(d) *Relationship to HIPAA Privacy Regulations*. This part does not apply to genetic information that is protected health information subject to the regulations issued by the Secretary of Health and Human Services pursuant to section 264(c) of the Health Insurance Portability and Accountability Act of 1996.

[75 FR 68932, Nov. 9, 2010, as amended at 81 FR 31159, May 17, 2016]

§ 1635.12 Medical information that is not genetic information.

(a) *Medical information about a manifested disease, disorder, or pathological condition*. (1) A covered entity shall not be considered to be in violation of this part based on the use, acquisition, or disclosure of medical information that is not genetic information about a manifested disease, disorder, or pathological condition of an employee or member, even if the disease, disorder, or pathological condition has or may have a genetic basis or component.

(2) Notwithstanding paragraph (a)(1) of this section, the acquisition, use, and disclosure of medical information that is not genetic information about a manifested disease, disorder, or pathological condition is subject to applicable limitations under sections 103(d)(1)–(4) of the Americans with Disabilities Act (42 U.S.C. 12112(d)(1)–(4)), and regulations at 29 CFR 1630.13, 1630.14, and 1630.16.

(b) *Genetic information related to a manifested disease, disorder, or pathological condition*. Notwithstanding paragraph (a) of this section, genetic information about a manifested disease, disorder, or pathological condition is subject to the requirements and prohibitions in sections 202 through 206 of GINA and §§ 1635.4 through 1635.9 of this part.

PART 1636—PREGNANT WORKERS FAIRNESS ACT

Sec.

AUTHORITY: 42 U.S.C. 2000gg *et seq.*

SOURCE: 89 FR 29182, Apr. 19, 2024, unless otherwise noted.

§ 1636.1 Purpose.

(a) The purpose of this part is to implement the Pregnant Workers Fairness Act, 42 U.S.C. 2000gg *et seq.* (PWFA).

(b) The PWFA:

(1) Requires a covered entity to make reasonable accommodation to the known limitations of a qualified employee related to pregnancy, childbirth, or related medical conditions, absent undue hardship;

(2) Prohibits a covered entity from requiring a qualified employee to accept an accommodation, other than a reasonable accommodation arrived at through the interactive process;

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

(4) Prohibits a covered entity from requiring a qualified employee to take leave if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee;

(5) Prohibits a covered entity from taking adverse actions in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation for known limitations related to pregnancy, childbirth, or related medical conditions;

(6) Prohibits discrimination against an employee for opposing unlawful discrimination under the PWFA or participating in a proceeding under the PWFA;

(7) Prohibits coercion of individuals in the exercise of their rights under the PWFA; and

(8) Provides remedies for individuals whose rights under the PWFA are violated.

§ 1636.2 Definitions—general.

(a) *Commission* means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964, 42 U.S.C. 2000e–4.

(b) *Covered entity* means *respondent* as defined in section 701(n) of the Civil Rights Act of 1964, 42 U.S.C. 2000e(n), and includes:

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

(2) *Employing office*, as defined in section 101 of the Congressional Accountability Act of 1995, 2 U.S.C. 1301, and 3 U.S.C. 411(c);

(3) An entity employing a State employee (or the employee of a political subdivision of a State) described in section 304(a) of the Government Employee Rights Act of 1991, 42 U.S.C. 2000e–16c(a); and

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

(c) *Employee* means:

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

(2) [Reserved]

(3) A covered employee (including an applicant), as defined in 3 U.S.C. 411(c);

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

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

(d) *Person* means person as defined by section 701(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e(a).

§ 1636.3 Definitions—specific to the PWFA.

(a) *Known limitation. Known limitation* means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or the employee's representative has communicated to the covered entity, whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990, 42 U.S.C. 12102.

(1) *Known*, in terms of limitation, means the employee or the employee's representative has communicated the limitation to the employer.

(2) *Limitation* means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, of the specific employee in question. ''Physical or mental condition'' is an impediment or problem that may be modest, minor, and/or episodic. The physical or mental condition may be that an employee affected by pregnancy, childbirth, or related medical conditions has a need or a problem related to maintaining their health or the health of the pregnancy. The definition also includes when an employee is seeking health care related to pregnancy, childbirth, or a related medical condition itself. The physical or mental condition can be a limitation whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990, 42 U.S.C. 12102.

(b) *Pregnancy, childbirth, or related medical conditions.* ''Pregnancy'' and ''childbirth'' refer to the pregnancy or childbirth of the specific employee in question and include, but are not limited to, current pregnancy; past pregnancy; potential or intended pregnancy (which can include infertility, fertility treatment, and the use of contraception); labor; and childbirth (including vaginal and cesarean delivery). ''Related medical conditions'' are medical conditions relating to the pregnancy or childbirth of the specific employee in question. The following are examples of conditions that are, or may be, ''related medical conditions'': termination of pregnancy, including via miscarriage, stillbirth, or abortion; ectopic pregnancy; preterm labor; pelvic prolapse; nerve injuries; cesarean or perineal wound infection; maternal cardiometabolic disease; gestational diabetes; preeclampsia; HELLP (hemolysis, elevated liver enzymes and low

platelets) syndrome; hyperemesis gravidarum; anemia; endometriosis; sciatica; lumbar lordosis; carpal tunnel syndrome; chronic migraines; dehydration; hemorrhoids; nausea or vomiting; edema of the legs, ankles, feet, or fingers; high blood pressure; infection; antenatal (during pregnancy) anxiety, depression, or psychosis; postpartum depression, anxiety, or psychosis; frequent urination; incontinence; loss of balance; vision changes; varicose veins; changes in hormone levels; vaginal bleeding; menstruation; and lactation and conditions related to lactation, such as low milk supply, engorgement, plugged ducts, mastitis, or fungal infections. This list is non-exhaustive.

(c) *Employee's representative. Employee's representative* means a family member, friend, union representative, health care provider, or other representative of the employee.

(d) *Communicated to the employer. Communicated to the employer*, with respect to a known limitation, means an employee or the employee's representative has made the employer aware of the limitation by communicating with a supervisor, a manager, someone who has supervisory authority for the employee or who regularly directs the employee's tasks (or the equivalent for an applicant), human resources personnel, or another appropriate official, or by following the steps in the covered entity's policy to request an accommodation.

(1) The communication may be made orally, in writing, or by another effective means.

(2) The communication need not be in writing, be in a specific format, use specific words, or be on a specific form in order for it to be considered ''communicated to the employer.''

(e) *Consideration of mitigating measures.* (1) The determination of whether an employee has a limitation shall be made without regard to the ameliorative effects of mitigating measures.

(2) The non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an employee has a limitation.

(f) *Qualified employee. Qualified employee* with respect to an employee with a known limitation under the PWFA means:

(1) An employee who, with or without reasonable accommodation, can perform the essential functions of the employment position. With respect to leave as an accommodation, the relevant inquiry is whether the employee is reasonably expected to be able to perform the essential functions, with or without a reasonable accommodation, at the end of the leave, if time off is granted, or if the employee is qualified as set out in paragraph (f)(2) of this section after returning from leave.

(2) Additionally, an employee shall be considered qualified if they cannot perform one or more essential functions if:

(i) Any inability to perform an essential function(s) is for a temporary period, where ''temporary'' means lasting for a limited time, not permanent, and may extend beyond ''in the near future'';

(ii) The essential function(s) could be performed in the near future. This determination is made on a case-by-case basis. If the employee is pregnant, it is presumed that the employee could perform the essential function(s) in the near future because they could perform the essential function(s) within generally 40 weeks of its suspension; and

(iii) The inability to perform the essential function(s) can be reasonably accommodated. This may be accomplished by temporary suspension of the essential function(s) and the employee performing the remaining functions of their position or, depending on the position, other arrangements, including, but not limited to: the employee performing the remaining functions of their position and other functions assigned by the covered entity; the employee performing the functions of a different job to which the covered entity temporarily transfers or assigns the employee; or the employee being assigned to light duty or modified duty or participating in the covered entity's light or modified duty program.

(g) *Essential functions. Essential functions* mean the fundamental job duties of the employment position the employee with a known limitation under

the PWFA holds or desires. The term ''essential functions'' does not include the marginal functions of the position.

(1) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for their expertise or ability to perform the particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time that would be spent on the job performing the function during the time the requested accommodation will be in effect;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(h) *Reasonable accommodation—generally*. (1) With respect to an employee or applicant with a known limitation under the PWFA, reasonable accommodation includes:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a known limitation under the PWFA to be considered for the position such qualified applicant desires;

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified employee with a known limitation under the PWFA to perform the essential functions of that position;

(iii) Modifications or adjustments that enable a covered entity's employee with a known limitation under the PWFA to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without known limitations; or

(iv) Temporary suspension of essential function(s) and/or modifications or adjustments that permit the temporary suspension of essential function(s).

(2) To request a reasonable accommodation, the employee or the employee's representative need only communicate to the covered entity that the employee needs an adjustment or change at work due to their limitation (a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions).

(i) The communication may be made to any of the individuals in paragraph (d) of this section. The provisions of paragraphs (d)(1) and (2) of this section, which define what it means to communicate a limitation to a covered entity, apply to communications under this paragraph (h)(2).

(ii) An employee's request does not have to identify a medical condition, whether from paragraph (b) of this section or otherwise, or use medical terms.

(3) To determine the appropriate reasonable accommodation, it may be necessary for the covered entity to initiate an informal, interactive process as explained in paragraph (k) of this section.

(i) *Reasonable accommodation—examples*. Reasonable accommodation may include, but is not limited to:

(1) Making existing facilities used by employees readily accessible to and usable by employees with known limitations under the PWFA;

(2) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; breaks for use of the restroom, drinking, eating, and/or resting; acquisition or modification of equipment, uniforms, or devices, including devices that assist with lifting or carrying for jobs that involve lifting

or carrying; modifying the work environment; providing seating for jobs that require standing, or allowing standing for jobs that require sitting; appropriate adjustment or modifications of examinations or policies; permitting the use of paid leave (whether accrued, as part of a short-term disability program, or any other employer benefit) or providing unpaid leave for reasons including, but not limited to, recovery from childbirth, miscarriage, stillbirth, or medical conditions related to pregnancy or childbirth, or to attend health care appointments or receive health care treatment related to pregnancy, childbirth, or related medical conditions; placement in the covered entity's light or modified duty program or assignment to light duty or modified work; telework, remote work, or change of work site; adjustments to allow an employee to work without increased pain or increased risk to the employee's health or the health of the pregnancy; temporarily suspending one or more essential functions of the position; providing a reserved parking space if the employee is otherwise entitled to use employer-provided parking; and other similar accommodations for employees with known limitations under the PWFA.

(3) The reasonable accommodation of leave includes, but is not limited to, the examples in paragraphs (i)(3)(i) through (iii) of this section.

(i) The ability to use paid leave (whether accrued, short-term disability, or another employer benefit) or unpaid leave, including, but not limited to, leave during pregnancy; to recover from childbirth, miscarriage, stillbirth, or other related medical conditions; and to attend health care appointments or receive health care treatments related to pregnancy, childbirth, or related medical conditions;

(ii) The ability to use paid leave (whether accrued, short-term disability, or another employer benefit) or unpaid leave for a known limitation under the PWFA; and

(iii) The ability to choose whether to use paid leave (whether accrued, short-term disability or another employer benefit) or unpaid leave to the extent that the covered entity allows employees using leave for reasons not related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions to choose between the use of paid leave and unpaid leave.

(4) Reasonable accommodation related to lactation includes, but is not limited to:

(i) Breaks, a space for lactation, and other related modifications as required under the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) (Pub. L. 117–328, Div. KK, 136 Stat. 4459, 6093 (2022)), if not otherwise provided under the PUMP Act;

(ii) Accommodations related to pumping, such as, but not limited to, ensuring that the area for lactation is in reasonable proximity to the employee's usual work area; that it is a place other than a bathroom; that it is shielded from view and free from intrusion; that it is regularly cleaned; that it has electricity, appropriate seating, and a surface sufficient to place a breast pump; and that it is in reasonable proximity to a sink, running water, and a refrigerator for storing milk;

(iii) Accommodations related to nursing during work hours (where the regular location of the employee's workplace makes nursing during work hours a possibility because the child is in close proximity); and

(iv) Other reasonable accommodations, including those listed in paragraphs (i)(1) through (3) of this section.

(5) The temporary suspension of one or more essential functions of the position in question, as defined in paragraph (g) of this section, is a reasonable accommodation if an employee with a known limitation under the PWFA is unable to perform one or more essential functions with or without a reasonable accommodation and the conditions set forth in paragraph (f)(2) of this section are met.

(j) *Undue hardship*—(1) *In general.* Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (j)(2) of this section.

(2) *Factors to be considered.* In determining whether an accommodation would impose an undue hardship on a

covered entity, factors to be considered, with no one factor to be dispositive, include:

(i) The nature and net cost of the accommodation needed under the PWFA;

(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, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type, and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

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

(3) *Temporary suspension of an essential function(s).* If an employee with a known limitation under the PWFA meets the definition of ''qualified employee'' under paragraph (f)(2) of this section and needs one or more essential functions of the relevant position to be temporarily suspended, the covered entity must provide the accommodation unless doing so would impose an undue hardship on the covered entity when considered in light of the factors provided in paragraphs (j)(2)(i) through (v) of this section as well as the following additional factors where they are relevant and with no one factor to be dispositive:

(i) The length of time that the employee will be unable to perform the essential function(s);

(ii) Whether, through the factors listed in paragraph (f)(2)(iii) of this section or otherwise, there is work for the employee to accomplish;

(iii) The nature of the essential function(s), including its frequency;

(iv) Whether the covered entity has provided other employees in similar positions who are unable to perform the essential function(s) of their position with temporary suspensions of the essential function(s);

(v) If necessary, whether there are other employees, temporary employees, or third parties who can perform or be hired to perform the essential function(s); and

(vi) Whether the essential function(s) can be postponed or remain unperformed for any length of time and, if so, for how long.

(4) *Predictable assessments.* The individualized assessment of whether a modification listed in paragraphs (j)(4)(i) through (iv) of this section is a reasonable accommodation that would cause undue hardship will, in virtually all cases, result in a determination that the four modifications are reasonable accommodations that will not impose an undue hardship under the PWFA when they are requested as workplace accommodations by an employee who is pregnant. Therefore, with respect to these modifications, the individualized assessment should be particularly simple and straightforward:

(i) Allowing an employee to carry or keep water near and drink, as needed;

(ii) Allowing an employee to take additional restroom breaks, as needed;

(iii) Allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and

(iv) Allowing an employee to take breaks to eat and drink, as needed.

(k) *Interactive process. Interactive process* means an informal, interactive process between the covered entity and the employee seeking an accommodation under the PWFA. This process should identify the known limitation under the PWFA and the adjustment or change at work that is needed due to the limitation, if either of these is not clear from the request, and potential reasonable accommodations. There are no rigid steps that must be followed.

(l) *Limits on supporting documentation.* (1) A covered entity is not required to seek supporting documentation. A covered entity may seek supporting documentation from an employee who requests an accommodation under the PWFA only when it is reasonable under

the circumstances for the covered entity to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and needs an adjustment or change at work due to the limitation. The following situations are examples of when it is not reasonable under the circumstances to seek supporting documentation:

(i) When the physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation), and the adjustment or change at work needed due to the limitation are obvious and the employee provides self-confirmation as defined in paragraph (l)(4) of this section;

(ii) When the employer already has sufficient information to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and needs an adjustment or change at work due to the limitation;

(iii) When the employee is pregnant and seeks one of the modifications listed in paragraphs (j)(4)(i) through (iv) of this section due to a physical or mental condition related to, affected by, or arising out of pregnancy (a limitation) and the employee provides self-confirmation as defined in paragraph (l)(4) of this section;

(iv) When the reasonable accommodation is related to a time and/or place to pump at work, other modifications related to pumping at work, or a time to nurse during work hours (where the regular location of the employee's workplace makes nursing during work hours a possibility because the child is in close proximity), and the employee provides self-confirmation, as defined in paragraph (l)(4) of this section; or

(v) When the requested accommodation is available to employees without known limitations under the PWFA pursuant to a covered entity's policies or practices without submitting supporting documentation.

(2) When it is reasonable under the circumstances, based on paragraph (l)(1) of this section, to seek supporting documentation, the covered entity is limited to seeking reasonable documentation.

(i) *Reasonable documentation* means the minimum that is sufficient to:

(A) Confirm the physical or mental condition (*i.e.*, an impediment or problem that may be modest, minor, and/or episodic; a need or a problem related to maintaining the employee's health or the health of the pregnancy; or an employee seeking health care related to pregnancy, childbirth, or a related medical condition itself) whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990, 42 U.S.C. 12102;

(B) Confirm that the physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (together with paragraph (l)(2)(i)(A) of this section, ''a limitation''); and

(C) Describe the adjustment or change at work that is needed due to the limitation.

(ii) Covered entities may not require that supporting documentation be submitted on a specific form.

(3) When it is reasonable under the circumstances, based on paragraph (l)(1) of this section, to seek supporting documentation, a covered entity may require that the reasonable documentation comes from a health care provider, which may include, but is not limited to: doctors, midwives, nurses, nurse practitioners, physical therapists, lactation consultants, doulas, occupational therapists, vocational rehabilitation specialists, therapists, industrial hygienists, licensed mental health professionals, psychologists, or psychiatrists. The health care provider may be a telehealth provider. The covered entity may not require that the health care provider submitting documentation be the provider treating the condition at issue. The covered entity may not require that the employee seeking the accommodation be examined by a health care provider selected by the covered entity.

(4) *Self-confirmation* means a simple statement where the employee confirms, for purposes of paragraph (l)(1)(i), (iii), or (iv) of this section, the physical or mental condition related

to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation), and the adjustment or change at work needed due to the limitation. The statement can be made in any manner and can be made as part of the request for reasonable accommodation under paragraph (h)(2) of this section. A covered entity may not require that the statement be in a specific format, use specific words, or be on a specific form.

§ 1636.4 Nondiscrimination with regard to reasonable accommodations related to pregnancy.

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

(1) An unnecessary delay in providing a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee may result in a violation of the PWFA, 42 U.S.C. 2000gg–1(1), even if the covered entity eventually provides the reasonable accommodation. In determining whether there has been an unnecessary delay, factors to be considered, with no one factor to be dispositive, include:

(i) The reason for the delay;

(ii) The length of the delay;

(iii) The length of time that the accommodation is needed. If the accommodation is needed for a short time, unnecessary delay in providing it may effectively mean failure to provide the accommodation;

(iv) How much the employee and the covered entity each contributed to the delay;

(v) Whether the covered entity was engaged in actions related to the reasonable accommodation request during the delay;

(vi) Whether the accommodation was or would be simple or complex to provide. There are certain accommodations, set forth in §1636.3(j)(4), that are common and easy to provide. Delay in providing these accommodations will virtually always result in a finding of unnecessary delay; and

(vii) Whether the covered entity offered the employee an interim reasonable accommodation during the interactive process or while waiting for the covered entity's response. For the purposes of this factor, the interim reasonable accommodation should be one that allows the employee to continue working. Leave will not be considered an interim reasonable accommodation supporting this factor, unless the employee selects or requests leave as an interim reasonable accommodation.

(2) An employee with known limitations related to pregnancy, childbirth, or related medical conditions is not required to accept an accommodation. However, if such employee rejects a reasonable accommodation that is necessary to enable the employee to perform an essential function(s) of the position held or desired or to apply for the position, or rejects the temporary suspension of an essential function(s) if the employee is qualified under §1636.3(f)(2), and, as a result of that rejection, cannot perform an essential function(s) of the position, or cannot apply, the employee will not be considered ''qualified.''

(3) A covered entity cannot justify failing to provide a reasonable accommodation or the unnecessary delay in providing a reasonable accommodation to a qualified employee with known limitations related to pregnancy, childbirth, or related medical conditions based on the employee failing to provide supporting documentation, unless:

(i) The covered entity seeks the supporting documentation;

(ii) Seeking the supporting documentation is reasonable under the circumstances as set out in §1636.3(l)(1);

(iii) The supporting documentation is ''reasonable documentation'' as defined in §1636.3(l)(2); and

(iv) The covered entity provides the employee sufficient time to obtain and provide the supporting documentation.

(4) When choosing among effective accommodations, the covered entity must choose an accommodation that provides the qualified employee with

known limitations related to pregnancy, childbirth, or related medical conditions equal employment opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges as are available to the average employee without a known limitation who is similarly situated. The similarly situated average employee without a known limitation may include the employee requesting an accommodation at a time prior to communicating the limitation.

(b) It is an unlawful employment practice for a covered entity to require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process referred to in 42 U.S.C. 2000gg(7) and described in §1636.3(k).

(c) It is an unlawful employment practice for a covered entity to deny employment opportunities to a qualified employee if such denial is based on the need, or potential need, of the covered entity to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee.

(d) It is an unlawful employment practice for a covered entity:

(1) To require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee that does not result in an undue hardship for the covered entity; but

(2) Nothing in paragraph (d)(1) of this section prohibits leave as a reasonable accommodation if that is the reasonable accommodation requested or selected by the employee, or if it is the only reasonable accommodation that does not cause an undue hardship.

(e) It is an unlawful employment practice for a covered entity:

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

(2) Nothing in paragraph (e)(1) of this section limits the rights available under 42 U.S.C. 2000gg–2(f).

§1636.5 Remedies and enforcement.

(a) *Employees covered by Title VII of the Civil Rights Act of 1964*—(1) *In general.* The powers, remedies, and procedures provided in sections 705, 706, 707, 709, 710, and 711 of the Civil Rights Act of 1964, 42 U.S.C. 2000e–4 *et seq.*, to the Commission, the Attorney General, or any person alleging a violation of Title VII of such Act, 42 U.S.C. 2000e *et seq.*, shall be the powers, remedies, and procedures the PWFA provides to the Commission, the Attorney General, or any person, respectively, alleging an unlawful employment practice in violation of the PWFA against an employee described in 42 U.S.C. 2000gg(3)(A), except as provided in paragraphs (a)(2) and (3) of this section.

(2) *Costs and fees.* The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes, 42 U.S.C. 1988, shall be the powers, remedies, and procedures the PWFA provides to the Commission, the Attorney General, or any person alleging such practice.

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

(b) [Reserved]

(c) *Employees covered by Chapter 5 of Title 3, United States Code*—(1) *In general.* The powers, remedies, and procedures provided in chapter 5 of title 3, United States Code, to the President, the Commission, the Merit Systems Protection Board, or any person alleging a violation of section 411(a)(1) of

such title shall be the powers, remedies, and procedures this section provides to the President, the Commission, the Board, or any person, respectively, alleging an unlawful employment practice in violation of this section against an employee described in 42 U.S.C. 2000gg(3)(C), except as provided in paragraphs (c)(2) and (3) of this section.

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

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

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

(2) *Costs and fees.* The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes, 42 U.S.C. 1988, shall be the powers, remedies, and procedures the PWFA provides to the Commission or any person alleging such practice.

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

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

(2) *Costs and fees.* The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes, 42 U.S.C. 1988, shall be the powers, remedies, and procedures the PWFA provides to the Commission, the Attorney General, the Librarian of Congress, or any person alleging such practice.

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

(f) *Prohibition against retaliation*—(1) *Prohibition against retaliation.* No person

shall discriminate against any employee because such employee has opposed any act or practice made unlawful by the PWFA or because such employee made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the PWFA.

(i) An employee need not be a qualified employee with a known limitation under the PWFA to bring an action under this paragraph (f)(1).

(ii) A request for reasonable accommodation for a known limitation under the PWFA constitutes protected activity under this paragraph (f)(1).

(iii) An employee does not actually have to be deterred from exercising or enjoying rights under the PWFA in order for the retaliation to be actionable.

(2) *Prohibition against coercion.* It shall be unlawful to coerce, intimidate, threaten, harass, or interfere with any individual in the exercise or enjoyment of, or on account of such individual having exercised or enjoyed, or on account of such individual having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the PWFA.

(i) An individual need not be a qualified employee with a known limitation under the PWFA to bring an action under this paragraph (f)(2).

(ii) An individual does not actually have to be deterred from exercising or enjoying rights under the PWFA for the coercion, intimidation, threats, harassment, or interference to be actionable.

(3) *Remedy.* The remedies and procedures otherwise provided for under this section shall be available to aggrieved individuals with respect to violations of this section regarding retaliation or coercion.

(g) *Limitation on monetary damages.* Notwithstanding paragraphs (a)(3), (c)(3), (d)(3), and (e)(3) of this section, if an unlawful employment practice involves the provision of a reasonable accommodation pursuant to the PWFA or this part, damages may not be awarded under section 1977A of the Revised Statutes, 42 U.S.C. 1981a, if the covered entity demonstrates good faith efforts, in consultation with the qualified employee with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such employee with an equally effective opportunity and would not cause an undue hardship on the operation of the business of the covered entity.

§ 1636.6 Waiver of State immunity.

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

§ 1636.7 Relationship to other laws.

(a) *In general.* (1) The PWFA and this part do not invalidate or limit the powers, remedies, and procedures under any Federal law, State law, or the law of any political subdivision of any State or jurisdiction that provides greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions.

(2) The PWFA and this part do not require an employer-sponsored health plan to pay for or cover any particular item, procedure, or treatment, or affect any right or remedy available under any other Federal, State, or local law with respect to any such payment or coverage requirement.

(b) *Rule of construction.* The PWFA and this part are subject to the applicability to religious employment set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1(a).

(1) Nothing in 42 U.S.C. 2000gg–5(b) or this part should be interpreted to limit a covered entity's rights under the U.S. Constitution.

(2) Nothing in 42 U.S.C. 2000gg–5(b) or this part should be interpreted to limit an employee's rights under other civil rights statutes.

§ 1636.8 Severability.

(a) The Commission intends that, if any provision of the PWFA or the application of that provision to particular persons or circumstances is held invalid or found to be unconstitutional, the remainder of the statute and the application of that provision to other persons or circumstances shall not be affected.

(b) The Commission intends that, if any provision of this part that uses the same language as the statute, or the application of that provision to particular persons or circumstances, is held invalid or found to be unconstitutional, the remainder of this part and the application of that provision to other persons or circumstances shall not be affected.

(c) The Commission intends that, if any provision of this part or the interpretive guidance in appendix A to this part that provides additional guidance to implement the PWFA, including examples of reasonable accommodations, or the application of that provision to particular persons or circumstances, is held invalid or found to be unconstitutional, the remainder of this part or the interpretive guidance and the application of that provision to other persons or circumstances shall not be affected.

APPENDIX A TO PART 1636—INTERPRETIVE GUIDANCE ON THE PREGNANT WORKERS FAIRNESS ACT

I. INTRODUCTION

1. The Pregnant Workers Fairness Act (PWFA) requires a covered entity to provide reasonable accommodations to a qualified employee's known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, absent undue hardship on the operation of the business of the covered entity. Although employees affected by pregnancy, childbirth, or related medical conditions have certain rights under existing civil rights laws, including Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. 2000e *et seq.*, and the Americans with Disabilities Act of 1990 (ADA), as amended by the ADA Amendments Act of 2008 (ADAAA or Amendments Act), 42 U.S.C. 12111 *et seq.*,[1] Congress determined that the legal protections offered by these two statutes, particularly as interpreted by the courts, were ''insufficient to ensure that pregnant workers receive the accommodations they need.''[2]

2. The PWFA, at 42 U.S.C. 2000gg–3, directs the U.S. Equal Employment Opportunity Commission (EEOC or Commission) to promulgate regulations to implement the PWFA.

3. This Interpretive Guidance addresses the major provisions of the PWFA and its regulation and explains the major concepts pertaining to nondiscrimination with respect to reasonable accommodations for known limitations (physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions) under the statute. The Interpretive Guidance represents the Commission's interpretation of the issues addressed within it, and the Commission will be guided by the regulation and the Interpretive Guidance when enforcing the PWFA.

II. GENERAL INFORMATION AND TERMS USED IN THE REGULATION AND INTERPRETIVE GUIDANCE

1. The PWFA at 42 U.S.C. 2000gg(3) uses the term ''employee (including an applicant)'' in its definition of ''employee.''[3] Thus, throughout the statute, the final regulation, and this Interpretive Guidance, the term ''employee'' should be understood to include ''applicant'' where relevant. Because the PWFA relies on Title VII for its definition of ''employee,'' that term also includes ''former employee,'' where relevant.[4] The PWFA defines ''covered entity'' using the definition of ''employer'' from different statutes, including Title VII.[5] Thus ''covered entities'' under the PWFA include public or private employers with 15 or more employees, unions, employment agencies, and the Federal Government.[6] In the regulation and this Interpretive Guidance, the Commission uses the

[1] References to the ADA throughout this part and the Interpretive Guidance in this appendix are intended to apply equally to the Rehabilitation Act of 1973, as all nondiscrimination standards under title I of the ADA also apply to Federal agencies under section 501 of the Rehabilitation Act. *See* 29 U.S.C. 791(f).

[2] H.R. Rep. No. 117–27, pt. 1, at 12 (2021).

[3] 42 U.S.C. 2000gg(3).

[4] *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997).

[5] 42 U.S.C. 2000gg(2)(A), (B)(i), (B)(iii), (B)(iv). The other statutes are the Congressional Accountability Act of 1995 and 3 U.S.C. 411(c).

[6] The statute at 42 U.S.C. 2000gg(2) provides that the term ''covered entity'' has the meaning given the term ''respondent'' under 42 U.S.C. 2000e(n) and includes employers as defined in 42 U.S.C. 2000e(b), 2000e–16c(a), and

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terms ''covered entity'' and ''employer'' interchangeably.

2. This Interpretive Guidance contains many examples to illustrate situations under the PWFA. The examples do not, and are not intended to, cover every limitation or possible accommodation under the PWFA. Depending on the facts in the examples, the same facts could lead to claims also being brought under other statutes that the Commission enforces, such as Title VII and the ADA. Moreover, the situations in specific examples could implicate other Federal laws, including, but not limited to, the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.* (FMLA); the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.* (OSH Act); and the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) (Pub. L. 117–328, Div. KK, 136 Stat. 4459, 6093 (2022)).[7] Finally, although some examples state that the described actions ''would violate'' the PWFA, additional facts not described in the examples could change that determination.[8]

III. 1636. DEFINITIONS—SPECIFIC TO THE PWFA

1636.3(a) Known Limitation

1. Section 1636.3(a) reiterates the definition of ''known limitation'' from 42 U.S.C. 2000gg(4) of the PWFA and then provides definitions for the operative terms.

1636.3(a)(1) Known

2. Paragraph (a)(1) adopts the definition of ''known'' from the PWFA and thus defines it to mean that the employee, or the employee's representative, has communicated the limitation to the covered entity.[9]

1636.3(a)(2) Limitation

3. Paragraph (a)(2) adopts the definition of ''limitation'' from the PWFA and thus defines it to mean a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.[10] The limitation must be of the specific employee in question. The ''physical or mental condition'' that is the limitation may be a modest, minor, and/or episodic impediment or problem. The definition encompasses when an employee affected by pregnancy, childbirth, or related medical conditions has a need or a problem related to maintaining their health or the health of the pregnancy.[11]

4. The definition of ''limitation'' also includes when an employee is seeking health care related to the pregnancy, childbirth, or a related medical condition itself. Under the ADA, when an individual has an actual or a record of a disability, employers often may be required to provide the reasonable accommodation of leave so that an employee can obtain medical treatment.[12] Similarly, under the PWFA, an employee may require a reasonable accommodation of leave to attend health care appointments or receive treatment for or recover from their pregnancy, childbirth, or related medical conditions.[13]

2000e–16(a). The statute at 42 U.S.C. 2000gg–5(b) provides as a rule of construction that the chapter is subject to the applicability to religious employment set forth in 42 U.S.C. 2000e–1(a) [section 702(a) of the Civil Rights Act of 1964].

[7] To the extent that an accommodation in an example is required under another law, like the OSH Act, the example should not be read to suggest that such a requirement is not applicable.

[8] In this part and the Interpretive Guidance, the Commission uses the terms ''leave'' and ''time off'' and intends those terms to cover leave however it is identified by the specific employer. Additionally, in this part and the Interpretive Guidance, the Commission uses the term ''light duty.'' The Commission recognizes that ''light duty'' programs, or other programs providing modified duties, can vary depending on the covered entity. *See* EEOC, *Enforcement Guidance: Workers' Compensation and the ADA*, text preceding Question 27 (1996) [hereinafter *Enforcement Guidance: Workers' Compensation*], *https://www.eeoc.gov/laws/guidance/enforcement-guidance-workers-compensation-and-ada*. The Commission intends ''light duty'' to include the types of programs included in Questions 27 and 28 of the *Enforcement Guidance: Workers' Compensation* and any other policy, practice, or system that a covered entity has for accommodating employees, including when one or more essential functions of a position are temporarily excused.

[9] 42 U.S.C. 2000gg(4).

[10] *Id.*

[11] In §1636.3(a)(2) and the Interpretive Guidance, the Commission uses the phrase ''maintaining their health or the health of the pregnancy.'' This includes avoiding risk to the employee's health or to the health of the pregnancy.

[12] EEOC, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, at text after n.49 (2002) [hereinafter *Enforcement Guidance on Reasonable Accommodation*], *http://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada*.

[13] *See, e.g.*, U.S. Dep't of Health & Hum. Servs., Off. of Women's Health, *Prenatal Care*, *https://www.womenshealth.gov/a-z-topics/prenatal-care* (last updated Feb. 22, 2021) (stating

passing the PWFA, Congress sought, in part, to help pregnant employees maintain their health.[14] Thus, the PWFA covers situations when an employee requests an accommodation in order to maintain their health or the health of their pregnancy and avoid negative consequences, and when an employee seeks health care for their pregnancy, childbirth, or related medical conditions. Practically, allowing for accommodations to maintain health and attend medical appointments may decrease the need for a more extensive accommodation because the employee may be able to avoid more serious complications.

5. The physical or mental condition (the limitation) required to trigger the obligation to provide a reasonable accommodation under the PWFA does not need to meet the definition of a ''disability'' under the ADA.[15] In other words, an employee need not have an impairment that substantially limits a major life activity to be entitled to a reasonable accommodation under the PWFA, nor does an employee need to have an ''impairment'' as defined in the regulation implementing the ADA.[16] The PWFA can cover physical or mental conditions that also are covered under the ADA. In these situations, an individual may be entitled to an accommodation under the ADA as well as the PWFA.

6. The PWFA does not create a right to reasonable accommodation based on an individual's association with someone else who may have a PWFA-covered limitation. Nor is a qualified employee entitled to accommodation because they have a physical or mental condition related to, affected by, or arising out of someone else's pregnancy, childbirth, or related medical conditions. For example, a spouse experiencing anxiety due to a partner's pregnancy is not covered by the PWFA. Time for bonding or time for childcare also is not covered by the PWFA.

7. Whether an employee has a ''physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions'' shall be construed broadly to the maximum extent permitted by the PWFA.

Related to, Affected by, or Arising Out of

8. The PWFA's use of the inclusive terms ''related to, affected by, or arising out of''[17] means that pregnancy, childbirth, or related medical conditions do not need to be the sole, the original, or a substantial cause of

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that during pregnancy usually visits are once a month until week 28, twice a month from weeks 28–36 and once a week from week 36 to birth); Am. Coll. of Obstetricians & Gynecologists, Comm. Opinion No. 736, *Optimizing Postpartum Care* (reaff'd 2021), *https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/05/optimizing-postpartum-care* (stating the importance of regular postpartum care); and Opinion No. 826, *Protecting and Expanding Medicaid to Improve Women's Health* (2021), *https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/06/protecting-and-expanding-medicaid-to-improve-womens-health* (encouraging the expansion of Medicaid to improve postpartum care).

[14] *See* Markup of the Paycheck Fairness Act; Pregnant Workers Fairness Act; Workplace Violence Prevention for Health Care and Social Service Workers Act, YouTube (2021), at 54:46 (statement of Rep. Kathy E. Manning) (stating that a goal of the PWFA is to help pregnant workers ''deliver healthy babies while maintaining their jobs''); at 21:50 (statement of Rep. Robert C. Scott) (''[W]ithout [these] basic protections, too many workers are forced to choose between a healthy pregnancy and their paychecks.''); at 1:35:01 (statement of Rep. Lucy McBath) (''[N]o mother should ever have to choose between the health of herself/themselves and their child or a paycheck.''); and at 1:37:38 (statement of Rep. Suzanne Bonamici) (''[P]regnant workers should not have to choose between a healthy pregnancy and a paycheck.''), *https://www.youtube.com/watch?v=p6Ie2S9sTxs; see also* H.R. Rep. No. 117–27, pt. 1, at 12 (workers whose pregnancy-related impairments substantially limit a major life activity are covered by the ADA; ''this standard leaves women with less serious pregnancy-related impairments, and who need accommodations, without legal recourse''); *id.* at 22–23 (accommodations are frequently needed by, and should be provided to, people with healthy pregnancies); *id.* at 23 (example of an ''uneventful pregnancy'' in which a woman needed more bathroom breaks); *id.* at 14–21 (outlining the gaps created by court interpretations of Title VII and the ADA that the PWFA is intended to fill so that pregnant workers can receive reasonable accommodations); *id.* at 56 (noting that a ''minor limitation'' can be covered because it presumably requires only minor accommodations).

[15] 42 U.S.C. 2000gg(4).

[16] *See* 29 CFR 1630.2(h).

[17] The statute at 42 U.S.C. 2000gg(4) defines the term ''known limitation'' as a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. Most of the prohibited acts in the statute, however, use the phrase ''known limitations related to the pregnancy, childbirth, or related medical conditions.'' *See* 42 U.S.C. 2000gg–1(1), (3)–(5). Thus, the Commission will define ''related to, affected by, or arising out of'' as one phrase and will not attempt to define each of the parts of it separately.

the physical or mental condition at issue for the physical or mental condition to be ''related to, affected by, or arising out of'' pregnancy, childbirth, or related medical conditions.

9. Whether a physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions will be apparent in the majority of cases. Pregnancy and childbirth cause systemic changes that not only create new physical and mental conditions but also can exacerbate preexisting conditions and can cause additional pain or risk.[18] Thus, a connection between an employee's physical or mental condition and their pregnancy, childbirth, or related medical conditions will be readily ascertained when an employee is currently pregnant or the employee is experiencing or has just experienced childbirth.

10. For example, if an employee is pregnant and as a result has pain when standing for long periods of time, the employee's physical or mental condition (pain when standing for a protracted period) is related to, affected by, or arising out of the employee's pregnancy. An employee who is pregnant and because of the pregnancy cannot lift more than 20 pounds has a physical condition related to, affected by, or arising out of pregnancy, because lifting is associated with low back pain and musculoskeletal disorders that may be exacerbated by physical changes associated with pregnancy.[19] An employee who is pregnant and seeks time off for prenatal health care appointments is attending medical appointments related to, affected by, or arising out of pregnancy. An employee who requests an accommodation to attend therapy appointments for postpartum depression has a medical condition related to pregnancy or childbirth (postpartum depression) and is obtaining health care related to, affected by, or arising out of a related medical condition. A pregnant employee who is seeking an accommodation to limit exposure to secondhand smoke to protect the health of their pregnancy has a physical or mental condition (trying to maintain the employee's health or the health of their pregnancy, or to address increased sensitivity to secondhand smoke) related to, affected by, or arising out of pregnancy. A lactating employee who seeks an accommodation to take breaks to eat has a related medical condition (lactation) and a physical condition related to, affected by, or arising out of it (increased nutritional needs). A pregnant employee seeking time off in order to have an amniocentesis procedure is attending a medical appointment related to, affected by, or arising out of pregnancy. An employee who requests leave for in vitro fertilization (IVF) treatment for the employee to get pregnant has a limitation, either related to potential or intended pregnancy or a medical condition related to pregnancy (difficulty in becoming pregnant or infertility), and is seeking health care related to, affected by, or arising out of it. An employee whose pregnancy is causing fatigue has a physical condition (fatigue) related to, affected by, or arising out of pregnancy. An employee whose pregnancy is causing back pain has a physical condition (back pain) related to, affected by, or arising out of pregnancy. This is not by any means a complete list of physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, but rather a discussion of examples to illustrate application of the legal rule.

11. The Commission recognizes that some physical or mental conditions (which can be ''limitations'' as defined by the PWFA[20]), including some of those in the examples in paragraph 10 of this section, may occur even if they are not related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (e.g., attending medical appointments, increased nutritional needs, constraints on lifting). The Commission anticipates that confirming whether a physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions usually will be straightforward and can be accomplished through the interactive process. If a physical or mental condition is not covered by the PWFA, it may be that the physical or mental condition constitutes a disability that is covered by the ADA.

12. There may be situations where a physical or mental condition begins as something that is related to, affected by, or arising out of pregnancy, childbirth, or related medical

[18] *See, e.g.*, Danforth's Obstetrics & Gynecology 286 (Ronald S. Gibbs et al. eds., 10th ed. 2008) (''Normal pregnancy entails many physiologic changes . . . .''); Clinical Anesthesia 1138 (Paul G. Barash et al. eds., 6th ed. 2009) (''During pregnancy, there are major alterations in nearly every maternal organ system.'')

[19] Am. Coll. of Obstetricians & Gynecologists, Comm. Opinion No. 733, *Employment Considerations During Pregnancy and the Postpartum Period* (reaff'd 2023), *https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/04/employment-considerations-during-pregnancy-and-the-postpartum-period.*

[20] 42 U.S.C. 2000gg(4) (providing that a ''known limitation'' is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee's representative has communicated to the employer).

conditions, and, once the pregnancy, childbirth, or related medical conditions resolve, the physical or mental condition remains, evolves, or worsens. To confirm whether the employee's physical or mental condition is still related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, the employer and the employee can engage in the interactive process.

13. There will be situations where an individual with a physical or mental condition that is no longer related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions has an ''actual'' or ''record of'' disability under the ADA. In those situations, an individual may seek an accommodation under the ADA and the reasonable accommodation process would follow the ADA.[21]

14. Finally, there may be situations where the pregnancy, childbirth, or related medical conditions exacerbate existing conditions that may be disabilities under the ADA. In those situations, an employee can seek an accommodation under the PWFA or the ADA, or both statutes.

1636.3(b) Pregnancy, Childbirth, or Related Medical Conditions

15. The PWFA uses the term ''pregnancy, childbirth, or related medical conditions,'' which appears in Title VII's definition of ''sex.'' [22] Because Congress chose to write the PWFA using the same language as Title VII, §1636.3(b) gives the term ''pregnancy, childbirth, or related medical conditions'' the same meaning as under Title VII.[23]

16. The non-exhaustive list of examples in §1636.3(b) for the definition of ''pregnancy'' and ''childbirth'' includes current pregnancy, past pregnancy, potential or intended pregnancy (which can include infertility, fertility treatments, and the use of contraception), and labor and childbirth (including vaginal delivery and cesarean section).[24]

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[21] *See, e.g.,* 29 CFR 1630.2(o)(3); 29 CFR part 1630, appendix, 1630.2(o)(3) and 1630.9.

[22] *See* 42 U.S.C. 2000e(k).

[23] *See, e.g., Tex. Dep't of Hous. & Cmty. Affs.* v. *Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 536 (2015) (''If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation.'') (omissions in original) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012)); *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998) (''When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.''); *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978) (''[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.''); *Hall* v. *U.S. Dep't of Agric.*, 984 F.3d 825, 840 (9th Cir. 2020) (''Congress is presumed to be aware of an agency's interpretation of a statute. We most commonly apply that presumption when an agency's interpretation of a statute has been officially published and consistently followed. If Congress thereafter reenacts the same language, we conclude that it has adopted the agency's interpretation.'') (internal citations and quotation marks omitted); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 323 (2012) (''[W]hen a statute uses the very same terminology as an earlier statute—especially in the very same field, such as securities law or civil-rights law—it is reasonable to believe that the terminology bears a consistent meaning.''); H.R. Rep. No. 117–27, pt. 1, at 11–17 (discussing the history of the passage of the PDA; explaining that, due to court decisions, the PDA did not fulfill its promise to protect pregnant employees; and that the PWFA was intended to rectify this problem and protect the same employees covered by the PDA).

[24] EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues*, (I)(A) (2015) [hereinafter *Enforcement Guidance on Pregnancy Discrimination*], *https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues* (providing that the phrase ''pregnancy, childbirth, or related medical conditions'' includes current pregnancy, past pregnancy, potential or intended pregnancy, infertility treatment, use of contraception, lactation, breastfeeding, and the decision to have or not have an abortion, among other conditions); *see, e.g., Kocak* v. *Cmty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 470 (6th Cir. 2005) (reasoning that the plaintiff ''cannot be refused employment on the basis of her potential pregnancy''); *Piraino* v. *Int'l Orientation Res., Inc.*, 84 F.3d 270, 274 (7th Cir. 1996) (rejecting ''surprising claim'' by the defendant that no pregnancy discrimination can be shown where the challenged action occurred after the birth of the plaintiff's baby); *Pacourek* v. *Inland Steel Co.*, 858 F. Supp. 1393, 1397, 1402–04 (N.D. Ill. 1994) (observing that the PDA gives a woman ''the right . . . to be financially and legally protected before, during, and after her pregnancy'' and stating ''[a]s a general matter, a woman's medical condition rendering her unable to become

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17. ''Related medical conditions'' are medical conditions that relate to pregnancy or childbirth.[25] To be a related medical condition, the medical condition need not be caused solely, originally, or substantially by pregnancy or childbirth.

18. There are some medical conditions where the relation to pregnancy will be readily apparent. They can include, but are not limited to, lactation (including breastfeeding and pumping), miscarriage, stillbirth, having or choosing not to have an abortion, preeclampsia, gestational diabetes, and HELLP (hemolysis, elevated liver enzymes and low platelets) syndrome.[26] Pregnancy causes systemic changes that can create new medical conditions and risks and can exacerbate preexisting conditions and the risks posed by such conditions.[27] Thus, the fact that a medical condition is related to pregnancy will usually be evident when the medical condition develops, is exacerbated, or poses a new risk during an employee's current pregnancy. Additionally, the relation will be apparent in many cases where the medical condition develops, is exacerbated, or poses a new risk during an employee's

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pregnant naturally is a medical condition related to pregnancy and childbirth for purposes of the Pregnancy Discrimination Act'') (internal citations and quotation marks omitted); *Donaldson* v. *Am. Banco Corp., Inc.*, 945 F. Supp. 1456, 1464 (D. Colo. 1996) (''It would make little sense to prohibit an employer from firing a woman during her pregnancy but permit the employer to terminate her the day after delivery if the reason for termination was that the woman became pregnant in the first place. The plain language of the statute does not require it, and common sense precludes it.''); *Neessen* v. *Arona Corp.*, 708 F. Supp. 2d 841, 851 (N.D. Iowa 2010) (finding the plaintiff covered by the PDA where the defendant allegedly refused to hire her because she had recently been pregnant and given birth); EEOC, *Commission Decision on Coverage of Contraception,* at (I)(A) (Dec. 14, 2000), *https://www.eeoc.gov/commission-decision-coverage-contraception* (''The PDA's prohibition on discrimination against women based on their ability to become pregnant thus necessarily includes a prohibition on discrimination related to a woman's use of contraceptives.''); *Cooley* v. *DaimlerChrysler Corp.*, 281 F. Supp. 2d 979, 984–85 (E.D. Mo. 2003) (determining that, although the defendant employer's policy was facially neutral, denying a prescription medication that allows an employee to control their potential to become pregnant is ''necessarily a sex-based exclusion'' that violates Title VII, as amended by the PDA, because only people who have the capacity to become pregnant use prescription contraceptives, and the exclusion of prescription contraceptives may treat medication needed for a sex-specific condition less favorably than medication necessary for other medical conditions); *Erickson* v. *Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1271–72 (W.D. Wash. 2001) (determining that the selective exclusion of prescription contraceptives from an employer's generally comprehensive prescription drug plan violated the PDA because only people who have the capacity to become pregnant use prescription contraceptives).

[25] *Enforcement Guidance on Pregnancy Discrimination, supra* note 24, at (I)(A)(4).

[26] *Id.; see also Hicks* v. *City of Tuscaloosa,* 870 F.3d 1253, 1259–60 (11th Cir. 2017) (finding lactation and breastfeeding covered under the PDA, and asserting that ''[t]he PDA would be rendered a nullity if women were protected during a pregnancy but then could be readily terminated for breastfeeding—an important pregnancy-related 'physiological process' '') (internal citation omitted); *EEOC* v. *Houston Funding II, Ltd.*, 717 F.3d 425, 428 (5th Cir. 2013) (holding that ''lactation is a related medical condition of pregnancy for purposes of the PDA''); *Doe* v. *C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008) (holding that the PDA prohibits an employer from discriminating against a female employee because she has exercised her right to have an abortion); *Turic* v. *Holland Hosp., Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996) (finding the termination of the employment of a pregnant employee because she contemplated having an abortion violated the PDA); *Carney* v. *Martin Luther Home, Inc.*, 824 F.2d 643, 648 (8th Cir. 1987) (referencing the PDA's legislative history and noting commentator agreement that ''[b]y broadly defining pregnancy discrimination, Congress clearly intended to extend protection beyond the simple fact of an employee's pregnancy to include 'related medical conditions' such as nausea or potential miscarriage'') (internal citations and quotation marks omitted); *Ducharme* v. *Crescent City Déjà Vu, LLC*, 406 F. Supp. 3d 548, 556 (E.D. La. 2019) (finding that ''abortion is encompassed within the statutory text prohibiting adverse employment actions 'because of or on the basis of pregnancy, childbirth, or related medical conditions' ''); 29 CFR part 1604, appendix, Questions 34–37 (1979) (addressing coverage of abortion under the PDA); H.R. Rep. No. 95–1786, at 4 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 4749, 4766 (''Because the bill applies to all situations in which women are 'affected by pregnancy, childbirth, and related medical conditions,' its basic language covers decisions by women who chose to terminate their pregnancies. Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion.'').

[27] *See supra* note 18.

childbirth or during the employee's postpartum period.

19. However, simply because a condition is listed as one that may be a related medical condition does not mean it necessarily meets the definition of ''related medical conditions'' for the purposes of the PWFA. To be a related medical condition for the PWFA, the employee's medical condition must relate to pregnancy or childbirth. If an employee has a condition but, in their situation, it does not relate to pregnancy or childbirth, the condition is not covered under the PWFA. For example, if an employee who gave birth 2 weeks ago is vomiting because of food poisoning, that medical condition is not related to pregnancy or childbirth and the employee is not eligible on that basis for a PWFA reasonable accommodation.

20. Related medical conditions may include conditions that existed before pregnancy or childbirth and for which an individual may already receive an ADA reasonable accommodation. Pregnancy or childbirth may exacerbate the condition, such that additional or different accommodations are needed. For example, an employee who received extra breaks to eat or drink due to Type 2 diabetes before pregnancy (an ADA reasonable accommodation) may need additional accommodations during pregnancy to monitor and manage the diabetes more closely to avoid or minimize adverse health consequences to the employee or the pregnancy. As another example, an employee may have had high blood pressure that could be managed with medication prior to pregnancy, but once the employee is pregnant, the high blood pressure may pose a risk to the employee or their pregnancy such that the employee needs bed rest. In these situations, an employee could request a continued or an additional accommodation under the ADA and/or an accommodation under the PWFA.

21. The Commission emphasizes that the list of ''pregnancy, childbirth or related medical conditions'' in §1636.3(b) is non-exhaustive; to receive an accommodation a qualified employee does not have to specify a condition on this list or use medical terms to describe a condition.

22. When an employer has received a request for an accommodation under the PWFA, the employer and employee can engage in the interactive process, if necessary, in order to confirm whether a medical condition is related to pregnancy or childbirth.

1636.3(c) Employee's Representative

23. The limitation may be communicated to the covered entity by the employee or the employee's representative. The term ''employee's representative'' encompasses any representative of the employee, including a family member, friend, union representative, health care provider, or other representative. In most instances, the Commission expects that the representative will have the employee's permission before communicating the limitation to the covered entity, but there may be some situations, for example if the employee is incapacitated, where that is not the case. Once the covered entity is made aware of the limitation, the representative's participation in any aspect of the reasonable accommodation process is at the discretion of the employee, and the employee may decide not to have the representative participate at any time. In most instances, the Commission expects that the covered entity will engage directly with the employee, even where the employee's representative began the process, but acknowledges that in some situations, for example, when the employee is incapacitated or the representative is the employee's attorney, the covered entity will need to continue to engage with the representative rather than the employee.

1636.3(d) Communicated to the Employer and 1636.3(h)(2) How To Request a Reasonable Accommodation

24. Section 1636.3(d) and (h)(2) sets out how an employee informs a covered entity of their limitation in order to make it ''known'' and how an employee requests a reasonable accommodation. In practice, the Commission expects that these actions—communicating the limitation to the employer and requesting a reasonable accommodation—will take place at the same time.

25. Informing the employer of the limitation and requesting a reasonable accommodation should not be complicated or difficult. The covered entity must permit an employee to do both through various avenues and means, as set forth in §1636.3(d). Given that many accommodations requested under the PWFA will be straightforward—like additional bathroom breaks or access to water—the Commission emphasizes the importance of employees being able to obtain accommodations by communicating with the employer representative(s) with whom they would normally consult if they had questions or concerns about work matters. Employees should not be made to wait for a reasonable accommodation, especially one that is simple and imposes negligible cost or is temporary, because they spoke to the ''wrong'' supervisor. The individuals to whom an employee can communicate to seek accommodation include persons with supervisory authority for or who regularly direct the employee's work (or the equivalent for the applicant) and human resources personnel. Depending on the situation, employees also may communicate with other appropriate officials such as an agent of the employer (e.g., a search firm, staffing agency, or third-party benefits administrator).

26. Section 1636.3(d)(1) and (2) explains that the communication informing the covered

entity of the limitation does not need to be in writing, be in a specific format, use specific words, or be on a specific form in order for it to be considered ''communicated to the employer.''

27. Just as the communication informing the covered entity of the limitation does not need to be in writing or use specific phrases, the same is true for the request for a reasonable accommodation. Employees may inform the employer of the limitation and request an accommodation in a conversation or may use another mode of communication to inform the employer.[28] A covered entity may choose to confirm a request in writing or may ask the employee to fill out a form or otherwise confirm the request in writing. However, the covered entity cannot ignore or close an initial request that satisfies §1636.3(h)(2) if the employee does not complete such confirmation procedures, because that initial request is sufficient to place the employer on notice.[29] If a form is used, the form should be a simple one that does not deter the employee from pursuing the request and does not delay the provision of an accommodation. Additionally, although employees are not required to communicate limitations or request reasonable accommodations in writing, an employee may choose email or other written means to submit a request for an accommodation, which can promote clarity and create a record of their request. Finally, the request for accommodation does not need to be in the form of a ''request,'' *i.e.*, an employee does not need to ''ask'' but may provide a statement of their need for an accommodation.

28. The requirement that no specific words or phrases are necessary to communicate a limitation or request a reasonable accommodation includes not needing to specifically identify whether a condition is ''pregnancy, childbirth, or related medical conditions'' or whether it is a ''physical or mental condition.'' The statutory definition of ''limitation'' uses the words ''condition'' and ''related'' twice (''known limitation'' means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.).[30] Under §1636.3(d), ''physical or mental conditions'' are impediments or problems affecting an employee that may be modest or minor.[31] A ''physical or mental condition'' includes when an employee affected by pregnancy, childbirth, or related medical conditions has a need or a problem related to maintaining their health or the health of the pregnancy; or is seeking health care related to pregnancy, childbirth, or a related medical condition itself.[32] ''Related medical conditions'' are conditions related to the pregnancy or childbirth of the specific employee in question.

29. Many, but not all, conditions related to pregnancy and childbirth can be both a ''limitation'' and a ''related medical condition.'' For example, hyperemesis gravidarum experienced during pregnancy is a ''condition'' that could be classified as either a ''limitation'' (nausea and vomiting that arises out of pregnancy), or a ''related medical condition'' (a condition that is related to pregnancy); similarly, incontinence could be a ''limitation'' (for example, when someone who is pregnant becomes less able to comfortably hold urine and thus requires more frequent bathroom breaks), or a ''related medical condition'' (for example, when the medical condition of incontinence arises out of or is exacerbated as a result of pregnancy or childbirth).[33] Either way, such needs can be a reason for a reasonable accommodation under the PWFA.

30. Because the statute uses the same term (''condition'') to define both ''limitation'' and ''related medical conditions'' and because some ''conditions'' can be both a ''limitation'' and a ''related medical condition,'' an employee does not have to identify whether a particular condition is a ''limitation'' or a ''related medical condition'' when requesting a reasonable accommodation. For example, where an employee is experiencing nausea and vomiting in connection with a pregnancy, the employee need not determine whether this is a ''limitation'' or a ''related medical condition'' in order to request an accommodation under the PWFA. Similarly, there is no need for the employer to make such a determination before granting an accommodation under the PWFA.

31. Finally, PWFA limitations also may be ADA disabilities.[34] Therefore, an employee is not required to identify the statute under which they are requesting a reasonable accommodation. Doing so would require that employees seeking accommodations use specific words or phrases, which §1636.3(d) prohibits.

1636.3(e) Consideration of Mitigating Measures

32. There may be steps that an employee can take to mitigate, or lessen, the effects of

[28] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at Questions 1–3 (addressing requests for accommodation under the ADA).

[29] *See id.*

[30] 42 U.S.C. 2000gg(4); 29 CFR 1636.3(a)(2).

[31] 29 CFR 1636.3(a)(2).

[32] *Id.*

[33] By contrast, normal weight gain during pregnancy that necessitates a larger uniform would be a ''limitation'' but not a ''related medical condition.''

[34] 42 U.S.C. 2000gg(4); *see also infra* in the Interpretive Guidance in section *1636.7(a)(1)* under *The PWFA and the ADA.*

a known limitation such as taking medication, getting extra rest, or using a reasonable accommodation. Paragraph (e) of §1636.3 explains that the ameliorative, or positive, effects of ''mitigating measures,'' as that term is defined in the ADA,[35] shall not be considered when determining whether the employee has a limitation under the PWFA. By contrast, the detrimental or non-ameliorative effects of mitigating measures, such as negative side effects of medication, the burden of following a particular treatment regimen, and complications that arise from surgery, may be considered when determining whether an employee has a limitation under the PWFA.[36] Both the positive and negative effects of mitigating measures may be considered when determining what accommodation an employee may need.

1636.3(f) Qualified Employee

33. An employee must meet the definition of ''qualified'' in the PWFA in one of two ways.[37] Paragraph (f) of §1636.3 reiterates the statutory language that ''qualified employee'' means an employee who, with or without reasonable accommodation, can perform the essential functions of the position.[38] Additionally, following the statute, §1636.3(f) also states that an employee shall be considered qualified if: (1) any inability to perform an essential function(s) is for a temporary period; (2) the essential function(s) could be performed in the near future; and (3) the inability to perform the essential function(s) can be reasonably accommodated.[39]

34. For both definitions of qualified, the determination of whether an employee with a known limitation is qualified should be based on the capabilities of the employee at the time of the relevant employment decision.[40] The determination of qualified should not be based on speculation that the employee may become unable in the future to perform certain tasks, may cause increased health insurance premiums or workers' compensation costs, or may require leave.[41]

1636.3(f)(1) Qualified Employee—With or Without Reasonable Accommodation

35. The first way that an employee can be ''qualified'' under 42 U.S.C. 2000gg(6) is if they can perform the essential functions of their job with or without reasonable accommodation, which is the same language as in the ADA and is interpreted accordingly. ''Reasonable'' has the same meaning as under the ADA on this topic—an accommodation that ''seems reasonable on its face, *i.e.,* ordinarily or in the run of cases,'' ''feasible,'' or ''plausible.''[42] Many employees will meet this part of the PWFA definition of qualified. For example, a pregnant cashier who needs a stool to perform the job will be qualified with the reasonable accommodation of a stool. A teacher recovering from childbirth who needs additional bathroom breaks will be qualified with a reasonable accommodation that allows such breaks.

''Qualified'' for the Reasonable Accommodation of Leave

36. When determining whether an employee who needs leave as a reasonable accommodation meets the definition of ''qualified,'' the relevant inquiry is whether the employee would be able to perform the essential functions of the position, with or without reasonable accommodation (or, if not, if the inability to perform the essential function(s) is for a temporary period, the essential function(s) could be performed in the near future, and the inability to perform the essential function(s) can be reasonably accommodated), with the benefit of a period of leave (e.g., intermittent leave, part-time work, or a period of leave or time off). Thus, an employee who needs some form of leave to recover from a known limitation related to pregnancy, childbirth, or related medical conditions can readily meet the definition of ''qualified'' under the first part of the PWFA definition because it is reasonable to conclude that once they return from the period of leave (or during the time they are working if it is intermittent leave), they will be able to perform the essential functions of the job,

[35] *See* 42 U.S.C. 12102(4)(E).

[36] *See* 29 CFR 1630.2(j)(1)(vi) and (j)(4)(ii); *see also* 29 CFR part 1630, appendix, 1630.2(j)(1)(vi).

[37] The PWFA does not address prerequisites for a position. Whether an employee is qualified for the position in question is determined based on whether the employee can perform the essential functions of the position, with or without a reasonable accommodation, or based on the second part of the PWFA's definition of ''qualified.'' 42 U.S.C. 2000gg(6).

[38] 42 U.S.C. 2000gg(6).

[39] 42 U.S.C. 2000gg(6)(A)–(C).

[40] *See* 29 CFR part 1630, appendix, 1630.2(m).

[41] *See* 29 CFR part 1630, appendix, 1630.2(m).

[42] *US Airways, Inc.* v. *Barnett,* 535 U.S. 391, 401–02 (2002); *see, e.g., Shapiro* v. *Twp. of Lakewood,* 292 F.3d 356, 360 (3d Cir. 2002) (citing the definition from *Barnett*); *Osborne* v. *Baxter Healthcare Corp.,* 798 F.3d 1260, 1267 (10th Cir. 2015) (citing the definition from *Barnett*); *EEOC* v. *United Airlines, Inc.,* 693 F.3d 760, 762 (7th Cir. 2012) (citing the definition from *Barnett*); *see also Enforcement Guidance on Reasonable Accommodation, supra* note 12, at text accompanying nn.8–9 (citing the definition from *Barnett*).

with or without additional reasonable accommodations, or will be ''qualified'' under the second part of the PWFA definition.[43]

1636.3(f)(2) Qualified Employee—Temporary Suspension of an Essential Function(s)

37. The PWFA provides that an employee can meet the definition of ''qualified'' even if they cannot perform one or more essential functions of the position in question with or without a reasonable accommodation, provided three conditions are met: (1) the inability to perform an essential function(s) is for a temporary period; (2) the essential function(s) could be performed in the near future; and (3) the inability to perform the essential function(s) can be reasonably accommodated.[44]

38. Based on the overall structure and wording of the statute, the second part of the definition of ''qualified'' is relevant only when an employee cannot perform one or more essential functions of the job in question, even with a reasonable accommodation, due to a known limitation under the PWFA. It is not relevant in any other circumstance. If the employee can perform the essential functions of the position with or without a reasonable accommodation, the first definition of ''qualified'' applies (*i.e.*, able to do the job with or without a reasonable accommodation). For example, if a pregnant employee requests additional restroom breaks, they are qualified if they can perform the essential functions of the job with the reasonable accommodation of additional restroom breaks, and, if so, there is no need to reach the second part of the definition of ''qualified,'' *i.e.*, to apply definitions of ''temporary'' or ''in the near future,'' or to determine whether the inability to perform an essential function(s) can be reasonably accommodated (as no such inability exists).

39. By contrast, some examples of situations where the second part of the definition of ''qualified'' may be relevant include: (1) a pregnant construction worker is told by their health care provider to avoid lifting more than 20 pounds during the second through ninth months of pregnancy, an essential function of the worker's job requires lifting more than 20 pounds, and there is not a reasonable accommodation that will allow the employee to perform that function without lifting more than 20 pounds; and (2) a pregnant police officer is unable because of their pregnancy to perform patrol duties during the third through ninth months of pregnancy, patrol duties are an essential function of the job, and there is not a reasonable accommodation that will allow the employee to perform the patrol duties.

40. This definition is solely concerned with determining whether an individual is ''qualified.'' An employer may still defend the failure to provide the reasonable accommodation based on undue hardship.

1636.3(f)(2)(i) Temporary

41. ''Temporary'' means that the need to suspend one or more essential functions is ''lasting for a limited time,[45] not permanent, and may extend beyond 'in the near future.''' How long it may take before the essential function(s) can be performed is further limited by the definition of ''in the near future.''

1636.3(f)(2)(ii) In the Near Future

42. An employee can be qualified under the exception in 42 U.S.C. 2000gg(6)(A)–(C) if they could perform the essential function(s) ''in the near future.'' In explaining the inclusion of this additional definition of ''qualified,'' the House Report analogized the suspension of an essential function under the PWFA to cases under the ADA regarding leave; ''in the near future'' is a term some courts have used in the context of determining whether an employee can perform the essential functions of the job with a reasonable accommodation of leave and, therefore, is qualified under the ADA.[46] These ADA leave cases provide some helpful guideposts to interpret this term in the PWFA. Under the ADA,

[43] If the employee will not be able to perform all of the essential functions at the end of the leave period, with or without accommodation, the employee may still be qualified under the second part of the PWFA's definition of qualified employee. 42 U.S.C. 2000gg(6).

[44] 42 U.S.C. 2000gg(6); *see* H.R. Rep. No. 117–27, pt. 1, at 27 (''[T]he temporary inability to perform essential functions due to pregnancy, childbirth, or related medical conditions does not render a worker 'unqualified.' . . . [T]here may be a need for a pregnant worker to temporarily perform other tasks or otherwise be excused from performing essential functions before fully returning to her position once she is able.'').

[45] *Temporary*, *Merriam-Webster.com*, *https://www.merriam-webster.com/dictionary/temporary* (last visited Mar. 13, 2024) (defining ''temporary'' as ''lasting for a limited time''). This definition is consistent with logic in the House Report, which states that ''the temporary inability to perform essential functions due to pregnancy, childbirth, or related medical conditions does not render a worker 'unqualified' '' and cites to *Robert* v. *Board of County Commissioners of Brown County*, 691 F.3d 1211, 1218 (10th Cir. 2012). *See* H.R. Rep. No. 117–27, pt. 1, at 27, n.109.

[46] H.R. Rep. No. 117–27, pt. 1, at 27–28. As explained *infra*, this definition of ''qualified'' at 42 U.S.C. 2000gg(6)(A)–(C) is not used to determine ''qualified'' for the purposes of leave under the PWFA.

courts have concluded that an employee who needs indefinite leave (that is, leave for a period of time that they cannot reasonably estimate under the circumstances) cannot perform essential job functions ''in the near future.'' [47] Similarly, the Commission concludes that a need under the PWFA to indefinitely suspend an essential function(s) cannot reasonably be considered to meet the standard of an employee who could perform the essential function(s) ''in the near future.'' [48]

43. Pregnancy is a temporary condition with an ascertainable end date; the request to temporarily suspend an essential function(s) due to a current pregnancy will never be indefinite and will not be more than generally 40 weeks. Thus, for a current pregnancy, §1636.3(f) defines ''in the near future'' to mean generally 40 weeks from the start of the temporary suspension of an essential function(s). To define ''in the near future'' as less than generally 40 weeks—*i.e.,* the duration of a full-term pregnancy—would run counter to a central purpose of the PWFA of keeping pregnant employees in the workforce even when pregnancy, childbirth, or related medical conditions necessitate the reasonable accommodation of temporarily suspending the performance of one or more essential functions of a job.[49]

44. The Commission emphasizes that the definition in §1636.3(f)(2)(ii) does not mean that the essential function(s) always must be suspended for 40 weeks, or that if an employee seeks the temporary suspension of an essential function(s) for 40 weeks the employer must automatically grant it. The actual length of the temporary suspension of the essential function(s) will depend upon what the employee requires, and the covered entity always has available the defense that it would create an undue hardship. However, the mere fact that the temporary suspension of one or more essential functions is needed for any time period up to and including generally 40 weeks for a pregnant employee will not, on its own, render an employee unqualified under the PWFA.

45. For conditions other than a current pregnancy, the Commission is not setting a specific length of time for ''in the near future'' because, unlike a current pregnancy, there is not a consistent measure of how long these diverse conditions can generally last, and thus, what ''in the near future'' might mean in different instances.

46. The Commission notes that beyond an agreement that an indefinite amount of time does not meet the standard of ''in the near future,'' how long a period of leave may be under the ADA and still be a reasonable accommodation (thus, allowing the individual

[47] *See, e.g., Herrmann* v. *Salt Lake City Corp.*, 21 F.4th 666, 676–77 (10th Cir. 2021); *Cisneros* v. *Wilson*, 226 F.3d 1113, 1129 (10th Cir. 2000), *overruled on other grounds by Bd. of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001). The Commission cites these ADA cases because they use the term ''in the near future'' in a related context (employees are ''qualified'' for leave under the ADA because the leave will allow them to return to work and perform essential functions ''in the near future''). The Commission emphasizes its position, as discussed below, that under both the PWFA and the ADA, leave provided as an accommodation does not constitute a suspension of an essential function. Thus, under the PWFA, in determining whether an essential function could be performed ''in the near future,'' the period of time during which an employee may be on leave is not included in the assessment. Likewise, in determining whether an individual is qualified for leave as a reasonable accommodation under the PWFA, the statutory term ''in the near future'' is not relevant.

[48] However, the Commission notes that the employee's inability to pinpoint the exact date when they expect to be able to perform the essential functions of the position, or their ability to provide only an estimated range of dates, does not make the temporary suspension of the essential function(s) ''indefinite'' or mean that they cannot perform the job's essential functions ''in the near future.'' The fact that an exact date is not necessary is supported by the language in the statute, which requires that the essential function(s) ''could'' be performed in the near future. 42 U.S.C. 2000gg(6)(B).

[49] *See* H.R. Rep. No. 117–27, pt. 1, at 5 (''When pregnant workers do not have access to reasonable workplace accommodations, they are often forced to choose between their financial security and a healthy pregnancy. Ensuring that pregnant workers have access to reasonable accommodations will promote the economic well-being of working mothers and their families and promote healthy pregnancies.''); *id.* at 22 (''When pregnant workers are not provided reasonable accommodations on the job, they are oftentimes forced to choose between economic security and their health or the health of their babies.''); *id.* at 24 (''Ensuring pregnant workers have reasonable accommodations helps ensure that pregnant workers remain healthy and earn an income when they need it the most.''); *id.* at 33 (''The PWFA is about ensuring that pregnant workers can stay safe and healthy on the job by being provided reasonable accommodations for pregnancy, childbirth, or related medical conditions . . . . The PWFA is one crucial step needed to reduce the disparities pregnant workers face by ensuring that pregnant women, and especially pregnant women of color, can remain safe and healthy at work.'').

to remain qualified) varies.[50] The Commission believes, however, that depending on the facts of a case, leave cases that allow for a longer period are more relevant to the determination of ''in the near future'' under the PWFA for three reasons. First, what constitutes ''in the near future'' may differ depending on factors, including but not limited to, the known limitation and the employee's position. For example, an employee whose essential job functions require lifting only during the summer months would remain qualified even if unable to lift during a 7-month period over the fall, winter, and spring months because the employee could perform the essential function ''in the near future'' (in this case, as soon as the employee was required to perform that function). Second, the determination of whether the employee could resume the essential functions of their position in the near future is only one step in the definition of qualified; standing alone, it does not require the employer to provide an accommodation. If the temporary suspension cannot be reasonably accommodated, or if the temporary suspension causes an undue hardship, the employer is not required to provide it.[51] Third, as detailed in the notice of proposed rulemaking (NPRM), especially in the first year after giving birth, employees may experience serious health issues related to their pregnancy that may prevent them from performing the essential functions of their positions.[52] Accommodating these situations and allowing employees to stay employed are among the key purposes of the PWFA.

47. Further, the Commission recognizes that employees may need an essential function(s) temporarily suspended because of a current pregnancy; take leave to recover from childbirth; and, upon returning to work, need the same essential function(s) or a different one temporarily suspended due to the same or a different physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. In keeping with the requirement that the determination of whether an

[50] *See, e.g., Robert*, 691 F.3d at 1218 (citing a case in which a 6-month leave request was too long to be a reasonable accommodation but declining to address whether, in the instant case, a further exemption following the 6-month temporary accommodation at issue would exceed ''reasonable durational bounds'') (citing *Epps* v. *City of Pine Lawn*, 353 F.3d 588, 593 (8th Cir. 2003)); *see also Blanchet* v. *Charter Commc'ns, LLC*, 27 F.4th 1221, 1225–26, 1230–31 (6th Cir. 2022) (determining that a pregnant employee who developed postpartum depression and requested a 5-month leave after her initial return date, and was fired after requesting an additional 60 days of leave could still be ''qualified,'' as additional leave could have been a reasonable accommodation); *Cleveland* v. *Fed. Express Corp.*, 83 F. App'x 74, 76–81 (6th Cir. 2003) (declining ''to adopt a bright-line rule defining a maximum duration of leave that can constitute a reasonable accommodation'' and determining that a 6-month medical leave for a pregnant employee with systemic lupus could be a reasonable accommodation); *Garcia-Ayala* v. *Lederle Parenterals, Inc.*, 212 F.3d 638, 641–42, 646–49 (1st Cir. 2000) (reversing the district court's finding that a secretary was not a ''qualified individual'' under the ADA because additional months of unpaid leave could be a reasonable accommodation, even though she had already taken over year of medical leave for breast cancer treatment, and rejecting per se rules as to when additional medical leave is unreasonable); *Nunes* v. *Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1245–1247 (9th Cir. 1999) (opining that, because extending leave to 9 months to treat a fainting disorder could be a reasonable accommodation, an employee's inability to work during that period of leave did not automatically render her unqualified); *Cayetano* v. *Fed. Express Corp.*, No. 1:19–CV–10619, 2022 WL 2467735, at *1–*2, *4–*7 (S.D.N.Y. July 6, 2022) (determining that an employee who underwent shoulder surgery could be ''qualified'' because 6 months of leave is not per se unreasonable as a matter of law); *Durrant* v. *Chemical/Chase Bank/Manhattan Bank, N.A.*, 81 F. Supp. 2d 518, 519, 521–22 (S.D.N.Y. 2000) (concluding that an employee who was on leave for nearly 1 year due to a leg injury and extended her leave to treat a psychiatric condition could be ''qualified'' under the ADA with the accommodation of additional leave of reasonable duration).

[51] The Commission is aware of and disagrees with ADA cases that held, for example, that 2 to 3 months of leave following a 12-week FMLA period was presumptively unreasonable as an accommodation. *See, e.g., Severson* v. *Heartland Woodcraft, Inc.*, 872 F.3d 476, 481 (7th Cir. 2017). In any event, such cases have no bearing on the determination of ''in the near future'' under the definition of ''qualified'' for the PWFA because this definition expressly contemplates temporarily suspending one or more essential functions.

[52] 88 FR 54724–25; *see, e.g.*, Susanna Trost et al., U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention, *Pregnancy-Related Deaths: Data from Maternal Mortality Review Committees in 36 U.S. States, 2017–2019* (2022), *https://www.cdc.gov/reproductivehealth/maternal-mortality/erase-mm/data-mmrc.html* (stating that 53% of pregnancy-related deaths occurred from one week to one year after delivery, and 30% occurred one- and one-half months to one year postpartum).

individual is qualified under the PWFA should be made at the time of the employment decision,[53] the determination of ''in the near future'' should be made when the employee asks for each accommodation that requires the suspension of one or more essential functions. Thus, an employee who is 3 months pregnant and who is seeking an accommodation of the temporary suspension of an essential function(s) due to a limitation related to pregnancy will meet the definition of ''in the near future'' because the inability to perform the essential function(s) will end in less than 40 weeks. When the employee returns to work from leave after childbirth, if the employee needs an essential function temporarily suspended for a reason related to pregnancy, childbirth, or related medical conditions, there should be a new determination made as to whether the employee is qualified under §1636.3(f)(2). In other words, there is a new calculation of ''in the near future'' with the new employment decision that involves the temporary suspension of an essential function(s).[54]

48. Determining ''in the near future'' in the definition of ''qualified'' when the employment decision is made is necessary because it would often be difficult, if not impossible, for a pregnant employee to predict what their limitations (if any) will be when returning to work after pregnancy. While pregnant, they may not know whether and, if so, for how long, they will have a known limitation or need an accommodation. They also may not know whether an accommodation after returning to work will require the temporary suspension of an essential function(s), and, if so, for how long. All of these questions may be relevant under the PWFA's second definition of ''qualified.''

49. Leave as a reasonable accommodation (e.g., for recovery from pregnancy, childbirth, or related medical conditions or any other purpose) does not count as time when an essential function(s) is suspended and, thus, is not relevant for the second part of the definition of ''qualified'' (§1636.3(f)(2)). If an individual needs leave as a reasonable accommodation under the PWFA or, indeed, any reasonable accommodation other than the temporary suspension of an essential function(s), only the first part of the definition of ''qualified'' is relevant (§1636.3(f)(1)). In the case of leave, the question would be whether the employee, after returning from the requested period of leave, would be able to perform the essential functions of the position with or without reasonable accommodation (or, if not, if the inability to perform the essential function(s) is for a temporary period, the essential function(s) could be performed in the near future, and the inability to perform the essential function(s) can be reasonably accommodated). Furthermore, for some employees, leave to recover from childbirth will not require a reasonable accommodation because they have a right to leave under Federal, State, or local law or under an employer's policy.[55]

1636.3(f)(2)(iii) Can Be Reasonably Accommodated

50. The second part of the PWFA's definition of ''qualified'' further requires that the suspension ''can be reasonably accommodated.''[56] For some positions, this may mean that one or more essential functions are temporarily suspended, with or without assigning the essential function(s) to someone else, and the employee continues to perform the remaining functions of the job. For other positions, some of the essential function(s) may be temporarily suspended, with or without assigning the essential function(s) to someone else, and the employee may be given other tasks to replace them. In other situations, one or more essential functions may be temporarily suspended, with or without giving the essential function(s) to someone else, and the employee may perform the functions of a different job to which the employer temporarily transfers or moves them, or the employee may participate in the employer's light or modified duty program.[57]

51. Examples Regarding §1636.3(f)(2):

Example #1/Definition of ''Qualified'': One month into pregnancy, Akira, an employee in a paint manufacturing plant, is told by her health care provider that she should avoid certain chemicals for the remainder of the pregnancy. One of several essential functions of the job involves regular exposure to these chemicals. Akira talks to her supervisor, explains her limitation, and asks that she be allowed to continue to perform her other tasks that do not require exposure to the chemicals.

[53] *See* 29 CFR part 1630, appendix, 1630.2(m).

[54] There is a new calculation regardless of whether the employee seeks to temporarily suspend the same essential function that was suspended during pregnancy or a different one.

[55] For additional information on how leave should be addressed under the PWFA, *see infra* in the Interpretive Guidance in section *1636.3(h)* under *Particular Matters Regarding Leave as a Reasonable Accommodation*.

[56] 42 U.S.C. 2000gg(6)(C).

[57] *See* H.R. Rep. No. 117–27, pt. 1, at 27 (''[T]he temporary inability to perform essential functions due to pregnancy, childbirth, or related medical conditions does not render a worker 'unqualified.' . . . [T]here may be a need for a pregnant worker to temporarily perform other tasks or otherwise be excused from performing essential functions before fully returning to her position once she is able.'').

1. Known limitation and request for accommodation: Akira's need to avoid exposure to chemicals is a physical or mental condition related to, affected by, or arising out pregnancy, childbirth, or related medical conditions; Akira needs an adjustment or change at work due to the limitation; and Akira has communicated this information to her employer.

2. Qualified: If modifications that would allow Akira to continue to perform the essential functions of her position (such as enclosing the chemicals, providing a local exhaust vent, or providing additional personal protective gear) are not effective or cause an undue hardship, Akira can still be qualified under the definition that allows for a temporary suspension of an essential function(s).

a. Akira's inability to perform the essential function(s) is temporary.

b. Akira can perform the essential function(s) of her job in the near future because she is pregnant and needs an essential function(s) suspended for less than 40 weeks.

c. Akira's inability to perform the essential function(s) may be reasonably accommodated. The employer can suspend the essential function(s) that requires her to work with the chemicals, while allowing her to do the remainder of her job.

Example #2/Definition of ''Qualified'': Two months into a pregnancy, Lydia, a delivery driver, is told by her health care provider that she should adhere to clinical guidelines for lifting during pregnancy, which means she should not continue to lift 30–40 pounds, which she routinely did at work when moving packages as part of the job. She discusses the limitation with her employer. The employer is unable to provide Lydia with assistance in lifting packages, and Lydia requests placement in the employer's light duty program, which is used for drivers who have on-the-job injuries.

1. Known limitation and request for accommodation: Lydia's lifting restriction is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; she needs an adjustment or change at work due to the limitation; and she has communicated this information to the employer.

2. Qualified: Lydia needs the temporary suspension of an essential function(s).

a. Lydia's inability to perform the essential function(s) is temporary.

b. Lydia can perform the essential function(s) of her job in the near future because Lydia is pregnant and needs an essential function(s) suspended for less than 40 weeks.

c. Lydia's need to temporarily suspend an essential function(s) of her job may be reasonably accommodated through the existing light duty program.

Example #3/Definition of ''Qualified'': Olga's position as a carpenter involves lifting heavy wood that weighs more than 20 pounds. Upon returning to work after giving birth, Olga tells her supervisor that she has a lifting restriction of 10 pounds due to her cesarean delivery. The restriction is for 8 weeks. The employer does not have an established light duty program but does have other design or administrative duties that Olga can perform.

1. Known limitation and request for accommodation: Olga's lifting restriction is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; she needs an adjustment or change at work due to the limitation; and she has communicated this information to the employer.

2. Qualified: Olga needs the temporary suspension of an essential function(s).

a. Olga's inability to perform the essential function(s) is temporary.

b. Olga can perform the essential function(s) of her job in the near future because she needs the essential function(s) suspended for 8 weeks.[58]

c. Olga's need to temporarily suspend an essential function(s) of her job may be reasonably accommodated by temporarily suspending the essential function(s) and temporarily assigning Olga to design or administrative duties.

Example #4/Definition of ''Qualified'': One of the essential functions of Elena's position as a park ranger involves patrolling the park. Park rangers also answer questions for guests, sell merchandise, and explain artifacts and maps. Due to her postpartum depression, Elena is experiencing an inability to sleep, severe anxiety, and fatigue. Her anti-depressant medication also is causing dizziness and blurred vision, which make it difficult to drive. Elena seeks the temporary suspension of the essential function of patrolling the park for 12 weeks.

1. Known limitation and request for accommodation: Elena's inability to sleep, anxiety, fatigue, dizziness, and blurred vision are physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; she needs an adjustment or change at work due to the limitation; and she has communicated this information to the employer.

2. Qualified: Elena needs the temporary suspension of an essential function(s).

a. Elena's inability to perform the essential function(s) is temporary.

b. Elena can perform the essential function(s) of her job in the near future because

[58] *See Cehrs* v. *Ne. Ohio Alzheimer's Rsch. Ctr.*, 155 F.3d 775, 781–783 (6th Cir. 1998) (determining that an employee suffering from severe psoriasis who was on an 8-week leave of absence and requested an additional 1-month leave could be ''otherwise qualified'' under the ADA).

she needs an essential function(s) suspended for 12 weeks.[59]

c. Elena's need to temporarily suspend an essential function(s) of her job may be reasonably accommodated by temporarily suspending the essential function(s) and temporarily assigning Elena to duties such as answering questions and selling merchandise at the visitor's center.

Example #5/Definition of ''Qualified'': Tamara's position at a retail establishment involves working as a cashier and folding and putting away clothing. In her final trimester of pregnancy, Tamara develops carpal tunnel syndrome that makes gripping objects and buttoning clothing difficult. Tamara seeks the temporary suspension of the essential functions of folding and putting away clothing. The employer provides the accommodation and temporarily assigns Tamara to greeting and assisting customers, tasks that cashiers are normally assigned to on a rotating basis. When she returns to work after she gives birth, Tamara continues to experience carpal tunnel symptoms, which her doctor believes will cease in approximately 16 weeks.

1. Known limitation and request for accommodation: Tamara's inability to grip objects and button clothing are physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; she needs an adjustment or change at work due to the limitation; and she has communicated this information to the employer.

2. Qualified: Tamara needs the temporary suspension of an essential function(s).

a. Tamara's inability to perform the essential function(s) is temporary.

b. Tamara can perform the essential functions of her job in the near future because she needs an essential function(s) suspended for 16 weeks.[60]

c. Tamara's need to temporarily suspend an essential function(s) of her job may be reasonably accommodated by temporarily suspending the essential function(s) and temporarily assigning Tamara to duties such as greeting and assisting customers.

1636.3(g) Essential Functions

52. Section 1636.3(g) adopts the Commission's definition of ''essential functions'' contained in the regulation implementing the ADA.[61] Thus, in determining whether something is an essential function, the first consideration is whether employees in the position actually are required to perform the function. This consideration will generally include one or more of the factors listed in §1636.3(g)(1), although this list is non-exhaustive. Relevant evidence as to whether a particular function is essential includes, but is not limited to, information from the employer (such as the position description) and information from incumbents (including the employee requesting the accommodation) about what they actually do on the job.[62] This includes whether employees in the position actually will be required to perform the function during the time for which an accommodation is expected to be needed. The list of factors in §1636.3(g)(2) is not exhaustive, and other relevant evidence also may be presented. No single factor is dispositive, and greater weight will not be granted to the types of evidence included on the list than to the types of evidence not listed.[63]

1636.3(h) Reasonable Accommodation—Generally

1636.3(h)(1) Definition of Reasonable Accommodation

53. The statute at 42 U.S.C. 2000gg(7) states that the term ''reasonable accommodation'' has the meaning given to it in section 101 of the ADA[64] and shall be construed as it is construed under the ADA and the Commission's regulation implementing the PWFA. Thus, under the PWFA, as under the ADA, the obligation to make reasonable accommodation is a form of non-discrimination and is therefore best understood as a means by which barriers to the equal employment opportunity are removed or alleviated.[65] A modification or adjustment is reasonable if it ''seems reasonable on its face, *i.e.*, ordinarily or in the run of cases''; this means it

[59] *See Criado* v. *IBM Corp.*, 145 F.3d 437, 443–43 (1st Cir. 1998) (concluding that an employee with severe anxiety and depression who was on leave for approximately 6 weeks and requested an extension of temporary leave was ''qualified'' under the ADA); *Durrant*, 81 F. Supp. 2d at 519, 521–22 (concluding that an employee who was on leave for nearly 11 months due to a leg injury and extended her leave to treat a psychiatric condition could be ''qualified'' under the ADA); *Powers* v. *Polygram Holding,* 40 F. Supp. 2d 195, 199 (S.D.N.Y. 1999) (determining that an employee experiencing bipolar disorder who requested a total of 17 weeks of leave could be ''qualified'' under the ADA).

[60] *See Rascon* v. *U.S. W. Commc'ns, Inc.,* 143 F.3d 1324, 1333 (10th Cir. 1998) (agreeing that an employee diagnosed with post-traumatic stress disorder who requested a 4-month leave for a treatment program was a ''qualified'' individual under the ADA), *abrogated on other grounds by New Hampshire* v. *Maine,* 532 U.S. 742 (2001).

[61] *See* 29 CFR 1630.2(n).

[62] *See* 29 CFR 1630.2(n); 29 CFR part 1630, appendix, 1630.2(n).

[63] *See* 29 CFR part 1630, appendix, 1630.2(n).

[64] *See* 42 U.S.C. 12111(9).

[65] *See* 29 CFR part 1630, appendix 1630.9.

is ''reasonable'' if it appears to be ''feasible'' or ''plausible.''[66] An accommodation also must be effective in meeting the qualified employee's needs, meaning it removes a work-related barrier and provides the employee with equal employment opportunity.[67]

54. Under the PWFA, ''reasonable accommodation'' has the same definition as under the ADA, with the exceptions noted in items (1) through (3) of this paragraph.[68] Therefore, like the ADA, reasonable accommodation under the PWFA includes: (1) modifications or adjustments to the job application process that enable a qualified applicant with a known limitation to be considered for the position; (2) modifications or adjustments to the work environment, or to the manner or circumstances under which the position is preformed to allow a qualified employee with a known limitation to perform the essential functions of the job; and (3) modifications or adjustments that enable an employee with a known limitation to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without known limitations.[69]

55. Because the PWFA also provides for reasonable accommodations when a qualified employee temporarily cannot perform one or more essential functions of a position but can meet the requirements of 42 U.S.C. 2000gg(6)(A)–(C), reasonable accommodations under the PWFA also include modifications or adjustments that allow a qualified employee with a known limitation to temporarily suspend one or more essential functions of the position. This can be either through the essential function(s) being suspended or through the essential function(s) being suspended and the employee doing other work as set out in §1636.3(f)(2)(iii).

1636.3(h)(2) How To Request a Reasonable Accommodation

56. To request a reasonable accommodation, the employee (or the employee's representative) must communicate to the employer that they need an adjustment or change at work due to their known limitation (a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions). Section 1636.3(d) applies to communications to request a reasonable accommodation. An employee may use plain language and need not mention the PWFA. An employee does not have to use the phrases ''reasonable accommodation,'' ''limitation,'' ''known limitation,'' ''qualified,'' or ''essential function''; use any medical terminology; provide a specific medical condition; use any other specific words or phrases; or put the explanation of the need for accommodation in the form of a request.

57. In these examples, the employee is communicating both their limitation and that they need an adjustment or change at work due to the limitation. The Commission expects that in the vast majority of cases these two communications will happen at the same time. All of these are examples of requests for reasonable accommodations under the PWFA.

Example #6: A pregnant employee tells her supervisor, ''I'm having trouble getting to work at my scheduled starting time because of morning sickness.''

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[66] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at General Principles (quoting *Barnett,* 535 U.S. at 403–06).

[67] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at General Principles & Question 9; 29 CFR part 1630, appendix, 1630.9.

[68] *See* 42 U.S.C. 2000gg(7).

[69] *See* 29 CFR 1630.2(o)(1)(i) through (iii). The requirement for employers to provide reasonable accommodations when requested that provide for equal benefits and privileges encompasses the requirement that an accommodation should provide the individual with an equal employment opportunity. 29 CFR part 1630, appendix, 1630.9. This requirement stems from the ADA's prohibition on discrimination in ''terms, conditions, and privileges of employment.'' 42 U.S.C. 12112(a). The PWFA prohibits adverse action in the terms, conditions, or privileges of employment against a qualified employee for using or requesting an accommodation and Title VII—which applies to employees affected by pregnancy, childbirth, or related medical conditions—prohibits discrimination in the terms, conditions, or privileges of employment. *See* 42 U.S.C. 2000e–2(a)(1). Based on the text of the PWFA, Title VII, and the requirement under the PWFA that reasonable accommodation has the same definition as in the ADA, the same requirement applies. Thus, a reasonable accommodation under the PWFA includes a change to allow employees affected by pregnancy, childbirth, or related medical conditions nondiscrimination in the terms, conditions, or privileges of employment or, in shorthand, to enjoy equal benefits and privileges. *See also* EEOC, *Compliance Manual Section 613 Terms, Conditions, and Privileges of Employment*, 613.1(a) (1982) [hereinafter *Compliance Manual on Terms, Conditions, and Privileges of Employment*], *https://www.eeoc.gov/laws/guidance/cm-613-terms-conditions-and-privileges-employment* (providing that ''terms, conditions, and privileges of employment'' are ''to be read in the broadest possible terms'' and ''a distinction is rarely made between terms of employment, conditions of employment, or privileges of employment'').

Example #7: An employee who gave birth 3 months ago tells the person who assigns her work at the employment agency, ''I need an hour off once a week for treatments to help with my back problem that started during my pregnancy.''

Example #8: An employee tells a human resources specialist that they are worried about continuing to lift heavy boxes because they are concerned that it will harm their pregnancy.

Example #9: At the employee's request, an employee's spouse requests light duty for the employee because the employee has a lifting restriction related to pregnancy; the employee's spouse uses the employer's established process for requesting a reasonable accommodation.

Example #10: An employee tells a manager of her need for more frequent bathroom breaks, explains that the breaks are needed because the employee is pregnant, but does not complete the employer's online form for requesting an accommodation.

Example #11: An employee tells a supervisor that she needs time off to recover from childbirth.

Alleviating Increased Pain or Risk to Health Due to the Known Limitation

58. One reason an employee may seek a reasonable accommodation is to alleviate increased pain or risk to health that is attributable to the physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that has been communicated to the employer (the known limitation).[70] When dealing with requests for accommodation concerning the alleviation of increased pain or risk to health associated with a known limitation, the goal is to provide an accommodation that allows the qualified employee to alleviate the identified pain or risk to health.

59. Examples Regarding Alleviating Pain or Risk to Health Due to the Known Limitation:

Example #12/Alleviating Pain or Risk to Health: Celia is a factory worker whose job requires her to regularly move boxes that weigh 50 pounds. Prior to her pregnancy, Celia occasionally felt pain in her knee when she walked for extended periods of time. When Celia returns to work after giving birth, which was by cesarean section, Celia requests that she limit tasks to those that do not require moving boxes of more than 30 pounds for 3 months because heavier lifting could increase the risk to her health and her continued recovery from childbirth. Under the PWFA, the employer is required to provide the requested accommodation (or another reasonable accommodation) absent undue hardship. However, under the PWFA, the employer would not be required to provide an accommodation for Celia's knee pain unless it was related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The employer also may have accommodation responsibilities regarding Celia's knee pain and lifting restrictions under the ADA.

Example #13/Alleviating Pain or Risk to Health: Emily is a candidate for a police officer position. The application process takes place over several months and has multiple steps, one of which is a physical agility test. By the time it is Emily's turn to take the test, she is 7 months pregnant. To avoid risk to her health and the health of her pregnancy, Emily asks that the test be postponed and that her application be kept active so that once she has recovered from childbirth, she can resume the application process and not have to re-apply. Under the PWFA, the employer is required to provide the requested accommodation (or another reasonable accommodation) absent undue hardship.

Example #14/Alleviating Pain or Risk to Health: Jackie's position at a fabrication plant involves working with certain chemicals, which Jackie thinks is the reason she has a nagging cough and chapped skin on her hands. For the one year when she is nursing, Jackie seeks the accommodation of a temporary suspension of an essential function—working with the chemicals—because of the risk that the chemicals will contaminate the milk she produces. The employer provides the accommodation. After Jackie stops nursing, she no longer has any known limitations. Thus, under the PWFA, she can be assigned to work with the chemicals again even if she would prefer not to do that work, because the PWFA requires an employer to provide an accommodation only if it is needed due to a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. Jackie's employer may have accommodation responsibilities under the ADA.

Example #15/Alleviating Pain or Risk to Health: Margaret is a retail worker who is pregnant. Because of her pregnancy, Margaret feels pain in her back and legs when she has to move stacks of clothing from one area to the other, one of the essential functions of her position. She can still manage to move the clothes, but, because of the pain, she requests a cart to use when she is moving the garments. Under the PWFA, the employer is required to provide the requested accommodation (or another reasonable accommodation) absent undue hardship.

[70] Depending on the facts of the case, the accommodation sought will allow an applicant to apply for the position, or an employee to perform the essential functions of the job, to enjoy equal benefits and privileges of employment, or to temporarily suspend an essential function(s) of the job.

Example #16/Alleviating Pain or Risk to Health: Lourdes is pregnant and works outdoors as a farmworker. The conditions where she works expose her to certain chemicals and the conditions can be slippery. Because of her pregnancy, Lourdes has a problem with her balance and is more likely to slip and fall, and she needs to avoid exposure to the chemicals that she is normally exposed to at work. She seeks the accommodation of working indoors, which will allow her to avoid the conditions that could lead her to slip and fall and will allow her to avoid exposure to the chemicals. There is indoor work, which Lourdes is occasionally assigned to perform, available at the farm, as well as work that does not involve chemicals. Under the PWFA, the employer is required to provide the requested accommodation (or another reasonable accommodation) absent undue hardship.

Example #17/Alleviating Pain or Risk to Health: Avery works as an administrative assistant and is pregnant. Avery normally works in the office and commutes by driving and public transportation. Due to pregnancy, Avery is experiencing sciatica; commuting is painful because it requires Avery to sit and stand in one position for an extended period of time. Avery seeks the accommodation of teleworking or changing the start and end time of the workday in order to commute during less crowded times and reduce the commute time and thereby reduce the pain. Under the PWFA, the employer is required to provide the requested accommodation (or another reasonable accommodation) absent undue hardship.

Example #18/Alleviating Pain or Risk to Health: Arya is pregnant and works in a warehouse. When it is hot outside, the temperature in the warehouse increases to a level that creates a risk to Arya and her pregnancy.[71] Arya seeks an accommodation of a portable cooling device to reduce the risk to her health and the health of her pregnancy because of the heat in her workplace. Under the PWFA, the employer is required to provide the requested accommodation (or another reasonable accommodation) absent undue hardship.

Example #19/Alleviating Pain or Risk to Health: Talia is a nurse and is pregnant. The community where she lives is experiencing a surge in cases of a contagious respiratory viral disease that has been shown to increase the risk of negative outcomes for pregnancy. To reduce her risk and the risk to her pregnancy, Talia requests additional protective gear and to not be assigned to patients exhibiting symptoms of this virus. Under the PWFA, the employer is required to provide the requested accommodation (or another reasonable accommodation) absent undue hardship.

Particular Matters Regarding Leave as a Reasonable Accommodation

60. Under the PWFA, leave may be a reasonable accommodation.[72] If an employee requests leave as an accommodation or if there is no other reasonable accommodation that does not cause an undue hardship, the covered entity should evaluate whether to offer leave as a reasonable accommodation under the PWFA. This is the case even if the covered entity does not offer leave as an employee benefit,[73] the employee is not eligible for leave under the employer's leave policy, or the employee has exhausted the leave the covered entity provides as a benefit (including leave exhausted under a workers' compensation program, the FMLA, or similar State or local laws).[74]

61. The Commission recognizes that there may be situations where an employer provides a reasonable accommodation to a qualified pregnant employee (e.g., a stool, additional breaks, or temporary suspension of one or more essential functions) under the PWFA, and then the employee requests leave

[71] U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention, *Heat and Pregnant Women* (Aug. 25, 2022), *https://www.cdc.gov/disasters/extremeheat/heat_and_pregnant_women.html*.

[72] H.R. Rep. No. 117–27, pt. 1, at 29 (noting that ''leave is one possible accommodation under the PWFA, including time off to recover from delivery'').

[73] *See Enforcement Guidance on Reasonable Accommodation*, *supra* note 12, at text preceding Question 17 (explaining that if an employee with a disability needs 15 days of leave and an employer only provides 10 days of paid leave, the employer should allow the employee to use 10 days of paid leave and 5 days of unpaid leave). The Commission has stated in a technical assistance document regarding leave and the ADA that an employer should consider providing unpaid leave to an employee with a disability as a reasonable accommodation even when the employer does not offer leave as an employee benefit. *See* EEOC, *Employer-Provided Leave and the Americans with Disabilities Act*, at text above Example 4 (2016) [hereinafter *Technical Assistance on Employer-Provided Leave*], *https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act*.

[74] *See supra* note 73. If an employee has a right to leave under the FMLA, an employer policy, or a State or local law, the employee is entitled to leave regardless of whether they request leave as a reasonable accommodation. An employee who needs leave beyond what they are entitled to under those laws or policies may request a reasonable accommodation.

as a reasonable accommodation (e.g., to recover from childbirth). In these situations, the covered entity should consider the request for the reasonable accommodation of leave to recover from childbirth in the same manner that it would any other request for leave as a reasonable accommodation. This requires first considering whether the employee will be able to perform the essential functions of the position with or without a reasonable accommodation after the period of leave, or, if not, whether, after the period of leave, the employee will meet the definition of ''qualified'' under §1636.3(f)(2).[75]

62. A qualified employee with a known limitation who is granted leave as a reasonable accommodation under the PWFA is entitled to return to their same position unless the employer demonstrates that holding open the position would impose an undue hardship.[76] When the employee is ready to return to work, the employer must allow the individual to return to the same position (assuming that there was no undue hardship in holding it open) if the employee is still qualified (*i.e.,* the employee can perform the essential functions of the position with or without reasonable accommodation under §1636.3(f)(1) or if the employee meets the definition of ''qualified'' under §1636.3(f)(2)).[77]

63. Under the PWFA, an employer does not have to provide a reasonable accommodation if it causes an undue hardship—a significant difficulty or expense. Thus, if an employer can demonstrate that the impact of the leave requested as a reasonable accommodation poses an undue hardship under the factors set out in §1636.3(j)(2)—for example, because of the impact of its length, frequency, or unpredictable nature, or because of another factor that causes significant difficulty or expense—it does not have to provide the requested leave under the PWFA.

64. Employees must be permitted to choose whether to use paid leave (whether accrued, as part of a short-term disability program, or as part of any other employee benefit) or unpaid leave to the same extent that the covered entity allows employees to choose between these types of leave when they are using leave for reasons unrelated to pregnancy, childbirth, or related medical conditions.[78] Similarly, an employer must continue an employee's health insurance benefits during their leave period to the extent that it does so for other employees in a similar leave status, such as paid or unpaid leave. An employer is not required to provide additional paid leave under the PWFA beyond the amount provided to similarly situated employees.[79]

Ensuring That Employees Are Not Penalized for Using Reasonable Accommodations

65. Generally, covered entities are not required to lower production standards for qualified employees receiving accommodations under the PWFA.[80] However, for example, when the reasonable accommodation is leave, the employee may not be able to meet a production standard during the period of leave or, depending on the length of the leave, meet that standard for a defined period of time (e.g., the production standard measures production in 1 year and the employee was on leave for 4 months). Thus, if the reasonable accommodation is leave, the production standard may need to be prorated to account for the reduced amount of time the qualified employee worked.[81]

66. In addition, covered entities making reasonable accommodations must ensure that their ordinary workplace policies or practices—including, but not limited to, attendance policies, productivity quotas, and requirements for mandatory overtime—do not operate to penalize qualified employees

[75] These considerations are relevant only if the leave is needed as a reasonable accommodation. The covered entity should first consider if there is a leave program that covers the need for leave to recover from childbirth and for which the employee is eligible. If there is a leave program that covers the request, the covered entity may not need to assess the employee's ability to perform essential functions upon return from leave under the PWFA.

[76] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at Question 18. As under the ADA, if an employer cannot hold a position open during the entire leave period without incurring undue hardship, the employer should consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue their leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position.

[77] *See id.*

[78] A failure to allow an employee affected by pregnancy, childbirth, or related medical conditions to use paid or unpaid leave to the same extent that the covered entity allows employees using leave for reasons unrelated to pregnancy, childbirth, or related medical conditions to do so or a failure to continue health care insurance for an employee affected by pregnancy, childbirth, or related medical conditions to the same extent that a covered entity does for other employees may be a violation of Title VII as well.

[79] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at text after n.48.

[80] *See id.* at text accompanying n.14.

[81] *See id.* at Question 19.

for utilizing PWFA accommodations.[82] When a reasonable accommodation involves a pause in work—such as a break, a part-time or other reduced work schedule, or leave—a qualified employee cannot be penalized, or threatened with a penalty, for failing to perform work during that non-work period, including through actions like the assessment of penalty points for time off or discipline for failing to meet a production quota. For example, if a call center employee with a known limitation requests and is granted 2 hours of unpaid leave in the afternoon for rest, the employee's required number of calls may need to be reduced proportionately. Alternatively, the accommodation could allow for the qualified employee to make up the time at a different time during the day so that the employee's production standards and pay would not be reduced, as long as this would not make the accommodation ineffective.

67. Similarly, policies that monitor employees for time on task (whether through automated means or otherwise) and penalize them for being off task may need to be modified to avoid imposing penalties for non-work periods that the qualified employee was granted as a reasonable accommodation. This includes situations in which hours worked or time on task are used to measure traits like ''productivity,'' ''focus,'' ''availability,'' or ''contributions.'' For example, if, as a reasonable accommodation, a qualified employee is excused from working overtime, and ''availability'' or ''contribution'' is measured by an employee's overtime hours, a qualified employee should not be penalized in those categories.

68. If an accommodation under the PWFA involves the temporary suspension of an essential function(s) of the position, a covered entity may not penalize a qualified employee for not performing the essential function(s) that has been temporarily suspended. So, for example, a covered entity must not penalize a qualified employee for not meeting a production standard related to the performance of the essential function(s) that has been temporarily suspended.

69. Penalizing an employee in these situations could render the accommodation ineffective, thus making the covered entity liable for failing to make reasonable accommodation.[83] It also may be an adverse action in the terms, conditions, or privileges of employment or retaliation.[84]

70. The following examples illustrate situations where penalizing an employee may violate 42 U.S.C. 2000gg–1(1) (failing to make reasonable accommodation absent undue hardship), (5) (prohibiting employers from taking adverse action against an employee on account of the employee using a reasonable accommodation), and/or section 2000gg–2(f) (prohibiting retaliation).

Example #20/Not Penalizing Employees: Arisa works in a fulfillment center that tracks employee productivity using personal tracking devices that monitor an employee's time on task and how long it takes an employee to complete a task. If the technology determines that an employee is spending insufficient time on task or taking too long to complete a task, the employee receives a warning, which can escalate to a reprimand and further discipline. Arisa is pregnant and, as a reasonable accommodation, is permitted to take bathroom breaks as necessary. Because the wearable technology determines that due to the approved additional bathroom breaks Arisa is spending insufficient time on task, Arisa receives a warning.

Example #21/Not Penalizing Employees: Hanh works in a call center that has a ''no-fault'' attendance policy where employees accrue penalty points for all absences and late arrivals, regardless of the reason for the lateness or absence. The policy allows for discipline or termination when an employee accrues enough points within a certain time period. Hanh gave birth and has had some complications that involve heavy vaginal bleeding for which she occasionally needs time off, and she also needs to attend related medical appointments. She sought, and her employer provided, the reasonable accommodations of being able to arrive up to 1 hour late on certain days with time to attend medical appointments. Despite the reasonable accommodations, because of the no-fault policy, Hanh accrues penalty points under the policy, subjecting her to possible discipline or termination.

Example #22/Not Penalizing Employees: Afefa, a customer service agent who is pregnant, requests two additional 10-minute rest breaks and additional bathroom breaks, as needed, during the workday. The employer determines that these breaks would not pose an undue hardship and grants the request. Because of the additional breaks, Afefa responds to three fewer calls during a shift. Afefa's supervisor gives her a lower performance rating because of her decrease in productivity.

Personal Use

71. The obligation to provide reasonable accommodation under the PWFA, like that under the ADA, does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the qualified employee with a known limitation. However, adjustments or modifications that might otherwise be considered personal may

[82] *See id.*

[83] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at Question 19; *see also* 42 U.S.C. 2000gg–1(1) and the regulations in this part.

[84] 42 U.S.C. 2000gg–1(5); 42 U.S.C. 2000gg–2(f).

be required as reasonable accommodations ''where such items are specifically designed or required to meet job-related rather than personal needs.'' [85]

72. For example, if a warehouse employee is pregnant and is having difficulty sleeping, the PWFA would not require as a reasonable accommodation for the employer to provide a pregnancy pillow to help with sleeping because that is strictly for an employee's personal use. However, allowing the employee some flexibility in start times for the workday may be a reasonable accommodation because it modifies an employment-related policy. In a different context, if the employee who is having trouble sleeping works at a job that involves sleeping between shifts on-site, such as a job as a firefighter, sailor, emergency responder, health care worker, or truck driver, a pregnancy pillow may be a reasonable accommodation because the employee is having difficulty sleeping because of the pregnancy, the employer is providing pillows for all employees required to sleep on-site, and the employee needs a modification of the pillows provided.

All Services and Programs

73. Under the PWFA, as under the ADA, the obligation to make reasonable accommodations applies to all services and programs provided in connection with employment and to all non-work facilities provided or maintained by an employer for use by its employees, so that employees with known limitations can enjoy equal benefits and privileges of employment.[86] Accordingly, the obligation to provide reasonable accommodations, barring undue hardship, includes providing access to employer-sponsored placement or counseling services, such as employee assistance programs, to employer-provided cafeterias, lounges, gymnasiums, auditoriums, transportation, and to similar facilities, services, or programs.[87] This includes situations where an employee is traveling for work and may need, for example, accommodations at a different work site or during travel.

Interim Reasonable Accommodations

74. An interim reasonable accommodation can be used when there is a delay in providing the reasonable accommodation. For example, an interim reasonable accommodation may be sought when: there is a sudden onset of a known limitation under the PWFA, sometimes as an emergency, including one that makes it unsafe, risky, or dangerous to continue performing the normal tasks of the job; while the interactive process is ongoing, such as when an employer is waiting for the arrival of ordered equipment; or when the employee is waiting for the employer's decision on the accommodation request.

75. Providing an interim reasonable accommodation is a best practice under the PWFA and may help limit a covered entity's exposure to liability under 42 U.S.C. 2000gg–1(1) (§1636.4(a)(1)), or 42 U.S.C. 2000gg–2(f) (§1636.5(f)).

76. For example, consider a situation where an employee lets their supervisor know that they are pregnant and need to avoid working with certain chemicals in the workplace. Given the chemicals and the fact that the employee is pregnant, the employee needs the change immediately. In this situation, the best practice is to provide the employee with an interim reasonable accommodation that meets the employee's needs or limitations and allows the employee to perform tasks for the benefit of the employer while the employer determines its response. This is the best possible situation for both the employer and the employee, and the one that the Commission strongly encourages. In addition, this type of interim reasonable accommodation could help mitigate a claim of delay by the employee.[88] The shortcomings and risks of two other approaches an employer might take are addressed in the following scenarios.

- Require the employee to continue to work with the chemicals while the employer determines its response. In this situation, the employee would be forced to work outside of their restrictions. In addition to placing the employee in a situation that the PWFA was enacted to prevent—choosing between their health and the health of their pregnancy on one hand and a paycheck on the other—the covered entity may be risking liability under 42 U.S.C. 2000gg–1(1) (if there is an unnecessary delay in providing the accommodation), and/or State and Federal workplace health and safety laws.
- Require the employee to take leave while the employer determines its response. In this situation, the employee is not exposed to the chemicals, so the risk is mitigated. However, depending on the facts, this option can have a severely detrimental effect on the employee—either because the leave is unpaid or because the employee is forced to use their paid leave. Meanwhile, the employee is unable to perform tasks for the employer.

77. Moreover, depending on the facts, requiring an employee to take unpaid leave or use their leave after they ask for an accommodation and are awaiting a response could lead to a violation of 42 U.S.C. 2000gg–2(f). For example, if the employee is put on unpaid leave, even though there is paid work that the employer reasonably could have

[85] *See* 29 CFR part 1630, appendix, 1630.9.
[86] *See id.*
[87] *See id.*
[88] Section 1636.4(a)(1)(vii).

given the employee, the employer's decision could be retaliatory because it might well dissuade a reasonable person from engaging in protected activity, such as asking for an accommodation under the PWFA. If the employer's actions were challenged, the employer would have to produce a legitimate, non-discriminatory reason for its actions. The employee could then show that the real reason for the action was retaliation.[89] Because the claim would arise under 42 U.S.C. 2000gg–2(f), the employee would not have to show that they are qualified under 42 U.S.C. 2000gg(6), and the employer would not have recourse to an undue hardship defense.

78. The possible connection between requiring leave as an interim reasonable accommodation and a potential violation of 42 U.S.C. 2000gg–2(f) is in keeping with the purposes of the PWFA. The PWFA recognizes that historically employees with limitations related to pregnancy, childbirth, or related medical conditions have been required to take leave to their detriment. Thus, 42 U.S.C. 2000gg–1(4) limits the use of leave as a reasonable accommodation, prohibiting employers from requiring qualified employees with known limitations to take leave as a reasonable accommodation where there is another reasonable accommodation that will allow them to remain at work that does not result in an undue hardship.

79. Examples Regarding Interim Reasonable Accommodations:

Example #23/Interim Reasonable Accommodation: Alicia is pregnant and works in a fulfillment center. Her job involves regularly moving boxes that weigh 15 to 20 pounds. On her Saturday shift, she informs her supervisor, Michelle, that she is pregnant and that she is worried about lifting these packages while she is pregnant. Michelle recognizes that Alicia is requesting a reasonable accommodation under the PWFA. While Michelle tells Alicia that she needs to wait until Monday to consult with human resources on the next steps, Michelle also immediately offers Alicia a cart to help move the boxes and assigns her to a line that has lighter packages. On Monday, Michelle tells Alicia that she will be provided with a hoist to help Alicia lift packages, but it will take a few days before it is installed. In the meantime, Alicia can continue to use the cart and work the lighter line. Once the hoist arrives, Alicia is able to use it while working on her usual line. If there were an unnecessary delay in providing the reasonable accommodation, and if Alicia were to challenge the delay as constituting a failure to make an accommodation, the employer could argue that the interim reasonable accommodation mitigates its liability.

Example #24/Interim Reasonable Accommodation: Nour is pregnant, and she drives a delivery van. Her employer uses vans that do not have air conditioning. It is summer and the temperature is over 100 degrees. Nour tells her supervisor she is pregnant and needs a change at work because of the risk to her health and the health of her pregnancy because of the excessive heat. Her supervisor orders equipment that will help Nour, such as a personal cooling vest or neck fan. While waiting for the equipment to be delivered, the employer does not have other possible work that Nour can do. In this situation, the employer could tell Nour that she may take leave while waiting for the equipment to arrive.

Example #25/Interim Reasonable Accommodation: The scenario is the same as described in Example #24, but there is office work that Nour could perform while waiting for the equipment. Further, there is evidence that the supervisor and others at the covered entity discussed the idea of giving Nour office work but decided against it because then ''every woman is going to come in here and demand it.'' In this situation, failing to provide Nour the opportunity to work in the office could be a violation of 42 U.S.C. 2000gg–2(f).

80. Covered entities that do not provide interim reasonable accommodations are reminded that an unnecessary delay in making a reasonable accommodation, including in responding to the initial request, in the interactive process, or in providing the accommodation may result in a violation of the PWFA if the delay constitutes an unlawful failure to make reasonable accommodation, as set forth in 42 U.S.C. 2000gg–1(1) (§1636.4(a)(1)).

1636.3(i) Reasonable Accommodation—Examples

81. The definition of ''reasonable accommodation'' in §1636.3(h)(1) tracks the meaning of the term from the ADA statute, regulation, and EEOC guidance documents.[90] The PWFA, at 42 U.S.C. 2000gg–3, directs the Commission to issue regulations providing examples of reasonable accommodations addressing known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The Commission notes that a qualified employee may need

[89] *See* EEOC, *Enforcement Guidance on Retaliation and Related Issues,* (II)(C)(1)–(3) (discussing causation standard and evidence of causation), (4) (discussing facts that would defeat a claim of retaliation), and (III) (discussing ADA interference claims) (2016) [hereinafter *Enforcement Guidance on Retaliation*], *https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues.*

[90] *See* 42 U.S.C. 12111(9); 29 CFR 1630.2(o); *Enforcement Guidance on Reasonable Accommodation, supra* note 12.

more than one of these accommodations at the same time, as a pregnancy progresses, or before, during, or after pregnancy. This list of possible reasonable accommodations is non-exhaustive.[91]

• Frequent breaks. The Commission has long construed the ADA to require additional breaks as a reasonable accommodation, absent undue hardship.[92] Under the PWFA, for example, a pregnant employee might need more frequent breaks due to shortness of breath; an employee recovering from childbirth might need more frequent restroom breaks or breaks due to fatigue; an employee who is nursing during work hours, where the regular location of the employee's workplace makes nursing during work hours a possibility because the child is in close proximity (for example, if the employee normally works from home and the child is there or the child is at a nearby or onsite day care center), may need additional breaks to nurse during the workday;[93] or an employee who is lactating might need more frequent breaks for water, for food, or to pump.[94]

• Sitting/Standing. The Commission has recognized the provision of seating for jobs that require standing and standing for those that require sitting as potential reasonable accommodations under the ADA.[95] Under the PWFA, reasonable accommodation of these needs might include, but is not limited to, policy modifications and the provision of equipment, such as seating, a sit/stand desk, or anti-fatigue floor matting, among other possibilities.

• Schedule changes, part-time work, and paid and unpaid leave. Permitting the use of paid leave (whether accrued, as part of a short-term disability program, or as part of any other employee benefit) or providing unpaid leave is a potential reasonable accommodation under the ADA.[96] Additionally, leave for medical treatment can be a reasonable accommodation.[97] By way of example, under the PWFA an employee could need a schedule change to attend a round of IVF appointments to get pregnant; a part-time schedule to address fatigue during pregnancy; or unpaid leave for recovery from childbirth, medical treatment, postpartum treatment or recuperation related to a cesarean section, episiotomy, infection, depression, thyroiditis, or preeclampsia.

• Telework. Telework (or ''remote work'' or ''work from home'') has been recognized by the Commission as a potential reasonable accommodation under the ADA.[98] Under the PWFA, telework could be used to accommodate, for example, a period of bed rest, a mobility impairment, or a need to avoid heightened health risk, such as from a communicable disease.

• Parking. Providing a reserved parking space if the employee is otherwise entitled to use employer-provided parking may be a reasonable accommodation to assist an employee who is experiencing fatigue or limited mobility related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.

• Light duty. Assignment to light duty or placement in a light duty program has been recognized by the Commission as a potential reasonable accommodation, even if the employer's light duty positions are normally reserved for those injured on-the-job and the person seeking a light duty position as an

[91] *See, e.g.,* H.R. Rep. No. 117–27, pt. 1, at 29 (stating that ''[t]he Job Accommodation Network (JAN), an ADA technical assistance center . . . lists numerous potential accommodations . . . including more than 20 suggested accommodations just for lifting restrictions related to pregnancy'').

[92] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 12, at Question 22; *see also* H.R. Rep. 117–27, pt. 1, at 22; 168 Cong. Rec. S7,048 (daily ed. Dec. 8, 2022) (statement of Sen. Robert P. Casey, Jr.); 168 Cong. Rec. S10,081 (daily ed. Dec. 22, 2022) (statement of Sen. Robert P. Casey, Jr.).

[93] The Commission cautions that this provision is intended to address situations where the employee and child are in close proximity in the normal course of business. It is not intended to state that there is a right to create proximity to nurse because of an employee's preference. Of course, there may be limitations that would allow an employee to request as a reasonable accommodation the creation of proximity (e.g., a limitation that made pumping difficult or unworkable).

[94] Breaks may be paid or unpaid depending on the employer's normal policies and other applicable laws. Breaks may exceed the number that an employer normally provides because reasonable accommodations may require an employer to alter its policies, barring undue hardship.

[95] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 12, at General Principles, Example B; *see also* H.R. Rep. No. 117–27, pt. 1, at 11, 22, 29.

[96] 29 CFR part 1630, appendix, 1630.2(o); *see also Technical Assistance on Employer-Provided Leave*, *supra* note 73. Additionally, an employer prohibiting an employee from using accrued leave for pregnancy, childbirth, or related medical conditions while allowing other employees to use leave for similar reasons also may violate Title VII.

[97] *See* 29 CFR part 1630, appendix, 1630.2(o).

[98] *See, e.g., Enforcement Guidance on Reasonable Accommodation*, *supra* note 12, at Question 34.

accommodation does not have an on-the-job injury.[99]

• Making existing facilities accessible or modifying the work environment.[100] Examples of reasonable accommodations might include allowing access to an elevator not normally used by employees; moving the employee's workspace closer to a bathroom; providing a fan to regulate temperature; moving a pregnant or lactating employee to a different workspace to avoid exposure to chemical fumes; changing the assigned worksite of the employee; or modifying the work space by providing local exhaust ventilation or providing enhanced personal protective equipment and training to reduce exposure to chemical hazards.[101] As noted in the regulation, this also may include modifications of the work environment to allow an employee to pump breast milk at work.[102]

• Job restructuring.[103] Job restructuring might involve, for example, removing a marginal function (any nonessential job function) that requires a pregnant employee to climb a ladder or occasionally retrieve boxes from a supply closet, or providing assistance with manual labor.[104]

• Temporarily suspending one or more essential function(s). For some positions, this may mean that one or more essential function(s) are temporarily suspended, and the employee continues to perform the remaining functions of the job. For others, the essential function(s) will be temporarily suspended, and the employee may be assigned other tasks. For still others, the essential function(s) will be temporarily suspended, and the employee may perform the functions of a different job to which the employer temporarily transfers or assigns them. For yet others, the essential function(s) will be temporarily suspended, and the employee will participate in the employer's light or modified duty program.

• Acquiring or modifying equipment, uniforms, or devices.[105] Examples of reasonable accommodations might include providing uniforms and equipment, including safety equipment, that account for changes in body size during and after pregnancy, including during lactation; providing devices to assist with mobility, lifting, carrying, reaching, and bending; or providing an ergonomic keyboard to accommodate pregnancy-related hand swelling or tendonitis.

• Adjusting or modifying examinations or policies.[106] Examples of reasonable accommodations include allowing employees with

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[99] *See Enforcement Guidance: Workers' Compensation*, *supra* note 8, at Question 28; *see also* 168 Cong. Rec. S7,048 (daily ed. Dec. 8, 2022) (statement of Sen. Robert P. Casey, Jr.) (''What are other types of reasonable accommodations that pregnant workers might request? Light duty is a common example.''); *id.* at S7,049 (statement of Sen. Patty Murray) (noting that workers need accommodations because ''their doctors say they need to avoid heavy lifting''); H.R. Rep. 117–27, pt. 1, at 14–17 (discussing *Young* v. *United Parcel Serv., Inc.*, 575 U.S. 206 (2015), a case involving light duty for pregnant employees).

[100] *See* 42 U.S.C. 12111(9); 29 CFR 1630.2(o)(1)(ii) and (o)(2)(i).

[101] *See, e.g.*, U.S. Dep't of Lab., Occupational Health & Safety Admin., *Recommended Practices for Safety and Health Programs, https://www.osha.gov/safety-management/hazard-prevention* (last visited Mar. 18, 2024).

[102] On December 29, 2022, President Biden signed the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) (Pub. L. 117–328, Div. KK, 136 Stat. 4459, 6093). The law extended coverage of the Fair Labor Standards Act of 1938, as amended (FLSA), 29 U.S.C. 201 *et seq.*, protections for nursing employees to apply to most employees. The FLSA provides most employees with the right to break time and a place to pump breast milk at work for a year following the child's birth. 29 U.S.C. 218d; U.S. Dep't of Lab., *Field Assistance Bulletin No. 2023–02: Enforcement of Protections for Employees to Pump Breast Milk at Work* (May 17, 2023), *https://www.dol.gov/sites/dolgov/files/WHD/fab/2023-2.pdf;* U.S. Dep't of Lab., *Fact Sheet #73: FLSA Protections for Employees to Pump Breast Milk at Work* (Jan. 2023), *https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers.* Employees who are not covered by the PUMP Act or employees who seek to pump longer than 1 year may seek reasonable accommodations regarding pumping under the PWFA. Further, whether or not employees are covered by the PUMP Act, employees may seek under the PWFA any reasonable accommodations needed for lactation, including things not necessarily required by the PUMP Act such as access to a sink, a refrigerator, and electricity. *See, e.g.*, U.S. Dep't of Lab., *Notice on Reasonable Break Time for Nursing Mothers*, 75 FR 80073, 80075–76 (Dec. 21, 2010) (discussing space requirements and noting factors such as the location of the area for pumping compared to the employee's workspace, the availability of a sink and running water, the location of a refrigerator to store milk, and electricity may affect the amount of break time needed). The PUMP Act is enforced by the Department of Labor, not the EEOC.

[103] *See* 42 U.S.C. 12111(9)(B); 29 CFR 1630.2(o)(2)(ii).

[104] *See* H.R. Rep. No. 117–27, pt. 1, at 29.

[105] *See* 42 U.S.C. 12111(9)(B); 29 CFR 1630.2(o)(2)(ii); *see also* H.R. Rep. No. 117–27, pt. 1, at 28.

[106] *See* 42 U.S.C. 12111(9)(B); 29 CFR 1630.2(o)(2)(ii); *see also* H.R. Rep. No. 117–27, pt. 1, at 28.

a known limitations to postpone examinations that require physical exertion. Adjustments to policies also could include increasing the time or frequency of breaks to eat or drink or to use the restroom.

82. Pursuant to 42 U.S.C. 2000gg–3, the following are further examples of types of reasonable accommodations and how they can be analyzed.[107]

Example #26/Telework: Gabriela, a billing specialist in a doctor's office, experiences nausea and vomiting beginning in her first trimester of pregnancy. Because the nausea makes commuting extremely difficult, Gabriela makes a verbal request to her manager stating she has nausea and vomiting due to her pregnancy and requests that she be permitted to work from home for the next 2 months so that she can avoid the difficulty of commuting. The billing work can be done from her home or in the office.

1. Known limitation and request for reasonable accommodation: Gabriela's nausea and vomiting is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Gabriela needs an adjustment or change at work due to the limitation; Gabriela has communicated the information to the employer.

2. Qualified: Gabriela can perform the essential functions of the job with the reasonable accommodation of telework.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example #27/Temporary Suspension of an Essential Function: Nisha, a nurse assistant working in a large elder care facility, is advised in the fourth month of her pregnancy to stop lifting more than 25 pounds for the remainder of the pregnancy. One of the essential functions of the job is to assist patients in dressing, bathing, and moving from and to their beds, tasks that typically require lifting more than 25 pounds. Nisha sends an email to human resources asking that she not be required to lift more than 25 pounds for the remainder of her pregnancy and requesting a place in the established light duty program under which employees who are hurt on the job take on different duties while coworkers take on their temporarily suspended duties.

1. Known limitation and request for reasonable accommodation: Nisha's lifting restriction is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Nisha needs an adjustment or change at work due to the limitation; Nisha has communicated that information to the employer.

2. Qualified: Nisha is asking for the temporary suspension of an essential function. The suspension is temporary, and Nisha can perform the essential functions of the job ''in the near future'' (generally within 40 weeks). It appears that the inability to perform the function can be reasonably accommodated through its temporary suspension and Nisha's placement in the light duty program.

3. The employer must grant the reasonable accommodation of temporarily suspending the essential function (or another reasonable accommodation) absent undue hardship. As part of the temporary suspension, the employer may assign Nisha to the light duty program.

Example #28: The scenario is the same as described in Example #27 of this appendix, except that the employer establishes that the light duty program is limited to 10 slots and all 10 slots are filled for the next 6 months. In these circumstances, the employer should consider other possible reasonable accommodations, such as the temporary suspension of an essential function without assigning Nisha to the light duty program, or job restructuring outside of the established light duty program. If such accommodations cannot be provided without undue hardship, then the employer should consider providing a temporary reassignment to a vacant position for which Nisha is qualified, with or without reasonable accommodation. For example, if the employer has a vacant position that does not require lifting patients which Nisha could perform with or without a reasonable accommodation, the employer must offer her the temporary reassignment as a reasonable accommodation, absent undue hardship.

Example #29/Temporary Suspension of Essential Function(s): Fatima's position as a farmworker usually involves working outdoors in the field although there also is indoor work such as sorting produce. After she returns

[107] As with all the examples in this Interpretive Guidance, these examples are illustrative only and are not intended to suggest that these are the only conditions under which an employee may receive a reasonable accommodation, or that the reasonable accommodations sought or given in the examples are the only ones that should be selected in similar situations.

For further examples, see the Job Accommodation Network (JAN), which provides free assistance regarding workplace accommodation issues. *See generally* Job Accommodation Network [hereinafter JAN], *https://askjan.org/* (last visited Mar. 25, 2024). Covered entities and employees also may seek additional information from the National Institute for Occupational Safety and Health (NIOSH). *See* U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention, Nat'l Inst. for Occupational Safety & Health, *Reproductive Health and The Workplace, https://www.cdc.gov/niosh/topics/repro/default.html* (last reviewed May 1, 2023).

from giving birth, Fatima develops postpartum thyroiditis, which has made her extremely sensitive to heat, and has contributed to muscle weakness and fatigue. She seeks the accommodation of a 7-month temporary suspension of the essential function of working outdoors in hot weather.

1. Known limitation and request for reasonable accommodation: Fatima's sensitivity to heat, muscle weakness, and fatigue are physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Fatima needs an adjustment or change at work due to the limitation; Fatima has communicated this information to the employer.

2. Qualified: Fatima is asking for the temporary suspension of an essential function. The suspension is temporary, and Fatima could perform the essential functions of the job in the near future (7 months). It appears that the inability to perform the essential function can be reasonably accommodated by temporarily assigning Fatima indoor work, such as sorting produce.

3. The employer must grant the accommodation of temporarily suspending the essential function (or another reasonable accommodation) absent undue hardship.

Example #30/Assistance with Performing an Essential Function: Mei, a warehouse worker, uses her employer's online accommodation portal to ask for a dolly to assist her for 3 months in moving items that are bulky, in order to accommodate lifting and carrying restrictions due to her cesarean section.

1. Known limitation and request for reasonable accommodation: Mei's lifting and carrying restrictions are physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Mei needs an adjustment or change at work due to the limitation; Mei has communicated this information to the employer.

2. Qualified: Mei can perform the essential functions of the job with the reasonable accommodation of a dolly.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example #31/Appropriate Uniform and Safety Gear: Ava is a police officer and is pregnant. They ask their union representative for help getting a larger size uniform and larger size bullet proof vest in order to cover their growing pregnancy. The union representative asks management for an appropriately-sized uniform and vest for Ava.

1. Known limitation and request for reasonable accommodation: Ava's inability to wear the standard uniform and safety gear is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Ava needs an adjustment or change at work due to the limitation; Ava's representative has communicated this information to the employer.

2. Qualified: Ava can perform the essential functions of the job with the reasonable accommodation of appropriate gear.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example #32/Temporary Suspension of Essential Function(s): Darina is a police officer and is 3 months pregnant. She talks to human resources about being taken off of patrol and put on light duty for the remainder of her pregnancy to avoid physical altercations and the need to physically subdue suspects, which may harm her pregnancy. The department has an established light duty program that it uses for officers with injuries that occurred on the job.

1. Known limitation and request for reasonable accommodation: Darina's inability to perform certain patrol duties is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Darina needs an adjustment or change at work due to the limitation; Darina has communicated this information to the employer.

2. Qualified: The suspension of the essential functions of patrol duties is temporary, and Darina can perform the essential functions of the job in the near future (within generally 40 weeks). It appears that the temporary suspension of the essential functions can be accommodated through the light duty program.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example #33/Temporary Suspension of Essential Function(s): Rory works in a fulfillment center where she is usually assigned to a line that requires moving 20-pound packages. After returning from work after giving birth, Rory lets her supervisor know that she has a lifting restriction of 10 pounds due to sciatica during her pregnancy that continues postpartum. The restriction is for 6 months. The employer does not have an established light duty program. There are other lines in the warehouse that do not require lifting more than 10 pounds.

1. Known limitation and request for reasonable accommodation: Rory's lifting restriction is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Rory needs an adjustment or change at work due to the limitation; Rory has communicated this information to the employer.

2. Qualified: The suspension of the essential function of lifting packages that weigh up to 10 pounds is temporary, and Rory can perform the essential function in the near future (6 months). It appears that the temporary suspension of the essential function

could be accommodated by temporarily assigning her to a different line.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example #34/Unpaid Leave: Tallah, a newly hired cashier at a small bookstore, has a miscarriage in the third month of pregnancy and asks a supervisor for 10 days of leave to recover. As a new employee, Tallah has only earned 2 days of paid leave, she is not covered by the FMLA, and the employer does not have a company policy regarding the provision of unpaid leave. Nevertheless, Tallah is covered by the PWFA.

1. Known limitation and request for reasonable accommodation: Tallah's need for time for recovery is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Tallah needs an adjustment or change at work due to the limitation; Tallah has communicated this information to the employer.

2. Qualified: After the reasonable accommodation of leave, Tallah will be able to perform the essential functions of the job with or without accommodation.

3. The employer must grant the accommodation of unpaid leave (or another reasonable accommodation) absent an undue hardship.

Example #35/Unpaid Leave for Prenatal Appointments: Margot started working at a retail store shortly after she became pregnant. She has an uncomplicated pregnancy. Because she has not worked at the store very long, she has earned very little leave and is not covered by the FMLA. In her fifth month of pregnancy, she asks her supervisor for the reasonable accommodation of unpaid time off beyond the leave she has earned to attend her regularly scheduled prenatal appointments.

1. Known limitation and request for reasonable accommodation: Margot's need to attend health care appointments is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Margot needs an adjustment or change at work due to the limitation; Margot has communicated the information to the employer.

2. Qualified: Margot can perform the essential functions of the job with the reasonable accommodation of leave to attend health care appointments.

3. The employer must grant the accommodation of unpaid time off (or another reasonable accommodation) absent undue hardship.

Example #36/Unpaid Leave for Recovery from Childbirth: Sofia, a custodian, is pregnant and will need 6 to 8 weeks of leave to recover from childbirth. Sofia is nervous about asking for leave, so Sofia asks her mother, who knows the owner, to do it for her. The employer has a sick leave policy, but no policy for longer periods of leave. Sofia is not eligible for FMLA leave because her employer is not covered by the FMLA.

1. Known limitation and request for reasonable accommodation: Sofia's need to recover from childbirth is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Sofia needs an adjustment or change at work due to the limitation; Sofia's representative has communicated this information to the employer.

2. Qualified: After the reasonable accommodation of leave, Sofia will be able to perform the essential functions of the job with or without reasonable accommodation.

3. The employer must grant the accommodation of unpaid leave (or another reasonable accommodation) absent undue hardship.

Example #37/Unpaid Leave for Medical Appointments: Taylor, a newly hired member of the waitstaff, requests time off to attend therapy appointments for postpartum depression. As a new employee, Taylor has not yet accrued sick or personal leave and is not covered by the FMLA. Taylor asks her manager if there is some way that she can take time off.

1. Known limitation and request for reasonable accommodation: Taylor's need to attend health care appointments is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Taylor needs an adjustment or change at work due to the limitation; Taylor has communicated this information to the employer.

2. Qualified: Taylor can perform the essential functions of the job with a reasonable accommodation of time off to attend the health care appointments.

3. The employer must grant the accommodation (or another reasonable accommodation) absent an undue hardship.

Example #38/Unpaid Leave: Claudine is 6 months pregnant and asks for leave so that she can attend her regular check-ups. The clinic where Claudine gets her health care is an hour drive away, the clinic frequently gets delayed, and Claudine has to wait for her appointment. Depending on the time of day, between commuting to the appointment, waiting for the appointment, and seeing her provider, Claudine may miss all or most of an assigned day at work. Claudine's employer is not covered by the FMLA, and Claudine does not have any sick leave left. Claudine asks human resources for time off as a reasonable accommodation so she can attend her medical appointments.

1. Known limitation and request for reasonable accommodation: Claudine's need to attend health care appointments is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Claudine needs an adjustment or change at work due

to the limitation; Claudine has communicated that information to the employer.

2. Qualified: Claudine can perform the essential functions of the job with a reasonable accommodation of time off to attend health care appointments.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example #39/Telework: Raim, a social worker, is pregnant. As her third trimester starts, she is feeling more fatigue and needs more rest. She asks her supervisor if she can telework and see clients virtually so she can lie down and take rest breaks between client appointments.

1. Known limitation and request for reasonable accommodation: Raim's fatigue is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Raim needs an adjustment or change at work due to the limitation; Raim has communicated that information to the employer.

2. Qualified: Assuming the appointments can be conducted virtually, Raim can perform the essential functions of the job with the reasonable accommodation of working virtually. If there are certain appointments that must be done in person, the reasonable accommodation could be a few days of telework a week and then other accommodations that would give Raim time to rest, such as assigning Raim in-person appointments at times when traffic will be light so that they are easy to get to, or setting up Raim's assignments so that on the days when she has in-person appointments she has breaks between them. Or the reasonable accommodation can be the temporary suspension of the essential function of in-person appointments.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example #40/Temporary Workspace/Possible Temporary Suspension of Essential Function(s): Brooke, a research assistant who is in her first trimester of pregnancy, asks the lead researcher in the laboratory for a temporary workspace that would allow her to work in a well-ventilated area because her work involves hazardous chemicals that her health care provider has told her to avoid. There are several research projects she can work on that do not involve exposure to hazardous chemicals.

1. Known limitation and request for reasonable accommodation: Brooke's need to avoid the chemicals related to maintaining her health or the health of her pregnancy is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Brooke needs an adjustment or change at work due to the limitation; Brooke has communicated this information to the employer.

2. Qualified: If working with hazardous chemicals is an essential function of the job, Brooke may be able to perform that function with the accommodation of a well-ventilated work area, a chemical fume hood, local exhaust ventilation, and/or personal protective equipment such as chemical-resistant gloves, a lab coat, and a powered air-purifying respirator. If providing these modifications would be an undue hardship or would not be effective, Brooke can still be qualified with the temporary suspension of the essential function of working with the hazardous chemicals because Brooke's inability to work with hazardous chemicals is temporary, and Brooke can perform the essential functions of the job in the near future (within generally 40 weeks). Her need to avoid exposure to hazardous chemicals also can be accommodated by allowing her to focus on the other research projects.

3. The employer must grant the accommodation (or another reasonable accommodation), absent undue hardship. If the employer cannot accommodate Brooke in a way that allows Brooke to continue to perform the essential function(s) of the position, the employer should consider providing alternative reasonable accommodations, including temporarily suspending one or more essential functions, absent undue hardship.

Example #41/Temporary Transfer to Different Location: Katherine, a budget analyst who has cancer also is pregnant, which creates complications for her cancer treatment. She asks her manager for a temporary transfer so that she can work out of an office in a larger city that has a medical center that can address her medical needs due to the combination of cancer and pregnancy. Katherine is able to do all her essential functions for the original office from the employer's other location and can continue to work full-time while obtaining treatment.

1. Known limitation and request for reasonable accommodation: Katherine's need for treatment at a particular medical facility related to maintaining her health or the health of the pregnancy is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Katherine needs an adjustment or change at work due to the limitation; Katherine has communicated that information to the employer.

2. Qualified: Katherine is able to perform the essential functions of the job and work full-time with the reasonable accommodation of a temporary transfer to a different location.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship. A reasonable accommodation can include a workplace change to facilitate medical treatment, including accommodations such as leave, a schedule change, or a temporary transfer to

a different work location needed in order to obtain treatment.

Example #42/Pumping Breast Milk: Salma gave birth 13 months ago and wants to be able to pump breast milk at work. Salma works for an employment agency that sends her to different jobs for a day or week at a time. Salma asks the person at the agency who makes her assignments to ensure she will be able to take breaks and have a space to pump breast milk at work at her various assignments.

1. Known limitation and request for reasonable accommodation: Salma's need to express breast milk is a physical or mental condition related to, affected by, or arising out pregnancy, childbirth, or related medical conditions; Salma needs an adjustment or change at work due to the limitation; Salma has communicated this information to the employer.

2. Qualified: Salma is able to perform the essential functions of the jobs to which she is assigned with the reasonable accommodation of being assigned to workplaces where she can pump at work.

3. The agency must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example #43/Commuting: Jayde is a retail clerk who gave birth 2 months ago. Because of childbirth, Jayde is experiencing urinary incontinence, constipation, and hemorrhoids. Jayde normally commutes by driving 45 minutes; because of the limitations due to childbirth, it is painful for Jayde to sit in one position for an extended period, and Jayde may need a bathroom during the commute. Jayde requests the reasonable accommodation of working at a different, closer store for 2 months. The commute to this other store is only 10 minutes.

1. Known limitation and request for reasonable accommodation: Jayde's urinary incontinence, constipation, and hemorrhoids are physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Jayde needs an adjustment or change at work due to the limitation; Jayde has communicated this information to the employer.

2. Qualified: Jayde can perform the essential functions of the job with the reasonable accommodation of a temporary assignment to a different location.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example #44/Medications Affected by Pregnancy: Riya is a data analyst who is pregnant, and her health care provider recommended that she stop taking her current ADHD medication and switch to another medication. As Riya is adjusting to her new medication, she finds it more difficult to concentrate and asks for more frequent breaks, a quiet place to work, and for her tasks to be divided up into smaller duties.

1. Known limitation and request for reasonable accommodation: Riya's difficulty concentrating due to her change in medication is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Riya needs an adjustment or change at work due to the limitation; Riya has provided this information to the employer.

2. Qualified: Riya can perform the essential functions of the job with the reasonable accommodation of more frequent breaks, a quiet place to work, and division of her tasks into smaller duties.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

1636.3(j) Undue Hardship

1636.3(j)(1) Undue Hardship—In General

83. The PWFA provides that ''undue hardship'' shall be construed under the PWFA as it is under the ADA and as set forth in this part.[108] This part, at §1636.3(j)(1), reiterates the definition of undue hardship provided in the ADA statute and regulation, which explains that undue hardship means significant difficulty or expense incurred by a covered entity.[109] Because the definition of undue hardship under the PWFA follows the ADA, under the PWFA the term ''undue hardship'' means significant difficulty or expense in, or resulting from, the provision of the accommodation. The ''undue hardship'' provision takes into account the financial realities of the particular employer or other covered entity. However, the concept of undue hardship is not limited to financial difficulty. ''Undue hardship'' refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.[110]

84. As under the ADA, if an employer asserts undue hardship based on cost, then there will be a determination made regarding whose financial resources should be considered.[111] Further, in determining whether an accommodation causes an undue hardship an employer cannot simply assert that a needed accommodation will cause it undue hardship and thereupon be relieved of the duty to provide accommodation. Rather, an

[108] 42 U.S.C. 2000gg(7).

[109] 42 U.S.C. 12111(10)(A); 29 CFR 1630.2(p); *see Enforcement Guidance on Reasonable Accommodation, supra* note 12, at text after n.112.

[110] *See* 29 CFR part 1630, appendix, 1630.2(p). The ADA defines ''undue hardship'' at 42 U.S.C. 12111(10).

[111] *See* 29 CFR part 1630, appendix, 1630.2(p).

employer will have to present evidence and demonstrate that the accommodation will, in fact, cause it undue hardship. Whether a particular accommodation will impose an undue hardship for a particular employer is determined on a case-by-case basis. Consequently, an accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time.[112]

85. As the Commission has stated under the ADA, ''[u]ndue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.'' [113]

86. Additionally, an employer cannot demonstrate undue hardship based on employees', clients', or customers' fears or prejudices toward the employee's pregnancy, childbirth, or related medical conditions, nor can an employer demonstrate undue hardship based on the possibility that the provision of an accommodation would negatively impact the morale of other employees.[114] Employers, however, may be able to show undue hardship where the provision of an accommodation would be unduly disruptive to other employees' ability to work.

87. Consistent with the ADA, a covered entity asserting that a reasonable accommodation will cause an undue hardship must offer other reasonable accommodations that it can provide, absent undue hardship.[115] Additionally, if the employer can provide only part of the reasonable accommodation absent undue hardship—for example, the employer can provide 6 weeks of leave absent undue hardship but the 8 weeks that the employee is seeking would cause undue hardship—the employer must provide the reasonable accommodation up to the point of undue hardship. Thus, in the example, the employer would have to provide 6 weeks of leave and then consider whether there are other reasonable accommodations it could provide for the remaining 2 weeks that would not cause an undue hardship.

1636.3(j)(2) Undue Hardship Factors

88. Section 1636.3(j)(2) sets out factors to be considered when determining whether a particular accommodation would impose an undue hardship on the covered entity using the factors from the ADA regulation.[116]

89. Examples Regarding Undue Hardship:

Example #45/Undue Hardship: Patricia, a convenience store clerk, requests that she be allowed to switch from full-time to part-time work for the last 3 months of her pregnancy due to extreme fatigue. The store assigns two clerks per shift. If Patricia's hours are reduced, the other clerk's workload will increase significantly beyond his ability to handle his responsibilities. The store determines that such an arrangement will result in inadequate coverage to serve customers in a timely manner, keep the shelves stocked, and maintain store security. It also would be infeasible for the store to hire a temporary worker on short notice at this time. Based on these facts, the employer likely can show undue hardship based on the significant disruption to its operations and, therefore, can refuse to reduce Patricia's hours. The employer, however, must offer other reasonable accommodations, such as providing a stool and allowing rest breaks throughout the shift, assuming they do not cause undue hardship.

Example #46/Undue Hardship: Shirin, a dental hygienist who is undergoing IVF treatments, needs to attend medical appointments for the IVF treatment near her house every other day and is fatigued. She asks her supervisor if the essential function of seeing patients can be temporarily suspended, so that she does not see patients 3 days a week and instead can work from home on those days assisting with billing and insurance claims, work for which she is qualified. Temporarily suspending the essential function of seeing patients and allowing Shirin to work at home may be an undue hardship for the employer because there is only one other hygienist and there is not enough work for Shirin to do remotely. However, the employer must offer other reasonable accommodations, such as a schedule that would allow Shirin breaks between patients, part-time work, permitting her to work from home for 1 or 2 days, or a reduced schedule, assuming they do not cause undue hardship.

Example #47/Undue Hardship: Cynthia, an office manager working in a large building,

[112] *See* 29 CFR part 1630, appendix, 1630.15(d).

[113] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at text accompanying n.113.

[114] *See* 29 CFR part 1630, appendix, 1630.15(d) (explaining that under the ADA an employer cannot show undue hardship based on employees' fears or prejudices toward the individual's disability or by showing that the provision of the accommodation has a negative impact on the morale of its other employees but not on the ability of these employees to perform their jobs); *Enforcement Guidance on Reasonable Accommodation, supra* note 12, at text surrounding n.117; *cf. Groff* v. *DeJoy,* 600 U.S. 447, 472 (2023) (providing that, under the Title VII undue hardship standard, an employer may not justify refusal to accommodate based on other employees' bias or hostility).

[115] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at text after n.116.

[116] *See* 29 CFR 1630.2(p).

has asthma that she controls with medication. Because of her pregnancy, her asthma becomes worse, and she requests a ban on airborne irritants and chemicals (e.g., fragrances, sprays, cleaning products) in the building. The employer could potentially show that ensuring a workplace completely free of any scents or irritants would impose a significant financial and administrative burden on it, as a ban would be difficult to enforce and encompass a wide variety of hygiene and cleaning products. Nevertheless, the employer must offer alternative accommodations, such as providing an air purifier, minimizing the use of irritants in her vicinity, or allowing her to telework, assuming they do not cause undue hardship.

1636.3(j)(3) Undue Hardship—Temporary Suspension of an Essential Function(s)

90. In certain circumstances, the PWFA requires an employer to accommodate an employee's temporary inability to perform one or more essential functions. Therefore, §1636.3(j)(3) provides additional factors that may be considered when determining whether the temporary suspension of one or more essential functions causes an undue hardship. These additional factors include: the length of time that the employee will be unable to perform the essential function(s); whether, through the methods listed in §1636.3(f)(2)(iii) (describing potential reasonable accommodations related to the temporary suspension of essential function(s)) or otherwise, there is work for the employee to accomplish;[117] the nature of the essential function(s), including its frequency; whether the covered entity has provided other employees in similar positions who are unable to perform essential function(s) of their positions with temporary suspensions of those function(s) and other duties; if necessary, whether or not there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function(s) in question; and whether the essential function(s) can be postponed or remain unperformed for any length of time and, if so, for how long.

91. As with other reasonable accommodations, if the covered entity can establish that accommodating an employee's temporary suspension of an essential function(s) would impose an undue hardship if extended beyond a certain period of time, the covered entity would only be required to provide that accommodation for the period of time that it does not impose an undue hardship. For example, consider the situation where an employee seeks to have an essential function suspended for 6 months. The employer can go without the function being accomplished for 4 months, but after that, it will create an undue hardship. The employer must accommodate the employee's inability to perform the essential function for 4 months and then consider whether there are other reasonable accommodations that it can provide, absent undue hardship, for the remaining time.

92. Section 1636.3(j)(3)(iv) is intended to account for situations where the covered entity has provided a similar accommodation to other employees. If the covered entity has temporarily suspended essential functions for other employees in similar positions before, it would tend to demonstrate that the accommodation is not an undue hardship. The reverse, however, is not true. A covered entity's failure to temporarily suspend an essential function(s) in the past does not tend to demonstrate that the accommodation creates an undue hardship because reasonable accommodation can include changing workplace procedures or rules.

1636.3(j)(4) Undue Hardship—Predictable Assessments[118]

93. The Commission has identified a limited number of simple modifications that will, in virtually all cases, be found to be reasonable accommodations that do not impose an undue hardship when requested by a qualified employee due to pregnancy.

94. These modifications are: (1) allowing an employee to carry or keep water near and drink, as needed; (2) allowing an employee to take additional restroom breaks, as needed; (3) allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and (4) allowing an employee to take breaks to eat and drink, as needed.[119] These accommodations are low cost and unlikely to affect the

[117] The employer is not required to make up work for an employee.

[118] The term ''predictable assessments'' also is seen in the ADA regulations, where it applies to establishing coverage. In the ADA, ''predictable assessments'' are impairments that will ''in virtually all cases'' be considered a disability covered by the ADA. 29 CFR 1630.2(j)(3). As used in this PWFA rule, however, the term relates to accommodations, not limitations or disabilities.

[119] The first and fourth categories of predictable assessments are related but separate. The first category of accommodations addresses an employee's ability to carry water on the employee's person while they perform their job duties, or their ability to have water nearby while working, without requiring the employee to take a break to access and drink it. The fourth category of accommodations addresses an employee's ability to take additional, short breaks in performing work (either at the employee's work location or a break location) to eat and drink (including beverages that are not

Continued

overall financial resources of the covered entity, the operations of the facility, or the ability of the facility to conduct business.[120] By identifying these predictable assessments, the Commission seeks to improve how quickly employees will be able to receive certain simple, common accommodations for pregnancy under the PWFA and thereby reduce litigation.

95. The Commission emphasizes that the predictable assessments provision does not alter the meaning of the term ''reasonable accommodation'' or ''undue hardship.'' Employers should still conduct an individualized assessment when one of these accommodations is requested by a pregnant employee to determine if the requested accommodation causes an undue hardship, and employers may still bring forward facts to demonstrate that the proposed accommodation imposes an undue hardship for its business under its own particular circumstances. Instead, the provision informs covered entities that the individualized assessment of whether one of the straightforward and simple modifications listed in paragraphs (j)(4)(i) through (iv) is a reasonable accommodation that would cause undue hardship will, in virtually all cases, result in a determination that the four modifications are reasonable accommodations that will not impose an undue hardship under the PWFA when they are requested as workplace accommodations by an employee who is pregnant.

96. Examples Regarding Predictable Assessments:

Example #48/Predictable Assessments: Amara, a quality inspector for a manufacturing company, experiences painful swelling in her legs, ankles, and feet during the final 3 months of her pregnancy. Her job requires standing for long periods of time, although it can be performed sitting as well. Amara asks the person who assigns her daily work for a stool to sit on while she performs her job. Amara's swelling in her legs and ankles is a physical or mental condition related to, affected by, or arising out of pregnancy. Amara's request is for a modification that will virtually always be a reasonable accommodation that does not impose an undue hardship. The employer argues that it has never provided a stool to any other worker who complained of difficulty standing, but points to nothing that suggests that this modification is not reasonable or that it would impose an undue hardship on the operation of the employer's business. The employer has not established that providing Amara a stool imposes an undue hardship.

Example #49/Predictable Assessments: Jazmin, a pregnant teacher who typically is only able to use the bathroom when her class is at lunch, requests additional bathroom breaks during her sixth month of pregnancy. Jazmin's need for additional bathroom breaks is a physical or mental condition related to, affected by, or arising out of pregnancy. The employer argues that finding an adult to watch over the Jazmin's class when she needs to take a bathroom break imposes an undue hardship. However, there are several teachers in nearby classrooms, aides in some classes, and an administrative assistant in the front office, any of whom, with a few minutes' notice, would be able to provide supervision either by standing in the hallway between classes or sitting in Jazmin's classroom to allow Jazmin a break to use bathroom. The employer has not established that providing Jazmin with additional bathroom breaks imposes an undue hardship.

Example #50/Predictable Assessments: Addison, a clerk responsible for receiving and filing construction plans for development proposals, needs to maintain a regular intake of water throughout the day to maintain a healthy pregnancy. They ask their manager if an exception can be made to the office policy prohibiting liquids at workstations. Addison's need to maintain a regular intake of water is a physical or mental condition related to, affected by, or arising out of pregnancy. Here, although the manager decides against allowing Addison to bring water into their workstation, he proposes that a table be placed just outside the workstation and gives permission for Addison to access water placed on the table as needed. The employer has satisfied its obligation to provide a reasonable accommodation.

Undue Hardship—Consideration of Prior or Future Accommodations

97. An employer may consider the current impact of past and current cumulative costs or burdens of accommodations that have already been granted to other employees or the same employee, when considering whether a new request for the same or a similar accommodation imposes an undue hardship. For example, where an employer is already allowing two of the three employees who are able to open the store to arrive after opening time on certain days, it could pose an undue hardship to grant the accommodation of a delayed arrival time to the third employee on those same days.

98. The fact that an employer has provided the same or similar accommodations in the past may indicate that the accommodation can be provided without causing an undue hardship. Additionally, even if an employer

water). Additionally, depending on the worksite, any employee may be able to eat or drink at the work location without taking a break.

[120] As explained in the NPRM, the Commission identified these modifications based on the legislative history of the PWFA and analogous State laws. 88 FR 54734.

previously failed to provide an employee a similar type of accommodation, if the employer intends to assert that providing the accommodation to another employee would pose an undue hardship, the employer should engage in the interactive process with the employee regarding the currently requested accommodation and determine whether the same conditions that previously imposed an undue hardship still exist. Ultimately, whether a particular accommodation will impose an undue hardship for an employer is determined on a case-by-case basis.

99. While an employer may consider the impact of prior accommodations granted to the employee currently seeking an accommodation, the mere fact that an employee previously received an accommodation or, indeed, several accommodations, does not establish that it would impose an undue hardship on the employer to grant a new accommodation.

100. Thus, for example, the fact that an employer already has provided an employee with an accommodation, such as the temporary suspension of an essential function due to their pregnancy, does not establish that providing this accommodation due to a post-pregnancy limitation would be an undue hardship. Instead, the employer would have to provide evidence showing that continuing the temporary suspension would impose an undue hardship. This showing could include, for example, evidence demonstrating why and how the cumulative impact of having already provided the accommodation during pregnancy makes the current impact of providing it post-pregnancy rise to the level of significant difficulty or expense.

101. A covered entity cannot demonstrate that a reasonable accommodation imposes an undue hardship based on the possibility—whether speculative or near certain—that it will have to provide the accommodation to other employees in the future.[121] Relatedly, a covered entity that receives numerous requests for the same or similar accommodations at the same time (for example, parking spaces closer to the factory) cannot fail to provide all of them simply because processing the volume of current or anticipated requests is, or would be, burdensome or because it cannot grant all of them. Rather, the covered entity must evaluate and provide reasonable accommodations on a case-by-case basis unless, or until, doing so imposes an undue hardship.

102. Finally, for the purposes of an employer asserting undue hardship based on the impact of prior or future accommodations, as with any assertion of an undue hardship, ''[g]eneralized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.'' [122]

Undue Hardship and Safety

103. An employer's contention that the accommodation an employee requests would cause a safety risk to co-workers or clients will be assessed under the PWFA's undue hardship standard. For example, consider a qualified pregnant employee in a busy fulfillment center that has narrow aisles between the shelves of products. The employee asks for the reasonable accommodation of a cart to use while they are walking through the aisles filling orders. The employer's assertion that the aisles are too narrow and its concern for the safety of other workers being bumped by the cart could be raised as a defense based on undue hardship, specifically §1636.3(j)(2)(v), but the employer will have to demonstrate that the accommodation would actually pose an undue hardship.

104. If a particular reasonable accommodation causes an undue hardship because of safety, just as with any other situation where an employer cannot provide the requested accommodation, the employer must provide an alternative reasonable accommodation, if there is one available that does not impose an undue hardship. Importantly, assertions by employers that employees create a safety risk merely by being pregnant (as opposed to a safety risk that stems from an accommodation for a pregnancy-related limitation) should be addressed under Title VII's bona fide occupational qualification (BFOQ) standard and not under the PWFA.[123]

1636.3(k) Interactive Process

105. The PWFA states that the interactive process will typically be used to determine

[121] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at n.113.

[122] *See id.*, text at n.113.

[123] *See, e.g., UAW* v. *Johnson Controls,* 499 U.S. 187, 211 (1991) (striking down the employer's fetal protection policy that limited the opportunities of women); *Everts* v. *Sushi Brokers LLC,* 247 F. Supp. 3d 1075, 1082–83 (D. Ariz. 2017) (relying on *Johnson Controls* and denying BFOQ defense in a case regarding a pregnant employee as a restaurant server, noting that, ''[u]nlike cases involving prisoners and dangers to customers where a BFOQ defense might be colorable, the present situation is exactly the type of case that Title VII guards against''); *EEOC* v. *New Prime, Inc.,* 42 F. Supp. 3d 1201, 1213–14 (W.D. Mo. 2014) (relying on *Johnson Controls* and denying a policy allegedly in place for the ''privacy'' and ''safety'' of women employees was a BFOQ); *Enforcement Guidance on Pregnancy Discrimination, supra* note 24, at (I)(B)(1)(c).

an appropriate reasonable accommodation.[124] Section 1636.3(k) largely adopts the explanation of the interactive process in the regulation implementing the ADA.[125] Section 1636.3(k) defines the interactive process as an informal, interactive process and states that the process should identify the known limitation and the adjustment or change at work that is needed due to the limitation, if either of these are not clear from the request, as well as potential reasonable accommodations.

106. There are no rigid steps that must be followed when engaging in the interactive process under the PWFA, and information provided by the employee does not need to be in any specific format, include specific words, or be on a specific form.

107. In many instances, the appropriate reasonable accommodation may be obvious to either or both the employer and the employee with the known limitation so that the interactive process can be a brief discussion. The request and granting of the accommodation can occur in a single informal conversation or short email exchange.[126]

108. Examples Regarding the Interactive Process:

Example #51/Interactive Process: Marge works at an assembly plant. She is 5 weeks pregnant. She knows that staying hydrated is important during pregnancy. She texts her supervisor that she is pregnant and that she needs to carry water with her and use the bathroom more frequently. Her supervisor explains how Marge can call for a substitute when she needs a break, and Marge uses that system when she needs to drink water or go to the bathroom.

Example #52/Interactive Process: Launa is a customer service representative. She is 6 weeks pregnant. Some mornings she has morning sickness. She has found that eating small amounts during the morning helps to control it. Launa uses the company's internal message system to tell her supervisor that she is pregnant and either needs to take breaks to eat or needs to eat in her cubicle, and that she may need a break if she is feeling nauseous. Her supervisor agrees.

109. In some instances, for example to determine an appropriate reasonable accommodation, the employer and employee may engage further in the interactive process. The process is not composed of rigid steps but is an opportunity for the covered entity and employee to participate in a dialogue to quickly identify a reasonable accommodation that enables the employee to address their limitation through a reasonable accommodation that does not pose an undue hardship. The interactive process also may provide an opportunity for the covered entity and the employee to discuss how different accommodations will provide the employee with equal employment opportunity and what accommodation the employee prefers.[127]

110. While the interactive process is an informal exchange of information, there are still certain rules that apply. The ADA restrictions on when employers are permitted to ask disability-related questions and require medical examinations apply to all such inquiries or examinations, whether employers make them of people with or without disabilities, including questions that an employer asks during the interactive process under the PWFA.[128] For example, an employer who requires an employee who requests an accommodation due to a pregnancy-related limitation to fill out a form identifying their physical and mental impairments would have difficulty demonstrating that this disability-related inquiry is job-related and consistent with business necessity, as required by the ADA.[129] Further, if a covered entity has sufficient information from the employee to determine whether they have a PWFA limitation and need an adjustment or change at work due to the limitation, requiring the employee to provide additional information could be a violation of the PWFA's anti-retaliation provision (42 U.S.C. 2000gg–2(f)) (§1636.5(f)) or the PWFA's prohibition on taking adverse action

[124] 42 U.S.C. 2000gg(7).

[125] *See* 29 CFR 1630.2(o)(3).

[126] 42 U.S.C. 2000gg–1(2) (§1636.4(b)) prohibits a covered entity from requiring a qualified employee with a PWFA limitation to accept an accommodation other than any reasonable accommodation arrived at through the interactive process.

[127] During the interactive process, especially if it is lengthened due to, for example, equipment being ordered or the employee waiting for information from or an appointment with a health care provider, the employer should determine how to address the employee's needs while the interactive process is ongoing. *See, e.g., Enforcement Guidance on Reasonable Accommodation, supra* note 12, at n.89 (discussing a situation when the employee is waiting for reassignment). The Commission has discussed a similar situation with regard to postponing an employee's evaluation pending the employee receiving a requested reasonable accommodation. EEOC, *Technical Assistance on Applying Performance and Conduct Standards to Employees with Disabilities,* Examples 8 & 11 (2008) *https://www.eeoc.gov/laws/guidance/applying-performance-and-conduct-standards-employees-disabilities. See also supra* in the Interpretive Guidance in section *1636.3(h)* under *Interim Reasonable Accommodations.*

[128] *See* 42 U.S.C. 12112(d); 29 CFR 1630.13, 1630.14.

[129] 42 U.S.C. 12112(d)(4)(A); 29 CFR 1630.14(c).

in response to a request for reasonable accommodation (42 U.S.C. 2000gg–1(5)) (§1636.4(e)). If an employer decides to seek supporting documentation in response to a request for a PWFA reasonable accommodation, the restrictions limiting supporting documentation set forth in §1636.3(l) apply. Finally, any medical information obtained during the interactive process under the PWFA must be maintained on separate forms and in separate medical files and be treated as a confidential medical record, in accordance with the ADA's rules on the confidentiality of medical information, as explained in section *1636.7(a)(1)* of this appendix under *Prohibition on Disability-Related Inquiries and Medical Examinations and Protection of Medical Information*. Of particular relevance to the PWFA, the fact that an employee is pregnant, has recently been pregnant, or has a medical condition related to pregnancy or childbirth is medical information. Similarly, disclosing that an employee is receiving or has requested an accommodation under the PWFA or has limitations for which they requested or are receiving a reasonable accommodation under the PWFA, usually amounts to a disclosure that the employee is pregnant, has recently been pregnant, or has a related medical condition.

Recommendations for an Interactive Process

111. Appropriate reasonable accommodations are best determined through a flexible interactive process that includes both the employer and the employee with the known limitation. Employers and employees may use some of the steps noted in paragraph 112 of this section, if warranted, to address requests for reasonable accommodations under the PWFA, but the Commission emphasizes that, as under the ADA, a covered entity and an employee do not have to complete all or even some of these steps. The Commission expects that typically a simple conversation will be sufficient for employers to obtain all the information needed to determine the appropriate reasonable accommodation. As with the ADA, a covered entity should respond expeditiously to a request for reasonable accommodation and act promptly to provide the reasonable accommodation.[130]

112. If an employer has not obtained enough information to determine the appropriate reasonable accommodation through the initial request or a simple conversation or email exchange, the flexible interactive process may continue. For example, when an employee with a known limitation has requested a reasonable accommodation regarding the performance of the essential functions of the job, the covered entity, using a problem-solving approach, may, as needed:

a. Analyze the particular job involved and determine its purpose and essential functions;

b. Consult with the employee with a known limitation to ascertain what kind of accommodation is necessary given the known limitation;

c. In consultation with the employee with the known limitation, identify potential accommodations and assess the effectiveness each would have in enabling the employee to perform the essential functions of the position. If the employee's limitation means that they are temporarily unable to perform one or more essential functions of the position, the parties also must consider whether suspending the performance of one or more essential functions may be a part of the reasonable accommodation if the known limitation is temporary and the employee could perform the essential function(s) in the near future; and

d. Consider the preference of the employee to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the covered entity.[131]

113. Steps (b) to (d) outlined in paragraph 112 of this section can be adapted and applied to requests for reasonable accommodations related to the application process and to benefits and privileges of employment. In those situations, in step (c), the consideration should be how to enable the applicant with a known limitation to be considered for the position in question or how to provide an employee with a known limitation with the ability to enjoy equal benefits and privileges of employment.

114. In some instances, neither the employee requesting the accommodation nor the covered entity may be able to readily identify an appropriate accommodation. For example, an applicant needing an accommodation may not know enough about the equipment used by the covered entity or the exact nature of the work site to suggest an appropriate accommodation. Likewise, the covered entity may not know enough about an employee's known limitation and its effect on the performance of the job to suggest an appropriate accommodation. In these situations, the steps in paragraph 112 of this section may be helpful as part of the employer's reasonable effort to identify the appropriate reasonable accommodation. In addition, parties may consult outside resources

[130] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at Question 10. Following the steps laid out for the interactive process is not a defense to liability if the employer fails to provide a reasonable accommodation that it could have provided absent undue hardship.

[131] *See* 29 CFR part 1630, appendix, 1630.9.

such as State or local entities, non-profit organizations, or the Job Accommodation Network (JAN) for ideas regarding potential reasonable accommodations.[132]

Engaging in the Interactive Process

115. A covered entity's failure to engage in the interactive process, in and of itself, is not a violation of the PWFA, just as it is not a violation of the ADA. However, a covered entity's failure to initiate or participate in the interactive process with the employee after receiving a request for reasonable accommodation could result in liability if the employee does not receive a reasonable accommodation even though one is available that would not have posed an undue hardship.[133] Relatedly, an employee's unilateral withdrawal from or refusal to participate in the interactive process can constitute sufficient grounds for failing to provide the reasonable accommodation.[134]

116. In situations where employers are permitted to seek supporting documentation, because employees may experience difficulty obtaining appointments with health care providers, especially early in pregnancy, the covered entity should be aware that it may take time for the employee to find a health care provider and provide documentation. Delay caused by the difficulty an employee faces in obtaining information from a health care provider in these circumstances should not be considered a withdrawal from or refusal to participate in the interactive process. If there is such a delay, an employer should consider providing an interim reasonable accommodation.

117. As set out in Example #53 of this appendix, if an employee requests an accommodation but then is unable to engage in the interactive process because of an emergency, an employer should not penalize the employee but rather should wait and restart the interactive process once the employee returns.

Example #53/Interruption of Interactive Process: Beryl is a quality control inspector at a labware manufacturing plant. She is in the early stage of pregnancy, and Beryl's employer does not know that she is pregnant. In the middle of her shift, Beryl suddenly experiences cramping and bleeding. She tells her supervisor that she thinks she is having a miscarriage and needs to leave. The next afternoon, Beryl's partner calls the supervisor and explains that Beryl will be resting at home for the next 24 hours. Following time at home, Beryl returns to the workplace and follows up with her supervisor regarding her emergency departure.

The bleeding and cramping Beryl experienced is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, and Beryl identified an adjustment or change needed at work (leave). Thus, Beryl made a request for a reasonable accommodation under the PWFA, and it serves to start the PWFA interactive process.

The employer received Beryl's request, but the interactive process was interrupted by the emergency situation that required immediate action. The interactive process resumed when Beryl's partner spoke with the supervisor and provided further information regarding Beryl's condition. When Beryl spoke with her supervisor upon her return, she reengaged in the interactive process. Through this continued conversation, the employer was able to gather sufficient information to determine that Beryl had a limitation under the PWFA and was entitled to a reasonable accommodation. The employer must grant Beryl leave for the time she took off because of her miscarriage unless it can establish that doing so would be an undue hardship. Moreover, if the employer is one that automatically assigns points or penalizes employees for unexcused absences, Beryl should not be penalized for using the leave because she was entitled to the accommodation of leave.[135]

[132] *See* JAN, *supra* note 107. *See also* U.S. Dep't of Lab., Occupational Safety & Health Admin., *Ergonomics–Solutions to Control Hazards, https://www.osha.gov/ergonomics/control-hazards* (last visited Apr. 3, 2024); U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention, Nat'l Inst. for Occupational Safety & Health, *Reproductive Health and The Workplace, https://www.cdc.gov/niosh/topics/repro/* (last reviewed May 1, 2023).

[133] *See Enforcement Guidance on Reasonable Accommodation*, *supra* note 12, at Question 6.

[134] *See id.*

[135] There also may be other types of situations where the employer is on notice of the need for accommodation but then the interactive process is interrupted. *See, e.g., King* v. *Steward Trumbull Mem'l Hosp., Inc.*, 30 F.4th 551, 568 (6th Cir. 2022) (''Anti-discrimination laws sometimes require employers to accommodate unexpected circumstances. Sudden illnesses and episodic flare-ups are, by nature, difficult to plan for and can be quite disruptive to those who fall ill and those around them. But that does not mean that accommodating a sudden flare-up will cause undue hardship merely because handling these situations requires more flexibility.'')

Some workplace attendance policies explicitly provide for unexpected absences by, for example, not penalizing workers who experience an emergency health situation. *See Enforcement Guidance on Reasonable Accommodation*, *supra* note 12, at text accompanying n.74. Providing this type of leave to some

1636.3(l) Limits on Supporting Documentation

118. A covered entity is not required to seek supporting documentation from an employee who requests an accommodation under the PWFA. If a covered entity decides to seek supporting documentation, the covered entity is permitted to do so only when reasonable under the circumstances to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and needs an adjustment or change at work due to the limitation. When seeking documentation is reasonable, the employer is limited to seeking documentation that itself is reasonable.

119. The restrictions on a covered entity seeking supporting documentation are enforceable through different parts of the PWFA. As set out in §1636.4(a)(3), as part of 42 U.S.C. 2000gg–1(1), a covered entity may not fail to provide a reasonable accommodation based on the employee's failure to provide supporting documentation if the covered entity's request for supporting documentation violates the standards set out in §1636.3(l). Moreover, as discussed in section *1636.5(f)* of this appendix under *Possible Violations of 42 U.S.C. 2000gg–2(f) (§1636.5(f)) Based on Seeking Supporting Documentation During the Reasonable Accommodation Process and Disclosure of Medical Information*, a covered entity may violate the PWFA's retaliation provisions by seeking documentation or information in circumstances beyond those that are permitted under §1636.3(l). This is the case whether or not the employee provides the documentation or information sought by the employer and whether or not the employer grants the accommodation.

120. In addition to the PWFA regulation, covered entities are reminded that the ADA's limitations on disability-related inquiries and medical exams apply to all ADA-covered employers.[136] These ADA limitations protect all of the covered entity's employees whether they have disabilities or not and whether they are seeking an ADA reasonable accommodation or not. Thus, employers responding to reasonable accommodation requests under the PWFA should be mindful of the ADA's limitations on the employer's ability to make disability-related inquiries or require medical exams in response to these requests.[137] For example, separate from requirements imposed by the PWFA and §1636.3(l), a covered entity may not ask an employee who requests an accommodation under the PWFA if the employee has asked for other reasonable accommodations in the past or whether the employee has pre-existing conditions, because these questions are disability-related inquiries, *i.e.*, questions that are likely to elicit disability-related information, and they are not job-related and consistent with business necessity in these circumstances. Further, an employer may not require that an employee seeking an accommodation under the PWFA complete specific forms that ask for information regarding ''impairments'' or ''major life activities.'' These are disability-related inquiries and, because they are not job-related and consistent with business necessity in these circumstances, they would violate the ADA.

121. The Commission notes that pregnant employees may experience limitations and, therefore, require accommodations, before they have had any pregnancy-related medical appointments. Pregnant employees also may experience difficulty obtaining an immediate appointment with a health care provider early in a pregnancy or finding a health care provider at all. The Commission encourages employers who choose to seek supporting documentation, when that is permitted under §1636.3(l), to consider the best practice of granting interim reasonable accommodations if an employee indicates that they have tried to obtain documentation and it will be provided at a later date.

1636.3(l)(1) Seeking Supporting Documentation Only When Reasonable Under the Circumstances

122. The Commission expects that most PWFA interactive processes will consist of simple exchanges of information between employees and employers, such as brief conversations or emails, and that many of these will be concluded very shortly after the employee with a known limitation requests a reasonable accommodation, without any requests for further information. Once an employer has determined an appropriate reasonable accommodation, such as through these types of simple communications, no further interactive process is necessary.

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workers but not to workers affected by pregnancy, childbirth, or related medical conditions could be a violation of Title VII. Finally, if the worker does not qualify for coverage under the PWFA, there may be other laws, like the ADA or the FMLA, that would apply.

[136] The PWFA and title I of the ADA apply to the same entities. Therefore, all entities covered by title I of the ADA also are covered by the PWFA.

[137] For further discussion of this topic, *see infra* section *1636.7(a)(1)* of this appendix under *Prohibition on Disability-Related Inquiries and Medical Examinations and Protection of Medical Information*.

123. The PWFA does not require employers to seek supporting documentation from employees requesting accommodations. Under the PWFA, a covered entity may seek supporting documentation only if it is reasonable under the circumstances for the covered entity to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and needs an adjustment or change at work due to the limitation.

124. Under §1636.3(l), situations when it would be reasonable under the circumstances for a covered entity to seek supporting documentation include, for example, if a pregnant employee asks for the temporary suspension of an essential function(s) that involves climbing ladders due to dizziness and the danger of falling, then the employer may, but is not required to, seek reasonable documentation, which is the minimum that is sufficient to confirm the physical or mental condition—*i.e.*, dizziness and increased risk related to falling; confirm that the physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (together ''a limitation''); and describe the adjustment or change at work needed due to the limitation—*i.e.*, how high the employee may climb, the types of actions the employee should avoid, and how long the modification will be needed. As another example, if an employee requests an accommodation for a known limitation but has only a vague idea of what type of accommodation would be effective and the employer also does not know of a potential accommodation, it would be reasonable under the circumstances for the employer to seek supporting documentation describing the adjustment or change at work needed due to the limitation to help identify the needed accommodation. The employer also may consult resources such as JAN.[138]

125. Section 1636.3(l) provides five examples of when it would not be reasonable under the circumstances for the employer to seek supporting documentation.

1636.3(l)(1)(i)—Obvious

126. Under the PWFA, it is not reasonable under the circumstances for an employer to seek supporting documentation when the physical or mental condition related to, affected by, or arising out of the pregnancy, childbirth, or related medical conditions (the limitation) and the adjustment or change at work that is needed due to the limitation are obvious.

127. In practice, the Commission expects this example will usually apply when the employee is obviously pregnant.[139] Whether someone is ''obviously'' pregnant can depend on a number of factors, and not everyone who is pregnant looks the same, but there is a large subset of pregnant workers who most individuals would agree are ''obviously'' pregnant, *i.e.*, the pregnancy is showing and onlookers easily notice by looking. To limit problems that can arise in some instances when employers attempt to determine if someone is pregnant by looking at them, the regulation requires the employee to confirm the limitation and the adjustment or change at work needed due to the limitation through self-confirmation as defined in §1636.3(l)(4). This may happen in the same conversation where the employee requests an accommodation.

128. Thus, for example, when an obviously pregnant employee confirms they are pregnant and asks for a different size uniform or related safety gear, the limitation and the adjustment or change at work needed due to the limitation are obvious, and the employer may not seek supporting documentation. In situations where some information is obvious and other information is not, the employer may seek supporting documentation relevant only to the non-obvious issue. Thus, if an obviously pregnant employee requests the reasonable accommodation of leave related to childbirth and recovery and confirms that they are pregnant, it may be reasonable under the circumstances for the employer to seek supporting documentation about the length of leave for recovery, but it would not be reasonable to seek supporting documentation regarding the limitation. Of course, the employer does not have to seek supporting documentation and can simply engage the employee in a discussion about how much leave the employee will need and when they will need it.

1636.3(l)(1)(ii)—Known

129. The second example of when it would not be reasonable to seek supporting documentation is when the employer already has sufficient information to determine that the employee has a PWFA limitation and the adjustment or change at work needed due to the limitation. For example, if an employee already provided documentation stating that because of their recent cesarean section they

[138] *See* JAN, *supra* note 107.

[139] ''Obvious'' means that the condition is apparent without being mentioned. In terms of pregnancy itself, this may depend on physical appearance, *i.e.*, whether the pregnancy is ''showing.'' This is a concept that the Commission has used previously regarding pregnancy discrimination. *Enforcement Guidance on Pregnancy Discrimination*, *supra* note 24, at (I)(A)(1)(a) (discussing the ''obviousness'' of pregnancy and a discrimination claim).

should not lift over 20 pounds for 2 months, the employer may not seek further supporting documentation during those 2 months because the employer already has sufficient information.[140]

130. This principle also applies to episodic conditions. If an employer already has sufficient information to determine that the employee has a PWFA limitation that is episodic (e.g., migraines that are related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions), and the adjustment or change at work needed periodically due to the limitation (breaks or time off), the employer cannot seek additional or new supporting documentation every time the condition arises.

1636.3(l)(1)(iii)—Predictable Assessments

131. The third example of when it is not reasonable under the circumstances for an employer to seek supporting documentation is based on the common types of pregnancy modifications sought under the PWFA. Specifically, it is not reasonable under the circumstances for an employer to seek supporting documentation when an employee, at any time during their pregnancy, seeks one of the following modifications, due to their pregnancy: (1) carrying or keeping water near for drinking, as needed; (2) taking additional restroom breaks, as needed; (3) sitting, for those whose work requires standing, and standing, for those whose work requires sitting, as needed; and (4) taking breaks to eat and drink, as needed. In these situations, an employee must provide self-confirmation as defined in §1636.3(l)(4). Example #10 of this appendix shows how this can be part of the request for an accommodation. It is not reasonable to seek supporting documentation when an employee is pregnant, seeks one of the four listed modifications, and provides self-confirmation as defined in paragraph (l)(4) because these are a small set of commonly sought modifications that are widely known to be needed during an uncomplicated pregnancy.

1636.3(l)(1)(iv)—Lactation

132. The fourth example of when it is not reasonable under the circumstances to seek supporting documentation concerns lactation and pumping at work or nursing during work hours. Specifically, it is not reasonable under the circumstances to seek supporting documentation when the reasonable accommodation is related to a time and/or place to pump or any other modification related to pumping at work,[141] and the employee has provided a self-confirmation as set out in §1636.3(l)(4). Likewise, it is not reasonable under the circumstances to seek supporting documentation when the reasonable accommodation is related to time to nurse during work hours when the regular location of the employee's workplace makes nursing during work hours a possibility because the child is in close proximity and the employee has provided self-confirmation as set out in paragraph (l)(4).[142]

133. It is not reasonable to seek supporting documentation regarding pumping or nursing at work because lactation beginning around or shortly after birth is an obvious fact. Additionally, and pragmatically, health care providers may not be able to provide supporting documentation about the details of how a specific employee is managing nursing or pumping, as this is not something necessarily discussed with a health care provider. This example does not, however, apply to all reasonable accommodations related to lactation; thus, this example would not apply if a lactating employee requested full-time remote work due to a condition that makes pumping difficult.

1636.3(l)(1)(v)—Employer's Own Policies or Practices

134. The fifth example of when it would not be reasonable under the circumstances for a covered entity to seek supporting documentation relates to an employer's own policies or practices. If the requested accommodation is one that is available to employees without known limitations pursuant to the covered entity's policies or practices without submitting supporting documentation, then it is not reasonable for the employer to seek supporting documentation from an employee seeking a similar accommodation under the PWFA. For example, if an employer has a policy or practice of requiring supporting documentation only for the use of leave for 3 or more consecutive days, it would not be reasonable to ask someone who is using the same type of leave due to a known limitation

[140] This example does not mean that when it is otherwise reasonable in the circumstances to seek supporting documentation, an employer is prohibited from doing so because the employee has simply stated that they have a limitation and need an adjustment or change at work due to the limitation. However, the employer also is not required to seek documentation and can accept the employee's statement.

[141] *See supra* note 102 for discussion of the PUMP Act and the types of accommodations that may be requested with regard to pumping.

[142] ''Nursing during work hours'' could include, for example, when an employee who always teleworks from home and has their child at home takes a break to nurse the child, or when an employee takes a break to travel to a nearby daycare center to nurse.

under the PWFA to submit supporting documentation when they request leave for 2 or fewer days.[143]

1636.3(l)(2) Reasonable Documentation

135. Under the PWFA, reasonable accommodations are available for physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. When it is reasonable under the circumstances for the covered entity to seek supporting documentation, the covered entity is limited to seeking documentation that is itself reasonable. When it is reasonable under the circumstances for the covered entity to seek supporting documentation, the covered entity may require that the supporting documentation come from a health care provider.

136. Confirming the physical or mental condition requires only a simple statement that the physical or mental condition meets the first part of the definition of ''limitation'' at §1636.3(a)(2), (*i.e.*, the physical or mental condition is: an impediment or problem, including ones that are modest, minor, or episodic; a need or a problem related to maintaining the health of the employee or the pregnancy, or that the employee is seeking health care related to the pregnancy, childbirth, or a related medical condition itself).[144] The physical or mental condition can be a PWFA limitation whether or not such condition is an impairment or a disability under the ADA.[145] Some examples of physical or mental conditions that could be limitations are that the employee: has a back injury; has swollen ankles; is experiencing vomiting; has a lifting restriction; is experiencing fatigue; should not be exposed to a certain chemical; should avoid working in the heat; needs to avoid certain physical tasks such as walking, running, or physical confrontation because of increased risk; needs to attend a health care appointment; or needs to recover from a health care procedure. Because the physical or mental condition can be something like fatigue or vomiting, there is no need for the statement to contain a medical diagnosis. Thus, documentation is sufficient under §1636.3(l)(2) even if it does not contain a medical diagnosis, as long as it has a simple statement of the physical or mental condition.

137. The supporting documentation should confirm that the physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The supporting documentation need not state that the pregnancy, childbirth, or related medical conditions are the sole, the original, or a substantial cause of the physical or mental condition at issue because the statute only requires that the physical or mental condition be ''related to, affected by, or arising out of'' pregnancy, childbirth, or related medical conditions.[146] If relevant, the documentation should include confirmation that the ''related medical condition'' is related to pregnancy or childbirth.

138. The employer also may seek reasonable documentation to describe the adjustment or change at work that is needed due to the limitation and an estimate of the expected duration of the need for the adjustment or change. This may be, for example: no heavy lifting for approximately 4 months; cannot stand for more than 30 minutes at a time until the end of the pregnancy; the maximum amount of weight involved in the lifting restriction and the approximate length of the restriction; the approximate number of and length of breaks; the kind of support or equipment needed and for approximately how long; a change in the type of protective equipment or ventilation needed and for approximately how long it will be needed; the need to limit movement and be allowed to lie down when necessary and for approximately how long the employee will need to limit movement; a change in work location and the approximate length of time of the change; a period of leave expected to be needed for recovery or to attend health care appointments; or the essential function(s) that should be temporarily suspended and for how long.

139. Where the supporting documentation meets the standards described in this section, it is sufficient to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and needs an adjustment or change at work due to the limitation. Accordingly, a covered entity that has received sufficient documentation but fails to provide an accommodation based on the failure to provide sufficient documentation, or continues to seek additional documentation or information, risks liability under 42 U.S.C. 2000gg–1(1) (§1636.4(a)(3)) and/or 42 U.S.C. 2000gg–2(f) (§1636.5(f)).

[143] Conversely, if regular employer policies or practices would require documentation when the PWFA would not, or would require more documentation than the PWFA would allow in a situation where the employee is requesting an accommodation under the PWFA, the PWFA's restrictions on supporting documentation would apply.

[144] Section 1636.3(a)(2).

[145] 42 U.S.C. 2000gg(4); *see* 29 CFR 1630.3(h).

[146] 42 U.S.C. 2000gg(4); *see supra* in section *1636.3(a)(2)* of this appendix under *Related to, Affected by, or Arising Out of*.

140. Examples Regarding Documentation:[147]

Example #54/Reasonable Documentation: Amelia recently returns to work after giving birth and recovery from childbirth. Amelia requests that she not be required to lift more than 30 pounds due to a back injury arising out of her pregnancy. Amelia's employer can use the interactive process to identify Amelia's limitation and what accommodation will address her limitation. Amelia's employer may, but is not required to, seek supporting documentation; in this situation, the employer decides to seek supporting documentation from Amelia. At Amelia's request, her obstetrician emails the human resources department, explaining that Amelia's recent pregnancy has caused a back injury and that she should avoid lifting more than 30 pounds for approximately the next 3 months. This is sufficient documentation to confirm that Amelia has a limitation—a physical or mental condition (a back injury, which is an impediment or problem) related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions—and to describe an adjustment or change at work that is needed due to the limitation (avoid lifting more than 30 pounds for approximately the next three months). Because this is sufficient documentation, the covered entity failing to provide Amelia an accommodation based on a lack of documentation may violate 42 U.S.C. 2000gg–1(1) (§1636.4(a)(3)), and the covered entity trying to obtain additional documentation or information related to Amelia's request for a reasonable accommodation may violate 42 U.S.C. 2000gg–2(f) (§1636.5(f)).

Example #55 Reasonable Documentation: Rachna is 6 months pregnant and has just learned that she has preeclampsia. She requires limited activity and bed rest for the remainder of her pregnancy to limit the risks to her health and the health of her pregnancy. Rachna's employer can use the interactive process to identify Rachna's limitation and what accommodation will address her limitation. Rachna's employer may, but is not required to, seek supporting documentation; in this situation, the employer decides to seek supporting documentation from Rachna. Rachna provides her employer with a note from her midwife saying that, because of risks related to her health and the health of her pregnancy, Rachna needs to limit activities that involve sitting or standing, needs bed rest as much as possible, and should not commute to work for the remaining 3 months of her pregnancy. This is sufficient documentation to confirm that Rachna has a limitation—a physical or mental condition (maintaining the health of the employee or the employee's pregnancy) related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions—and to describe the change at work that is needed (limiting activities involving sitting and standing, lying down as much as possible, and not commuting for the remainder of her pregnancy). Because this is sufficient documentation, the covered entity failing to provide Rachna an accommodation based on a lack of documentation may violate 42 U.S.C. 2000gg–1(1) (§1636.4(a)(3)), and the covered entity trying to obtain additional documentation or information related to her request for a reasonable accommodation may violate 42 U.S.C. 2000gg–2(f) (§1636.5(f)).

141. Because a covered entity is limited to the minimum supporting documentation necessary, a covered entity may not require that a pregnancy be confirmed through a specific test or method. Moreover, such a requirement could implicate the ADA's provisions that medical examinations only are permitted when they are job-related and consistent with business necessity.[148]

142. Additionally, covered entities may not require that supporting documentation be submitted on a specific form, but only that documentation meets the requirements of §1636.3(l)(2). If covered entities offer an optional form for employees to use in submitting supporting documentation, the covered entities may wish to review preexisting forms they have for reasonable accommodations or leave to ensure their compliance with the PWFA. For example, the PWFA does not require that an employee have a ''serious health condition'' and the statute does not use the term ''major life activity,'' so employer forms or other employer communications seeking supporting documentation for PWFA-related reasonable accommodations should not use this terminology.

1636.3(l)(3) Limitations on a Covered Entity Seeking Supporting Documentation From a Health Care Provider

143. When it is reasonable under the circumstances for the covered entity to seek supporting documentation, a covered entity may require that the supporting documentation comes from a health care provider. The regulation contains a non-exhaustive list of possible health care providers that is based on the non-exhaustive list provided in the Commission's ADA policy guidance.[149]

[147] The conditions described in these examples also may be disabilities under the ADA and therefore may entitle the employee to an accommodation under the ADA, regardless of whether they are entitled to one under the PWFA.

[148] 42 U.S.C. 12112(d)(4)(A).

[149] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at Question 6.

144. The covered entity may not require that the health care provider who is submitting documentation be the provider treating the employee for the condition at issue, as long as the health care provider is able to confirm the physical or mental condition; confirm that the physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (together ''a limitation''); and describe the adjustment or change at work that is needed due to the limitation. The covered entity may not require that an employee be examined by a health care provider of the covered entity's choosing.

1636.3(l)(4) Self-Confirmation of Pregnancy or Lactation

145. For the purposes of supporting documentation under the PWFA, self-confirmation is a simple statement in which the employee confirms, as set forth in §1636.3(l)(1)(i), (iii) and (iv), the limitation and adjustment or change that is needed at work due to the limitation. The self-confirmation statement can be made in any manner and can be made as part of the request for reasonable accommodation under §1636.3(h)(2). For example, self-confirmation may be spoken, it may be recorded or live, or it may be written on paper or electronically, such as in an email or text. Self-confirmation does not need to use any particular words or format, does not need to be written on a form, does not need to be a particular length, does not need to be notarized or otherwise verified, and does not need to be accompanied by documentary or physical evidence. In many instances, the self-confirmation will be part of what the employee communicates when they start the reasonable accommodation process. Example #10 of this appendix, where an employee tells a manager of her need for more frequent bathroom breaks and explains that the breaks are needed because the employee is pregnant, is an example of self-confirmation of pregnancy.

Interaction Between the PWFA and the ADA

146. Employers covered by the PWFA also are covered by the ADA.[150] The ADA's statutory text includes express restrictions on when a covered entity may require medical exams and make disability-related inquiries.[151] These restrictions apply to all the interactions between covered entities and their employees, regardless of whether an individual has a disability. Thus, for example, if an employee is requesting a reasonable accommodation under the PWFA, the ADA's restrictions apply and prevent an employer from seeking the employee's entire medical record or asking the employee if they have received accommodations in the past because these inquiries are likely to elicit information about a disability and are not job-related and consistent with business necessity in these circumstances. Independent of these ADA restrictions, §1636.3(l)(2) also prohibits seeking this type of documentation under the PWFA because it goes beyond the definition of reasonable documentation. Finally, depending on the facts, seeking such information could violate 42 U.S.C. 2000gg–2(f).

147. The ADA provides for the confidentiality of medical information, subject to limited disclosure rules.[152] These rules apply to medical information in the employer's possession, including information obtained by an employer from disability-related inquiries or medical exams, or information obtained as part of the reasonable accommodation process.[153] That an employee is pregnant, has recently been pregnant, or has a

[150] 42 U.S.C 12111(5) (ADA); 42 U.S.C. 2000gg(2) (PWFA).

[151] 42 U.S.C. 12112(d), 12112(d)(4)(A).

[152] 42 U.S.C. 12112(d)(3)(B); 29 CFR 1630.14(b)(1), (c)(1), (d)(4); EEOC, *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA*, at text accompanying nn.9–10 (2000) [hereinafter *Enforcement Guidance on Disability-Related Inquiries*], *http://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees* (''The ADA requires employers to treat any medical information obtained from a disability-related inquiry or medical examination . . . as well as any medical information voluntarily disclosed by an employee, as a confidential medical record. Employers may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA.''); EEOC, *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, at text accompanying n.6 (1995) [hereinafter *Enforcement Guidance: Preemployment Disability-Related Questions*], *https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical. https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical* (''Medical information must be kept confidential.''). In addition, Federal agencies are covered by the Privacy Act of 1974, as amended, 5 U.S.C. 552a, and many Federal agencies maintain equal employment opportunity records subject to a Privacy Act System of Records Notice.

[153] *See Enforcement Guidance on Disability-Related Inquiries, supra* note 152, at General Principles (''The ADA requires employers to treat any medical information obtained from

medical condition related to pregnancy or childbirth is medical information. The ADA requires that employers keep such information confidential and only disclose it within the confines of the ADA's limited disclosure rules. Similarly, disclosing that an employee is receiving or has requested a reasonable accommodation under the PWFA usually amounts to a disclosure that the employee is pregnant, has recently been pregnant, or has a related medical condition and thus must be treated as confidential medical information as well. This is explained further in section *1636.7(a)(1)* of this appendix under *Prohibition on Disability-Related Inquiries and Medical Examinations and Protection of Medical Information.*

148. If there is a situation where an employee requests an accommodation and both the PWFA and the ADA could apply, the employer should apply the provision that it would be less demanding for the employee to satisfy. For example, assume a pregnant employee has diabetes that is exacerbated by the pregnancy and needs breaks to eat or drink. Under the PWFA, the covered entity cannot seek supporting documentation (as set forth in §1636.3(l)(1)(iii)) and this is the provision that the employer should apply.

IV. 1636.4 Nondiscrimination With Regard to Reasonable Accommodations Related to Pregnancy

1636.4(a) Failing To Provide Reasonable Accommodation

1. The statute at 42 U.S.C. 2000gg–1(1) prohibits a covered entity from not making a reasonable accommodation for a qualified employee with a known limitation related to pregnancy, childbirth, or related medical conditions unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business. This provision of the PWFA uses the same language as the ADA, and the rule likewise uses the language from the corresponding ADA regulation.[154] Because 42 U.S.C. 2000gg–1(1) uses the same operative language as the ADA, it should be interpreted in a similar manner.

2. This section is violated when a covered entity fails to make reasonable accommodation to a qualified employee with a known limitation, absent undue hardship.[155] However, a covered entity does not violate 42 U.S.C. 2000gg–1(1) merely by refusing to engage in the interactive process; for a violation, there also must have been a reasonable accommodation that the employer could have provided absent undue hardship.

1636.4(a)(1) Unnecessary Delay in Providing a Reasonable Accommodation

3. An unnecessary delay in providing a reasonable accommodation to the known limitations related to pregnancy, childbirth, or related medical conditions of a qualified employee may result in a violation of the PWFA if the delay constitutes a failure to provide a reasonable accommodation. This can be true even if the reasonable accommodation is eventually provided, when the delay was unnecessary. Unnecessary delay that can be actionable under this section can occur at any time during the accommodation process including, but not limited to, responding to the initial request, during the interactive process, or in implementing the accommodation once the request is approved. Delay by a third-party administrator acting on behalf of the covered entity is attributable to the covered entity.

4. Section 1636.4(a)(1) sets out the factors that are used when determining whether a delay in the provision of a reasonable accommodation violates the PWFA. Section 1636.4(a)(1) sets out the factors already identified in the ADA guidance[156] and adds three additional factors, described in paragraphs 5, 6, and 7 of this section.

5. First, whether providing the accommodation was simple or complex is a factor to be considered. Under the PWFA, there are certain modifications, set forth in §1636.3(j)(4), that will virtually always be found to be reasonable accommodations that

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a disability-related inquiry or medical examination (including medical information from voluntary health or wellness programs), as well as any medical information voluntarily disclosed by an employee, as a confidential medical record.'') and text after n.12 (''[T]he ADA's restrictions on inquiries and examinations apply to all employees, not just those with disabilities.'').

[154] *See* 42 U.S.C. 12112(b)(5)(A); 29 CFR 1630.9(a).

[155] The regulation in §1636.4, following the language in the statute, uses the phrase ''known limitations related to pregnancy, childbirth, or related medical conditions.'' 42 U.S.C. 2000gg–1(1), (3)–(5). Given the definition in the statute of ''known limitation'' (42 U.S.C. 2000gg(4)), the phrase ''known limitations related to pregnancy, childbirth, or related medical conditions'' in §1636.4 and 42 U.S.C. 2000gg–1 should be understood to mean that the known limitations are related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions or that ''known limitations'' mean physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.

[156] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at Question 10 & n.38. The *Enforcement Guidance* notes that these are ''relevant factors'' but not that these are the only factors.

do not impose an undue hardship: (1) allowing a pregnant employee to carry or keep water near and drink, as needed; (2) allowing a pregnant employee to take additional restroom breaks, as needed; (3) allowing a pregnant employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and (4) allowing a pregnant employee to take breaks to eat and drink, as needed. If there is delay in providing these accommodations to a qualified employee with a known limitation, it will virtually always be found to be unnecessary because of the presumption that these modifications will be reasonable accommodations that do not impose an undue hardship.

6. Second, whether the covered entity offered the employee an interim reasonable accommodation during the interactive process is a factor to be considered. The offer of an interim reasonable accommodation can be made at any time following the request for accommodation. The provision of an interim accommodation will decrease the likelihood that an unnecessary delay will be found. Under this factor, the interim reasonable accommodation should be one that enables the employee to keep working as much as possible; the provision of leave will not be considered as a factor that can excuse delay, unless the employee selects, or requests, leave as an interim reasonable accommodation.[157]

7. Third, the length of time for which the employee will need the reasonable accommodation is another factor to be considered. Given that limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions are frequently temporary, an unnecessary delay in providing an accommodation may mean that the period necessitating the accommodation could pass without action simply because of the delay.

1636.4(a)(2) Refusing an Accommodation

8. An employee with a known limitation is not required to accept a reasonable accommodation. However, if the rejection of the reasonable accommodation results in the employee being unable to perform the essential functions of the job, the employee is not qualified. This provision mirrors the language from a similar provision in the ADA regulation,[158] with the inclusion of employees who are qualified under §1636.3(f)(2).

1636.4(a)(3) Covered Entity Failing To Provide a Reasonable Accommodation Due to Lack of Supporting Documentation

9. A covered entity cannot defend the failure to provide an accommodation based on the lack of supporting documentation if: the covered entity did not seek supporting documentation; seeking supporting documentation was not reasonable under the circumstances as defined in §1636.3(l)(1); the covered entity sought documentation beyond that which is reasonable as defined in §1636.3(l)(2); or the covered entity did not provide the employee sufficient time to obtain and provide the supporting documentation sought.

1636.4(a)(4) Choosing Among Possible Accommodations

10. The covered entity must provide an effective accommodation, *i.e.,* one that meets the employee's needs or limitations. If there is more than one effective accommodation, the employee's preference should be given primary consideration.[159] However, the employer providing the accommodation has the ultimate discretion to choose among effective reasonable accommodations.[160] The employer may choose, for example, the less expensive accommodation, the accommodation that is easier for it to provide, or, generally, the accommodation that imposes the least hardship.[161] In the situation where the employer is choosing among effective reasonable accommodations and does not provide the accommodation that is the employee's preferred accommodation, the employer does not have to show that it is an undue hardship to provide the employee's preferred accommodation.

11. A covered entity's ''ultimate discretion'' in choosing a reasonable accommodation is limited by certain other considerations. First, 42 U.S.C. 2000gg–1 (§1636.4(a)(4)) requires that the accommodation must provide the qualified employee with a known limitation with equal employment opportunity.[162] By this, the Commission means an opportunity to attain the same level of performance, experience the same level of benefits, or otherwise enjoy the same terms, conditions, and privileges of employment as are available to the average similarly situated employee without a known limitation, which includes the individual who needs the accommodation when they are without the known limitation.[163] This may be shown by evidence

[157] The restriction on using leave as an interim accommodation is based on 42 U.S.C. 2000gg–1(4) and 2000gg–2(f).

[158] *See* 29 CFR 1630.9(d).

[159] *See* 29 CFR part 1630, appendix, 1630.9.

[160] *Id.*

[161] *Id.*

[162] *See also Enforcement Guidance on Reasonable Accommodation, supra* note 12, at Question 9, Example B.

[163] *See* 29 CFR part 1630, appendix, 1630.9; 29 CFR part 1630, appendix, 1630.2(o) (explaining that reassignment should be to a position with equivalent pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time); *see also Enforcement Guidance on Reasonable*

of the opportunities that would have been available to the employee seeking the accommodation had they not identified a known limitation or sought an accommodation, or other evidence that tends to demonstrate that the accommodation provided to the employee did not provide equal employment opportunity. Depending on the facts, selecting the accommodation that does not provide equal opportunity could violate 42 U.S.C. 2000gg–1(1), 2000gg–1(5), or 2000gg–2(f).[164]

12. Second, 42 U.S.C. 2000gg–1(2) prohibits a covered entity from requiring a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process.

13. Third, 42 U.S.C. 2000gg–1(4) prohibits a covered entity from requiring a qualified employee with a known limitation to take leave, whether paid or unpaid, if there is a reasonable accommodation that will allow the employee to continue to work, absent undue hardship.

14. Fourth, 42 U.S.C. 2000gg–1(5) prohibits a covered entity from taking adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee.

15. Fifth, 42 U.S.C. 2000gg–2(f) prohibits retaliation and coercion by covered entities.

16. These limitations to the ''ultimate discretion'' of a covered entity to choose among effective accommodations are described in the discussions of §§1636.4(b), (d), and (e) and 1636.5(f).

17. Example Regarding Failing To Provide Equal Employment Opportunity:

Example #56/Failing To Provide Equal Employment Opportunity: Yasmin's job requires her to travel to meet with clients. Because of her pregnancy, she is not able to travel for 3 months. She asks that she be allowed to conduct her client meetings via video conferencing. Although this accommodation would allow her to perform her essential job functions and would not impose an undue hardship, her employer reassigns her to smaller, local accounts. Being assigned only to these accounts is not an effective accommodation because it limits Yasmin's opportunity to compete for promotions and bonuses as she had in the past. This could be a violation of 42 U.S.C. 2000gg–1(1), because Yasmin is denied an equal opportunity to compete for promotions; thus, her employer has failed to provide her a reasonable accommodation. The employer's actions also could violate 42 U.S.C. 2000gg–1(5) and 2000gg–2(f), or Title VII's prohibition against pregnancy discrimination.

1636.4(b) Requiring a Qualified Employee To Accept an Accommodation

18. The statute at 42 U.S.C. 2000gg–1(2) prohibits a covered entity from requiring a qualified employee to accept an accommodation other than any reasonable accommodation arrived at through the interactive process. Pursuant to this provision in the PWFA and §1636.4(b), a covered entity cannot require a qualified employee to accept an accommodation such as light duty or a temporary transfer, or delay of an examination that is part of the application process, without engaging in the interactive process, even if the covered entity's motivation is concern for the employee's health or pregnancy.

19. The statute at 42 U.S.C. 2000gg–1(2) does not require that the employee have a limitation, known or not; thus, a violation of 42 U.S.C. 2000gg–1(2) could occur if a covered entity believes that a qualified employee is pregnant and decides, without engaging in the interactive process with the employee, that the employee needs a particular accommodation, and unilaterally requires the employee to accept the accommodation, even though the employee has not requested it and can perform the essential functions of the job without it. For example, this provision could be violated if an employment agency, without discussing the situation with the candidate, decides that a candidate recovering from a miscarriage needs an accommodation in the form of not being sent

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Accommodation, supra note 12, at text following n.80 (''However, if both the employer and the employee voluntarily agree that transfer is preferable to remaining in the current position with some form of reasonable accommodation, then the employer may transfer the employee.''); *cf.* EEOC, *Compliance Manual on Religious Discrimination,* (12–IV)(A)(3) (2021) [hereinafter *Compliance Manual on Religious Discrimination*], *https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination* (stating that in the context of a religious accommodation, an accommodation would not be reasonable ''if it requires the employee to accept a reduction in pay rate or some other loss of a benefit or privilege of employment and there is an alternative accommodation that does not do so''); EEOC, *Enforcement Guidance: Unlawful Disparate Treatment of Workers With Caregiving Responsibilities,* Example 5 (2007), *https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities* (explaining how a worker can be a comparator for themselves).

[164] Depending on the facts, this could be a violation of Title VII's prohibition on sex discrimination as well.

to certain jobs that the agency views as too physical. Similarly, a violation could result if an employer decides to excuse a qualified pregnant employee from overtime as an accommodation without the employee seeking an accommodation and the employer and the employee engaging in the interactive process.[165]

20. Additionally, a violation could occur if a covered entity receives a request for a reasonable accommodation and unilaterally imposes an accommodation that was not requested by the qualified employee without engaging in the interactive process.

21. Example Regarding Requiring an Employee To Accept an Accommodation:

Example #57/Requiring an Employee To Accept an Accommodation: Kia, a restaurant server, is pregnant. She asks for additional breaks during her shifts as her pregnancy progresses because she feels tired, and her feet are swelling. Her employer, without engaging in the interactive process with Kia, directs Kia to take host shifts for the remainder of her pregnancy, because it allows her to sit for long periods. The employer has violated 42 U.S.C. 2000gg–1(2) (§1636.4(b)), because it required Kia to accept an accommodation other than one arrived at through the interactive process, even if Kia's earnings did not decrease and her terms, conditions, and privileges of employment were not harmed.

Moreover, if the host shift does not provide Kia with equal terms, conditions, and privileges of employment (e.g., Kia's wages decrease or Kia no longer can earn tips), the covered entity also may have violated 42 U.S.C. 2000gg–1(1) (requiring reasonable accommodation absent undue hardship); 2000gg–1(5) (prohibiting adverse action in terms, conditions, or privileges of employment); and/or 2000gg–2(f) (prohibiting retaliation) (§§1636.4(a) and (e) and 1636.5(f)).

22. Finally, this provision also could be violated if a covered entity has a rule that requires all qualified pregnant employees to stop a certain function—such as traveling—automatically, without any evidence that the particular employee is unable to perform that function.

1636.4(c) Denying Opportunities to Qualified Employees

23. The statute at 42 U.S.C. 2000gg–1(3) prohibits a covered entity from denying employment opportunities to a qualified employee with a known limitation if the denial is based on the need of the covered entity to make reasonable accommodations to the known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions of the qualified employee. Thus, an employee's known limitation and need for a reasonable accommodation cannot be part of the covered entity's decision regarding hiring, discharge, promotion, or other employment decisions, unless the reasonable accommodation would impose an undue hardship on the covered entity.

24. This provision in the PWFA uses language similar to that of the ADA, and §1636.4(c) likewise uses language similar to the corresponding ADA regulation.[166] Section 1636.4(c) encompasses situations where the covered entity's decision is based on the future possibility that a reasonable accommodation will be needed, *i.e.*, 42 U.S.C. 2000gg–1(3) prohibits a covered entity from making a decision based on its belief that an employee may need a reasonable accommodation in the future regardless of whether the employee has asked for one or not. Thus, under §1636.4(c), this prohibition would include situations where a covered entity refuses to hire a pregnant applicant because the covered entity believes that the applicant will need leave to recover from childbirth, regardless of whether the covered entity knows the exact amount of leave the applicant will require, or whether the applicant has mentioned the need for leave as a reasonable accommodation to the covered entity.

1636.4(d) Requiring a Qualified Employee To Take Leave

25. A covered entity may not require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the employee's known limitations related to pregnancy, childbirth, or related medical conditions absent undue hardship.

26. This provision does not prohibit a covered entity from offering leave as a reasonable accommodation if leave is the reasonable accommodation requested or selected by the qualified employee, or if it is the only reasonable accommodation that does not cause an undue hardship. As provided in §1636.3(i)(3), both paid leave (accrued, short-term disability, or another employer benefit) and unpaid leave are potential reasonable accommodations under the PWFA.

1636.4(e) Adverse Action on Account of Requesting or Using a Reasonable Accommodation

27. The PWFA contains overlapping provisions that protect employees, applicants, and former employees seeking or using reasonable accommodations. Importantly, nothing

[165] These actions also could violate Title VII's prohibition of disparate treatment based on sex. *See Enforcement Guidance on Pregnancy Discrimination, supra* note 24, at (I)(B)(1).

[166] *See* 42 U.S.C. 12112(b)(5)(B); 29 CFR 1630.9(b).

in the PWFA limits which provision an employee may use to protect their rights.

28. One of these provisions is 42 U.S.C. 2000gg–1(5), which prohibits adverse action in the terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee.

29. The protections provided by 42 U.S.C. 2000gg–1(5) are likely to have significant overlap with 42 U.S.C. 2000gg–2(f), which prohibits retaliation. However, the PWFA's anti-retaliation provisions apply to a broader group of individuals and actions than 42 U.S.C. 2000gg–1(5) does.

30. ''Terms, conditions, or privileges of employment'' is a term from Title VII, and the Commission has interpreted it to encompass a wide range of activities or practices that occur in the workplace including, but not limited to: discriminatory work environment or atmosphere; duration of work (such as the length of an employment contract, hours of work, or attendance); work rules; job assignments and duties; and job advancement (such as training, support, and performance evaluations).[167] In addition, for the purposes of 42 U.S.C. 2000gg–1(5), ''terms, conditions, or privileges of employment'' can include hiring, discharge, or compensation.

31. This provision prohibits a covered entity from taking a harmful action against a qualified employee. For example, this provision prohibits a covered entity from penalizing an employee for having requested or used an accommodation that the covered entity had granted previously.

32. Examples Regarding Adverse Action in Terms, Conditions, or Privileges of Employment:

Example #58/Adverse Action in Terms, Conditions, or Privileges of Employment: Nava took leave to recover from childbirth as a reasonable accommodation under the PWFA, and, as a result, failed to meet the sales quota for that quarter, which led to a negative performance appraisal. The negative appraisal could be a violation of 42 U.S.C. 2000gg–1(5) because Nava received it due to the use of a reasonable accommodation. If an employee receives the reasonable accommodation of leave, a production standard, such as a sales quota, may need to be prorated to account for the reduced amount of time the employee works.[168]

33. Also, an employer may violate this provision if there is more than one reasonable accommodation that does not impose an undue hardship, and the employer, after the interactive process, chooses the accommodation that causes an adverse action with respect to the terms, conditions, or privileges of employment, despite the existence of an alternative accommodation that would not do so.

Example #59/Adverse Action in Terms, Conditions, or Privileges of Employment: Ivy asks for additional bathroom breaks during the workday because of pregnancy, including during overtime shifts. After talking to Ivy, Ivy's supervisor decides Ivy should simply not work overtime, because during the overtime shift there are fewer employees and the supervisor does not want to bother figuring out coverage for Ivy's bathroom breaks, although it would not be an undue hardship to do so. As a result, Ivy is not assigned overtime and loses earnings. The employer's actions could violate 42 U.S.C. 2000gg–1(5) because Ivy suffered the adverse action of not being assigned to overtime and losing wages because she used a reasonable accommodation.

Example #60/Adverse Action in Terms, Conditions, or Privileges of Employment: Leah asks for telework due to morning sickness. Through the interactive process, it is determined that either telework or a later schedule combined with an hour rest break in the afternoon would allow Leah to perform the essential functions of her job without imposing an undue hardship. Although Leah prefers telework, the employer would rather Leah be in the office. It would not be a violation of 42 U.S.C. 2000gg–1(5) to offer Leah the schedule change/rest break, instead of telework, as a reasonable accommodation.

34. The facts set out in Examples #58 and #59 of this appendix also could violate 42 U.S.C. 2000gg–1(1) and 2000gg–2(f).

V. 1636.5 Remedies and Enforcement

1. In crafting the PWFA remedies and enforcement section, Congress recognized the advisability of using the existing mechanisms for redress of other forms of employment discrimination. The regulation at §1636.5(a), (c), (d), and (e) follows the language of the statute.

1636.5(a) Remedies and Enforcement Under Title VII

2. The enforcement mechanisms, procedures, and remedies available to employees and others covered by Title VII apply to the

[167] 42 U.S.C. 2000e–2(a)(1); *Compliance Manual on Terms, Conditions, and Privileges of Employment, supra* note 69, at 613.1(a) (stating that the language is to be read in the broadest possible terms and providing a list of examples).

[168] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at Question 19.

PWFA.[169] Thus, employees covered by section 706 of Title VII may file charges alleging violations of the PWFA with the Commission, and the Commission will investigate them using the same process as set out in Title VII.[170] Similarly, the Commission will use the same rules to determine the time limits for filing a charge; if the State or locality in which the charge has been filed has a law prohibiting sex discrimination, pregnancy discrimination, or specifically providing accommodations for pregnancy, childbirth, or related medical conditions, the deadline to file a charge will be 300 days.[171]

1636.5(e) Remedies and Enforcement Under Section 717 of the Civil Rights Act of 1964

3. The applicable procedures and available remedies for employees covered by section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e–16, apply under the PWFA. Employees covered by section 717 of Title VII may file complaints with the relevant Federal agency which will investigate them, and the Commission will process appeals using the same process as set out in Title VII for Federal employees. Thus, the Commission's implementing regulations found at 29 CFR part 1614 (Federal sector equal employment opportunity) apply to the PWFA as well.

Damages

4. As with other Federal employment discrimination laws, the PWFA provides for recovery of pecuniary and non-pecuniary damages, including compensatory and punitive damages. The statute's adoption by reference of section 1977A of the Revised Statutes of the United States, 42 U.S.C. 1981a, also imports the limitations on the recovery of compensatory damages and punitive damages generally applicable in employment discrimination cases, depending on the size of the employer. Punitive damages are not available in actions against a government, government agency, or political subdivision. This part lays out these requirements involving damages in separate paragraphs under §1636.5(a) through (e).

1636.5(f) Prohibition Against Retaliation

5. The anti-retaliation provisions of the PWFA should be interpreted broadly, like those of Title VII and the ADA, to effectuate Congress' broad remedial purpose in enacting these laws.[172] The protections of these provisions extend beyond qualified employees with known limitations and cover activity that may not yet have occurred, such as a circumstance in which a covered entity threatens an employee with termination if they file a charge or requires an employee to sign an agreement that prohibits such individual from filing a charge with the Commission.[173]

1636.5(f)(1) Prohibition Against Retaliation

6. The types of conduct prohibited, the standard for determining what constitutes retaliatory conduct, and the individuals protected under the PWFA are the same as they are under Title VII.[174] Accordingly, this provision prohibits discrimination against employees who engage in protected activity, which includes "'participating' in an EEO process or 'opposing' discrimination."[175] Title VII's anti-retaliation provision is broad and protects an employee from conduct, whether related to employment or not, that a reasonable person would have found "materially adverse," meaning that the action "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[176] Additionally, Title

[169] 42 U.S.C. 2000gg–2(a), (d), (e).

[170] *See* 29 CFR part 1601.

[171] *See EEOC* v. *Dolgencorp, LLC*, 899 F.3d 428, 433–34 (6th Cir. 2018) (applying the 300-day time limit to a charge alleging failure to provide a reasonable accommodation under the ADA filed in Tennessee where the state statute prohibited discrimination against individuals with disabilities but did not provide for reasonable accommodations, noting, "[t]he relevant question is whether the state agency has the power to entertain the claimant's disability discrimination claim, not whether state law recognizes the same theories of discrimination as federal law").

[172] *See Enforcement Guidance on Retaliation and Related Issues*, *supra* note 89, at (II)(A)(1) (describing the broad protection of the participation clause); *id.* at (II)(A)(2), (2)(a) (describing the broad protection of the opposition clause).

[173] *See* EEOC, *Enforcement Guidance on Non-Waivable Employee Rights under EEOC Enforced Statutes*, (II) (1997), *https://www.eeoc.gov/laws/guidance/enforcement-guidance-non-waivable-employee-rights-under-eeoc-enforced-statutes* ("[P]romises not to file a charge or participate in an EEOC proceeding are null and void as a matter of public policy. Agreements extracting such promises from employees may also amount to separate and discrete violations of the anti-retaliation provisions of the civil rights statutes.").

[174] *See* 42 U.S.C. 2000gg–2(f)(1) (using the same language as 42 U.S.C. 2000e–3(a)).

[175] *See Enforcement Guidance on Retaliation*, *supra* note 89, at (II)(A); *see also id.* at (II)(A)(1), (2) (describing protected activity under Title VII's anti-retaliation clause).

[176] *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 68 (2006) (internal citations and quotation marks omitted).

VII's anti-retaliation provision protects employees, applicants, and former employees.[177] The same interpretations apply to the PWFA's anti-retaliation provision.[178]

7. Section 1636.5(f) contains three other provisions based on the statutory language and established anti-retaliation concepts under Title VII and the ADA.

8. First, 42 U.S.C. 2000gg–2(f)(1) protects ''any employee,'' not only ''a qualified employee with a known limitation''; therefore, an employee, applicant, or former employee need not establish that they have a known limitation or are qualified (as those terms are defined in the PWFA) to bring a claim under 42 U.S.C. 2000gg–2(f)(1).[179]

9. Second, a request for a reasonable accommodation under the PWFA constitutes protected activity, and therefore retaliation for such a request is prohibited.[180]

10. Third, an employee, applicant, or former employee does not have to be actually deterred from exercising or enjoying rights under this section for the retaliation to be actionable.[181]

1636.5(f)(2) Prohibition Against Coercion

11. The PWFA's anti-coercion provision uses the same language as the ADA's interference provision, with one minor variation in the title of the section.[182] The scope of the PWFA anti-coercion provision is broader than the anti-retaliation provision; it reaches those instances ''when conduct does not meet the 'materially adverse' standard required for retaliation.''[183] Following the language of 42 U.S.C. 2000gg–2(f)(2) and consistent with the ADA's analogous interference provision, §1636.5(f)(2) protects individuals, not qualified employees with a known limitation under the PWFA. Thus, the individual need not be an employee, applicant, or former employee and need not establish that they have a known limitation or that they are qualified (as those terms are defined in the PWFA) to bring a claim for coercion under the PWFA.[184]

12. The purpose of this provision is to ensure that employees are free to avail themselves of the protections of the statute. Thus, consistent with the ADA regulation for the analogous provision, §1636.5(f)(2) includes ''harass'' in the list of prohibitions; the inclusion is intended to characterize the type of adverse treatment that may in some circumstances violate the coercion provision.[185] Section 1636.5(f)(2) also states that an individual does not actually have to be deterred from exercising or enjoying rights under this section for the coercion to be actionable.[186]

13. Importantly the coercion provision does not apply to any and all conduct or statements that an individual finds intimidating; it only prohibits conduct that is reasonably likely to interfere with the exercise or enjoyment of PWFA rights.[187]

Some examples of coercion include:

• coercing an individual to relinquish or forgo an accommodation to which they are otherwise entitled;

• intimidating an applicant from requesting an accommodation for the application process by indicating that such a request will result in the applicant not being hired;

[177] *See* 42 U.S.C. 2000e–3(a). The statute at 42 U.S.C. 2000gg–2(f)(1) applies to an ''employee'' which 42 U.S.C. 2000gg(3) defines to include applicants. The statute at 42 U.S.C. 2000gg(3) relies on the Title VII definition of employee, which includes former employees, where relevant. *See also Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997) (finding former employees are protected under Title VII's anti-retaliation provision).

[178] All retaliatory conduct under Title VII (and the ADA), including retaliation that takes the form of harassment, is evaluated under the legal standard for retaliation. *See Enforcement Guidance on Retaliation*, *supra* note 89, at (II)(B)(3).

[179] *See Enforcement Guidance on Retaliation*, *supra* note 89, at (II)(A)(3).

[180] *See id.* at (II)(A)(2)(e) and Example 10.

[181] *See id.* at (II)(B)(1), (2) (stating that the retaliation ''standard can be satisfied even if the individual was not in fact deterred'' and that ''[i]f the employer's action would be reasonably likely to deter protected activity, it can be challenged as retaliation even if it falls short of its goal'').

[182] The ADA uses the phrase ''Interference, coercion, or intimidation'' to preface the prohibition against interference (42 U.S.C. 12203(b)), whereas the PWFA uses ''Prohibition against coercion'' (42 U.S.C. 2000gg–2(f)(2)). The language of the prohibitions is otherwise identical.

[183] *See Enforcement Guidance on Retaliation*, *supra* note 89, at (III).

[184] *See id.*

[185] *See* 29 CFR 1630.12(b); *see also Enforcement Guidance on Retaliation*, *supra* note 89, at text accompanying n.177 (stating, with regard to the ADA, that ''[t]he statute, regulations, and court decisions have not separately defined the terms 'coerce,' 'intimidate,' 'threaten,' and 'interfere.' Rather, as a group, these terms have been interpreted to include at least certain types of actions which, whether or not they rise to the level of unlawful retaliation, are nevertheless actionable as interference.'').

[186] *See Enforcement Guidance on Retaliation*, *supra* note 89, at (II)(B)(1), (2) (noting that actions can be challenged as retaliatory even if the person was not deterred from engaging in protected activity).

[187] *See id* at (III) (discussing the ADA's interference provision).

• issuing a policy or requirement that purports to limit an employee's rights to invoke PWFA protections (e.g., a fixed leave policy that states ''no exceptions will be made for any reason'');

• interfering with a former employee's right to file a PWFA lawsuit against a former employer by stating that a negative job reference will be given to prospective employers if the suit is filed; and

• subjecting an employee to unwarranted discipline, demotion, or other adverse treatment because they assisted a coworker in requesting a reasonable accommodation.[188]

Possible Violations of 42 U.S.C. 2000gg–2(f) (§1636.5(f)) Based on Seeking Supporting Documentation During the Reasonable Accommodation Process and Disclosure of Medical Information

14. Seeking documentation or information that goes beyond the parameters laid out in §1636.3(l) when an employee requests a reasonable accommodation under the PWFA may violate 42 U.S.C. 2000gg–2(f) (§1636.5(f)) because seeking such information or documentation might well dissuade a reasonable person from engaging in protected activity, such as requesting a reasonable accommodation, or might constitute coercion. Circumstances under which going beyond the parameters of §1636.3(l) may violate 42 U.S.C. 2000gg–2(f) (§1636.5(f)) include:

• Seeking supporting documentation or information in response to an employee's request for reasonable accommodation when it is not reasonable under the circumstances for the covered entity to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and needs an adjustment or change at work due to the limitation, whether or not the employee provides the documentation or information and whether or not the employer grants the accommodation.

• Continued efforts to obtain more information or supporting documentation when sufficient information or supporting documentation has already been provided to allow the employer to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and the adjustment or change at work that is needed due to the limitation, whether or not the employee provides the documentation or information and whether or not the employer grants the accommodation.[189]

15. Disclosing medical information, threatening to disclose medical information, or requiring an employee to share their medical information other than in the limited situations set out in section *1636.7(a)(1)* of this appendix under *Prohibition on Disability-Related Inquiries and Medical Examinations and Protection of Medical Information* also may violate 42 U.S.C. 2000gg–2(f) (§1636.5(f)) because such actions might well dissuade a reasonable person from engaging in protected activity, such as requesting a reasonable accommodation, or might constitute coercion.[190]

16. Actions that the courts or the Commission have previously determined may be retaliation or interference under Title VII or the ADA may violate the retaliation and coercion provisions of the PWFA as well. Depending on the facts, a covered entity's retaliation for activity protected under the PWFA also may violate 42 U.S.C. 2000gg–1(1) (because these actions may make the accommodation ineffective) or 2000gg–1(5) (prohibiting adverse actions) (§1636.4(a) and (e)).

17. The following examples could violate 42 U.S.C. 2000gg–2(f) and also may violate 42 U.S.C. 2000gg–1(1), (5) or other laws.

Example #61/Retaliatory Performance Appraisal: Perrin requests a stool to sit on due to her pregnancy which makes standing difficult. Lucy, Perrin's supervisor, denies Perrin's request. The corporate human resources department instructs Lucy to grant the request because there is no undue hardship. Angry about being told to provide the

[188] *See id.*

[189] This is based on a similar policy adopted under the ADA. *See Enforcement Guidance on Disability-Related Inquiries, supra* note 152, at Question 11 (''[W]hen an employee provides sufficient evidence of the existence of a disability and the need for reasonable accommodation, continued efforts by the employer to require that the individual provide more documentation and/or submit to a medical examination could be considered retaliation.''). The Commission notes that if the covered entity can show that it had a good faith belief that the submitted documentation was insufficient and thus sought additional documentation, its actions would not be retaliatory because they would lack the requisite intent.

[190] As described in detail *infra* in section *1636.7(a)(1)* of this appendix under *Prohibition on Disability-Related Inquiries and Medical Examinations and Protection of Medical Information*, the ADA's rules on medical confidentiality apply to medical information obtained under the PWFA and allow for disclosure of such information only in specific, limited circumstances. *See* 42 U.S.C. 12112(d)(3); 29 CFR 1630.14; *Enforcement Guidance on Disability-Related Inquiries, supra* note 152, at text accompanying nn.9–10; *Enforcement Guidance: Preemployment Disability-Related Questions, supra* note 152, at text accompanying n.6.

reasonable accommodation, Lucy thereafter gives Perrin an unjustified poor performance rating and denies Perrin's request to attend training that Lucy approves for Perrin's coworkers.

Example #62/Retaliatory Surveillance: Marisol files an EEOC charge after Cyrus, her supervisor, refuses to provide her with the reasonable accommodation of help with lifting following her cesarean section. Marisol also alleges that after she requested the accommodation, Cyrus asked two coworkers to: conduct surveillance on Marisol, including watching her at work; note with whom she associated in the workplace; suggest to other employees that they should avoid her; and report her breaks to Cyrus, who said he kept a record of this information ''just in case.''

Example #63/Seeking Supporting Documentation Beyond §1636.3(l): Mara provides her employer with a note from her health care provider explaining that she is pregnant and will need the functions of her position that require her to be around certain chemicals to be temporarily suspended. Mara's supervisor requires that Mara confirm the pregnancy through an ultrasound, even though the employer already has sufficient information to determine whether Mara has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and needs an adjustment or change at work due to the limitation.

Example #64/Dissuaded from Requesting an Accommodation: During an interview at an employment agency, Arden tells the human resources staffer, Stanley, that Arden is dealing with complications from their recent childbirth and may need time off for doctor's appointments during their first few weeks at work. Stanley counsels Arden that needing leave so soon after starting will be a ''black mark'' on their application and that it would be a waste of time for the employment agency to try to find work for Arden.

Example #65/Threatening Future Employment: Merritt, who gets jobs through an employment agency, is fired after requesting an accommodation under the PWFA. The employment agency refuses to refer Merritt to other employers, telling Merritt that the agency only refers workers who will not cause any trouble.

Example #66/Disciplined for Assisting Other Employees: Jessie, a factory union steward, ensures that workers know about their rights under the PWFA and encourages employees with known limitations to ask for reasonable accommodations. Jessie helps employees navigate the reasonable accommodation process and provides suggestions of possible reasonable accommodations. Factory supervisors, annoyed by the number of PWFA reasonable accommodation requests, write up Jessie for trivial timekeeping violations and other actions that had not been deemed worthy of discipline prior to Jessie assisting other employees with their PWFA accommodation requests.

Example #67/Negative Reference: While she was pregnant, Laila requested and received the reasonable accommodation of a temporary suspension of the essential function of moving heavy boxes and placement in the light duty program. After giving birth, Laila tells her employer that she has decided to resign and stay home for a year. Her employer responds that if Laila follows through and resigns now, the employer will have no choice but to give her a negative reference because Laila demanded an accommodation but did not have the loyalty to come back after having her baby.

Example #68/Seeking Supporting Documentation Beyond §1636.3(l): Robbie, a retail worker, is pregnant. Her job requires her to stand at a cash register. Because of her pregnancy, Robbie has difficulty standing for long periods of time. Robbie explains the situation to the manager, who requires Robbie to produce a signed doctor's note saying that Robbie is pregnant and needs to sit. Because Robbie is pregnant and has requested one of the simple modifications that will virtually always be found to be a reasonable accommodation that does not impose an undue hardship, and she has confirmed the limitation and her need for the modification due to the limitation, the manager is not permitted to seek supporting documentation, as set forth in §1636.3(l)(1)(iii).

Example #69/Disciplined Through Workplace Policy: Tina gave birth and started a new job. She is experiencing urinary incontinence related to, affected by, or arising out of childbirth and needs time to attend a medical appointment. Her new employer has a policy that employees cannot be absent during the first 90 days of work. Tina requests and is given the reasonable accommodation of time to attend her medical appointment, but then is issued a disciplinary write-up for missing work during her first 90 days.

Example #70/Retaliatory Failure to Provide Interim Reasonable Accommodation: Dominique is lactating and, based on the recommendation of her health care provider, requests additional safety gear and protection to reduce the risk that chemicals she works with will contaminate her breast milk. The equipment has to be ordered, and the employer puts Dominique on unpaid leave while waiting for the equipment, although there is available work that Dominique could perform that would not require her to be around the chemicals while she waits for the additional safety gear. Additionally, her supervisor tells human resources staff that he is tired of accommodating Dominique because she asked for accommodations during her pregnancy as well and there has to be an end to her requests.

Example #71/Retaliation for Requesting Safety Information: Wynne is pregnant and is in a probationary period as a janitor. She asks her supervisor for safety information about the cleaning products that she handles as part of her job and explains it is to help her determine if she needs to ask for a reasonable accommodation regarding exposure to the chemicals. Her supervisor tells her not to worry and warns her that trying to get this kind of information will mark her as a troublemaker. During her first review near the end of the probationary period, the supervisor notes that, for an entry-level janitor, Wynne asks many questions and behaves like a troublemaker. The supervisor terminates Wynne even though she was performing satisfactorily.

Example #72/Seeking Supporting Documentation Beyond §1636.3(l): An employer adopts a policy requiring everyone who requests a reasonable accommodation to provide medical documentation in support of the request. Cora, a production worker who is 8 months pregnant, requests additional bathroom breaks. The employer applies the policy to her, refusing to provide the accommodation until she submits supporting documentation, even though under §1636.3(l)(1)(iii) the employer is not permitted to seek documentation in this situation.

Example #73/Seeking Supporting Documentation Beyond §1636.3(l) and Failure to Provide Accommodation: An employer adopts a policy requiring everyone who requests a reasonable accommodation to provide supporting documentation. Fourteen months after giving birth, Alex wants to continue to pump at work, which is beyond the length of time the PUMP Act requires. She explains her request to her supervisor and asks that she have breaks to pump and that the room provided have a chair, a table, access to electricity and running water. Alex's employer refuses to grant the accommodations unless Alex provides supporting documentation from her health care provider. Alex cannot provide the information, so she stops pumping. In addition to potentially violating 42 U.S.C 2000gg–2(f), the employer cannot use the lack of supporting documentation as a defense to the failure to provide the accommodations because seeking documentation was not reasonable under the circumstances as set forth in §1636.3(l)(1)(iv) and thus these actions may violate 42 U.S.C 2000gg–1(1) (§1636.4(a)(3)).

Example #74/Retaliatory Waiver of Rights: An employer adopts a policy under which an employee who files a claim with the EEOC or another outside agency automatically waives their right to have a complaint processed through the employer's internal complaint procedure. Rebecca submitted an internal complaint to her supervisor after her request for a reasonable accommodation was denied and, a month later, filed a charge with the EEOC. The employer notified her that it would stop investigating her internal complaint until the EEOC matter was resolved, but that she would be free to pursue the internal resolution of her complaint if she withdrew her EEOC charge. The employer's policy is retaliatory because it adversely affects the employee by stripping her of an employment privilege for filing a charge with the EEOC.

Example #75/Disclosure of Medical Information: Caroline requested and received an accommodation under the PWFA in the form of a lifting restriction due to a back injury related to her pregnancy. Caroline's accommodation was granted early in her third trimester. Two weeks after her accommodation went into effect, during a team meeting, Caroline's supervisor went around the table describing each team members' duties, sighing as she explained that Caroline had a back injury due to pregnancy that prevented her from lifting and that Caroline's injury was the reason that other team members had extra duties. At each biweekly team meeting for the next two months, Caroline's supervisor noted that team members continued to be assigned extra duties because of Caroline's back injury. In addition to potential violation 42 U.S.C 2000gg–2(f), this disclosure of medical information violates the ADA's confidentiality rules, as it does not fit within any of the five disclosure exceptions.

Example #76/Retaliatory Harassment: Benita requested and received an accommodation under the PWFA in the form of a one-hour delayed start time due to morning sickness related to her pregnancy. Benita's coworkers are aware that she is receiving the accommodation due to a condition related to her pregnancy. A few days after Benita's accommodation is granted, her coworkers start to make unwelcome, critical comments about her ''late'' arrivals on a frequent basis, including that other pregnant individuals were able to start work on time during their pregnancies, that being able to ''work during pregnancy is mind over matter,'' and calling her ''lazy'' and a ''slacker.'' The coworkers schedule meetings that begin a half hour before Benita arrives in the office and complain to Benita's supervisor that she arrives late to those meetings. Because she cannot attend the meetings, Benita falls behind on her work.

1636.5(g) Limitation on Monetary Damages

18. The PWFA at 42 U.S.C. 2000gg–2(g), using the language of the Civil Rights Act of 1991, 42 U.S.C. 1981a(a)(3), provides a limitation on damages based on a ''good faith effort'' to provide a reasonable accommodation. The covered entity bears the burden of proof for this affirmative defense. This limitation on damages applies to violations of 42 U.S.C. 2000gg–1(1) (§1636.4(a)) only. It does

not apply to any other provisions of the PWFA.

VI. 1636.7 RELATIONSHIP TO OTHER LAWS

1636.7(a)(1) Relationship to Other Laws in General

1. The PWFA does not limit the rights of individuals affected by pregnancy, childbirth, or related medical conditions under a Federal, State, or local law that provides greater or equal protection. It is equally true that a Federal, State, or local law that provides less protection for individuals affected by pregnancy, childbirth, or related medical conditions than the PWFA does not limit the rights provided by the PWFA.

2. Federal laws, including, but not limited to, Title VII, the ADA, the FMLA, the Rehabilitation Act, the PUMP Act, and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, provide protections for employees affected by pregnancy, childbirth, or related medical conditions. Numerous States and localities also have laws that provide accommodations for pregnant employees.[191] All of the protections for employees affected by pregnancy, childbirth, or related medical conditions in these laws are unaffected by the PWFA. If these laws provide greater protections than the PWFA, the greater protections will apply. For example, the State of Washington's Healthy Starts Act provides that certain accommodations, including lifting restrictions of 17 pounds or more, cannot be the subject of an undue hardship defense.[192] If an employee in Washington is seeking a lifting restriction as a reasonable accommodation for a pregnancy-related reason under the Healthy Starts Act, an employer in Washington cannot argue that a lifting restriction of 20 pounds is an undue hardship, even though that defense could be raised if the claim were brought under the PWFA.

3. Section 1636.7(a) also applies to Federal or State occupational health and safety laws and collective bargaining agreements (CBAs). Thus, nothing in the PWFA limits an employee's rights under laws such as the OSH Act or under a CBA if either of those provide protection greater than or equal to that of the PWFA.

The PWFA and Title VII

4. The PWFA uses many terms and definitions from Title VII, and conduct that is the subject of PWFA claims also may give rise to claims under Title VII. For example, a qualified pregnant employee who sought leave for recovery from childbirth and was terminated may have a claim under both Title VII for sex discrimination and the PWFA for failure to accommodate, adverse employment action, or retaliation.[193]

5. Under Title VII, employees affected by pregnancy, childbirth, or related medical conditions may be able to receive accommodations if they can identify a comparator similar in their ability or inability to work.[194] Under the PWFA, qualified employees with physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions are entitled to reasonable accommodations (absent undue hardship) whether or not other employees have those accommodations and whether or not the affected employees are similar in their ability or inability to work as employees not so affected. Additionally, if the covered entity offers a neutral reason or policy to explain why qualified employees affected by pregnancy, childbirth, or related medical conditions cannot access a specific benefit, the qualified employee with a known limitation under the PWFA still may ask for a waiver of that policy as a reasonable accommodation. Under the PWFA, the employer must grant the waiver, or another reasonable accommodation, absent undue hardship. If, for example, an employer denies a qualified pregnant employee's request to join its light duty program as a reasonable accommodation because the program is for employees with on-the-job injuries, it may be a reasonable accommodation for the employer's light duty program policy to be waived. Finally, employers in this situation should remember that if there are others to whom the benefit is extended, the Supreme Court stated in *Young* v. *UPS* that ''[the employer's] reason [for refusing to accommodate a pregnant employee] normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those . . . whom the employer accommodates.'' [195] Thus, if the undue hardship defense of the employer under the PWFA is based solely on cost or convenience, that defense could, under certain fact patterns, nonetheless lead to liability under Title VII.

6. Finally, nothing in the PWFA, this part, or this Interpretive Guidance should be interpreted to reduce or limit any protections provided by Title VII.

The PWFA and the ADA

7. The PWFA uses many terms and definitions from the ADA. Conduct that is the subject of PWFA claims also may give rise to

[191] U.S. Dep't of Lab., Women's Bureau, *Employment Protections for Workers Who Are Pregnant or Nursing, www.dol.gov/agencies/wb/pregnant-nursing-employment-protections* (last visited Mar. 25, 2024).

[192] Wash. Rev. Code 43.10.005(1)(d).

[193] *See* 42 U.S.C. 2000gg–1(1), (5); 2000gg–2(f).

[194] 42 U.S.C. 2000e(k).

[195] 575 U.S. at 229.

claims under the ADA. For example, an employee with postpartum depression seeking a reasonable accommodation to attend treatment whose employer fails to provide the accommodation may have a claim under both the PWFA and the ADA (and possibly also Title VII). Similarly, an employee who has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions may have both a known limitation under the PWFA and a disability under the ADA (where the physical or mental condition substantially limits a major life activity, including a major bodily function—in other words, the individual would have an ''actual'' ADA disability).[196] In such case, the employee may be entitled to accommodation, absent undue hardship, under both the PWFA and the ADA.

8. While it will depend on the specific facts, if an employee could be covered under either the PWFA or the ADA, a covered entity's analysis, in most cases, should begin with the PWFA because the definition of ''known limitation'' under the PWFA covers situations when the ADA does not apply.[197]

9. Requests for accommodation under the PWFA may be indistinguishable from requests for accommodation under the ADA and there will be situations in which both statutes apply. In one instance, the PWFA known limitation also may be an ADA disability. In another, employees with existing disabilities may seek ADA coverage for those, while also invoking the PWFA to address limitations related to pregnancy, childbirth, or related medical conditions interacting with an existing disability. In these situations, employees with disabilities may require additional or different accommodations and are entitled to them, absent undue hardship, under the PWFA and/or the ADA.

10. There also will be situations where an employee with a disability who has an accommodation under the ADA seeks and is granted an accommodation under the PWFA. For example, an employee who uses an adaptive keyboard as an ADA reasonable accommodation temporarily may be assigned to a new position as part of an accommodation under the PWFA because an essential function of their original position has been temporarily suspended. In this situation, the employer must continue to provide the adaptive keyboard as an ADA reasonable accommodation if it is necessary for the employee to perform the essential functions of the new position.

11. Because an individual may be covered by both the ADA and the PWFA, and the PWFA provides at 42 U.S.C. 2000gg–5(a)(1) that nothing in the statute shall be construed to invalidate or limit the powers, remedies, and procedures under any Federal law that provides greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions, a covered entity must apply the law that provides the worker the most protection.

12. Examples Regarding Disability and Pregnancy:

Example #77/Disability and Pregnancy: Roxy is an accountant who has developed gestational hypertension and preeclampsia late in her pregnancy, causing damage to her kidneys. As a result, Roxy needs leave for periodic medical appointments to protect her own health and the health of her pregnancy. Because Roxy's condition is both a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions and a condition that substantially limits one of her major bodily functions (kidney function), it qualifies as both a limitation under the PWFA and a disability under the ADA. Absent undue hardship, the employer must provide Roxy with the accommodation she requires due to her pregnancy (under the PWFA) and her disability (under the ADA). Of course, one effective accommodation may be sufficient to satisfy requirements under both statutes in this instance.

Example #78/Disability and Pregnancy: Farah is a nurse who has diabetes, and her employer has provided her with the accommodation of breaks to eat small meals throughout the day and breaks to check her insulin levels. When Farah becomes pregnant, she experiences morning sickness that makes it difficult for her to eat in the morning. As a result, she needs more breaks for eating later in the day and occasionally needs a break to rest while at work. Absent undue hardship, the employer must provide Farah with the additional accommodations she requires due to her pregnancy under the PWFA.

13. In cases where both the ADA and PWFA apply, if an employer fails to provide an accommodation the employee could potentially file a claim for failure to accommodate under both the ADA and the PWFA. They also could file a separate ADA claim if they experienced disparate treatment based on a disability.

Prohibition on Disability-Related Inquiries and Medical Examinations and Protection of Medical Information

14. Important protections from the ADA that apply to all covered employees continue to apply when employees are seeking accommodations under the PWFA. First, the rules limiting the ability of covered entities to make disability-related inquiries or require medical exams in the ADA apply to all disability-related inquiries and medical exams

[196] 42 U.S.C. 12102(1); 29 CFR 1630.2(g).

[197] 42 U.S.C. 2000gg(4).

including those made in the context of requests for PWFA accommodation.[198] For example, a covered entity may not ask an employee who is seeking an accommodation under the PWFA whether the employee has asked for other accommodations in the past or has preexisting conditions because these questions are likely to elicit information about a disability and are not job-related and consistent with business necessity in this context. Similarly, an employer's response to an employee's request for accommodation under the PWFA that requires the employee to complete a release permitting the employer to obtain the employee's complete medical records would not be job-related or consistent with business necessity.

15. Second, under the ADA, covered entities are required to keep medical information of all applicants, employees, and former employees (whether or not those individuals have disabilities) confidential, with limited exceptions.[199] The Commission has repeatedly stated that the requirement applies to all medical information in the employer's possession, whether obtained through inquiries pursuant to the ADA or otherwise.[200] Thus, this protection applies to medical information obtained under the PWFA, including medical information provided voluntarily and medical information provided as part of the reasonable accommodation process. Moreover, as a practical matter, in many circumstances under the PWFA, the medical information obtained by an employer may involve a condition that could be a disability; rather than an employer attempting to parse out whether to keep certain information confidential or not, all medical information should be kept confidential.[201] Therefore, medical information obtained under the PWFA is subject to the ADA requirement that information regarding the medical condition or history of any employee be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record.[202]

16. That an employee is pregnant, has recently been pregnant, or has a medical condition related to pregnancy or childbirth is medical information. The ADA requires that employers keep such information confidential and only disclose it within the confines of the limited disclosure rules described in paragraphs 17 and 18 of this section. Similarly, disclosing that an employee is receiving or has requested an accommodation under the PWFA, or has limitations for which they requested or are receiving a reasonable accommodation under the PWFA, usually amounts to a disclosure that the employee is pregnant, has recently been pregnant, or has a related medical condition.

17. As set forth at 29 CFR 1630.14, under the ADA, medical information must be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with the ADA shall be provided relevant information on request.

18. In addition to what is stated in the ADA regulation: covered entities (iv) may disclose the medical information to State workers' compensation offices, State second

[198] *See* 42 U.S.C. 12112(d); 29 CFR 1630.13, 1630.14.

[199] 42 U.S.C. 12112(d)(3)(B); 29 CFR 1630.14(b)(1)(i) through (iii), (c)(1), (d)(4); *Enforcement Guidance on Disability-Related Inquiries*, *supra* note 152, at text accompanying nn.9–10 (''The ADA requires employers to treat any medical information obtained from a disability-related inquiry or medical examination . . ., as well as any medical information voluntarily disclosed by an employee, as a confidential medical record. Employers may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA.'') and text after n.12 (''[T]he ADA's restrictions on inquiries and examinations apply to all employees, not just those with disabilities.''); *Enforcement Guidance: Preemployment Disability-Related Questions*, *supra* note 152, at text accompanying n.6 (''Medical information must be kept confidential.'').

[200] *See supra* note 199. This policy also appears in numerous EEOC technical assistance documents. *See, e.g.*, EEOC, *Visual Disabilities in the Workplace and the Americans with Disabilities Act*, at text preceding n.43 (2023), *https://www.eeoc.gov/laws/guidance/visual-disabilities-workplace-and-americans-disabilities-act#q8* (''With limited exceptions, an employer must keep confidential any medical information it learns about an applicant or employee.'').

[201] Requests for accommodation under the PWFA also may overlap with FMLA issues, and the FMLA requires medical information to be kept confidential as well. 29 CFR 825.500(g).

[202] 42 U.S.C. 12112(d)(3)(B); 29 CFR 1630.14(b)(1), (c)(1), and (d)(4)(i); *see Enforcement Guidance: Preemployment Disability-Related Questions*, *supra* note 152, at text accompanying the question ''Can medical information be kept in an employee's regular personnel file?''

injury funds, or workers' compensation insurance carriers in accordance with State workers' compensation laws; and (v) may use the medical information for insurance purposes.[203] All these disclosure exceptions apply to medical information obtained under the PWFA. Disclosing medical information in any circumstances, other than those set forth in these five recognized disclosure exceptions, violates the ADA's confidentiality rule.

19. In addition, as explained in section *1636.5(f)* of this appendix under *Possible Violations of 42 U.S.C. 2000gg–2(f) (§1636.5(f)) Based on Seeking Supporting Documentation During the Reasonable Accommodation Process and Disclosure of Medical Information*, disclosing medical information, threatening to disclose medical information, or requiring an employee to share their medical information other than in the limited situations set out in paragraphs 17 and 18 of this section also may violate 42 U.S.C. 2000gg–2(f) (§1636.5(f)).[204] Given the protections for confidential medical information under the ADA and the potential of violating 42 U.S.C. 2000gg–2(f), if a covered entity is under an obligation to disclose medical information received under the PWFA in any circumstances other than those provided in this Interpretive Guidance, before doing so it should inform the individual to whom the information relates of its intent to disclose the information; identify the specific reason for the disclosure; and provide sufficient time for the individual to object.

20. Finally, nothing in the PWFA, this part, or this Interpretive Guidance should be interpreted to reduce or limit any protections provided by the ADA.

1636.7(a)(2) Limitations Related to Employer-Sponsored Health Plans

21. The statute at 42 U.S.C. 2000gg–5(a)(2) states that nothing in the PWFA shall be construed to require an employer-sponsored health plan to pay for or cover any item, procedure, or treatment and, further, that nothing in the PWFA shall be construed to affect any right or remedy available under any other Federal, State, or local law with respect to any such payment or coverage requirement. For example, nothing in the PWFA requires, or forbids, an employer to pay for health insurance benefits for an abortion.

1636.7(b) Rule of Construction

22. The statute at 42 U.S.C. 2000gg–5(b) provides a ''rule of construction'' stating that the PWFA is ''subject to the applicability to religious employment'' set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1(a). The relevant portion of section 702(a) provides that Title VII shall not apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.[205] Section 1636.7(b) reiterates the PWFA statutory language and adds that nothing in 42 U.S.C. 2000g–5(b) or this part should be interpreted to limit the rights of a covered entity under the U.S. Constitution or the rights of an employee under other civil rights statutes. As with assertions of section 702(a) of the Civil Rights Act of 1964 in Title VII matters, when 42 U.S.C. 2000gg–5(b) is asserted by a respondent employer, the Commission will consider the application of the provision on a case-by-case basis.[206]

VII. 1636.8 SEVERABILITY

1. The PWFA at 42 U.S.C. 2000gg–6 contains a severability provision regarding the statute. Section 1636.8 repeats the statutory provision and also addresses the Commission's intent regarding the severability of the Commission's regulations in this part and this Interpretive Guidance.

2. Following Congress' rule for the statute, in places where this part uses the same language as the statute, if any of those identical regulatory provisions, or the application of those provisions to particular persons

[203] *See Enforcement Guidance: Preemployment Disability-Related Questions*, *supra* note 152, at text accompanying the heading ''Confidentiality.''

[204] *See, e.g., Haire* v. *Farm & Fleet of Rice Lake, Inc.*, No. 2:21–CV–10967, 2022 WL 128815, at *8–*9 (E.D. Mich. Jan. 12, 2022) (disclosing personal and confidential information about an employee's medical condition and mental health episodes to her coworkers could constitute retaliation under Title VII); *Holtrey* v. *Collier Cnty. Bd. of Cnty. Comm'rs*, No. 2:16–CV–00034, 2017 WL 119649, at *3 (M.D. Fla. Jan. 12, 2017) (determining that an employer's disclosure of its employee's confidential medical information about his genito-urinary system to his coworkers and subordinates could constitute retaliation under FMLA, relying on Title VII's definition of ''materially adverse action'').

[205] The PWFA makes no mention of section 703(e)(2) of the Civil Rights Act of 1964, which provides a second statutory exemption for religious educational institutions in certain circumstances.

[206] The case-by-case analysis of religious defenses asserted in response to a charge under the PWFA is consistent with the Commission's framework evaluating similar defenses under other statutes the Commission enforces. *See Compliance Manual on Religious Discrimination*, *supra* note 163, at (12–I)(C).

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

3. In other places, where this part or this Interpretive Guidance provide additional guidance to carry out the PWFA, including examples of reasonable accommodations, following Congress' intent regarding the severability of the provisions of the statute, it is the Commission's intent that if any of those regulatory provisions or the Interpretive Guidance or the application of those provisions or the Interpretive Guidance to particular persons or circumstances is held invalid or found to be unconstitutional, the remainder of this part or the Interpretive Guidance and the application of that provision of this part or the Interpretive Guidance to other persons or circumstances shall not be affected.

PART 1640—PROCEDURES FOR COORDINATING THE INVESTIGATION OF COMPLAINTS OR CHARGES OF EMPLOYMENT DISCRIMINATION BASED ON DISABILITY SUBJECT TO THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT OF 1973

Sec.

AUTHORITY: 5 U.S.C. 301; 29 U.S.C. 794(d); 42 U.S.C. 12117(b).

SOURCE: 59 FR 39904, 39908, Aug. 4, 1994, unless otherwise noted.

§ 1640.1 Purpose and application.

(a) This part establishes the procedures to be followed by the Federal agencies responsible for processing and resolving complaints or charges of employment discrimination filed against recipients of Federal financial assistance when jurisdiction exists under both section 504 and title I.

(b) This part also repeats the provisions established by 28 CFR 35.171 for determining which Federal agency shall process and resolve complaints or charges of employment discrimination:

(1) That fall within the overlapping jurisdiction of titles I and II (but are not covered by section 504); and

(2) That are covered by title II, but not title I (whether or not they are also covered by section 504).

(c) This part also describes the procedures to be followed when a complaint or charge arising solely under section 504 or title I is filed with a section 504 agency or the EEOC.

(d) This part does not apply to complaints or charges against Federal contractors under section 503 of the Rehabilitation Act.

(e) This part does not create rights in any person or confer agency jurisdiction not created or conferred by the ADA or section 504 over any complaint or charge.

§ 1640.2 Definitions.

As used in this part, the term:

Americans with Disabilities Act of 1990 or *ADA* means the Americans with Disabilities Act of 1990 (Pub. L. 101–336, 104 Stat. 327, 42 U.S.C. 12101–12213 and 47 U.S.C. 225 and 611).

Assistant Attorney General refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice, or his or her designee.

Chairman of the Equal Employment Opportunity Commission refers to the Chairman of the United States Equal Employment Opportunity Commission, or his or her designee.

Civil Rights Division means the Civil Rights Division of the United States Department of Justice.

Designated agency means any one of the eight agencies designated under §35.190 of 28 CFR part 35 (the Department's title II regulation) to implement and enforce title II of the ADA