, LLC*, 1:13-CV-001092016 WL 389987 (D. Utah Feb. 1, 2016).

*Lochren v. Suffolk County*[23]: In one of the earliest PDA accommodation cases and one of the few pre-*Young* victories, ACLU and the New York Civil Liberties Union represented Sandra Lochren and five other police officers in a lawsuit against the Suffolk County Police Department (SCPD) for refusing to temporarily reassign pregnant officers to desk work and other non-patrol jobs, even though it did so for officers injured on the job. But for those officers who opted to keep working patrol, SCPD also failed to provide bullet-proof vests or gun belts that would fit pregnant officers. As a result, pregnant officers' only safe option was to go on unpaid leave long before their due date. In 2006, a federal court found SCPD's policy discriminatory. As a result, it changed its policy to cover pregnant officers.

*Cole v. SavaSeniorCare*: When Jaimie Cole, a certified nursing assistant, was in her third trimester, she developed a high risk of preeclampsia, a condition that can lead to preterm labor or even death. Her doctor advised her not to do any heavy lifting. Cole's job required her to regularly help patients in and out of bed and assist with bathing, so she asked for a temporary light duty assignment. Instead, her employer sent her home without pay for the rest of her pregnancy because, according to her supervisor, pregnant women weren't eligible for light duty. Under the settlement negotiated by the ACLU and ACLU of North Carolina in 2014 after filing a U.S. Equal Employment Opportunity Commission (EEOC) charge of discrimination, SavaSeniorCare adopted a new policy ensuring that pregnant workers get light duty or other accommodations on the same terms as other employees needing temporary job changes.

*Myers v. Hope Healthcare Center*[24]: Asia Myers, a certified nursing assistant, experienced complications early in her pregnancy and was told by her doctor that she could continue to work, but should not do any lifting on the job. Although Hope Healthcare Center had a history of providing light duty to workers with temporary lifting restrictions, including workers who had been injured on the job, Myers was told not to return to work until her restrictions were lifted. As a result, she was out of work for over a month with no income or health insurance coverage. Myers was able to return to work after her complications had passed, but she suffered significant financial hardship. Under the settlement negotiated by the ACLU and ACLU of Michigan in 2015, the company adopted a pregnancy accommodation policy.

*Hicks v. City of Tuscaloosa*[25]: Stephanie Hicks, an narcotics investigator with the Tuscaloosa Police Department in Alabama, wanted to breastfeed her new baby, but her bulletproof vest was restrictive, painful, and prone to causing infection in her breasts. She asked for a desk job so that she would not need to wear a vest for protection, but her employer refused, even though it routinely granted desk jobs to

[23] No. 08-2723-cv (E.D.N.Y.).
[24] No. 2:13-cv-14459 (E.D. Mich.).
[25] 870 F.3d 1253 (2017).

officers unable to fulfill all of their patrol duties. Instead, her employer only offered her an ill-fitting vest that put her at risk. Hicks quit her job rather than perform it unsafely. She won at trial, but her employer appealed. The ACLU, along with the Center for WorkLife Law, submitted an amicus brief arguing that accommodation of the need to pump was covered by the *Young* paradigm. The Eleventh Circuit agreed, affirming the jury verdict for Hicks and becoming the first appellate court to extend *Young* to employees who are breastfeeding.

*Luke v. CPlace SNF, LLC*[26]: Nursing assistant Eryon Luke was denied accommodation of her lifting restriction during her pregnancy, even though her employer routinely allowed assistants to seek assistance with lifting and had mechanical lifts available for such a purpose, as well. In 2016, the district court ruled against Luke, finding she had failed to identify sufficient comparators to make out a PDA claim.[27] The ACLU, the ACLU of Louisiana, A Better Balance, and the Center for WorkLife Law authored an amicus brief in support of Luke. Unfortunately, the U.S Court of Appeals for the Fifth Circuit affirmed the lower court's ruling, erroneously eschewing the *Young* analysis, instead concluding that lifting was an "essential function" of Luke's job and further, that her inability to fulfill that function – which of course was the very reason she needed accommodation – justified her discharge.

*LaCount v. S. Lewis SH OPCO, LLC*[28]: Nursing assistant Whitney LaCount was denied accommodation of her lifting restriction during her pregnancy, even though the facility where she worked had a policy of accommodating non-pregnant workers with various limitations, after her supervisor deemed her a "liability." In 2016, the district court dismissed LaCount's complaint because she had not identified individual comparators, despite the existence of those policies and despite the explicit bias reflected by the employer's statement.[29] The ACLU, ACLU of Oklahoma, and the Center for WorkLife Law drafted an *amicus* brief urging reversal. The U.S. Equal Employment Opportunity Commission also submitted a supportive brief. The parties settled prior to oral argument.

*Legg v. Ulster County*[30]: Corrections Officer Ann Marie Legg was denied temporary assignment to light duty during her pregnancy, even though Ulster County gave such assignments to guards injured on the job. In her third trimester, Legg had to intervene in an inmate fight, prompting her to go on leave rather than face future risks. After a trial, a federal judge in 2017 refused to find that the County's policy imposed a discriminatory disparate impact on pregnant workers,

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[26] 747 Fed. App'x 978 (5th Cir. 2019).
[27] *Luke v. CPlace SNF, LLC*, No. 13-00402-BAJ-EWD, 2016 WL 4247592 (M.D. La. Aug. 9, 2016).
[28] No. 17-5075 (10th Cir.).
[29] No. 16–CV–0545–CVE–TLW, 2017 WL 1826696 (N.D. Okla. May 5, 2017), reconsideration denied, No. 16-CV-0545-CVE-TLW, 2017 WL 2821814 (N.D. Okla. June 29, 2017).
[30] No. 17-2861 (2d Cir.).

employees continue to be disadvantaged—and often discriminated against—in the workplace, see Brief of Law Professors et al. as Amici Curiae 37–38. [52]

"Legislation enacted under § 5 must be targeted at 'conduct transgressing the Fourteenth Amendment's substantive provisions,'"[53] but Congress is not limited to narrowly prohibiting acts forbidden by the Fourteenth Amendment itself.[54] Instead, "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."[55] In particular, use of Section Five power is appropriate to remedy or deter constitutional violations involving "subtle discrimination that may be difficult to detect on a case-by-case basis." The Pregnant Workers Fairness Act does just this:[56] its reasonable accommodation framework relieves individual employees of the burden of proving that an employer's inflexible imposition of workplace standards reflects sex stereotyping that flows from the invidious assumption that pregnant workers are not competent or committed workers;[57] it would remedy and deter unconstitutional sex stereotyping in the hiring and promotion of young potentially pregnant women.[58]

## V. Accommodating workers is good for business.

In July of 2019, ten major companies from across states and industries sent an open letter to Congress in support of the Pregnant Workers Fairness Act.[59] The letter, signed by Adobe, Amalgamated Bank, Chobani, Cigna Corp., Facebook, ICM Partners, L'Oreal USA, Levi Strauss & Co., Microsoft Corporation, and Spotify, as well as the US Women's Chamber of Commerce, underscored that women's labor force participation is critical to the strength of companies and the growth of the national economy. These employers recognize that the passage of the Pregnant Workers Fairness Act would be an important step to ensuring the health, safety, and productivity of the modern workforce, because accommodating pregnant workers is not only good for working women and families, it is good for business.

Experience implementing the Americans with Disabilities Act demonstrates the business benefits of reasonable accommodation. A survey by the Job Accommodation Network (JAN), a technical assistance provider to the Department of Labor, found that the majority of employers that provided accommodations to employees with disabilities reported that the accommodations did not impose any new costs on the employer.[60] Of those employers that reported a cost for accommodations, the majority reported a one-time cost of $500 or less.[61] Because accommodations provided to pregnant workers are temporary, the costs associated with these accommodations, if any, are likely to be substantially less than the already low costs associated with providing accommodations to workers with permanent disabilities.

Employers also report significant benefits from providing accommodations including:

- Improved recruitment and retention of employees: In the JAN survey, 89% of employers reported that providing an accommodation for disabilities allowed them to retain valued employees,[62] and 59% said that it "eliminated costs associated with training a new employee."[63] Workplace flexibility has also been shown to increase employee retention in industries with typically high turnover such as sales and customer service.[64] When

country, where judges use *Young* to hinder access to needed accommodations.[35] Despite the clear mandates of the PDA, the current legal landscape leaves exposed and unprotected those pregnant workers who want to continue working while maintaining a healthy pregnancy.[36]

Similarly, many pregnant workers have not found protection or recourse under the Americans with Disabilities Act of 1990 because absent complications, pregnancy is not considered a disability that substantially limits a major life activity. This legal reality means that many of the symptoms of a normal pregnancy that can disrupt a worker's ability to do her job – such as extreme fatigue, morning sickness, or limitations on her mobility – are not entitled to accommodation. Moreover, many pregnant workers seek accommodation precisely because they wish to *avoid* the conditions that might disable them or endanger their pregnancy.[37] Yet because the ADA is so expansive with respect to other conditions that qualify as disabilities, the population of non-pregnant workers entitled to reasonable accommodation is exponentially larger than when the PDA was enacted more than 40 years ago. Accordingly, without such express entitlement to accommodation, pregnant workers face an untenable "least favored nation" status in the workplace.

The simple solution to this no-win situation is the Pregnant Workers Fairness Act. This legislation, modeled after the ADA and using a framework familiar to most employers, takes a thoughtful and measured approach to balancing

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[35] A Better Balance, The Work and Family Legal Center, *Long Overdue: It is Time for the Federal Pregnant Workers Fairness Act* (May 2019), available at https://www.abetterbalance.org/long-overdue/.

[36] Workers who are breastfeeding also continue to face denial of their need to pump on the job. See, e.g., Frederick, supra n.19. Although the Affordable Care Act's Break Time for Nursing Mothers provision has provided some measure of support 29 U.S.C. § 207(r), those protections are severely limited – most notably because the law only covers workers who qualify as "non-exempt" under the Fair Labor Standards Act and contains no private right of action for employees whose employers violate it.

[37] *See generally* Wendy Chavkin, *Walking a Tightrope: Pregnancy, Parenting, and Work, in* Double Exposure: Women's Health Hazards on the Job and at Home, 196, 200 (Wendy Chavkin ed., 1984); Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 Stetson L. Rev. 1, 3-8 (1995) (discussing scientific research about the maternal and fetal hazards in the workplace); Jeannette A. Paul et al., *Work Load and Musculoskeletal Complaints During Pregnancy*, 20 Scandinavian J. Work, Env'T & Health 153, 156-57 (1994) (noting the effect of the hormone relaxing on joint stability during pregnancy); J. A. Nicholls & D. W. Grieve, *Performance of Physical Tasks in Pregnancy*, 35 Ergonomics 301, 301, 304 (1992) (finding that pregnant women had more difficulty performing thirty-two of forty-six ordinary tasks); Karen J. Kruger, *Pregnancy & Policing: Are They Compatible?: Pushing the Legal Limits on Behalf of Equal Employment Opportunities*, 22 Wis. Women's L.J. 61, 70-71 (2007) (describing the impact of pregnancy-related physical changes on police officer's job duties).

the needs of working people and employers by requiring businesses with fifteen or more employees to provide workers with temporary, reasonable accommodation for known limitations related to pregnancy, childbirth, or related medical conditions if doing so would not place an undue hardship on business. It also prohibits employers from forcing a pregnant employee to take a leave of absence if a reasonable accommodation can be provided; prevents employers from denying job opportunities to an applicant or employee because of the individual's need for a reasonable accommodation; prevents an employer from forcing an applicant or employee to accept a specific accommodation; and prohibits retaliation against individuals who seek to use PWFA to protect their rights.

At a time when women constitute nearly 60 percent of the workforce and contribute significantly to their families' economic well-being, PWFA is a dire necessity. When a pregnant worker is forced to quit, coerced into taking unpaid leave, or fired because her employer refuses to provide a temporary job modification, the economic impact can be severe; if she is the sole or primary breadwinner for her children, as nearly half of working women are, her entire family will be without an income when they most need it. She further may be denied unemployment benefits because she is considered to have left her job voluntarily. She may have few if any additional resources on which to rely. PWFA ensures that women would not face such devastating consequences. Instead, it treats pregnancy for what it is – a normal condition of employment.

PWFA promotes women's health. Accommodations make a difference in physically demanding jobs (requiring long hours, standing, lifting heavy objects, etc.) where the risk of preterm delivery and low birth weight are significant.[38] The failure to provide accommodations can be linked to miscarriages and premature babies who suffer from a variety of ailments.[39] This bill would be an important contribution in the fight to improve maternal health and mortality.

There is also a strong business case for PWFA. Providing pregnant employees with reasonable, temporary accommodations increases worker productivity, retention, and morale, decreases re-training costs, and reduced health care costs associated with pregnancy complications. PWFA can also reduce litigation costs by providing greater clarity regarding an employer's legal obligations to pregnant workers. These benefits apply to small and large businesses.[40]

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[38] Mayo Clinic, *Pregnancy Week by Week* (last visited October 18, 2019), available at https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/pregnancy/art-20047441.

[39] A Better Balance, The Work and Family Legal Center, *Long Overdue: It Is Time for the Federal Pregnant Workers Fairness Act* at 25 (May 2019), available at https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf.

[40] Kent Oyler, President and CEO of Greater Louisville Inc., *Legislation would help Kentucky Women in the Workforce* (January 4, 2019), available at

Recently, a group of leading private sector employer – Adobe, Amalgamated Bank, Chobani, Cigna Corp, Facebook, ICM Partners, L'Oreal USA, Levi Strauss & Co., Microsoft Corporation, and Spotify – expressed their support for PWFA and noted that "women's labor force participation is critical to the strength of our companies, the growth of our economy and the financial security of most modern families."[41] Their support for the bill was in line with their commitment to "strive to create more equitable workplaces."

Finally, twenty-seven states[42] across the political and ideological spectrum -- from California, Nebraska, South Carolina, Kentucky, New Jersey, and Maine – and the District of Columbia, have recognized the benefits of providing reasonable accommodations to pregnant workers. Congress should ensure that all pregnant workers, not just some, have the protections they are due.

Adoption of the Pregnant Workers' Fairness Act is indeed long overdue. It is time for Congress to clarify what the Pregnancy Discrimination Act requires and to meet the needs of pregnant workers and employers across the country. We urge swift passage of PWFA in the 116th Congress.

Thank you for your consideration of our views. If you need additional information, please contact Vania Leveille, senior legislative counsel, at vleveille@aclu.org.

Sincerely,

Ronald Newman
National Political Director

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https://www.bizjournals.com/louisville/news/2019/01/04/guest-comment-legislation-would-help-kentucky.html ("Most large HR departments long ago enacted policies to retain their valuable female employees through their pregnancies, but many small-to-midsize businesses are forced to navigate complex circumstances like childbirth without the aid of a robust HR department or in-house counsel… Beyond clarifying the rules, [the Kentucky pregnant worker fairness bill] will help boost Kentucky's female workforce participation rate, which ranks 44th in the nation.")

[41] National Partnership for Women, *An Open Letter in Support of the Pregnant Workers Fairness Act from Leading Private-Sector Employers* (July 2019), available at http://www.nationalpartnership.org/our-work/resources/economic-justice/coalition/an-open-letter-in-support-of-PWFA-from-private-sector-employers.pdf.

[42] The states are Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, Texas, Utah, Vermont, Washington, and West Virginia.

Vania Leveille
Senior Legislative Counsel

Gillian Thomas
Senior Staff Attorney

The Leadership Conference
on Civil and Human Rights

1620 L Street, NW
Suite 1100
Washington, DC
20036

202.466.3311 voice
202.466.3435 fax
www.civilrights.org

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Vanita Gupta

The Leadership Conference

October 18, 2019

The Honorable Suzanne Bonamici
Chairwoman
Civil Rights and Human Services Subcommittee
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

The Honorable James Comer
Ranking Member
Civil Rights and Human Services Subcommittee
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

**Support the Pregnant Workers Fairness Act (H.R. 2694)**

Dear Chairwoman Bonamici and Ranking Member Comer:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States, I write to urge you to **support the bipartisan Pregnant Workers Fairness Act (H.R. 2694)**, a critical bill that will help ensure that no pregnant worker is forced to choose between a healthy pregnancy and a job.

Ensuring the protection and advancement of the rights, economic security, and dignity of all working people in this country is a priority of The Leadership Conference and its members. The passage of the Pregnancy Discrimination Act of 1978 was critical to opening up the workplace to pregnant people who were routinely denied employment or pushed off the job, but more than 40 years later, many pregnant workers in the United States are still vulnerable to adverse employment actions that force them to choose between risking their livelihoods or risking their health and the health of their pregnancies. The bipartisan Pregnant Workers Fairness Act would help strengthen existing federal protections against pregnancy discrimination and promote the economic security, health, and well-being of pregnant people and their families.

In the U.S. today, there are more pregnant workers than ever before. Of mothers who gave birth to their first child between 2006 and 2008, 66 percent worked during their pregnancy.[i] Women are also working later into their pregnancies. More than 80 percent of pregnant workers continue to work into their last trimester.[ii] Many will never require an accommodation in order to perform their jobs, but too often, employers have fired or pushed

onto unpaid leave pregnant workers who do require a reasonable accommodation, cutting off both a paycheck and health insurance just when both are needed the most.

Black women are particularly vulnerable to pregnancy discrimination. According to the National Partnership for Women & Families, between 2011 and 2015, Black women filed nearly 30 percent of all pregnancy discrimination charges with the Equal Employment Opportunity Commission, even though Black women made up only 14 percent of women in the workforce ages 16 to 54.[iii] Black women are also at higher risk for pregnancy-related complications, many of which may require, sometimes modest, workplace accommodations; and while loss of a paycheck or health insurance can have severe consequences for any pregnant person, for Black women it can be dire. Already, structural racism in health care puts Black women at risk for a range of negative health outcomes, including higher risk of maternal death.[iv] Black women are up to four times more likely to die from pregnancy-related conditions than non-Hispanic white women, and the death rate for Black infants is twice that of infants born to non-Hispanic white mothers.[v] Depriving women of both their wages and access to health insurance during pregnancy does nothing to alleviate this crisis.

An investigation by *The New York Times* illustrates the real-world consequences of failing to adequately protect and support pregnant workers. Reporters for the *Times* interviewed numerous warehouse employees who had miscarried after they had requested accommodations that included lifting lighter boxes, working shorter shifts, or the ability to sit in a chair. The women reported being denied these accommodations even after presenting their employer with doctors' notes. The women depended on their paychecks to survive; but many miscarried while at work.[vi]

In 2015, the Supreme Court in *Young v. United Parcel Service* held that the failure to make accommodations for pregnant workers with medical needs arising out of pregnancy may sometimes violate the Pregnancy Discrimination Act.[vii] *Young* was an important decision, but the legal standard it set out still leaves pregnant workers without protection. A review of pregnancy accommodation cases conducted by A Better Balance following the *Young* decision found that more than two-thirds of courts held employers were not obligated to accommodate pregnant workers under the Pregnancy Discrimination Act.[viii] Lack of clarity about how to apply the *Young* standard also means that pregnant workers are still not getting the accommodations they need to continue working safely on the job.

The Pregnant Workers Fairness Act would ensure that pregnant workers who need reasonable accommodations receive them, so they can continue working without jeopardizing their health or the economic security of their families. The bill would:

- Clarify that employers must make reasonable accommodations for employees who have limitations related to pregnancy, childbirth, or a related medical condition, unless the accommodation would impose an undue hardship on the employer;

- Protect pregnant workers from being fired, forced to take paid or unpaid leave, or retaliated against if they request or use an accommodation; and

The Leadership Conference

- Require an interactive process between employers and pregnant workers to determine appropriate reasonable accommodations, similar to the Americans with Disabilities Act, a law that is already familiar to employers and employees.

By providing a clear rule for pregnancy accommodations, the Pregnant Workers Fairness Act supports pregnant workers and promotes economic security, workplace fairness, and healthy families. An accommodation as simple as having a stool to sit on, the ability to take extra bathroom breaks, or the ability to carry a water bottle, are often all that is required for a person to ensure a safe pregnancy while at work. Pregnancy should not suspend the right to earn a living while being treated with dignity and respect in the workplace.

We urge you to support H.R. 2694. If you have any questions, please contact Gaylynn Burroughs, Senior Policy Counsel, at burroughs@civilrights.org or (202) 466-3311.

Sincerely,

Vanita Gupta
President & CEO

CC: Chairman Bobby Scott
Ranking Member Virginia Foxx

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[i] George Gao and Gretchen Livingston, Pew Research Center, *Working While Pregnant is Much More Common than It Used to Be* (Mar. 31, 2015), https://www.pewresearch.org/fact-tank/2015/03/31/working-while-pregnant-is-much-more-common-than-it-used-to-be/.
[ii] *Id.*
[iii] National Partnership for Women & Families, *By the Numbers: Women Continue to Face Pregnancy Discrimination in the Workplace* (Oct. 2016), http://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/by-the-numbers-women-continue-to-face-pregnancy-discrimination-in-the-workplace.pdf.
[iv] *See* Jamila Taylor et al., *Eliminating Racial Disparities in Maternal and Infant Mortality: A Comprehensive Blueprint* (May 2, 2019), https://www.americanprogress.org/issues/women/reports/2019/05/02/469186/eliminating-racial-disparities-maternal-infant-mortality/.
[v] *Id.*
[vi] Jessica Silver-Greenberg and Natalie Kitroeff, Miscarrying at Work: The Physical Toll of Pregnancy Discrimination, *The New York Times* (Oct. 21, 2018), https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html.
[vii] 135 S.Ct. 1338 (2015).
[viii] Dina Bakst, Elizabeth Gedmark, and Sarah Brafman, A Better Balance, *Long Overdue: It Is Time for the Federal Pregnant Workers Fairness Act*(May 2019), https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf.

[Additional submissions by Ms. Hayes follow:]

**Statement of Emily Martin**
**Vice President for Education and Workplace Justice**
**National Women's Law Center**

**House Committee on Education & Labor**
**Subcommittee on Civil Rights and Human Services**
**Subcommittee Hearing on the Pregnant Workers Fairness Act (H.R. 2694)**
**October 22, 2019**

Thank you for the opportunity to submit a statement to the Committee and the Subcommittee on Civil Rights and Human Services on the Pregnant Workers Fairness Act, H.R. 2694. The National Women's Law Center has worked for more than 45 years to advance and protect women's equality and opportunity, and has long worked to remove barriers women face in the workplace. Protecting against pregnancy discrimination is at the core of our work.
We urge you to support H.R. 2694, which would ensure that pregnant workers are no longer asked to choose between the health of their pregnancy and their job.

**I. The National Women's Law Center strongly supports H.R. 2694.**

Before Congress passed the federal Pregnancy Discrimination Act of 1978, it was common for employers to categorically exclude pregnant women from the workplace. The Pregnancy Discrimination Act changed this forever by making indisputably clear that the right to be free from discrimination on the basis of sex includes: (1) the right not to be treated adversely because of pregnancy, childbirth, or related medical conditions; and (2) the right of workers affected by pregnancy, childbirth, or related medical conditions to be treated the same as other employees who are not so affected but are "similar in their ability or inability to work" with respect to all aspects of employment, including benefits, insurance, leave policies, and workplace accommodations.[1]

Over 40 years after passage of the Pregnancy Discrimination Act, however, pregnant women still face challenges on the job. This is especially so in jobs that require physical activity like running, lifting, moving, standing, or repetitive motion—activities that may pose difficulty to some women during some stages of pregnancy. Many of these women could continue to work without risk to themselves or their pregnancies with temporary, and often minor, job modifications. But in the absence of such a modification, a pregnant worker may face a choice no one should have to make—between the health of her pregnancy and her job.

The Pregnant Workers Fairness Act, H.R. 2694, would ensure that pregnant workers can continue to do their jobs and support their families by setting out a simple, easy to apply legal standard that would provide clarity for employers and employees alike; it would require employers to make reasonable workplace adjustments for those workers who need them due to pregnancy, childbirth, and related medical conditions, like lactation, unless the accommodation

imposes an undue hardship on the employer. Because pregnancy itself is temporary, these accommodations are short-term and are frequently low-cost, such as providing a stool to sit on rather than requiring a worker to stand during a shift or allowing a pregnant worker to keep a bottle of water by her workstation. Providing accommodations ensures that women can work safely while pregnant instead of getting pushed out of work at the very moment when they and their families are preparing for the expenses associated with a new baby.[2]

Public support for the Pregnant Workers Fairness Act is high. In March 2019 the National Women's Law Center commissioned a poll to assess voters' views on core issues related to gender equity. In a national survey of 2,000 registered voters, we found extremely strong support across the political spectrum for the Pregnant Workers Fairness Act. Eighty-nine percent of voters, including 96% of Democrats, 84% of Republicans, and 85% of Independents, supported Congress taking action to "require employers to make reasonable accommodations for pregnant workers who have a medical need for temporary changes at work," with more than half of all voters voicing "strong" support for this proposal.[3]

This overwhelming voter support has been a factor leading to a wave of bipartisan legislation in the states ensuring reasonable accommodations for pregnant workers. Twenty-seven states and the District of Columbia have passed bills or issued Executive Orders to explicitly grant pregnant employees, or certain categories of pregnant employees, the right to reasonable accommodations at work. Twenty-two of these bills have been passed in the last six years alone, all with bipartisan support, and in the majority of cases with unanimous or near-unanimous support.[4] States including South Carolina, Kentucky, Nebraska, North Dakota, West Virginia, and Utah, as well as states such as Massachusetts, Oregon, Delaware, and New Jersey, have passed legislation to ensure that pregnant workers receive reasonable accommodations when they need them to continue working safely.[5]

But the right to reasonable accommodations should not depend on where you happen to live, and pregnant workers across the country cannot afford to continue to wait for Congress to act. The National Women's Law Center urges the 116th Congress to seize the opportunity to make a real difference in the lives of women and their families and pass the Pregnant Workers Fairness Act without delay.

## II. Women who work in low-wage jobs disproportionately need accommodations, and without them, they face dire economic and health consequences.

Many women can work through their pregnancies without any changes in their jobs. However, for some pregnant women, particular job activities – such as lifting, bending, or standing for long periods – can pose a challenge at some point during a pregnancy. For example, workers employed in four of the ten most common occupations for pregnant workers -- retail salesperson; waiter or waitress; nursing, psychiatric and home health aide; and cashier[6] – report continuously standing on the job,[7] and prolonged standing at work has been shown to more than triple the odds of pregnant women taking leave during pregnancy or becoming unemployed.[8] These women may have a medical need for temporary adjustments of job duties or work rules so that they can continue to work safely and support their families. But too often when pregnant workers ask for modest accommodations recommended by their doctors, like a stool to sit on or the right to drink

water during a shift, they are instead forced onto unpaid leave or even fired.[9] Indeed, one survey estimated that a quarter of a million pregnant workers are denied their requests for reasonable workplace accommodations nationally every year.[10] When an employer refuses an accommodation request, requiring a pregnant worker to choose between following medical advice and following a boss's orders, it can have grave implications for her health and the health of her pregnancy, as well as serious financial repercussions.

Workers in low-wage occupations, where work rules and work culture are often particularly inflexible, appear to be especially likely to be denied accommodations for pregnancy.[11] For instance, over 40 percent of full-time workers in low-wage jobs report that their employers do not permit them to decide when to take breaks, and roughly half report having very little or no control over the scheduling of hours.[12] This culture of inflexibility can lead to reflexive denials when workers in low-wage jobs seek pregnancy-related accommodations, which is of particular concern given that more than one in five (20.9%) pregnant workers is employed in a low-wage job.[13] Moreover, pregnant Black women and Latinas are disproportionately represented in low-wage jobs. Nearly one in three Black and Latina pregnant workers hold low-wage jobs (30.0 percent and 31.3 percent, respectively).[14] This means a lack of clear legal rights to pregnancy accommodations likely hits Black women and Latinas particularly hard.

When women who have physical limitations stemming from pregnancy are forced off the job instead of being accommodated, their families can suffer a devastating loss of income at the very moment their financial needs are increasing. Mothers' earnings are crucial to most families' financial security and well-being – in 2017, 41% of mothers nationally were sole or primary breadwinners, and nearly another one-quarter of mothers were co-breadwinners, bringing home 25% to 49% of earnings for their families.[15]

For this reason, many pregnant workers denied the accommodations they need to continue working safely will have no choice other than to continue to work; these women are often put at risk of serious health consequences, such as miscarriage, pre-term birth, pregnancy-induced hypertension and preeclampsia, congenital anomalies, and low birth weight.[16] Premature birth is the leading cause of death during the first month of a baby's life, and can cause developmental delays and intellectual disabilities.[17] Low birth weight babies face increased health risks at birth such as breathing difficulties, bleeding in the brain, heart problems, intestinal issues, and potential vision problems.[18]

While the stakes are high for pregnant workers with a medical need for accommodation, only a small number of employees will need pregnancy accommodations in any given year, meaning that the employers' burden in providing such accommodations is slight. Only about 1.5% of workers give birth each year, and only a fraction of those pregnant workers would require accommodations.[19] Even in the occupations where they are most likely to be employed, pregnant women represent a negligible share of total workers. For example, pregnant women are most likely to work as elementary and middle school teachers, but only 3.2% of all elementary and middle school teachers are pregnant in a given year.[20]

Those workers who are pregnant, however, typically work late into their pregnancies, which may increase the need for an accommodation. The United States Census Bureau shows that, out of all

first-time mothers who worked while pregnant between 2006 and 2008, 88% worked into their last trimester, while 65% worked into their last month of pregnancy.[21]

### III. Federal law too often leaves pregnant workers unprotected and without recourse.

The existing federal laws on the books are not sufficient to protect pregnant workers with medical needs for accommodation from discrimination.

Some pregnant workers experiencing significant pregnancy complications have been able to obtain accommodations under the Americans with Disabilities Act or state law equivalents.[22] These laws implement the fundamental principle that physical limitations that can be reasonably accommodated without an undue hardship to the employer should not force people out of work. However, courts have been reluctant to treat the physical limitations and medical needs that can arise out of a normally-progressing pregnancy as disabilities.[23] Pregnancy is not considered a disability as a matter of law or logic, and thus courts have typically required plaintiffs seeking a pregnancy-related accommodation under the Americans with Disabilities Act to demonstrate that they have a significant pregnancy complication that constitutes a disability[24]—but this leaves many pregnant workers with physical needs for accommodation unprotected. For instance, a woman may need a bigger uniform or a new bullet-proof vest to accommodate her growing pregnancy – this need is indicative of a normally progressing pregnancy, yet may require an accommodation. In other circumstances, pregnant workers may seek accommodations precisely because they wish to prevent pregnancy complications that are likely in the absence of accommodation, yet courts have held that the Americans with Disabilities Act provides no right to such preventive accommodations.[25]

Pregnant workers who need to take time away from work because of pregnancy complications may be able to access unpaid leave under the Family and Medical Leave Act, if they work for an employer with at least 50 employees and otherwise meet the Family and Medical Leave Act's eligibility conditions.[26] While the Family and Medical Leave Act is very important and helpful to many individuals who need time off, what many pregnant workers want is to be able to continue to do their job – and many could do so and keep earning income for their families with reasonable accommodations to work rules or duties. The Family and Medical Leave Act does not provide a solution for these workers.

And while the Pregnancy Discrimination Act significantly changed the landscape for pregnant workers and provides critical protections against pregnancy discrimination, many courts have unfortunately interpreted the Pregnancy Discrimination Act and state law equivalents narrowly and allowed employers to refuse to accommodate workers with medical needs arising out of pregnancy, even when they routinely accommodated other physical limitations.

In 2015 in *Young v. UPS*,[27] the Supreme Court held that when an employer accommodates workers who are similar to pregnant workers in their ability to work, it cannot refuse to accommodate pregnant workers who need it simply because it "is more expensive or less convenient" to accommodate pregnant workers too.[28] The Court also held that an employer that fails to accommodate pregnant workers violates the Pregnancy Discrimination Act when its

accommodation policies impose a "significant burden" on pregnant workers that outweighs any justification the employer offers for those policies.[29]

Peggy Young was working as a driver for UPS when she became pregnant and was advised by her health care provider that she should not lift more than 20 pounds during her pregnancy. Although UPS accommodated needs for alternative duties for several groups of workers—those injured on the job, those protected by the Americans with Disabilities Act, and those who lost their commercial drivers' licenses because of medical or other reasons—the company refused to accommodate Peggy Young. Instead, UPS pushed Peggy Young onto unpaid leave for the last six months of her pregnancy despite her desire and ability to work; as a result, she lost her paycheck and her UPS-provided health insurance. She sued UPS for violating the Pregnancy Discrimination Act.

In *Young*, the Supreme Court altered the legal tests for pregnancy accommodation claims in several important ways. First, the Court made clear that a plaintiff successfully makes an initial showing in a pregnancy discrimination case challenging the denial of an accommodation when she shows (1) that she was pregnant; (2) that she sought accommodation; (3) that the employer did not accommodate her; (4) that the employer did accommodate others "similar in their ability or inability to work."[30] The Court emphasized that this does not mean that a pregnant worker must identify a nearly identical coworker that the employer accommodated.

Second, the Court offered some clarification about how an employer may and may not defend an accommodation policy after the pregnant worker has made this showing. When the pregnant worker has made this showing, the employer may then come forward with a "legitimate, nondiscriminatory" reason for the difference in treatment, but evidence that it is more expensive or less convenient to accommodate pregnant workers too does not constitute a legitimate reason.[31]

Third, the Court set out a new way in which a pregnant employee may prove that the employer's stated legitimate reason is actually a pretext and that the employer is actually motivated by discrimination against pregnant women. The Court explained that when a pregnant worker shows the accommodation policies impose a significant burden on pregnant workers that outweigh any justifications offered by an employer, this can demonstrate intentional discrimination.[32]

Despite the Supreme Court's affirmation that a refusal to accommodate pregnancy can run afoul of the Pregnancy Discrimination Act, in case after case in the courts since *Young,* workers denied pregnancy accommodations have had their cases thrown out because of a misinterpretation of the comparator standard, a botched interpretation of the significant burden determination, or in some cases ignoring the *Young* test altogether. The multi-step balancing test set out in Young appears to have left courts, employers, and employees confused about when exactly the Pregnancy Discrimination Act requires pregnancy accommodations.

Indeed, a recent survey of pregnancy accommodations caselaw since the 2015 *Young* decision found that in over two-thirds of post-*Young* pregnancy accommodations cases, courts held that employers were permitted to deny pregnant workers accommodations under current federal law.[33]

For example, in *Santos v. Wincor Nixdorf, Inc.*[34] this past August, the Fifth Circuit Court of Appeals affirmed a grant of summary judgment against an employee, Michelle Santos, who requested an accommodation to allow her to work from home in compliance with her doctor's recommendations during her pregnancy. Instead of evaluating whether Ms. Santos was able to fulfill her workplace obligations under the accommodations she requested, the court focused on the need to identify other employees who were similarly situated. In reaching their conclusions, both the district court and the circuit court relied on a pre-*Young* decision by the Fifth Circuit that required the circumstances of the employee-comparator be "nearly identical."[35]

*Adduci v. Fed. Express Corp.*[36] is another example of a particularly egregious case showcasing problems with comparator analysis under the Pregnancy Discrimination Act. After becoming pregnant, Cassandra Adduci, an employee of FedEx in Tennessee, requested a temporary reassignment to comply with her physician's lifting-restriction of 25lbs. Instead, her employer placed her on unpaid leave. Although Ms. Adduci was able to provide the court with a spreadsheet documenting over 261 other part-time employees who were given temporary work reassignments in the same calendar year, the district court granted summary judgment in favor of her employer. The court found that the comparators in the spreadsheet did not "address the relevant aspects of [her] employment situation" and was therefore not a sufficient example of similarly situated comparators.[37]

In *Swanger-Metcalfe v. Bowhead Integrated Support Servs. LLC*,[38] a district court in Pennsylvania granted the employer's motion to dismiss because Elizabeth Swanger-Metcalfe, an employee at Bowhead who requested accommodations, was unable to identify "similarly situated" employees. The employer's schedule had some workers spending time both in the "prep floor" and the "sand room." While working in the sand room, employees were required to wear respirators or ventilation hoods to protect themselves from the hazardous chemicals. When Ms. Swanger-Metcalfe found out she was pregnant, she was told by her doctor that she should request to work only in well-ventilated areas. When she requested the accommodation from her employer, she was told that she would be sent home if she refused to work in the sand room and that the employer couldn't show "favoritism" in work assignments.[39] Although the plaintiff believed that there were indeed other individuals who were accommodated in their requests to move between departments, the court dismissed the case because she did not provide "factual details as to how other employees" were accommodated in her complaint, prior to any discovery on these issues.[40]

*Jackson v. J.R. Simplot Co.*[41] provides yet another example of the comparator analysis leaving pregnant workers unprotected. Stacey Jackson worked at a fertilizer plant when her doctor recommended lifting restrictions and limited exposure to harmful chemicals in conjunction with her fertility treatment and pregnancy. When she requested the accommodation, her employer stated that they were not able to find her a job that would minimize her exposure to chemicals. The employee sued, but both the district court and the circuit court granted summary judgment in favor of the employer. Although she was able to present evidence of five other employees who were granted light duty when they requested the accommodation, the courts rejected the argument that the failure to accommodate her was discriminatory because the other employees did not also request limiting exposure to chemicals.[42]

All of these women fought for their rights to an accommodation under the post-*Young* Pregnancy Discrimination Act framework in court and lost, and sadly, their cases are not unique.[43] These cases demonstrate the difficult burdens of proof that are still imposed on pregnant workers post-*Young*. More fundamentally, they make clear that the comparator-focused analysis demanded by the Pregnancy Discrimination Act fails to grapple with the question that matters most when a pregnant worker's health is threatened by a workplace condition or task: can that medical need be reasonably accommodated, in a manner that does not impose undue hardship on an employer, but allows a pregnant worker to do her job safely?

**IV. The Pregnant Workers Fairness Act will ensure that pregnant workers are no longer forced off the job because of limitations that can be reasonably accommodated.**

The Pregnant Workers Fairness Act has been narrowly drafted to specifically address employer requirements to provide reasonable accommodations for employees with limitations arising out of pregnancy, childbirth, or a related medical condition. For example:

- An employer might be required to modify a no-food-or drink policy for a pregnant employee who experiences painful or potentially dangerous uterine contractions when she does not regularly drink water.
- An employer might be required to provide a stool to a pregnant cashier who was experiencing leg pain and swelling from standing for long periods of time.
- An employer might be required to reassign heavy lifting duties to other employees for some portion of an employee's pregnancy.
- An employer might be required to provide an available light duty position to a pregnant police officer who was temporarily unable to go on patrol because no bulletproof vest would fit her.

The bill would prohibit employers from discriminating against employees because they need this sort of reasonable accommodation. [44] In other words, an employer would not be allowed to fire a pregnant employee to avoid making any job modifications, or to retaliate against an employee who had asked for an accommodation.

The Pregnant Workers Fairness Act would also prohibit employers from forcing a pregnant employee onto leave when another reasonable accommodation would allow the employee to continue to work. While the employee would remain free to choose to use any leave available to her, she would not be forced off the job and onto leave against her will. Neither would she be forced to accept an unnecessary accommodation, if she did not, in fact, have a limitation arising out of pregnancy, childbirth, or a related medical condition.

The Pregnant Workers Fairness Act relies on a reasonable accommodation framework already familiar to employers accustomed to the Americans with Disabilities Act's requirements, and the text of the bill defines "reasonable accommodation" and "undue hardship" by reference to section 101 of the Americans with Disabilities Act of 1990 and its implementing regulations.[45] This definition includes incorporation of the Americans with Disabilities Act's interactive

process between employer and employee that will typically be used to come to agreement as to an appropriate reasonable accommodation.

The remedies and enforcement section of the bill extends enforcement powers, procedures and remedies to those employees covered by the following statutes; Title VII of the Civil Rights Act of 1964, the Congressional Accountability Act of 1995, Chapter 5 of Title 3, United States Code, employees covered by the Government Employee Rights Act of 1991, and employees covered by Section 717 Of the Civil Rights Act Of 1964. Through this broad coverage, both private and public employees would be protected under the Pregnant Workers Fairness Act.

The Pregnant Workers Fairness Act further sets out that no later than two years from the date of enactment, the Equal Employment Opportunity Commission shall issue implementation regulations, providing specific examples of accommodations addressing known limitations related to pregnancy, childbirth or related medical conditions that would be provided to job applicants or employees that would be presumed to be reasonable unless the employer could demonstrate that providing such an accommodation would create an undue hardship.[46]

The bill includes an explicit waiver of state immunity.[47] The remedies provided by the Pregnant Workers Fairness Act are a "congruent and proportional"[48] response addressing a pattern of sex discrimination in violation of the Equal Protection Clause by public employers against pregnant employees,[49] and thus state sovereign immunity is appropriately waived pursuant to Congress's powers under Section Five of the Fourteenth Amendment.

As recognized by the Supreme Court, gender stereotypes about "mothers or mothers to be" [50] have led to pervasive sex discrimination in violation of the Equal Protection Clause: "denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second."[51]

As Justice Kennedy stated in his dissent in *Young*:

> There must be little doubt that women who are in the work force—by choice, by financial necessity, or both—confront a serious disadvantage after becoming pregnant . . . . "Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second." *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 736, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (quoting The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor–Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 100 (1986)). Such "attitudes about pregnancy and childbirth . . . have sustained pervasive, often law-sanctioned, restrictions on a woman's place among paid workers." *AT & T Corp. v. Hulteen*, 556 U.S. 701, 724, 129 S.Ct. 1962, 173 L.Ed.2d 898 (2009) (Ginsburg, J., dissenting). Although much progress has been made in recent decades and many employers have voluntarily adopted policies designed to recruit, accommodate, and retain employees who are pregnant or have young children, see Brief for U.S. Women's Chamber of Commerce et al. as *Amici Curiae* 10-14, pregnant

employees continue to be disadvantaged—and often discriminated against—in the workplace, see Brief of Law Professors et al. as Amici Curiae 37–38. [52]

"Legislation enacted under § 5 must be targeted at 'conduct transgressing the Fourteenth Amendment's substantive provisions,'"[53] but Congress is not limited to narrowly prohibiting acts forbidden by the Fourteenth Amendment itself.[54] Instead, "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."[55] In particular, use of Section Five power is appropriate to remedy or deter constitutional violations involving "subtle discrimination that may be difficult to detect on a case-by-case basis." The Pregnant Workers Fairness Act does just this:[56] its reasonable accommodation framework relieves individual employees of the burden of proving that an employer's inflexible imposition of workplace standards reflects sex stereotyping that flows from the invidious assumption that pregnant workers are not competent or committed workers;[57] it would remedy and deter unconstitutional sex stereotyping in the hiring and promotion of young potentially pregnant women.[58]

## V. Accommodating workers is good for business.

In July of 2019, ten major companies from across states and industries sent an open letter to Congress in support of the Pregnant Workers Fairness Act.[59] The letter, signed by Adobe, Amalgamated Bank, Chobani, Cigna Corp., Facebook, ICM Partners, L'Oreal USA, Levi Strauss & Co., Microsoft Corporation, and Spotify, as well as the US Women's Chamber of Commerce, underscored that women's labor force participation is critical to the strength of companies and the growth of the national economy. These employers recognize that the passage of the Pregnant Workers Fairness Act would be an important step to ensuring the health, safety, and productivity of the modern workforce, because accommodating pregnant workers is not only good for working women and families, it is good for business.

Experience implementing the Americans with Disabilities Act demonstrates the business benefits of reasonable accommodation. A survey by the Job Accommodation Network (JAN), a technical assistance provider to the Department of Labor, found that the majority of employers that provided accommodations to employees with disabilities reported that the accommodations did not impose any new costs on the employer.[60] Of those employers that reported a cost for accommodations, the majority reported a one-time cost of $500 or less.[61] Because accommodations provided to pregnant workers are temporary, the costs associated with these accommodations, if any, are likely to be substantially less than the already low costs associated with providing accommodations to workers with permanent disabilities.

Employers also report significant benefits from providing accommodations including:

- Improved recruitment and retention of employees: In the JAN survey, 89% of employers reported that providing an accommodation for disabilities allowed them to retain valued employees,[62] and 59% said that it "eliminated costs associated with training a new employee."[63] Workplace flexibility has also been shown to increase employee retention in industries with typically high turnover such as sales and customer service.[64] When

employers provide temporary accommodations that allow pregnant workers who need accommodations to continue working, they make it possible for these workers to transition smoothly to being a working parent and create incentives for them to stay with their employers when they return to work after having a baby.

- Increased employee commitment: Sixty-one percent of employers reported in the JAN survey that providing accommodations to workers with disabilities "increase[s] overall company morale."[65] Similarly, a 2014 report on work-life balance and workplace flexibility policies by the President's Council of Economic Advisors noted that "[w]orkers with more flexible arrangements report higher levels of job satisfaction" and "more loyalty and commitment to their employers."[66] The same results can be expected for pregnant workers, who are more likely to be committed to employers who meet workers' needs for workplace accommodations during pregnancy

- Increased productivity: Accommodating employees with disabilities increases productivity not only for the employee who needs an accommodation, but also for the business overall. Seventy-two percent of employers reported to JAN that accommodating employees "increased the employee's productivity,"[67] and 55% reported that providing accommodations "increased overall company productivity."[68] These studies suggest that when pregnant workers' needs for accommodations are met, employers can anticipate improved productivity.

- Reduced absenteeism**:** JAN's survey found that 55% of employers reported better attendance from an employee after providing an accommodation for a disability, partly because accommodations improve employee health by decreasing work-related stress.[69] Workplace flexibility studies also show that businesses experience less absenteeism when they offer flexible work arrangements.[70] All too often, pregnant workers are being forced to miss work simply because their employers are denying minor temporary adjustments they need to do their jobs safely. Providing these accommodations to pregnant workers is likely to reduce absences, resulting in a bottom-line benefit for employers.

- Improvements in workplace safety: When employers provide accommodations, they create a safer workplace. Forty-six percent of employers reported increases in workplace safety as a result of providing accommodations to employees with disabilities,[71] and 36% reported reduced workers' compensation and other insurance costs.[72] Providing flexible workplaces can also reduce employee stress and improve overall health[73] which lead to reduced risk of workplace injury and fewer workers' compensation claims.[74] Providing accommodations to those pregnant workers who need them to work safely during pregnancy will undoubtedly reduce stress on these workers, and thus lower their risk of injury.

- Increased diversity: Many employers value workplace diversity, not only for its intrinsic benefits but also because diversity is highly valued in the marketplace. Forty-one percent of employers surveyed noted that a benefit of providing accommodations to employees with disabilities was that they "increase diversity of the company."[75] Similarly, workplace flexibility has been shown to increase the presence of women in the

workplace: a survey conducted by Deloitte showed that flexibility was the factor "most likely to improve the retention of women." After Deloitte implemented flexible work options, turnover rates between men and women equalized and the number of women in leadership positions rose from 14 to 168 over ten years.[76] Likewise, providing temporary accommodations to pregnant workers, particularly those in nontraditional and physically demanding jobs, is likely to make women who might become pregnant much more willing to choose these fields.

## VI. The Pregnant Workers Fairness Act is a commonsense and common ground bill.

The National Women's Law Center strongly supports H.R. 2694. Working families cannot afford to wait for the Pregnant Workers Fairness Act any longer. More than 40 years after the passage of the Pregnancy Discrimination Act, it is unconscionable that pregnant workers across the country continue to face discrimination when seeking reasonable accommodations that would allow them to continue to work safely. No one who is pregnant should be forced to choose between ignoring her doctor's advice and losing her job at a time when both her health and the economic security of her family are absolutely crucial. We urge swift passage of this commonsense and common ground bill.

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[1] *See* 42 U.S.C. § 2000e(k); 29 C.F.R. §1604, App. Q&A 5.

[2] While this statement makes mention of pregnant women, the Pregnant Workers Fairness Act applies to all employees for pregnancy, childbirth and related medical conditions, including transgender men and nonbinary individuals.

[3] NAT'L WOMEN'S LAW CTR. (NWLC), NWLC SURVEY FINDS OVERWHELMING SUPPORT FOR GENDER JUSTICE POLICIES (MAY 2019), https://nwlc.org/resources/nwlc-survey-finds-overwhelming-support-for-gender-justice-policies.

[4] *See* NWLC, PREGNANCY ACCOMMODATIONS IN THE STATES (Sept. 2019), https://nwlc.org/resources/pregnancy-accommodations-states/.

[5] *Id.*

[6] Occupational data are from O*NET OnLine, National Center for O*NET Development, *available at* www.onetonline.org/ (last visited April 17, 2019). In some cases, researchers selected similar but not exact occupation(s) to serve as a proxy for ACS and/or O*NET occupation(s) due to inconsistencies between data sources. Occupations were considered physically demanding or hazardous if 40% of workers or more responded performing activities continuously or almost continuously while at work. Researchers combined O*NET data from nursing assistants, home health aides, and psychiatric aides to serve as a proxy for the ACS occupation nursing, psychiatric and home health aides. O*NET Occupational data for nursing assistants were used in the table: "Common jobs for pregnant workers: Standing" (i.e. 50% of nursing assistants responded standing continuously or almost continuously at work). In addition, 41% of home health aides and 51% of psychiatric aides stood more than half the time.

[7] Workers in other common occupations among pregnant women reported standing a significant amount at work. For instance, 40% of elementary school teachers, except special education; 48% of middle school teachers, except special education; and 35% of first-line supervisors of retail sales workers reported standing more than half the time.

[8] *See* Sylvia Guendelman et al., *Biomechanical and Organisational Stressors and Associations with Employment Withdrawal Among Pregnant Workers: Evidence and Implications*, 59 ERGONOMICS 1613 (2016).

[9] For stories of women pushed out of work because they were denied the temporary accommodations that they sought during pregnancy, *see generally* NWLC & A BETTER BALANCE (ABB), IT SHOULDN'T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS (2013), http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf. *See also* Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination is Rampant Inside America's Biggest Companies*, N.Y. TIMES (Feb. 8, 2019),

https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html; Bryce Covert, *The American Workplace Still Won't Accommodate Pregnant Workers*, THE NATION (Aug. 12, 2019), https://www.thenation.com/article/pregnant-workers-discrimination-workplace-low-wage/.

[10] *See* NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, LISTENING TO MOTHERS: THE EXPERIENCE OF EXPECTING AND NEW MOTHERS IN THE WORKPLACE 3 (Jan. 2014), http://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf.

[11] *See* Covert, *supra* note 9.

[12] *See* LIZ WATSON & JENNIFER SWANBERG, WORKPLACE FLEXIBILITY 2010: GEORGETOWN LAW, FLEXIBLE WORKPLACE SOLUTIONS FOR LOW-WAGE HOURLY WORKERS: A FRAMEWORK FOR A NATIONAL CONVERSATION 19 (May 2011), https://www.researchgate.net/publication/283088549_Flexible_workplace_solutions_for_low-wage_hourly_workers.

[13] NWLC defines low-wage occupations as jobs that pay $11.50 per hour or less (the annual equivalent of about $23,920 per year ($11.50 x 2080 hours), which assumes a 40-hour workweek for 52 weeks.

[14] Occupational data are from O*NET OnLine, *available at* http://www.onetonline.org/. Percentages are how often workers reported standing continuously or almost continuously at work, except for registered nurses (47% of registered nurses responded standing about half the time). Median hourly incomes are from Bureau of Labor and Statistics (BLS), Occupational Employment Statistics, *available at* https://www.bls.gov/oes/2017/may/oes_nat.htm.

[15] *See* SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, BREADWINNING MOTHERS CONTINUE TO BE THE U.S. NORM (May 2019), https://cdn.americanprogress.org/content/uploads/2019/05/12070012/Breadwinners2019-report1.pdf.

[16] NWLC & ABB, *supra* note 9, at 12.

[17] MARCH OF DIMES, PREMATURE BABIES, https://www.marchofdimes.org/complications/premature-babies.aspx (last visited Oct. 17, 2019).

[18] *Id.*

[19] NWLC calculations based on 2017 American Community Survey (ACS) one-year averages using Steven Ruggles, Sarah Flood, Ronald Goeken, Josiah Grover, Erin Meyer, Jose Pacas, and Matthew Sobek. IPUMS-USA: Version 9.0 [dataset]. Minneapolis. MN: IPUMS, 2019. https://doi.org/10.18128/D010.V9.0.

[20] *See* MORGAN HARWOOD & SARAH DAVID HEYDEMANN, NWLC, BY THE NUMBERS: WHERE DO PREGNANT WOMEN WORK? 2 (Aug. 2019), https://nwlc.org/wp-content/uploads/2019/08/Pregnant-Workers-by-the-Numbers-v3-1.pdf. NWLC calculations based on American Community Survey (ACS) 2017 1-year estimates using IPUMS-USA, *available at* http://usa.ipums.org/usa. The percentage of pregnant workers in the occupation is calculated by reference to the share of women in the occupation who have given birth in the last year.

[21] LINDA LAUGHLIN, US CENSUS BUREAU, CURRENT POPULATION REPORTS, MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS: 1961-2008 at Table 2, https://www.census.gov/prod/2011pubs/p70-128.pdf.

[22] 42 U.S.C. § 12111 et seq.; 21 V.S.A. § 495 et seq.

[23] NWLC & ABB, *supra* note 9, at 14.

[24] *See, e.g.*, *Spees v. James Marine, Inc.*, 617 F.3d 380, 397 (6th Cir. 2010) ("Pregnancy-related conditions have typically been found to be impairments where they are not part of a 'normal' pregnancy."); *Lang v. Wal-Mart Stores E., L.P.*, 2015 WL 1523094, at *2 (D.N.H. Apr. 3, 2015) ("[P]regnancy is not an actionable disability, unless it is accompanied by a pregnancy-related complication."); *Amnobil v. Worcester Skilled Care Ctr., Inc.*, 2014 WL 4657295, at *11 (D. Mass. Sept. 10, 2014) (granting summary judgment for defendant where plaintiff "provides no legal argument as to whether such symptoms [including headaches, nausea and vomiting] differ from normal symptoms of pregnancy and how these complications are disabling"); *Mayorga v. Alorica, Inc.*, 2012 WL 3043021, at *5 (S.D. Fla. July 25, 2012) (Post-ADAAA, "[p]regnancy, absent unusual circumstances, is not considered a disability under the ADA." (collecting cases)).

[25] *E.g.*, *Swanger-Metcalfe v. Bowhead Integrated Support Services*, LLC, No. 1:17-cv-2000, 2019 WL 149334, *11 (M.D. Pa. March 31, 2019) ("While Plaintiff argues that working in the sand room could have caused her to sustain pregnancy complications at some point in the future, Plaintiff does not allege that she suffered from any pregnancy-related complications at the time she sought an accommodation. As a result, Plaintiff's claim of discrimination under the ADA fails because she has not alleged facts sufficient to support a reasonable inference that she is disabled under the ADA.").

[26] 29 U.S.C. § 2601 et seq.

[27] *Young v. UPS*, 135 S. Ct. 1338 (2015).

[28] *Id.* at 1354.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 1354-55.
[33] *See* DINA BAKST, ELIZABETH GEDMARK, & SARAH BRAFMAN, ABB, LONG OVERDUE: IT IS TIME FOR THE FEDERAL PREGNANT WORKERS FAIRNESS ACT 9 (May 2019), https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf.
[34] *Santos v. Wincor Nixdorf, Inc.*, No. 19-50046, 2019 WL 3720441 (5th Cir. Aug. 7, 2019).
[35] *Lee v. Kansas City S. Ry. Co.*, 574 F.3d 253, 260 (5th Cir. 2009) (quoting *Little v. Republic Ref. Co., Ltd.*, 924 F.2d 93, 97 (5th Cir.1991)).
[36] 298 F. Supp. 3d 1153 (W.D. Tenn. 2018).
[37] *Id.* at 1160.
[38] No. 1:17-CV-2000, 2019 WL 1493342 (M.D. Pa. Mar. 31, 2019).
[39] *Id.* at *2.
[40] *Id.* at *8.
[41] 666 F. App'x 739 (10th Cir. 2016).
[42] *Id.* at 740.
[43] For additional stories of pregnancy discrimination after the Supreme Court's decision in *Young v. UPS*, *see* BAKST, GEDMARK, & BRAFMAN, *supra* note 33, at 14-16.
[44] Small businesses with fewer than 15 employees would be exempt from the federal Pregnant Workers Fairness Act requirements. However, the Pregnant Workers Fairness Act as written does not supersede or invalidate city or state Pregnant Workers Fairness Acts, some of which cover employers with less than 15 employees, or otherwise preempt or invalidate any other law providing greater or equal protections.
[45] 42 U.S.C. § 12111.
[46] Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. (2019).
[47] *Id.*
[48] *E.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).
[49] *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) (alleging pregnancy discrimination by a public research university); *Vidovic v. City of Tampa*, No. 8:16-cv-T-17AAS, 2017 WL 10294807, at *9 (M.D. Fla. Oct. 12, 2017) (alleging pregnancy discrimination by a Tampa city fire department); *Webster v. U.S. Dep't of Energy*, 267 F. Supp. 3d 246, 264 (D.D.C. 2017) (alleging pregnancy discrimination claims against the federal Department of Energy); *Diaz v. Florida*, 219 F. Supp. 3d 1207, 1218 (S.D. Fla. 2016) (state employee alleging pregnancy discrimination against the state of Florida); *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) (alleging pregnancy discrimination against a city police department).
[50] *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).
[51] *Id.*; *see generally United States v. Virginia*, 518 U.S. 533-34 ("Sex] classifications may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.") (citing *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948)).
[52] *See Young v. United Parcel Serv.*, 135 S. Ct. 1338, 1367 (Kennedy, J., dissenting).
[53] *Coleman v. Maryland Court of Appeals*, 132 S.Ct. 1327, 1334 (2012).
[54] "Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000)
[55] *Hibbs* at 727.
[56] I am deeply indebted to Professor Reva Siegel of Yale Law School for her analysis of these matters, to be published in a forthcoming piece.
[57] *See* Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 GEO. J. ON POVERTY L. & POL'Y 1, 21 (2012) ("A third way in which employers of low-wage workers demonstrate hostility to pregnancy is by refusing to allow even the smallest of workplace adjustments for pregnant workers-adjustments that employers would often make for other, non-pregnant employees who needed them."); *Id.* at 26 ("The inflexibility of many low-

wage jobs is often compounded by rigid attendance policies that penalize workers for justifiable absences, for being minutes late, or even for assumption of future absences-for example, the stereotype that a single mother will be 'unreliable.'").

[58] In this way, the protections offered by the Pregnant Workers Fairness Act would be analogous to Title VII's disparate impact provision, justified under Section 5, as a remedy for intentional discrimination that is difficult to prove. *In re Empt. Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1321-23 (11th Cir. 1999); *see also Okrahlik v. Univ. of Ark.*, 255 F.3d 615, 626 (8th Cir. 2001) (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987, 990 (1988)); Claude Platton, *Title VII Disparate Impact Suits Against State Governments After* Hibbs *and* Lane, 55 DUKE L.J. 641 (2005).

[59] AN OPEN LETTER IN SUPPORT OF THE PREGNANT WORKERS FAIRNESS ACT FROM LEADING PRIVATE-SECTOR EMPLOYERS (Jul. 2019), *available at* http://www.nationalpartnership.org/our-work/resources/economic-justice/coalition/an-open-letter-in-support-of-PWFA-from-private-sector-employers.pdf.

[60] JOB ACCOMMODATION NETWORK (JAN), WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT 4 (Sept. 2019), https://askjan.org/publications/Topic-Downloads.cfm?pubid=962628.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *See* WATSON & SWANBERG, *supra* note 12, at 24.

[65] JAN, *supra* note 60, at 5.

[66] COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, WORK-LIFE BALANCE AND THE ECONOMICS OF WORKPLACE FLEXIBILITY 15-16 (June 2014), *available at* https://obamawhitehouse.archives.gov/sites/default/files/docs/updated_workplace_flex_report_final_0.pdf [hereinafter EXECUTIVE OFFICE REPORT].

[67] JAN, *supra* note 60, at 5.

[68] *Id.*

[69] *Id.*

[70] EXECUTIVE OFFICE REPORT, *supra* note 66, at 19.

[71] JAN, *supra* note 60, at 5.

[72] *Id.*

[73] *Id.*

[74] CORPORATES VOICES FOR WORKING FAMILIES, BUSINESS IMPACT OF FLEXIBILITY: AN IMPERATIVE FOR EXPANSION 19 (Feb. 2011), *available at* https://www.wfd.com/PDFS/BusinessImpactsofFlexibility_March2011.pdf; *see also* DAVID LEE, MANAGING EMPLOYEE STRESS AND SAFETY: A GUIDE TO MINIMIZING STRESS-RELATED COST WHILE MAXIMIZING EMPLOYEE PRODUCTIVITY 1 (2000), *available at* http://docplayer.net/18897220-Managing-employee-stress-and-safety-a-guide-to-minimizing-stress-related-cost-while-maximizing-employee-productivity.html.

[75] JAN, *supra* note 60, at 5.

[76] CORPORATES VOICES FOR WORKING FAMILIES *supra* note 74.

ELIZABETH WARREN
MASSACHUSETTS

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ARMED SERVICES
SPECIAL COMMITTEE ON AGING

United States Senate

UNITED STATES SENATE
WASHINGTON, DC 20510-2105
P: 202-224-4543

2400 JFK FEDERAL BUILDING
15 NEW SUDBURY STREET
BOSTON, MA 02203
P: 617-565-3170

1550 MAIN STREET
SUITE 406
SPRINGFIELD, MA 01103
P: 413-788-2690

www.warren.senate.gov

October 21, 2019

The Honorable Bobby Scott, Chairman
The Honorable Virginia Foxx, Ranking Member
Committee on Education and Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Scott and Ranking Member Foxx:

I appreciate the Chairman's invitation to submit a letter for the record for the House Committee on Education and Labor's October 22, 2019 hearing, "Long Over Due: Pregnant Workers Fairness Act." I'm glad that the Committee is taking action to address the issue of pregnancy discrimination and fairness for pregnant workers.

I wanted to be a teacher since I was in the second grade when I used to line up my dolls and play "school." After some twists and turns, I finally got my chance to teach special education at a public school in New Jersey. But when I was 22 and finishing my first year of teaching, I had an experience millions of women will recognize. By the end of that school year, I was visibly pregnant—and the principal told me the job I'd already been promised for the next year would go to someone else.

That was years before Congress outlawed pregnancy discrimination. For me, supporting pregnant workers is personal, but this fight is not just about my story, it's about the 62% of pregnant women and new moms who have jobs or are looking for work. While discrimination against workers based on pregnancy, childbirth, or related medical conditions has been illegal since 1978, too often, people are still forced to choose between a healthy pregnancy and their jobs (and incomes) because employers won't make common-sense accommodations that would allow pregnant workers to continue to work.

If enacted, the Pregnant Workers Fairness Act would strengthen protections against pregnancy discrimination and clarify that employers must provide reasonable accommodations for pregnant workers – such as providing a break from heavy lifting or finding ways for workers to sit instead of stand. The bill would also clarify employers cannot discriminate on the basis of pregnancy, childbirth, or other related medical condition by failing to hire someone because they need accommodations, requiring workers to take leave if another accommodation exists, or retaliating against workers who ask for accommodations. Importantly, the legislation also provides powerful tools to fight back against employers who break the law. These are necessary steps to promote and protect the health and economic security of pregnant workers and their families.

Thank you for holding this important hearing, and for the opportunity to contribute my perspective. I urge the House and Senate to take up and pass legislation to strengthen protections against pregnancy discrimination as soon as possible.

Sincerely,

Elizabeth Warren
United States Senator

[Additional submissions by Ms. Lee follow:]

October 22, 2019

The Honorable Suzanne Bonamici
Chair, Civil Rights and Human Services Subcommittee
House Education and Labor Committee
United States House of Representatives

The Honorable James Comer
Ranking Member, Civil Rights and Human Services Subcommittee
House Education and Labor Committee
United States House of Representatives

Dear Chairwoman Bonamici and Ranking Member Comer,

The National Partnership for Women & Families, a non-profit, non-partisan advocacy organization committed to improving the lives of women and families by achieving equality for all women. **We write in strong support for H.R. 2694, the Pregnant Workers Fairness Act**. This bipartisan legislation will support pregnant workers on the job, improving women's and families' economic security and promoting healthier pregnancies.

More than 40 years ago, Congress passed the Pregnancy Discrimination Act of 1978, outlawing discrimination on the basis of pregnancy, childbirth or related medical conditions, yet pregnancy discrimination is still widespread and impacts pregnant workers across industry, race, ethnicity and jurisdiction. Nearly 31,000 pregnancy discrimination charges were filed with the U.S. Equal Employment Opportunity Commission (EEOC) and state-level fair employment practice agencies between 2010 and 2015,[1] and the reality of pregnancy discrimination is likely much worse than illustrated by EEOC charges.[2] As a result of this discrimination, too many women must choose between their paychecks and a healthy pregnancy. That's not a choice anyone should have to make.

The Pregnant Workers Fairness Act would create a clear policy standard requiring employers to provide reasonable accommodations to pregnant workers. Support for a law like the Pregnant Workers Fairness Act is nearly universal and bipartisan. Ninety-five percent of voters say it is reasonable for employers to provide minor accommodations to pregnant workers.[3] Just this year, eleven leading private sector employers endorsed the Pregnant Workers Fairness Act in an open letter to Congress.

More than 85 percent of women will become mothers at some point in their working lives.[4] And sometimes, an accommodation is needed in order for a pregnant worker to continue performing their job. Those accommodations are often small changes to their work environment such as additional bathroom breaks, a stool to sit on or the ability to have a water bottle at their work station. Although minor, these accommodations allow pregnant workers to stay in the workforce and continue to provide for themselves and their families. When pregnant workers are fired, demoted, or forced into unpaid leave, they and their

1875 connecticut avenue, nw ~ suite 650 ~ washington, dc 20009 ~ phone: 202.986.2600 ~ fax: 202.986.2539
email: info@nationalpartnership.org ~ web: www.nationalpartnership.org

families lose critical income, and they may struggle to re-enter a job market that is particularly harsh for people who are currently or were recently pregnant.

Pregnancy discrimination affects women across race and ethnicity, but women of color and immigrants are at particular risk. They are disproportionately likely to work in jobs and industries where accommodations during pregnancy are not oftenprovided (such as home health aides, food service workers, package handlers and cleaners).[5] Black women are much more likely than white women to file pregnancy discrimination charges;[6] they are also at a higher risk for pregnancy-related complications like pre-term labor, preeclampsia and hypertensive disorders,[7] making reasonable accommodations on the job even more important, and loss of wages and health insurance due to pregnancy discrimination especially challenging.

To date, twenty-seven states, the District of Columbia and four cities have passed laws requiring employers to provide reasonable accommodations to pregnant workers.[8] But the ability to maintain a healthy pregnancy and keep a job should not depend on where a pregnant person works. Women are a crucial part of the workforce and their participation matters for the growth of our economy and for the stability and wellbeing of families nationwide. The Pregnant Workers Fairness Act would strengthen existing federal protections, ensure more equitable workplaces and allow women to remain in the workforce and maintain their economic stability while having the accommodations necessary for healthy pregnancies. **It is time to clarify and strengthen existing federal protections for pregnant workers by passing the Pregnant Workers Fairness Act.**

CC: Chairman Scott and Ranking Member Foxx

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1 National Partnership for Women & Families. (2016, October). *By the Numbers: Women Continue to Face Pregnancy Discrimination in the Workplace.* Retrieved 18 October 2019, from http://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/by-the-numbers-women-continue-to-face-pregnancy-discrimination-in-the-workplace.pdf

2 National Partnership for Women & Families. (2014, January). *Listening to Mothers: The Experiences of Expecting and New Mothers in the Workplace.* Retrieved 18 October 2019, from http://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf

3 Center for American Progress. (2014, November 24). *Survey on Pregnancy Discrimination* [Memo]. Retrieved 18 October 2019, from https://cdn.americanprogress.org/wp-content/uploads/2014/11/YoungPollingMemo.pdf

4 U.S. Census Bureau. (2017, May). *Fertility of Women in the United States: 2016, Table 6, Completed Fertility for Women age 40 to 50 Years Old – Selected Characteristics: June 2016.* Retrieved 18 October 2019, from https://www.census.gov/data/tables/2016/demo/fertility/women-fertility.html#par_list_62 (Unpublished calculation. The reported percentage of women who had become mothers by age 40 to 44 as of 2014 is 85.6 percent.)

5 National Latina Institute for Reproductive Health and National Women's Law Center. (2014, May). *Accommodating Pregnancy On the Job: The Stakes for Women of Color and Immigrant Women.* Retrieved 18 October 2019, from https://www.nwlc.org/wp-content/uploads/2015/08/the_stakes_for_woc_final.pdf

6 See note 1.

7 Creanga, A. A., Bateman, B. T., Kuklina, E. V., & Callaghan, W. M. (2014, May). Racial and ethnic disparities in severe maternal morbidity: a multistate analysis, 2008-2010. *American Journal of Obstetrics & Gynecology, 210*(5), 435.e1–435.e8. Retrieved 18 October 2019, from http://www.ajog.org/article/S0002-9378(13)02153-4/fulltext

8 For a list, see: National Partnership for Women & Families. (2019, May). *Reasonable Accommodations for Pregnant Workers: State and Local Laws.* Retrieved 18 October 2019, from http://www.nationalpartnership.org/our-work/resources/workplace/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf

The National Partnership for Women & Families is a nonprofit, nonpartisan advocacy group dedicated to promoting fairness in the workplace, reproductive health and rights, access to quality, affordable health care and policies that help all people meet the dual demands of work and family. More information is available at NationalPartnership.org.

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[Additional submissions by Dr. Schrier follow:]

National WIC Association

2001 S Street NW, Suite 580
Washington, DC 20009-1165
☎ 202 232 5492 202 387 5281
www.nwica.org

October 18, 2019

The Honorable Suzanne Bonamici
Chairwoman
Civil Rights & Human Services Subcommittee
House Education and Labor Committee
2176 Rayburn House Office Building
Washington, DC 20515

The Honorable James Comer
Ranking Member
Civil Rights & Human Services Subcommittee
House Education and Labor Committee
1037 Longworth House Office Building
Washington, DC 20515

Dear Chairwoman Bonamici and Ranking Member Comer:

On behalf of the National WIC Association, the 12,000 service provider agencies we represent, and the approximately 7 million women, infants, and young children our members serve, we write to express our strong support for H.R. 2694, the Pregnant Workers' Fairness Act. This legislation is a critical step toward ensuring healthy pregnancies and positive birth outcomes for working mothers served by WIC.

WIC's nutrition assistance and counseling is specifically targeted to improve pregnancy and birth outcomes for expectant mothers. WIC's nutrition intervention has proven effective at reducing negative birth outcomes, particularly preterm birth and low birthweight. Negative birth outcomes can lead to lifelong health conditions, resulting in significant healthcare costs in both the short- and long-term. The average preterm birth costs $49,033 in first-year medical expenses, compared to a mere $4,551 for an uncomplicated birth.[1] Preterm births alone are estimated to cost employers more than $12 billion in additional healthcare spending each year.[2]

The Pregnant Workers' Fairness Act includes a reasonable accommodations framework for pregnant workers that is necessary to reduce health risks to both mother and baby. Certain physical tasks, such as heavy lifting or standing for long periods of time, could significantly increase the likelihood of preterm birth, miscarriage, or injury.[3] Indeed, women are four-times more likely to deliver preterm if their job tasks involve frequent heavy lifting.[4] Low-income women, in particular, may have to choose between the health of their pregnancy or their own job security. The bill's framework for accommodations can ensure that a pregnant worker would be able to remain employed with the additional support necessary to address her health needs and ensure a healthy pregnancy.

This legislation is especially relevant for the approximately 20 percent of working women – a total of 15.2 million women – who live in households that earn less than 185 percent of the federal poverty line, which is the income threshold for WIC participation.[5] Indeed, the average annual household income for WIC families is $18,626.[6] Of the 15.2 million working women within WIC's income guidelines, 59 percent (approximately nine million) are working part-time.[7] By strengthening protections for working women so that they can continue in their positions during pregnancy, this legislation is bolstering family income and job security for millions of WIC families.

Beth Beachy, Illinois, Chair
Berry Kelly, South Carolina, Chair-Elect
Rita Arni, Missouri, Chair Emeritus
Barbara Riley, Ohio, Secretary
Melinda Morris, Colorado, Treasurer
Rev. Douglas A. Greenaway, Washington, DC, President & CEO

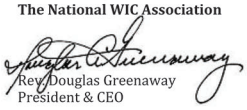
The reasonable accommodations framework is a tested and balanced approach that would permit pregnant workers to continue to earn an income and maintain job security, while also ensuring healthy pregnancies and securing positive birth outcomes. By drawing on the Americans with Disabilities Act model, employers are already familiar with the framework. Twenty-seven states have enacted similar provisions for pregnant workers, but national uniformity is necessary to provide clarity for both businesses and workers.

As direct service providers that serve almost two million pregnant and postpartum women, the WIC community is supportive of steps that safeguard the health of pregnancies, while also supporting family economic security. This legislation is a necessary step to ensure that children of working parents are able to get a healthy start to life.

We applaud the Subcommittee for its leadership in raising awareness about this important legislation.

Sincerely,

**The National WIC Association**



Rev. Douglas Greenaway
President & CEO

cc: Chairman Robert C. Scott
Ranking Member Virginia Foxx

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[1] March of Dimes, "The Cost of Prematurity and Complicated Deliveries to U.S. Employers" (2008), https://www.marchofdimes.org/Peristats/pdfdocs/cts/ThomsonAnalysis2008_SummaryDocument_final121208.pdf.
[2] March of Dimes, "Premature Babies Cost Employers $12.7 Billion Annually" (2014), https://www.marchofdimes.org/news/premature-babies-cost-employers-127-billion-annually.aspx.
[3] US Ctrs. for Disease Control & Prev., Nat'l Inst. for Occup. Safety & Health, "Reproductive Health and the Workplace" (2017), https://www.cdc.gov/niosh/topics/repro/physicaldemands.html.
[4] SB Runge, et al., "Occupational lifting of heavy loads and preterm birth: a study within the Danish National Birth Cohort," 70(11) *Occupational and Environmental Medicine* 782 (2013), https://www.ncbi.nlm.nih.gov/pubmed/23839660.
[5] Nat'l Acads. of Sciences, Engineering & Medicine, "Review of WIC Food Packages: Improving Balance and Choice: Final Report" (2017), https://www.ncbi.nlm.nih.gov/books/NBK435920/# (citing U.S. Census Bureau data).
[6] U.S. Dep't of Agriculture, Food & Nutrition Serv., "WIC Participants and Program Characteristics 2016, Final Report" (Apr. 2018), https://fns-prod.azureedge.net/sites/default/files/ops/WICPC2016.pdf.
[7] Nat'l Acads., *supra* n.5.

October 18, 2019

Subcommittee Chairwoman Bonamici and Ranking Member Comer
Civil Rights and Human Services Subcommittee
House Education and Labor Committee
2176 Rayburn House Office Building
Washington, DC 20515

**RE: Pregnant Workers Fairness Act**

Dear Chairwoman Bonamici and Ranking Member Comer,

On behalf of Equal Rights Advocates, I write in strong support of the Pregnant Workers Fairness Act), which will ensure that our federal law adequately protects pregnant women so that they are able to continue working while maintaining healthy pregnancies, which is critical to ensuring their economic security.

Not only are women now almost half of the workforce, but they are increasingly the co- or primary-breadwinners in their families and thus, are working later into their pregnancies – often out of economic necessity. However, despite the fact that the Pregnancy Discrimination Act has been on the books for nearly 40 years, pregnant women continue to face discrimination and obstacles at work.

Pregnant women – especially those in more physically demanding jobs - often require a temporary accommodation at work that allows them to continue performing the essential duties of their job, but also maintain a health pregnancy. These necessary accommodations might include having a stool to sit on, taking more frequent water or meal breaks, or avoiding lifting items over a certain weight, which often still allow a pregnant woman to fulfill her essential job functions. However, employers all too often deny these types of reasonable accommodations without engaging in any form of meaningful dialogue with the worker to determine if the accommodation can be provided. Women are often fired or pushed out onto unpaid leave when they request such an accommodation, at a time when they are most financially vulnerable.

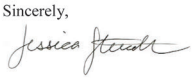
Equal Rights Advocates (ERA) is a national, non-profit legal organization based in San Francisco, California, whose mission is to protect and expand economic and educational access and opportunities for women and girls. We frequently provide legal representation, direct services and education to women who have experienced pregnancy-related discrimination at work, including being denied reasonable accommodations recommended by their doctors. Ensuring pregnancy related accommodations at work is a critical to ensuring that women are able to participate in the workforce and to advance economic security for mothers, who are vital to building strong communities and the overall economy.

The Pregnant Workers Fairness Act (PWFA) (H.R. 2694) would address critical gaps in the law that leave many pregnant women unprotected, including answering questions left open by the U.S. Supreme Court, by setting out a simple, easy-to-apply legal standard that would provide clarity for employers and employees alike.

The PWFA would let pregnant women continue to do their jobs and support their families by requiring employers to make the same sorts of accommodations for pregnancy, childbirth, and related medical conditions that the ADA requires employers to make for disabilities. It is therefore a commonsense bill that is long overdue.

For these reasons, we are in strong support of the Pregnant Workers Fairness Act. If you have any additional questions, please do not hesitate to contact me at jstender@equalrights.org.

Sincerely,



Jessica Stender
Senior Counsel, Workplace Justice & Public Policy
Equal Rights Advocates

CC: Chairman Scott and Ranking Member Foxx

[Additional submissions by Mr. Scott follow:]

**Statement for the Record Submitted by**
**Stacey D. Stewart, President and CEO, March of Dimes**
**House Education and Labor, Civil Rights and Human Services Subcommittee Hearing**
**"Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694)"**
**Tuesday, October 22, 2019**

March of Dimes, a unique collaboration of scientists, clinicians, parents, members of the business community, and other volunteers representing every state, the District of Columbia and Puerto Rico, appreciates this opportunity to submit a statement for the record. March of Dimes commends you for holding today's hearing on H.R. 2694, the *Pregnant Workers' Fairness Act*, legislation that is long overdue. This important bipartisan legislation would ensure that pregnant workers have the reasonable accommodations they need to work safely while having healthy pregnancies.

The Pregnancy Discrimination Act, passed in 1978, mandated that pregnant workers must be able to participate fully and equally in the workplace. The law prohibits discriminating against women due to pregnancy and childbirth, however, the law left out a requirement for pregnancy accommodations. As a result, employers continue to deny pregnant workers the basic and reasonable accommodations they need to continue working safely during their pregnancies, such as keeping water bottles on hand, restricting the weight a worker can lift, or allowing for more frequent water and restroom breaks.

Women who need income but lack these accommodations are often forced to continue working under unhealthy conditions, risking their own health as well as the health of their babies. Physically demanding work, where accommodations are more often necessary but too often unavailable, has been associated with an increased risk for preterm birth and low birth weight.

***Our nation is the midst of a Maternal Mortality and Severe Morbidity Public Health Crisis***

Workplace accommodations for pregnant women are more important now than ever before with the maternal mortality crisis our nation is facing. Women across the United States are tragically dying or suffering serious consequences from pregnancy-related causes. Of the 700 pregnancy-related deaths in the United States, approximately one-third occur during pregnancy, another third happen during delivery and up to one week afterward, and the final third come in the year following delivery. The Centers for Disease Control and Prevention (CDC) estimates that up to 60 percent of these deaths are preventable. For every maternal death,

there are about 100 episodes of severe maternal morbidity (SMM) affecting more than 50,000 women in the United States every year. Black women are 27 percent more likely to experience severe pregnancy complications than white women.

***This makes it all that more critical we protect pregnant women in the workplace***

March of Dimes is committed to a future where every mom is able to have a healthy pregnancy and delivery. To that end, we must ensure that pregnant workers can have the healthiest pregnancies without fear of discrimination, and being in an unsafe workplace. Unfortunately, that is just not the case today.

Despite the Pregnancy Discrimination Act declaring that discrimination on the basis of pregnancy and childbirth is illegal sex discrimination, nearly 31,000 pregnancy discrimination charges were filed between 2010 and 2015 with the U.S. Equal Employment Opportunity Commission (EEOC). Pregnant workers are forced out of their jobs and denied reasonable accommodations, jeopardizing their health and the health of their baby. One study found that 250,000 pregnant workers are denied reasonable accommodations per year.

Pregnant workers are further discriminated against according to their race, ethnicity, immigrant and income status putting their employee rights and health at risk. Latinas, Black women, immigrant and low-income women are more likely to work in labor-intensive occupations. White women file pregnancy discrimination charges at higher rates of 46%, whereas Black women file at lower rates of 29% despite their poor working conditions. Yet, black women are at higher risk for pregnancy related complications and have the highest infant mortality rate in the United States.

It is clear that there are health consequences to women being pushed out the workplace. Stress from job loss can increase the risk of a premature baby and baby with low birthweight. In addition, women who are not forced to use their leave during pregnancy may have more leave available to take following childbirth, which facilitates breastfeeding, bonding with and caring for a new child, and recovering from childbirth.

I would like to share with you one story from a March of Dimes' advocate who experienced workplace discrimination:

*During my first pregnancy, I had extreme morning sickness and found myself vomiting every hour. My job made me utilize my paid family medical leave. When I came back after my pregnancy, I was given the run around as I tried desperately to get my job back. I finally got a new job, however there was no place for me to pump. I often went to my car or used one of the restroom stalls to pump; and was told that I needed to clock out. I am advocating for pregnancy accommodations, because I know how discouraging these conditions can be for new mothers. I hope that one day no mother will ever have to pump her child's meal in a restroom stall. – Victoria J.*

Victoria's story is not uncommon. Clearing up the law will not only prevent the type of discrimination that happened to Victoria, but also ensure better health outcomes for women and babies, and reduce health care costs, supporting our economy. We can and we must do more to address this issue. The *Pregnant Workers Fairness Act* is a crucial maternal and infant health measure that will promote healthy pregnancies and economic security for women and their families.

March of Dimes would like to thank the bill's lead sponsors for their leadership. We stand ready to assist the Committee as it works to advance this critically important workplace safety and maternal health measure in an expeditious manner this Congress.

[Questions submitted for the record and their responses follow:]

MAJORITY MEMBERS:

ROBERT C. "BOBBY" SCOTT, VIRGINIA,
*Chairman*

SUSAN A. DAVIS, CALIFORNIA
RAÚL M. GRIJALVA, ARIZONA
JOE COURTNEY, CONNECTICUT
MARCIA L. FUDGE, OHIO
GREGORIO KILILI CAMACHO SABLAN,
NORTHERN MARIANA ISLANDS
FREDERICA S. WILSON, FLORIDA
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DAVID TRONE, MARYLAND
HALEY M. STEVENS, MICHIGAN
SUSIE LEE, NEVADA
LORI TRAHAN, MASSACHUSETTS
JOAQUIN CASTRO, TEXAS

COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

MINORITY MEMBERS:

VIRGINIA FOXX, NORTH CAROLINA,
*Ranking Member*

DAVID P. ROE, TENNESSEE
GLENN THOMPSON, PENNSYLVANIA
TIM WALBERG, MICHIGAN
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DUSTY JOHNSON, SOUTH DAKOTA
FRED KELLER, PENNSYLVANIA
GREGORY F. MURPHY, NORTH CAROLINA

November 1, 2019

Ms. Dina Bakst, J.D.
Co-Founder & Co-President
A Better Balance: The Work & Family Legal Center
40 Worth Street, 10th Floor
New York, NY 10013

Dear Ms. Bakst:

I would like to thank you for testifying at the October 22, 2019 Civil Rights and Human Services hearing *"Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694)."*

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Friday, November 8, 2019 for inclusion in the official hearing record. Your responses should be sent to Eunice Ikene of the Committee staff. She can be contacted at 202-225-3725 should you have any questions.

I appreciate your time and continued contribution to the work of the Committee.

Sincerely,

**ROBERT C. "BOBBY" SCOTT**
Chairman

Enclosure

Civil Rights and Human Services Subcommittee Hearing
***"Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694)"***
Tuesday, October 22, 2019 10:15 a.m.

**Chairman Robert C. "Bobby" Scott (D-VA)**

- Ms. Bakst, in her written testimony, Ms. McLaughlin express concern over the *Pregnant Workers Fairness Act* (PWFA) provision that states that an employee cannot be required to accept an accommodation that an employee chooses not to accept if the accommodation doesn't help the employee perform her job.
    - Do you interpret this provision to mean that the employee can veto any accommodation proposed by the employer?
    - What is your interpretation of this provision and why is it important?

- Ms. Bakst, during the hearing, Republican Committee members expressed concern over the lack of definition of a "known limitation related to pregnancy, childbirth, or related medical condition…". Based on your expertise and experience working with pregnant workers, what would you consider to be considered a "known limitation related to pregnancy, childbirth, or related medical conditions?"

**Representative Suzanne Bonamici (D-OR)**

- Ms. Bakst, when Congress passed the Americans with Disabilities Act Amendments Act (ADAAA) in 2008, it intended for courts to err on the side of the ADA, covering a broad range of impairments, including some pregnancy related impairments.
    - What pregnancy-related impairments have the courts deemed covered under the ADAAA?
    - What pregnancy related impairments or disabilities have the courts deemed not covered under the ADAAA?
    - What pregnancy related impairments would the Pregnant Workers Fairness Act cover that are not currently covered under the ADAAA?
    - Why might the Americans with Disabilities Act (ADA) be insufficient for pregnant workers seeking accommodation under that law?
    - Why have pregnant workers struggled to get accommodations under the ADA?

- Ms. Bakst, in her written testimony, Ms. McLaughlin expressed concern that the Pregnant Workers Fairness Act (PWFA) did not incorporate certain provisions from the ADA, including the requirements for medical documentation, medical examinations, and that the individual not pose a direct threat to the health and safety of other workers. Can you describe why some of these provisions may create additional barriers for pregnant workers?

- Ms. Bakst, in her testimony, Ms. McLaughlin expressed concerns that the Pregnant Workers Fairness Act does not incorporate the ADA's requirement that an employee to whom a reasonable accommodation is provided must be able to do the "essential

functions" of the job. In her written testimony, Ms. McLaughlin stated, "the Bill appears to require employers to take steps to keep the employee on the job regardless of her ability to continue to perform the core functions of the job."
    - Do you agree with Ms. McLaughlin's concern, and if not, why?
    - Would the PWFA require an employer to accommodate a pregnant worker if, even with the accommodation, they cannot perform the essential functions of their job?

**Representative Marcia Fudge (D-OH)**

- Ms. Bakst, the *Pregnant Workers Fairness Act* (PWFA) makes it unlawful for an employer to require and employee "to take leave whether paid or unpaid if another reasonable accommodation can be provided"?
    - Why is it important that pregnant workers are not forced onto unpaid or paid leave?

MAJORITY MEMBERS:

ROBERT C. "BOBBY" SCOTT, VIRGINIA,
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JAMES COMER, KENTUCKY
BEN CLINE, VIRGINIA
RUSS FULCHER, IDAHO
VAN TAYLOR, TEXAS
STEVEN C. WATKINS, JR., KANSAS
RON WRIGHT, TEXAS
DAN MEUSER, PENNSYLVANIA
DUSTY JOHNSON, SOUTH DAKOTA
FRED KELLER, PENNSYLVANIA
GREGORY F. MURPHY, NORTH CAROLINA

November 1, 2019

Ms. Iris Wilbur
Vice President of Government Affairs & Public Policy
Greater Louisville Inc.
614 W Main Street, #6000
Louisville, KY 40202

Dear Ms. Wilbur:

I would like to thank you for testifying at the October 22, 2019 Civil Rights and Human Services hearing *"Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694)."*

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Friday, November 8, 2019 for inclusion in the official hearing record. Your responses should be sent to Eunice Ikene of the Committee staff. She can be contacted at 202-225-3725 should you have any questions.

I appreciate your time and continued contribution to the work of the Committee.

Sincerely,

**ROBERT C. "BOBBY" SCOTT**
Chairman

Enclosure

Civil Rights and Human Services Subcommittee Hearing
***"Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694)"***
Tuesday, October 22, 2019 10:15 a.m.

**Representative Suzanne Bonamici (D-OR)**

- Ms. Wilbur, you mentioned the strong bipartisan support at the state level for the Kentucky Pregnant Workers Act. How did you work with legislators on both sides of the aisle in Kentucky to pass the state's Pregnant Workers Act with bipartisan support?

[Ms. Bakst response to questions submitted for the record follows:]

a better balance
the work and family legal center

Headquarters
40 Worth Street, 10th Floor
New York, NY 10013
**tel:** 212.430.5982

info@abetterbalance.org
**abetterbalance.org**

Southern Office
2301 21st Avenue South, Suite 355
Nashville, TN 37212
**tel:** 615.915.2417

The Honorable Robert C. "Bobby" Scott
Committee on Education and Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515-6100

November 8, 2019

Dear Chairman Scott:

Enclosed please find my responses to questions submitted by Committee members following the October 22, 2019 hearing, *Long Over Due, Exploring the Pregnant Workers' Fairness Act (H.R. 2694)*.

Thank you for your time and attention to this critical issue.

Sincerely,

Dina Bakst

Dina Bakst
Co-Founder & Co-President

Enclosure

**Questions from Chairman Robert C. "Bobby" Scott (D-VA):**

1. **Ms. Bakst, in her written testimony, Ms. McLaughlin express concern over the Pregnant Workers Fairness Act (PWFA) provision that states that an employee cannot be required to accept an accommodation that an employee chooses not to accept if the accommodation doesn't help the employee perform her job.**
    a. **Do you interpret this provision to mean that the employee can veto any accommodation proposed by the employer?**

No, I do not interpret this to mean an employee can veto any accommodation proposed by the employer. The text of the Pregnant Workers Fairness Act (PWFA) imports the definition of "reasonable accommodation" from the Americans with Disabilities Act (ADA) "including with regard to the interactive process that will typically be used to determine an appropriate reasonable accommodation."[1] This provision does not conflict with that requirement. Rather, it says that it shall be unlawful for an employer to: "(2) require a job applicant or employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation that such applicant or employee chooses not to accept, *if such accommodation is unnecessary to enable the applicant or employee to perform her job*."[2]

    b. **What is your interpretation of this provision and why is it important?**

The purpose of Section 2(2) in H.R. 2694 is to address the problem we see all too often wherein employers punish pregnant workers out of misguided, paternalistic concerns for the workers' health.

This provision is meant to make clear that, for example, an employer cannot unilaterally cut a pregnant worker's hours because the employer thinks pregnant workers should not work late when the worker has not sought and does not need any such accommodation. When employers tell workers like a woman who recently called our legal helpline that they feel sorry for them because they have to work while pregnant, and had her hours cut as a result, they are relying on paternalistic attitudes toward pregnant women. Rather than engaging in an individualized inquiry and engaging in the interactive process to determine if an accommodation is possible, as employers do for workers with disabilities and as is required under the ADA, they too often resort instead to one-size-fits-all solutions about what *they* perceive pregnant workers need or want. These forms of explicit bias against pregnant women and mothers continue to be rampant in the workplace and are what this provision intends to prevent.[3]

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[1] *See* H.R. 2694, 116th Cong. (2019) [hereinafter H.R. 2694].
[2] *Id.* (emphasis added).
[3] *See Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694): Hearing Before the Subcomm. on Civil Rights and Human Services of the H. Comm. on Ed. & Lab.*, 116th Cong. (2019) [hereinafter *Bakst Testimony*], https://edlabor.house.gov/download/10/22/2019/baksttestimony102219 (testimony of Dina Bakst) (citing Joan C. William & Amy J.C. Cuddy, *Will Mothers Take Your Company to Court*, Harv. Bus. Rev. (Sept. 2012), https://hbr.org/2012/09/will-working-mothers-take-your-company-to-court ("Maternal wall bias stems from the ways we think: from old-fashioned beliefs about what makes a good mother (someone who is always available to her children) and a good father (a good provider). Extensive research shows that these kinds of assumptions are

Just as under the ADA, however, an employee does not necessarily have the right to the particular accommodation they prefer if the employer is offering an alternative accommodation that is reasonable and would permit the employee to continue working without risking her health on the job. There must be a good faith, interactive process wherein an employer and employee work together to find a workable accommodation. That is what would happen under the Pregnant Workers Fairness Act as well.

2. **Ms. Bakst, during the hearing, Republican Committee members expressed concern over the lack of definition of a "known limitation related to pregnancy, childbirth, or related medical condition…". Based on your expertise and experience working with pregnant workers, what would you consider to be considered a "known limitation related to pregnancy, childbirth, or related medical conditions?"**

The intent of the PWFA is *precisely* to ensure coverage for pregnant workers with known physical and/or medical needs arising from pregnancy, childbirth, or related medical conditions regardless of whether or not those needs qualify as disabilities as defined under the Americans with Disabilities Act. The purpose of the bill is intended to address those medical needs, or limitations, that may require a temporary accommodation but are likely not a covered disability under the ADA. For example:

- A worker who regularly lifts more than 75 pounds may be advised by her healthcare provider not to lift over a certain number of pounds so as to avoid miscarriage.
- A pregnant worker who needs to carry a water bottle or have more frequent water breaks in order to stay adequately hydrated and avoid complications.
- A doctor may advise a patient who works as a cashier and stands all day to request a stool to sit on periodically during their shift to reduce the risk of preterm birth.
- A pregnant worker unable to work her entire 8-hour shift without restroom breaks has a limitation related to her pregnancy and should be entitled to a reasonable accommodation to prevent urinary tract infections and other serious health risks.
- A pregnant worker who can no longer fit in her workplace uniform or safety equipment and requires some adjustments also has a limitation stemming from pregnancy.

Furthermore, as my answer to Rep. Bonamici's Question 1(b) makes abundantly clear, courts routinely find that women with serious pregnancy-related conditions— such as high-risk pregnancy, hyperemesis, and other pregnancy-related complications—do not have qualifying disabilities under the Americans with Disabilities Amendments Act (ADAAA)[4] This gap also necessitates a broader standard that moves beyond "disability" language and towards a standard that will cover the medical needs pregnant women may have.

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widely shared and will persist unless they are brought into the light and challenged" and finding that such bias "often feels more like a sledgehammer than a paper cut" and citing Shelley Correll, Stephen Benard, & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, Am. J. of Soc. (2007) who found that a woman with children was 79% less likely to be hired than one without children)).

[4] *See infra* response to Rep. Bonamici's Question 1(b).

At the state level, legislatures have recognized that a core concept of pregnant worker fairness legislation is to ensure pregnant workers with medical needs arising from pregnancy are provided temporary accommodation absent undue hardship. Despite Ms. McLaughlin's concern, state legislators on both sides of the aisle have recognized that this concept is common-sense. Pregnancy accommodation laws in West Virginia, Oregon, and Maine use "known limitation" language.[5] In Kentucky, the law uses the term "limitation."[6] In addition, South Carolina's law uses the term "medical needs."[7] Although the wording of each of these laws may vary slightly, the underlying concept is the same.[8]

**Questions from Representative Suzanne Bonamici (D-OR)**

1. **Ms. Bakst, when Congress passed the Americans with Disabilities Act Amendments Act (ADAAA) in 2008, it intended for courts to err on the side of the ADA, covering a broad range of impairments, including some pregnancy related impairments.**

    a. **What pregnancy-related impairments have the courts deemed covered under the ADAAA?**

Courts have not drawn bright line rules that indicate which pregnancy-related impairments are deemed covered under the ADAAA—instead courts treat each case as a fact-specific inquiry, as required under the law to assess whether the worker has "a physical or mental impairment that substantially limits one or more major life activities of such individual."[9] There have certainly been cases where courts have deemed certain pregnancy-related disabilities, such as preeclampsia or HELLP Syndrome, "a life-threatening pregnancy condition and disability that is a permanent diagnosis", to merit ADAAA coverage.[10]

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[5] *See* H.B. 2341, 80th Legis. Assemb., Reg. Sess. (Or. 2019); 5 MRSA § 4553(8-E) (2019); W. Va. Code § 5-11B-2 (2014). In Kentucky, the law uses the term "limitation." *See* KRS 344.030 (2019).

[6] *See* KRS 344.030 (2019).

[7] *See* S.C. Code Ann. § 1-13-30 (2018).

[8] *See, e.g.* 21 V.S.A. § 495k (2017); N.Y. Exec. Law § 292 (2016); R.I. Gen. Laws § 28-5-7.4 (2015).

[9] 42 U.S.C. § 12102 (1)(a) (2012).

[10] *See e.g.*, *Boyne v. Town & Country Pediatrics & Family Med.* No. 3:15-CV-1455 (MPS), 2017 WL 507212, at *1 (D. Conn. Feb. 7, 2017). (finding that HELLP (Hemolysis-Elevated Liver Enzymes-Low Platelet) Syndrome, "a life-threatening pregnancy condition and disability that is a permanent diagnosis" and causes severe abdominal pain, a swollen liver, headaches, tiredness, nausea, and ulcers" was an ADAAA-qualifying disability and allowed her disability discrimination claim to proceed); *Alexander v. Trilogy Health Servs., LLC*, No. 1:11-CV-295, 2012 WL 5268701, at *11 n.10 (S.D. Ohio Oct. 23, 2012) (finding that the plaintiff's condition qualified as a disability because her "preeclampsia substantially limited the operation of her circulatory and urinary functions because it caused her blood pressure to reach a dangerous 180/100 and protein levels in her kidneys to rise to dangerous levels as well"). *See also Mayorga v. Alorica, Inc.*, No. 12-21578-CIV, 2012 WL 3043021, at *1, *5 (S.D. Fla. July 25, 2012) (finding that "premature uterine contractions, irritation of the uterus, increased heart rate, severe morning sickness, severe pelvic bone pains, severe back pain, severe lower abdominal pain, extreme headaches, and other pregnancy-related conditions" qualified as a disability under the ADAAA); *Hamilton v. Prince George's Cty. Police Dep't,* No. CV DKC 17-2300, 2018 WL 1365847, at *8 (D. Md. Mar. 16, 2018) (holding genuine dispute of material fact existed as to whether plaintiff, who had an incompetent cervix and was told to avoid squatting, significant driving, and lifting more than twenty pounds, was substantially impaired in a major life function). Hamilton's doctor's note indicated she had an incompetent cervix. *See* Complaint at Exhibit B*, Hamilton v. Prince George's Cty. Police Dep't,* No. CV DKC 17-2300 (D. Md. Mar. 16, 2018), ECF No. 14-6.

**b. What pregnancy related impairments or disabilities have the courts deemed not covered under the ADAAA?**

As stated in 1(a), assessing what meets the legal definition of "disability" in order to trigger ADAAA protection will depend on courts' analysis as to whether the worker has "a physical or mental impairment that substantially limits one or more major life activities of such individual."[11] That means a court's analysis will rest on two primary inquiries: 1) whether a worker has an "impairment;" and 2) whether that impairment "substantially limits one or more major life activities."

Pregnant women are routinely losing their cases under one or both of the two prongs of the disability analysis. The first section below outlines those cases in which, despite a pregnant worker presenting with a very serious pregnancy-related complication that required accommodation, courts found that workers failed to trigger ADAAA protections because the complication did not amount to an "impairment" in the courts view, [12] and/or their pregnancy complication did not substantially limit a major life activity.[13]

The second section outlines those cases in which courts have found that because a woman only had a medically advised need for an accommodation to prevent a complication from arising or maintain a healthy pregnancy, they did not have a "disability" that qualified them for ADAAA-covered accommodations. [14] This section also highlights stories of women who may not have had the time or resources to go to court but were denied modest accommodations for medical needs stemming from pregnancy that would likely not qualify for ADAAA disability but would help them maintain a healthy pregnancy.

**1. Courts routinely find that even serious pregnancy related complications fail to trigger ADAAA protection because they are only "temporary" and/or not "sufficiently severe."**

Disturbingly, courts are finding that even when pregnant women have quite serious complications, those complications do not merit ADAAA protections either because the complications do not meet the definition of "impairment" and/or because they do not substantially limit a major life activity.

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[11] 42 U.S.C. § 12102 (1)(a) (2012).
[12] *See Tomiwa v. PharMEDium Servs., LLC*, No. 4:16-CV-3229, 2018 WL 1898458, at *5 (S.D. Tex. Apr. 20, 2018).
[13] *See, e.g.*, *Pineda v. ESPN, Inc.*, No. 3:18-CV-325 (MPS), 2018 WL 5268123, at *4 (D. Conn. Oct. 23, 2018) ("Because Pineda fails to allege how her PTSD substantially limited a major life activity, she does not allege a qualifying disability under the ADA."); *Colon v. Sabic Innovative Plastics US, LLC*, No. 115CV651MADDJS, 2017 WL 3503681, at *7 (N.D.N.Y. Aug. 15, 2017) ("The only evidence that Plaintiff presented in support of her position that her high-risk pregnancy was a disability is the fact that her doctor diagnosed her with a high risk pregnancy. Plaintiff does not claim that her high-risk pregnancy substantially limited in any way her reproductive functions or any other major life activity.").
[14] *See, e.g.*, *LaCount v. S. Lewis SH OPCO, LLC*, No. 16-CV-0545-CVE-TLW, 2017 WL 1826696, at *3 (N.D. Okla. May 5, 2017).

When it comes to the "impairment" prong of the inquiry, over and over, courts have found that "pregnancy, absent unusual circumstances, is not considered a disability under the ADA."[15] Courts also explicitly distinguish "pregnancy-related complications" from an ADAAA qualifying "disability," thus acknowledging that even those pregnant women *with* complications may have no recourse under the ADAAA. As a federal court in Indiana held in September 2019 in dismissing a care professional's ADAAA claim even though she experienced unbearable cramping that required her to go to the hospital and led to bleeding and miscarriage, "even if Adireje had a pregnancy-related complication…[she] was not disabled for purposes of the ADA because there is no evidence that her cramps limited her ability to work or other major life activities."[16]

This has led to the reality that, as one court stated, "only in extremely rare cases have courts found that conditions that arise out of pregnancy qualify as a disability."[17] Or as the Northern District of Illinois concluded in the 2018 case *Scheidt v. Floor Covering Associates*, "Although the 2008 amendments broadened the ADA's definition of disability, these changes only have had a modest impact when applied to pregnancy-related conditions."[18]

The issue also stems from the fact that pregnancy-related impairments are short in duration and even after the ADAAA, courts continue to hold that "temporary, non-chronic impairments of short-duration, with little or no long term or permanent impact, are usually not disabilities."[19] Or as another court put it, "courts applying the ADAAA continue to find that impairments of a very short-duration do not substantially limit major life activities absent extenuating circumstances."[20] The EEOC's guidance on the ADAAA also states that "[i]mpairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe."[21]

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[15] *See Tomiwa v. PharMEDium Servs.*, LLC, No. 4:16-CV-3229, 2018 WL 1898458, at *5 (S.D. Tex. Apr. 20, 2018) ("Absent unusual circumstances, pregnancy and related medical conditions do not constitute a physical impairment."); *Mayorga v. Alorica, Inc.,* No. 12-21578-CIV, 2012 WL 3043021, at *5 (S.D. Fla. July 25, 2012) (citing, inter alia, *Selkow v. 7–Eleven, Inc.*, No. 11–CV–456, 2012 WL 2054872, at *14 (M.D. Fla. June 7, 2012) ("Absent unusual circumstances, pregnancy is not considered a disability—temporary or otherwise—under the ADA or FCRA."); *Jeudy v. Holder*, No. 10–22873, 2011 WL 5361076, at *4 (S.D. Fla. Nov.7, 2011) (noting "that pregnancy is not normally considered a disability")).

[16] Adireje v. ResCare, Inc., No. 118CV01429TWPDLP, 2019 WL 4750037, at *8 (S.D. Ind. Sept. 30, 2019).

[17] *Sam-Sekur v. Whitmore Grp., Ltd*., No. 11-CV-4938 JFB GRB, 2012 WL 2244325, at *8 (E.D.N.Y. June 15, 2012); *see also Wanamaker v. Westport Board of Education*, 899 F.Supp.2d 193, 211 (D. Conn. 2012) (citing to *Sam-Sekur* and the EEOC guidance that short-term impairments must be "sufficiently severe" for the proposition that pregnancy-related conditions are only ADAAA-qualifying in rare cases and finding plaintiff teacher could not survive her ADA claim because she "failed to allege that her transverse myelitis limit[ed] a major life activity and that any impairment as a result of her transverse myelitis was not for a short period of time" and "no other facts indicating that [her] condition was chronic.").

[18] *Scheidt v. Floor Covering Assocs., Inc.*, No. 16-CV-5999, 2018 WL 4679582, at *6 (N.D. Ill. Sept. 28, 2018) (emphasis added) (holding allergies, including rashes and breathing problems, do not constitute a disability that impairs a major life activity).

[19] *Wanamaker,* 899 F. Supp. 2d at 211; *see also Turner v. Eastconn Reg'l Educ. Serv. Ctr.*, No. 3:12-CV-00788 VLB, 2013 WL 6230092, at *6 (D. Conn. Dec. 2, 2013) (citing *Wanamaker,* 899 F. Supp. 2d at 211).

[20] *Love v. First Transit, Inc.*, No. 16-CV-2208, 2017 WL 1022191, at *6 (N.D. Ill. Mar. 16, 2017) (citing cases).

[21] See Appendix to Part 1630, Interpretive Guidance on Title I of the Americans with Disabilities Amendments Act, 29 C.F.R. § 1630, App. (2018).

These cases speak to a fundamental problem with the ADAAA when it comes to pregnancy accommodations. Often, a worker will only need an accommodation to address a medical need for a short period of time, e.g. the need to avoid lifting may only last a number of weeks. In that circumstance, even with an impairment, the worker likely would not be covered by the ADAAA.

Below are numerous examples of pregnant workers who experienced quite serious complications but courts still held they were not a "disability" meriting ADAAA protections because they did not meet one or both prongs of the ADAAA "disability" inquiry.

**High-Risk Pregnancy**

**Shakirat Tomiwa's** case signifies how, even ten years after the ADAAA was enacted, too many courts are still patently dismissive of the law's requirements when it comes to pregnancy-related complications. In September 2015, Shakirat, a licensed pharmacy technician in Texas, had to undergo two emergency surgeries related to pregnancy-related complications.[22] At that point, her pregnancy was high-risk and she knew she may need accommodations related to her pregnancy.[23] In October 2015, just two weeks before her delivery date, she presented a doctor's note requesting an accommodation.[24] Instead of working with her to try to see if they could provide the accommodation, the employer terminated her the day after she made the request.[25] The court dismissed her ADAAA claim, finding she did not have an impairment that constituted a "disability." Despite the two emergency surgeries she had to undergo, the court said "[a]bsent unusual circumstances, pregnancy and related medical conditions do not constitute a physical impairment," under the ADAAA. The Court concludes that the plaintiff's pregnancy is not a 'physical impairment.' Therefore, the plaintiff is not a qualified individual with a disability."[26]

In **Margarita Colon's** case, the court in 2017 found that even though she had documented evidence of a "high-risk pregnancy" from her medical provider that was not enough to meet the definition of a disability under the ADAAA because she could not show that her high-risk pregnancy "substantially limited a major life activity."[27]

**Hyperemesis Gravidarum & Pregnancy-Related Nausea**

**Sylvia Wonasue,** from Maryland, went to the Emergency Room while pregnant and was diagnosed with hyperemesis gravidarum of pregnancy, a severe form of morning sickness, and hypokalemia, a low level of potassium.[28] But the court, in 2013, cited and quoted pre-ADAAA

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[22] Complaint at 5, *Tomiwa v. PharMEDium Servs*., LLC, No. 4:16-CV-3229 (S.D. Tex. Apr. 20, 2018), ECF No. 1.
[23] *Id.*
[24] *Id.* at 6.
[25] *Id.*
[26] *Tomiwa v. PharMEDium Servs.*, LLC, No. 4:16-CV-3229, 2018 WL 1898458, at *5 (S.D. Tex. Apr. 20, 2018).
[27] *Colon v. Sabic Innovative Plastics US, LLC*, No. 115CV651MADDJS, 2017 WL 3503681, at *7 (N.D.N.Y. Aug. 15, 2017).
[28] *Wonasue v. University of Maryland Alumni Association*, 984 F. Supp. 2d 480, 490 (D. Md. 2013).

case law and found she did not have an impairment for purposes of the ADA and questioned whether she really needed an accommodation.[29]

**Rebbeca Llano**, from New York, experienced pregnancy-related nausea and complications but because she could not show that her nausea was severe enough such that it "substantially limited one or more major life activities," the court in 2015 held she could not "satisfy the first definition of disabled" under the ADAAA.[30]

**Elizabeth Annobil**, from Massachusetts, reported to her supervisor that she suffered from headaches, nausea, and vomiting during her pregnancy but the court found she failed to show she had impairment because she provided "no legal argument as to whether such symptoms differ from normal symptoms of pregnancy and how these complications are disabling. Therefore she [] failed to establish the first prong of her prima facie case, i.e., that she was disabled."[31]

**Pregnancy-Related Bleeding at Work**

**Jennifer Alger,** from Georgia, experienced "severe complications" and bleeding at work.[32] In her case, the court said she failed to show her pregnancy-related complications constituted an impairment that qualified as a disability under the ADAAA.[33]

**Tomisha Love** worked as a customer service representative in 2014. In December 2014, while pregnant, she experienced bleeding at work and asked for an accommodation to leave work early to go to the hospital, where she ended up miscarrying.[34] When she returned to work the next day, her employer fired her. The court in *Love* found that she was not entitled to an accommodation—of missing less than a day after bleeding at work—under the ADAAA because she did not have a "disability."[35] In reaching this holding, the court also relied on the fact that "courts applying the ADAAA continue to find that impairments of a very short-duration do not substantially limit major life activities absent extenuating circumstances."[36]

I certainly disagree with these courts who are denying ADA protection to high-risk pregnancies and pregnancy-related disabilities but if courts are getting these cases wrong, then a worker with medical needs arising from an uncomplicated pregnancy and in need of accommodation to prevent problems before they start— e.g., more frequent restroom breaks to prevent a urinary tract infection or permission to carry a water bottle to prevent dehydration, simply cannot rely on the ADAAA for protection.

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[29] *Id.*
[30] *Llano v. New York City Health & Hosps.* Corp., No. 13 CIV. 5820 RJS, 2014 WL 1302654, at *2 (S.D.N.Y. Mar. 31, 2014).
[31] *Annobil v. Worcester Skilled Care Ctr., Inc.,* No. CIV.A. 11-40131-TSH, 2014 WL 4657295, at *11 (D. Mass. Sept. 10, 2014).
[32] *Alger v. Prime Rest. Mgmt.*, LLC, No. 1:15-CV-567-WSD, 2016 WL 3741984, at *1 (N.D. Ga. July 13, 2016).
[33] *Id.* at *7–8.
[34] *Love v. First Transit, Inc.*, No. 16-CV-2208, 2017 WL 1022191, at *1, (N.D. Ill. Mar. 16, 2017).
[35] *Id* at *6–7.
[36] *Id.* at *6.

**2. Pregnancy-related medical and/or physical needs, conditions, or minor impairments for which accommodations help maintain a healthy pregnancy and/or prevent serious complications are almost entirely excluded from ADAAA coverage.**

Courts have consistently made clear that if a pregnant worker does not have a complication, or a severe-enough complication, she will be unlikely to merit reasonable accommodations under the ADAAA.[37] Ms. McLaughlin acknowledged this very point in her testimony.[38] That means that if a doctor recommends an accommodation in order for a pregnant worker to avoid serious pregnancy-related complications (e.g., preterm labor) for any number of reasons, the worker will likely not be covered under the ADAAA.

**Whitney LaCount's** case illustrates this gap in protection. A certified nursing assistant in Oklahoma, LaCount brought in a doctor's note with a 25-pound lifting restriction. She asked to refrain from lifting only one particular patient during her pregnancy and had five other employees willing to help her. But rather than grant her this modest temporary light duty accommodation, her employer pushed her out onto unpaid leave. The court in 2017 dismissed her ADAAA claim because she did not allege that she was pregnant and had a related mental or physical impairment such as an abnormal pregnancy and so she did not merit accommodations under the ADAAA.[39]

In addition to lifting, women may also need modest accommodations such as additional bathroom breaks to maintain a healthy pregnancy. That need would likely not qualify as a disability under the ADAAA, but this is where the Pregnant Workers Fairness Act could step in to ensure that women receive the accommodation they need to maintain a healthy pregnancy.

The poultry industry provides a stark example. Sandra, a former poultry worker whose experience was highlighted in the OxFam report, *Women on the Line,* reported "that when she was pregnant, she was only allowed the standard two breaks per shift, which was not sufficient."[40] But, she noted that "if you come back one or two times late from a break, you get fired." Another poultry worker reported that, "when I was pregnant, I had to constantly go to the bathroom, and a male supervisor told me 'why don't women hold it like I have to hold it all

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[37] *See, e.g. Lang v. Wal-Mart Stores E., L.P.*, 2015 WL 1523094, at *2 (D.N.H. Apr. 3, 2015) ("[P]regnancy is not an actionable disability, unless it is accompanied by a pregnancy-related complication"); *Mayorga v. Alorica, Inc.*, 2012 WL 3043021, at *5 (S.D. Fla. July 25, 2012) ("[p]regnancy, absent unusual circumstances, is not considered a disability under the ADA." (collecting cases)); *see also Bakst Testimony, supra* note 3, at 17 n. 77 (citing cases).

[38] *See Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694): Hearing Before the Subcomm. on Civil Rights and Human Services of the H. Comm. on Ed. & Lab.*, 116th Cong. (2019) [hereinafter *McLaughlin Testimony*], https://edlabor.house.gov/download/mclaughlin-testimony
(testimony of Ellen McLaughlin).

[39] *LaCount v. S. Lewis SH OPCO, LLC*, No. 16-CV-0545-CVE-TLW, 2017 WL 1826696, at *3 (N.D. Okla. May 5, 2017). *See also Lang v. Wal-Mart Stores E., L.P.*, No. 13-CV-349-LM, 2015 WL 1523094, at *2 (D.N.H. Apr. 3, 2015); *Reynolds v. Town of Suffield,* No. 3:10CV1528 JBA, 2012 WL 3135896, at *7 (D. Conn. July 31, 2012) (holding that a police officer who provided a physician's note which stated that "she was not to lift more than 20 pounds while at work" and another note that she should only work day shifts did not have a disability under the ADAAA because she was not precluded from "performing a class of jobs.").

[40] OXFAM AMERICA, WOMEN ON THE LINE: A REVIEW OF WORKPLACE GENDER ISSUES IN THE US POULTRY INDUSTRY 12 (2018).

day?'"[41] Often, the report highlights, pregnant workers needed to resort to wearing diapers on the line because they were not allowed to take extra bathroom breaks.[42] While these workers may not have had pregnancy complications, it should never be the case in this country that pregnant women are forced to urinate in a diaper—which could potentially lead to pregnancy complications and undermines human dignity—because they are too afraid to lose their jobs.

Accommodations as simple as carrying a water bottle on the retail floor may not be linked to a disability but certainly go a long way in ensuring a pregnant worker can maintain a healthy pregnancy. For example, when A Better Balance community advocate Natasha Jackson's sister was pregnant she was working in a shoe store in South Carolina. Her employer refused to allow her to carry a water bottle on the floor to stay hydrated, even though she was pregnant. One day, still not allowed to carry water and denied a lunch break, she had to be rushed to the Emergency Room.[43] Natasha's sister is not alone. As I pointed out in my testimony, Dr. Lucy Willis, an ER physician in New York City, treated a pregnant patient who arrived by ambulance at the ER with severe dehydration because she was not allowed to carry a water bottle on the retail floor.[44]

These women had modest medical needs related to pregnancy, needs which the ADAAA would likely not account for, but for which the PWFA is specifically designed to address.

**c. What pregnancy related impairments would the Pregnant Workers Fairness Act cover that are not currently covered under the ADAAA?**

Crucially, the PWFA would cover physical and/or medical needs related to pregnancy that do not qualify as disabilities under the ADAAA, as discussed in Part 2 of my answer to Question 1(b). Right now, if a pregnant worker has no pregnancy-related disability but a physician recommends an accommodation in order for the pregnant worker to maintain a healthy pregnancy and to avoid serious pregnancy-related complications, the worker is not covered under the ADAAA.

Second, the PWFA would also cover serious pregnancy-related complications whether or not they are currently covered by the ADAAA, including those complications highlighted in Part 1 of my answer to Question 1(b) wherein courts failed to recognize quite serious complications pregnant workers faced as pregnancy-related disabilities meriting ADAAA protections.

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[41] *Id.*
[42] *Id.* at 11.
[43] *Hearing on H. 3865 Before the H. Comm. on Judiciary,* 122nd Gen. Assemb. (S.C. Mar. 22, 2017) (testimony of A Better Balance Community Advocate Natasha Jackson in Support of South Carolina Pregnancy Accommodations Act), https://www.abetterbalance.org/resources/natasha-jacksontestimony-south-carolina-pregnancy-accommodations-act/.
[44] *Bakst Testimony*, *supra* note 3, at 26 n.14 (citing Letter from Wendy Chavkin, MD, MPH, Professor of Population and Family Health and Obstetrics-Gynecology, Columbia University, to James Vacca, New York City Council Member (Nov. 29, 2012), https://www.abetterbalance.org/resources/chavkin-letter/).

**d. Why might the Americans with Disabilities Act (ADA) be insufficient for pregnant workers seeking accommodation under that law?**

The purpose of the ADA is to address scenarios where a worker already has a disability or impairment. As explained in detail in my answer to question 1(b), pregnancy is a medical condition but, as courts have made clear, it is not itself a disability or impairment, not to mention that even in scenarios where pregnant workers have presented complications, courts have still been unwilling to recognize those as ADAAA qualifying disabilities.[45]

Pregnant workers may have disabilities *related to* pregnancy, but the condition of pregnancy itself is a medical event that is not inherently a disability or impairment. A pregnant worker may have medical needs that stem from pregnancy but these needs are not always going to be related to impairments. Rather, those medical needs are often designed to *avoid* complications and impairments from arising.

When a doctor gives a pregnant worker a note outlining a modest accommodation to maintain a healthy pregnancy, the PWFA would ensure that a pregnant worker can follow her doctor's orders and obtain that accommodation through an informal interactive process with her employer. In this scenario, however, under the ADAAA, the worker would not be entitled to an accommodation unless she could prove that she was disabled.[46]

States around the country have recognized pregnancy-related medical needs irrespective of whether they constitute a disability, as noted in my response to Rep. Scott's Question #2.

**e. Why have pregnant workers struggled to get accommodations under the ADA?**

Pregnant workers have struggled to receive accommodations under this law for numerous reasons. First, pregnancy itself is not a disability; therefore, if a worker has a medical need related to pregnancy that does not constitute a "disability," as defined by law, they will not be entitled to the protections of the ADAAA.

Second, even though the ADAAA expanded the types of disabilities that merit accommodations under the law, as stated for the record, even when a pregnant worker has presented courts with evidence of a pregnancy-related complication, certain courts are still holding that such complications did not rise to meet the definition of "disability" under the ADAAA.[47] Thus, even for pregnant workers with conditions such as high-risk pregnancy, hyperemesis gravidarum, pregnancy-related bleeding at work, pregnancy-related surgery, pregnancy-related nausea, courts are still finding that those conditions do not merit ADAAA protections.[48]

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[45] *See supra* response to Rep. Bonamici's Question 1(b).
[46] *Id.*
[47] *Id.*
[48] *See id.* (citing cases).

2. **Ms. Bakst, in her written testimony, Ms. McLaughlin expressed concern that the Pregnant Workers Fairness Act (PWFA) did not incorporate certain provisions from the ADA, including the requirements for medical documentation, medical examinations, and that the individual not pose a direct threat to the health and safety of other workers. Can you describe why *some* of these provisions may create additional barriers for pregnant workers?**

To Ms. McLaughlin's point about direct threat, in all of the hundreds of scenarios I have heard about in doing this work for 15 years, I have never heard an employer make the argument that a pregnant worker was a threat to the health or safety of her coworkers by continuing to work with a reasonable accommodation.

What I have heard time and time again is employers who try to argue that a pregnant worker should go on leave because if she continues to work she will pose a threat to herself or her pregnancy. In her testimony, Ms. McLaughlin posits that an employer should be able to "require that the pregnant worker not report to the job site" if it would "expose the fetus to unsafe conditions, such as lead or radiation."[49] Notably, Ms. McLaughlin only specifies that employers should be able to push out pregnant workers, but not men who could have adverse reproductive effects from lead or radiation exposure.[50]

This is precisely the type of paternalism that the Supreme Court outlawed in *United Automobile Workers v. Johnson Controls* case when it struck down a policy that barred pregnant women from working in an environment that would expose them to lead.[51] Though the *Johnson Controls* decision came down nearly 30 years ago, Ms. McLaughlin's testimony demonstrates that this paternalistic thinking is still alive and well today. A pregnant worker can certainly choose to seek a medically necessary accommodation regarding chemical exposure, but that is for her to decide, not her employer. These types of assumptions and stereotypes that have for decades been used to keep women out of the workforce, are still being used. Suggesting that the PWFA—a bill designed to put an end to these assumptions and stereotypes—should explicitly import that paternalism into the bill runs directly counter to the very intention of the legislation.

With this history and precedent in mind, the Pregnant Workers Fairness Act intentionally avoided importing the "direct threat" provisions from the ADA.[52] Rather, the portions imported from the ADA are those that are applicable and relevant to ensuring equality for pregnant workers.

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[49] *McLaughlin Testimony, supra* note 38, at 8–9.
[50] *See, e.g.*, Hsien-Ming Wu, Dan-Tzu Lin-Tan, Mei-Li Wang, Hong-Yuan Huang, Chyi-Long Lee, Hsin-Shih Wang, Yung-Kuei Soong, and Ja-Liang Lin, *Lead Level in Seminal Plasma May Affect Semen Quality for Men Without Occupational Exposure to Lead,* 10 REPROD. BIO. ENDOCRIN. 91 (2012).
[51] *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 191, 211 (1991).
[52] *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 76 (2002) (interpreting the "direct threat" provision of the ADA to also include threats to a worker's own health).

Furthermore, including a direct threat provision in the PWFA would not only lead to discrimination against pregnant workers but also poses great challenges to employers. Employers who push out pregnant workers on the assumption that certain conditions pose a danger, risk liability for sex discrimination, especially if these policies are specifically targeted at pregnant women. Even a gender-neutral policy may expose employers to litigation if unevenly applied and disproportionately impact pregnant women.

With respect to medical documentation and examinations, there is no reason why a pregnant worker should have to seek medical examination or certification to be allowed to use the bathroom more frequently, carry a water bottle on the retail floor, or receive a stool to sit on. Often, employers will use the requirement to provide a medical note as a way to prolong having to provide a very simple or reasonable accommodation, knowing that it may be very difficult for a worker to take time to go to the doctor.

This delay tactic—which is likely to disproportionately impact low-wage workers—only stands to further compromise women's health. In addition, as we have seen up close at A Better Balance, vague and poorly written doctors' notes have also been used as a tool to push out a worker rather than engage with them in a good faith interactive process.

3. **Ms. Bakst, in her testimony, Ms. McLaughlin expressed concerns that the Pregnant Workers Fairness Act does not incorporate the ADA's requirement that an employee to whom a reasonable accommodation is provided must be able to do the "essential functions" of the job. In her written testimony, Ms. McLaughlin stated, "the Bill appears to require employers to take steps to keep the employee on the job regardless of her ability to continue to perform the core functions of the job."**
    a. **Do you agree with Ms. McLaughlin's concern, and if not, why?**

No, I disagree with Ms. McLaughlin. If a pregnant worker's limitation in her ability to do her job is one that cannot be reasonably accommodated without undue hardship, the employer does not have an obligation to the pregnant worker under the Pregnant Workers Fairness Act. Pregnancy accommodations are typically only a few weeks or months. They do not impact an employee's long-term job performance or career in the same way as workers with longer-term disabilities covered by the ADA. The undue hardship standard is specifically designed to ensure that employers are not forced to provide accommodations that would be extremely difficult or expensive. So long as an employer can provide a reasonable accommodation and it does not impose an undue hardship, that should be a sufficient standard to determine whether an accommodation is appropriate. Of course, this may, at times, mean that temporarily excusing an essential function is warranted, as is also the case in the ADA context.[53]

Furthermore, we know that employers sometimes use the notion of "essential functions" as a weapon to avoid providing accommodations for workers. For instance, under the ADA, two of the primary factors in determining essential functions are "the employer's judgment as to which

[53] *See infra* response to Rep. Bonamici's question 3(b).

functions are essential[] and written job descriptions."[54] Unfortunately, many courts give overwhelming deference to employer's judgment regarding essential functions and written job descriptions. For instance, the Eighth Circuit considers an employer's judgment on essential functions "highly probative."[55] The court has further held that the "specific personal experience" of a plaintiff "is of no consequence in the essential functions equation."[56] Rather, it is generally "the written job description, the employer's judgment, and the experience and expectations of all [employees in the plaintiff's position] …which establish the essential functions of the job."[57] This incentivizes employers to include certain functions as part of the job description so as to avoid having to provide the accommodation. This would be especially likely in the pregnancy context, where employers may be able to anticipate the kinds of restrictions a worker may have, such as heavy lifting or prolonged standing, and thus automatically include them as essential functions in a job description, even when they bear no real resemblance to the core functions of the job.

Pregnancy accommodations are temporary. At A Better Balance, we have seen coworkers and managers willing to assist pregnant workers without issue, temporarily excusing an essential function, before someone from Human Resources becomes involved and decides to use "essential functions" as an excuse to push her out. Putting this requirement in the law would create many scenarios where reasonable accommodations could likely be provided but an employer could avoid having to provide them simply because they may require a temporary waiver of an essential function. The analysis should rest on whether an accommodation to keep a pregnant worker healthy imposes an undue hardship.

**b. Would the PWFA require an employer to accommodate a pregnant worker if, even with the accommodation, they cannot perform the essential functions of their job?**

Again, the PWFA framework is designed to ensure an employer is not burdened by providing an accommodation–if the accommodation imposes an undue hardship, an employer does not need to provide it. That said, in certain circumstances, just as there is precedent under the ADA for the temporary excusal of essential functions, there may be a need for a pregnant worker to temporarily perform other tasks before fully returning to her position, such as a police officer who requests light duty for a few weeks. For example, in the ADAAA context, courts have found workers are entitled to reasonable accommodations if they only need a finite leave of absence or a transfer that would allow them to perform the essential functions of the job "in the near future."[58] Pregnancy and pregnancy-related conditions are also time limited, and employers may

[54] *See* 29 CFR § 1630.2(n)(3)(i)–(ii).
[55] *See Scruggs v. Pulaski Cty., Ark.,* 817 F.3d 1087, 1093 (8th Cir. 2016) (citing *Kammueller v. Loomis, Fargo & Co.,* 383 F.3d 779, 786 (8th Cir. 2004)).
[56] *See Dropinski v. Douglas Cty., Neb.,* 298 F.3d 704, 709 (8th Cir. 2002).
[57] *Id.*
[58] *See, e.g. Robert v. Bd. of Cty. Comm'rs of Brown Cty., Kans.*, 691 F.3d 1211, 1218 (10th Cir. 2012) (For a leave of absence to be considered a reasonable accommodation, the employee must provide "an estimated date when she can resume her essential duties" and must assure an employer that an employee can perform the essential functions of her position in the "near future."); *see also Conoshenti v. Public Service Elec. & Gas Co.*, 364 F.3d 135, 151 (3rd Cir. 2004); *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995) ("[R]easonable accommodation is by its terms most

have to temporarily excuse essential functions, like they must do under the ADAAA, unless it causes an undue hardship on the employer.

**Question from Representative Marcia Fudge (D-OH)**

1. **Ms. Bakst, the Pregnant Workers Fairness Act (PWFA) makes it unlawful for an employer to require and employee "to take leave whether paid or unpaid if another reasonable accommodation can be provided".**
    a. **Why is it important that pregnant workers are not forced onto unpaid or paid leave?**

It is important that pregnant workers not be forced onto unpaid leave because many pregnant workers want, and need, to keep working to ensure they are earning a paycheck at a time in life when they may most need it. Today, women make up almost half of the workforce and are the primary or co-breadwinner in almost two-thirds of families.[59] When pregnant workers are pushed out, they, and their families suffer devastating economic consequences.

What we see all too often is that employers have a reflexive reaction when workers announce their pregnancy to say, "you're pregnant, why don't you just go home and rest" even when pregnant workers want and need to work. When employers have stereotypical views about a pregnant woman's ability to work, or her proper roles, or what they deem to be best for her health, they are much more likely to send her home rather than engaging in a good faith interactive process with her.

Not only do pregnant workers suffer from the paternalism of such actions, as I wrote about extensively in my written testimony, when pregnant workers are forced out onto unpaid leave, they are left without a paycheck. Many women lose their health insurance and are forced to switch providers and/or delay medical care. Others are forced to accept lower-paying jobs affecting their long-term financial health and ability to progress and rise in the workplace. Many women have no choice but to turn to public assistance to stay afloat—and are forced into a poverty hole they have a difficult time climbing out of—all when a modest accommodation could keep them healthy and on the job.[60]

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logically construed as that which presently*, or in the immediate future*, enables the employee to perform the essential functions of the job in question." (emphasis added)).

[59] *See* SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, BREADWINNING MOTHERS CONTINUE TO BE THE U.S. NORM, (May 2019), https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm/.

[60] For a further discussion of the economic consequences pregnant workers face when they are pushed out onto leave, see *Bakst Testimony*, *supra* note 3, at 8–9.

[Ms. Wilbur response to questions submitted for the record follows:]

GREATER LOUISVILLE INC.
The Metro Chamber of Commerce

GreaterLouisville.com

**Committee on Education and Labor**
Civil Rights and Human Services Subcommittee Hearing
***"Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694)"***
Tuesday, October 22, 2019 10:15 a.m.

**Representative Suzanne Bonamici (D-OR)**

- Ms. Wilbur, you mentioned the strong bipartisan support at the state level for the Kentucky Pregnant Workers Act. How did you work with legislators on both sides of the aisle in Kentucky to pass the state's Pregnant Workers Act with bipartisan support?

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**Iris Wilbur, Vice President of Government Affairs and Public Policy**
**Greater Louisville Inc., The Metro Chamber of Commerce, Louisville, KY**

- Representative Bonamici:
  Thank you for your question. The need for Greater Louisville Inc. (GLI) to earn bipartisan support on the Kentucky Pregnant Workers Act (KY PWA) was significant. Although versions of this proposal were not new to many legislators, our advocacy team took the time to meet with nearly all Kentucky House and Senate members to specifically outline all the aspects of the proposal and explain the need for this state legislation. We recognized that the bill had many positive policy attributes and were confident that it would attract widespread support, however, it was necessary to educate the Kentucky General Assembly to help secure a broad range of proponents and empower legislators to advocate for the issue in their respective caucuses.

  The appeal of KY PWA allowed GLI and others to connect with virtually every lawmaker, regardless of party affiliation and district location. The strong coalition of support included interests related to improving Kentucky's business climate through legal liability solutions, workforce development, improved health outcomes, pro-life aspects, and workers' rights.

  Not only did the KY PWA earn overwhelming bipartisan support in the Kentucky House and Senate, but many bill "champions" helped ensure progress and passage throughout the legislative process, especially in a difficult time when many policy initiatives are competing for attention.

  KY PWA was a unique opportunity to bring together elected leaders around shared values that are not thwarted by party affiliation. By highlighting the fact that the KY PWA would support Kentucky businesses, in addition to Kentucky women, was the win-win recognized by our state leaders.

[Whereupon, at 12:06 p.m., the subcommittee was adjourned.]

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