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The Federal Pregnant Workers Fairness Act: Statutory Requirements, Regulations, and Need (Especially in Post-*Dobbs* America)

By Deborah A. Widiss*

Abstract

The federal Pregnant Workers Fairness Act, enacted in December 2022, is landmark legislation that will help ensure workers can stay healthy through a pregnancy. It responds to the reality that pregnant workers may need small changes at work, such as permission to sit periodically, carry a water bottle, relief from heavy lifting, or reduced exposure to potentially dangerous chemicals. Workers may also need schedule modifications or leave for prenatal appointments, childbirth, or post-partum recovery, or accommodations to address medical conditions related to pregnancy or childbirth.

Previously, federal sex discrimination law and federal disability law sometimes required employers to provide such accommodations, but many pregnancy-related needs fell between the cracks. Both employees and employers were confused about how the requirements of those laws interacted. PWFA, passed with strong bipartisan support, provides a clear standard modeled on disability law: employers must provide reasonable accommodations for pregnancy, childbirth, and related medical conditions, unless doing so would be an undue hardship.

This article analyzes the new federal statute's substantive provisions in detail, as well as key legislative history, models for the statutory language, and the Equal Employment Opportunity Commission's regulations to implement the new law. It explains

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the basic reasonable accommodation requirement, other substantive requirements, the likely scope of "related medical conditions," and the remedies available if violations occur. The article also highlights how new restrictions on abortion access make PWFA even more essential. In states that have sharply curtailed abortion rights, more women are carrying pregnancies, including high-risk pregnancies, to term. PWFA is not a substitute for the autonomy to make decisions regarding reproductive health, but it can help keep pregnant workers healthy and assure they are treated with dignity and fairness.

I. INTRODUCTION

In December 2022, a broad coalition of workers' and women's rights advocates, as well as the Chamber of Commerce and other key business organizations, cheered the enactment of the federal Pregnant Workers Fairness Act (PWFA).[1] Previously, federal sex discrimination law and federal disability law sometimes required employers to provide accommodations for pregnant workers, but many pregnancy-related needs fell between the cracks.[2] Both employees and employers were confused about how the requirements of those laws interacted. PWFA provides a clear standard, modeled on disability law: employers must provide "reasonable accommodations" for employees with known limitations related to pregnancy, childbirth, or related medical conditions, unless doing so would be an "undue hardship."[3] This landmark legislation will help pregnant workers stay gainfully employed, without being forced into the untenable position of choosing between their economic security and a healthy pregnancy.

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[1] *See, e.g.*, J. Edward Moreno, *Accommodating Pregnant Workers: New Workplace Law Explained*, BLOOMBERG (Jan. 3, 2023, 9:30 AM), https://news.bloomberglaw.com/daily-labor-report/accommodating-pregnant-workers-new-workplace-law-explained [https://perma.cc/KG5S-CKMR] (noting the bill had gathered bipartisan approval, including from "top employer lobbying groups such as the US Chamber of Commerce and the Society for Human Resource Management"); H.R. REP. NO. 117-27, at 5–8 (2021) (identifying more than 230 organizations that endorsed PWFA); Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714, 54714 & n.2 (proposed Aug. 11, 2023) (EEOC proposed rule detailing broad range of support for PWFA).

[2] *See infra* Part II.

[3] 42 U.S.C. § 2000gg-1(1).

PWFA responds to the reality that pregnant and postpartum workers sometimes need accommodations at work to protect their health and safety.[4] For example, they may ask for permission to sit periodically, carry a water bottle, or modify uniforms. They might seek to be excused from heavy lifting or to reduce exposure to potentially dangerous chemicals. Some workers may need schedule modifications to allow them to attend prenatal appointments or recover from childbirth, permission to work remotely, or simply extra restroom breaks. Employees may also need modifications at work to address conditions that are related to pregnancy, but occur before conception or after childbirth, such as infertility or lactation. Although some employees can make such changes without seeking formal permission, many workers, especially low-wage workers, do not have that latitude. And although some employers routinely grant such requests, many others do not.

This article explains how PWFA addresses workers' needs related to pregnancy, childbirth, or related medical conditions.[5] The basic requirement—to provide a reasonable accommodation so long as it is not an undue hardship—is modeled on the Americans with Disabilities Act (ADA), which requires comparable support for conditions that qualify as disabilities under that statute. PWFA also borrows from the ADA an expectation that typically the employer and the employee will engage in an "interactive process" to explore possible accommodations.[6] There are, however, important differences between the ADA and PWFA. For example, in contrast to the ADA, PWFA provides explicitly that an employee can be considered "qualified" even if she is unable to perform an essential function of her job, so long as the inability will be temporary and there is a viable reasonable accommodation to address it.[7] This difference is particularly salient, since most of the needs addressed by PWFA will be relatively short in duration. PWFA also makes clear that employees cannot be *forced* to take leave if other accommodations can meet their needs,[8] and that employees generally will not be required to accept other unrequested accommodations, even if they may be offered out of a stated concern for the worker's safety or health.[9]

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[4] *See infra* Part II.

[5] *See infra* Part III.

[6] *See* 42 U.S.C. § 2000gg(7).

[7] *See id.* § 2000gg(6).

[8] *See id.* § 2000gg-1(4).

[9] *See id.* § 2000gg-1(2).

PWFA will be a key tool in promoting women's equality.[10] Although employment discrimination on the basis of sex, including pregnancy discrimination, has been illegal for decades, pregnant workers have been regularly denied support at work, and sometimes even pushed out of jobs when they asked for accommodations. This was true even if the employer at issue offered comparable accommodations to employees with workplace injuries, or workers with disabilities. Under prior law, this kind of selective denial was theoretically illegal if it was motivated by antipregnancy bias or stereotypical misperceptions about the capacity of pregnant workers,[11] but such cases were very difficult to prove.[12] PWFA provides an explicit clear standard that does not depend on identifying other employees who have received comparable support, or on proving a medical condition meets the standard of a "disability."

In earlier work, I have explored the limitations of the pre-existing federal law,[13] as well as the remarkably effective campaign to pass PWFAs in both red and blue states.[14] My primary objective in this

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[10] Transmen, genderqueer, and non-binary persons may become pregnant and experience the other medical conditions covered by PWFA. PWFA's language is gender neutral, so it should provide support for any person with a relevant health condition. That said, since the vast majority of persons who are pregnant are cisgender women, failure to accommodate pregnant workers implicates women's equality more generally. In this article, I primarily use the term pregnant workers—a purposefully gender-inclusive term. However, as context dictates, I also sometimes refer to pregnant women and use female pronouns. For a thoughtful exploration of the significance of language choices in this context, see Irin Carmon, *You Can Still Say "Woman" But You Shouldn't Stop There*, N.Y. MAG. (Oct. 28, 2021), https://nymag.com/intelligencer/2021/10/abortion-law-trans-inclusive-advocacy.html [https://perma.cc/GM57-NXNT].

[11] *See* Young v. United Parcel Serv., Inc., 575 U.S. 206 (2015).

[12] *See* DINA BAKST, ELIZABETH GEDMARK & SARAH BRAFMAN, A BETTER BALANCE, LONG OVERDUE—IT IS TIME FOR THE FEDERAL PREGNANT WORKERS FAIRNESS ACT 13–16 (2019), https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf [https://perma.cc/S9G9-HX9L] (reporting that in over two-thirds of post-*Young* cases, courts held employers were permitted to deny pregnant workers accommodations).

[13] *See* Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS. L. REV. 961 (2013) [hereinafter Gilbert *Redux*]; *see also* Deborah A. Widiss, *The Interaction of the Pregnancy Discrimination Act and the Americans with Disability Act After* Young v. UPS, 50 U.C. DAVIS L. REV. 1423 (2017).

[14] *See* Deborah A. Widiss, *Pregnant Workers Fairness Acts: Advancing a Progressive Policy in Both Red and Blue America*, 22 NEV. L.J. 1131 (2022).

article is simply to explain the new federal law and the regulations and interpretative guidance issued by the Equal Employment Opportunity Commission (EEOC) to implement it. PWFA will provide essential support to *all* pregnant workers. That said, when I was invited to participate in this particular symposium, exploring the effect of *Dobbs* on work law, I took it as an opportunity to also discuss how PWFA is even more important now that the Supreme Court has held the federal Constitution does not protect a general right to abortion.[15] In approximately half of the states, including much of the South, Midwest, and Great Plains, women are being forced to carry to term pregnancies, including medically-risky pregnancies, that they otherwise might have chosen to terminate. In other cases, essential medical care may be delayed, causing additional health complications for a pregnant worker, even if the pregnancy is ultimately not successful. PWFA is not a substitute for the autonomy to make individual choices regarding reproductive healthcare, but it can play a key role in helping workers stay healthy and gainfully employed throughout a pregnancy.

This article proceeds as follows. Part II explains why pregnant workers might need workplace accommodations and the gaps in federal law that PWFA addresses. Part III explains PWFA's substantive provisions, key legislative and statutory history of the bill, and the EEOC's regulations and interpretive guidance. Part IV examines the post-*Dobbs* landscape, highlighting how PWFA's protections will help address some of the consequences of stringent limitations on access to abortion.

II. NEED

Pregnant workers often request small changes related to work to help keep them safe and healthy during a pregnancy.[16] In almost any pregnancy, a worker will be more comfortable with an option to sit at times during a workday, or to have water or snacks at a job station. Pregnant workers may need a flexible schedule or to take extra restroom breaks, especially if experiencing nausea or morning

[15] *See infra* Part IV.

[16] *See generally* WORKLIFE LAW, PREGNANCY, CHILDBIRTH, AND RELATED MEDICAL CONDITIONS: COMMON WORKPLACE LIMITATIONS AND REASONABLE ACCOMMODATIONS EXPLAINED, https://pregnantatwork.org/wp-content/uploads/Workable-Accommodation-Ideas.pdf [https://perma.cc/CF4E-SMTC].

sickness. Likewise, virtually all pregnant workers will need to modify their clothing as the pregnancy advances. Some employees can make such changes without asking formal permission to do so, or even conceptualizing them as "accommodations." But employees in jobs where the work environment and work time are more tightly regulated often need formal permission to make even small changes to rules around food and drink, seating, breaktimes, or uniforms.

There are other changes that a pregnant worker might request that are more specific to particular jobs. For example, workers in physically-demanding jobs, ranging from construction to healthcare to childcare, may need to ask to be excused from heavy lifting or other tasks that can increase risks of preterm birth, miscarriage, or injury.[17] Pregnant workers in sectors such as agriculture, manufacturing, hair or nail salons, or custodial work may ask to modify their job responsibilities to avoid exposure to potentially harmful chemicals.[18] Excessive heat can increase the risk of certain birth defects, and pregnant people are more vulnerable to heat exhaustion, heat stroke, and dehydration.[19] Accordingly, persons who work outside, or in unusually hot spaces such as commercial kitchens or worksites that lack climate control, might ask for measures to relieve heat effects.[20]

The House Committee that considered PWFA discussed these kinds of needs, as well as studies showing that such requests were routinely denied.[21] For example, the Committee report cited studies from the American College of Obstetricians and Gynecologists (ACOG) that describe the kinds of health risks that can come from

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[17] *See* Leslie A. MacDonald, Thomas R. Waters, Peter G. Napolitano, Donald E. Goddard, Margaret A. Ryan, Peter Nielsen & Stephen D. Hudock, *Clinical Guidelines for Occupational Lifting in Pregnancy: Evidence Summary and Provisional Recommendations*, 209 AM. J. OBSTETRICS & GYNECOLOGY 80 (2013), https://www.sciencedirect.com/science/article/abs/pii/S0002937813002421 [https://perma.cc/D7UP-YACP].

[18] *See* Am. Coll. of Obstetricians & Gynecologists, *ACOG Committee Opinion, No. 832, Reducing Prenatal Exposure to Toxic Environmental Agents*, 138 OBSTETRICS & GYNECOLOGY e40-e54 (2021), https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2021/07/reducing-prenatal-exposure-to-toxic-environmental-agents.pdf [https://perma.cc/7TD9-2XL6].

[19] *See Heat-Reproductive Health*, NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH (May 1, 2023), https://www.cdc.gov/niosh/topics/repro/heat.html [https://perma.cc/N7NA-TUMJ].

[20] *See id.*

[21] *See* H.R. REP. NO. 117-27, at 11–26 (2021).

certain workplace conditions[22] and a study showing that 250,000 pregnant workers were denied accommodation requests each year.[23] Notably, the most common accommodation sought was simply the flexibility to take extra restroom breaks.[24] This responds to the reality that 40 percent of full-time workers in low-wage jobs are not allowed to decide when to take breaks.[25] This can also be a challenge for some kinds of more highly-paid work, as well. For example, Representative Jahana Hayes, a member of the House committee, explained that in her prior work as a high school teacher, she had been denied permission to take extra restroom breaks; as she put it, this denial "led to further complications with bladder issues so what started out as an uneventful pregnancy ended up having complications as a result of this minor accommodation not being met."[26]

The Committee also pointed to studies showing that 75 percent of women are pregnant and employed at some point in their careers, and that their income is essential for many families.[27] In 2017, 41 percent of mothers were the sole or primary breadwinner in their families, and an additional quarter of mothers contributed between 25 and 49 percent of family income.[28] The Committee explained that many pregnant workers who requested and were denied accommodations were forced to go on unpaid leave or simply fired.[29] In addition to the loss of a paycheck, this also sometimes meant the loss of health

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[22] *See id.* at 22 (citing Am. Coll. of Obstetricians & Gynecologists, *ACOG Committee Opinion No. 733, Employment Considerations During Pregnancy and the Postpartum Period*, 131 OBSTETRICS & GYNECOLOGY e115, e117 (2018), https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2018/04/employment-considerations-during-pregnancy-and-the-postpartum-period.pdf [https://perma.cc/Y9G3-H8E6]).

[23] *See id.* (citing NAT'L P'SHIP FOR WOMEN & FAMILIES, LISTENING TO MOTHERS: THE EXPERIENCES OF EXPECTING AND NEW MOTHERS IN THE WORKPLACE 2 (2014), https://nationalpartnership.org/wp-content/uploads/2023/02/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf [https://perma.cc/2XFK-XLKS]).

[24] *See id.*

[25] *See id.* (citing written testimony submitted for a 2019 subcommittee hearing by Emily Martin of the National Women's Law Center).

[26] *See id.* at 23.

[27] *See id.* at 24 (citing BAKST ET AL., *supra* note 12, at 23).

[28] *See id.* (citing SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, BREADWINNING MOTHERS CONTINUE TO BE THE U.S. NORM 5 (2019), https://www.americanprogress.org/article/breadwinning-mothers-continue-u-s-norm [https://perma.cc/Y9ZR-HUES]).

[29] *See id.* at 24–25 (citing BAKST ET AL., *supra* note 12, at 23).

insurance, meaning workers could be faced with the "staggering healthcare costs of childbirth," an average of $30,000 for vaginal delivery and $50,000 for a c-section.[30]

The House Committee explained how federal law prior to PWFA offered only limited support for workers with such accommodation needs.[31] In some circumstances, such accommodations were required by the Pregnancy Discrimination Act, which requires that pregnant workers be treated the "same" as other workers with similar limitations.[32] Thus, if an employer routinely provided support to non-pregnant employees, it would sometimes be required to provide the same kind of support to pregnant workers. Additionally, although pregnancy itself is not considered an impairment, and therefore it does not qualify as a disability under the ADA, some pregnancy-related conditions do.[33] In those cases, employers would be required under the ADA to provide "reasonable accommodations" for such limiting conditions, unless doing so would be an undue hardship.[34] But many claims fell between the cracks of these laws, and both employers and employees were confused about when accommodations were required. This left many pregnant workers in the extraordinarily difficult position of needing to choose between earning a paycheck and following medical advice designed to keep them safe during a pregnancy.

Beginning around a decade ago, a multipronged advocacy campaign sought to address the issue through legislative advocacy, litigation, and efforts to identify and promote best practices by businesses in responding to pregnancy.[35] This campaign was

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[30] *See id.*

[31] *See id.* at 11–21.

[32] 42 U.S.C. § 2000e(k).

[33] *See* 42 U.S.C. § 12102(1)(A) (defining disability as an "impairment" that "substantially limits" a major life activity); Joan C. Williams, Robin Devaux, Danielle Fuschetti & Carolyn Salmon, *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97 (2013) (discussing pregnancy-related conditions that could qualify as a disability).

[34] *See* 42 U.S.C. § 12112(b)(5)(A).

[35] The advocacy organization, A Better Balance, which played a leading role in the campaign, has issued a report that documents the various strategies that ultimately culminated in successfully passing the federal PWFA. A BETTER BALANCE, WINNING THE PREGNANT WORKERS FAIRNESS ACT: AN INSIDE STORY

remarkably successful. Half of the states—including many Republican-controlled states—passed "Pregnant Workers Fairness Acts," often unanimously.[36] In general, these laws explicitly require employers to provide "reasonable accommodations" for "pregnancy, childbirth, or related medical conditions," unless doing so would be an "undue hardship." In other words, they make sure that pregnancy and related medical conditions receive the same kind of support that health conditions that qualify as disabilities receive.

The broad-based coalition that supported these laws was possible because they provide a commonsense, reasonable response to a specific concrete problem. Business and faith leaders, as well as women's rights and workers' advocates, often endorsed the bills.[37] In some states, both anti-abortion and pro-choice organizations were supportive.[38] This was a tacit recognition that although they might disagree on the range of choices a pregnant woman should have regarding terminating a pregnancy, most groups agreed that women shouldn't feel functionally *forced* to choose an abortion because they were denied support they needed at work to protect their health. Indeed, in the 1970s, pro-choice and pro-life groups likewise found common ground in their support of the federal Pregnancy Discrimination Act for much the same reason.[39]

As the first state PWFAs were phased in, they provided helpful models to other states. Early studies showed that pregnancy-related litigation actually went *down* after PWFA laws were enacted.[40]

AND LESSONS LEARNED FROM THE DECADE-LONG FIGHT FOR JUSTICE, FAIRNESS, AND EQUALITY (2023), https://www.abetterbalance.org/wp-content/uploads/2023/05/ABB-Winning-PFWA-RD7-2.pdf [https://perma.cc/H5JK-94RP]. I also have discussed this history previously. *See generally* Widiss, *supra* note 14.

[36] *See* A BETTER BALANCE, *supra* note 35, at 88–98; Widiss, *supra* note 14, at 1144.

[37] *See id.* at 1147–49.

[38] *See id.* at 1149.

[39] *See* Widiss, Gilbert *Redux*, *supra* note 13, at 993.

[40] *See generally* NOREEN FARRELL, JAMIE DOLKAS & MIA MUNRO, EQUAL RTS. ADVOCATES, EXPECTING A BABY, NOT A LAY OFF: WHY FEDERAL LAW SHOULD REQUIRE REASONABLE ACCOMMODATION OF PREGNANT WORKERS (2013), https://web.archive.org/web/20140807060130/https://www.equalrights.org/wp-content/uploads/2013/10/2012-ERA-Pregnancy-Accommodation-Report.pdf [https://perma.cc/XY55-CGTL] (studying California law and finding that

Presumably, this is because employers better understood their obligations to support pregnant workers, and needs were addressed quickly and easily without requiring litigation. More recent, informal studies confirm this trend.[41] Additionally, business leaders in states that had implemented laws were often willing to testify that they found them to be non-onerous, and even helpful. This further bolstered support for additional campaigns in other states.

In addition to the state legislative campaigns, there were important regulatory and litigation developments that helped bolster support for federal legislation. In 2014, the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing antidiscrimination laws, released guidance that explained how accommodations could sometimes be required under both the PDA and the ADA.[42] In a case the following year, the Supreme Court likewise grappled with how the PDA applied in this context. Although the Court did not interpret the PDA's mandate quite as expansively

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number of filed claims under state law was low and that pregnancy discrimination claims in the state decreased, at a period when such claims were rising nationally); *Long Over Due: Exploring the Pregnant Workers' Fairness Act Hearing on H.R. 2694 Before the Subcomm. on Civ. Rts & Hum. Servs. of the H. Educ. & Lab. Comm.* 116th Cong. 29 (Oct. 22, 2019), https://www.congress.gov/116/meeting/house/110108/witnesses/HHRG-116-ED07-Wstate-BakstD-20191022.pdf [https://perma.cc/V6J9-3VSL] (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance) (citing Letter from Linda Hamilton Krieger & William D. Hoshijo, Hawai'i Civil Rights Comm'n, to A Better Balance (Feb. 1, 2013) (reporting decrease pregnancy discrimination claims after state implemented a pregnancy accommodation law)).

[41] *See* E-mail from Cynthia Calvert, Senior Advisor, Ctr. for WorkLife L., to Deborah Widiss (Feb. 16, 2023) (on file with author) (studying implementation of eighteen state laws requiring pregnancy accommodation enacted between 2013 and 2018 and finding that in the majority of states, the number of claims related to failure to accommodate under state and federal law either decreased or stayed the same, and that in states where claims increased the size of the increase was small).

[42] *See* EEOC, NOTICE NO. 915.003, EEOC ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES (2014), https://web.archive.org/web/20141219193255/http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm [https://perma.cc/T929-JDAT]. The EEOC has since updated this guidance to conform to the Supreme Court's holding in *Young*. *See* EEOC, EEOC-CVG-2015-1, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES (2015) [hereinafter EEOC 2015 PREGNANCY GUIDANCE], https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues [https://perma.cc/FH93-8ENY].

as did the EEOC, a decision in 2015 made clear that accommodations could at least sometimes be required under then-existing federal law.[43] Workers also successfully used social media and organizing campaigns to bring attention to unfair and inhumane treatment of pregnant employees.[44] Accordingly, some businesses changed their policies, rather than risk future litigation or bad press.[45]

The sometimes-applicable federal laws continued to cause confusion for businesses, and many businesses were required to provide accommodations pursuant to the rapidly expanding number of state PWFAs. This set the groundwork for a broad-based coalition, including the US Chamber of Commerce, Society for Human Resource Management, the National Retail Federation, and other leading business groups, as well as advocacy groups that more typically seek to expand workers' rights, to come together to advocate for a federal standard: The Pregnant Workers Fairness Act.[46]

The House Committee that considered PWFA was clear about the purpose of the law: "No worker should have to choose between their health, the health of their pregnancy, and the ability to earn a living."[47] PWFA enjoyed broad bipartisan support as a standalone bill. It passed the U.S. House 315-101; almost half of House Republicans, as well as virtually all House Democrats, voted for the bill.[48] A companion bill was also advanced by the relevant Senate committee with almost unanimous support.[49] Although it subsequently stalled in

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[43] *See* Young v. United Parcel Serv., Inc., 575 U.S. 206, 228–30 (2015).

[44] *See* Widiss, *supra* note 14, at 1149–52.

[45] *See id.*

[46] *See* Letter from Associated Builders & Contractors et al., to Sen. Patty Murray, Chair Comm. on Health, Educ., Lab. & Pensions and Sen. Richard Burr, Ranking Member Comm. on Health, Educ. Lab. & Pensions, on S. 1486, the "Pregnant Workers Fairness Act" (Aug. 2, 2021), https://www.uschamber.com/workforce/education/coalition-letter-s-1486-the-pregnant-workers-fairness-act [https://perma.cc/HWF8-44FP].

[47] *See* H.R. REP. NO. 117-27, at 11 (2021).

[48] *See* House Roll Call 143, Bill No. H.R. 1065, https://clerk.house.gov/Votes/2021143 [https://perma.cc/PY5P-NVF3] (indicating the bill passed 315-101, with 216 Democrats and 99 Republicans voting in favor of the bill and 101 Republicans voting against it; two Democrats and twelve Republicans did not vote).

[49] *See All Actions: S. 1486—117th Congress (2021–2022)*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/senate-bill/1486/all-actions (last

the Senate, PWFA's language was ultimately folded into an omnibus funding bill that passed in December 2022.[50]

PWFA became effective June 27, 2023.[51] On August 11, 2023, the EEOC published proposed regulations and accompanying interpretive guidance, inviting comment.[52] The final rule and interpretive guidance was published on April 19, 2024, and it becomes effective June 18, 2024.[53]

III. PWFA'S STATUTORY MANDATES

The heart of the federal PWFA, like the state PWFAs, is its mandate that employers provide "reasonable accommodations" for "known limitations" related to "pregnancy, childbirth, or related

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visited Apr. 13, 2024); *see also Senate HELP Committee Advances Bipartisan Bills to Improve Suicide Prevention, Protect Pregnant Workers, and Support People with Disabilities*, U.S. S. COMM. ON HEALTH, EDUC., LAB. & PENSIONS (Aug. 3, 2021), https://www.help.senate.gov/chair/newsroom/press/senate-help-committee-advances-bipartisan-bills-to-improve-suicide-prevention-protect-pregnant-workers-and-support-people-with-disabilities [https://perma.cc/JA3F-Z7VT] (reporting the committee advanced PWFA by a vote of 19-2).

[50] *See* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. II, 136 Stat. 4459, 6084 (2022) (Pregnant Workers Fairness Act) (codified at 42 U.S.C. § 2000gg); *see also* A BETTER BALANCE, *supra* note 35, at 83–87 (describing in detail the challenges of advancing the bill in the Senate and the ultimately-successful efforts to include it in the omnibus bill); Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714, 54714 (proposed Aug. 11, 2023) (to be codified at 29 C.F.R. 1636) (noting the amendment that added PWFA to the appropriations act passed 73-24). In February 2024, a district court in Texas held that the EEOC and other federal officials cannot enforce PWFA against the state of Texas. *See* Texas v. Garland, No. 5:23-CF-034-H, 2024 WL 967838, at *51–52 (N.D. Tex. Feb. 27, 2024), *notice of appeal filed* (Apr. 26, 2024). The court's injunction rested on a conclusion that the appropriations bill was enacted in violation of the Constitution's quorum clause, because fewer than half of the members of the House of Representatives were physically present on Dec. 23, 2022, when the House passed the final version of the bill; 226 members voted by proxy on the bill, as permitted by a House resolution put in place during the COVID pandemic. *See id.* at *5–6. Shortly before this article went to press, the government filed a notice of appeal.

[51] *See* Consolidated Appropriations Act, 2023, div. II, § 109, 136 Stat. at 6084.

[52] *See* Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. at 54714 (proposed Aug. 11, 2023).

[53] *See* Regulations to Implement the Pregnant Workers Fairness Act, 89 Fed. Reg. 29096, 29096–220 (Apr. 19, 2024) (to be codified at 29 C.F.R. pt. 1636); *see also id.* at 29096 (providing the interpretive rule and guidance is effective on June 18, 2024).

medical conditions," unless doing so would impose an "undue hardship" on the employer.[54] In important ways, the new law borrows from the ADA and the PDA to bridge the gaps between them. Thus, in many respects, regulations, guidance, and caselaw interpreting the language in those other laws will provide guidance as to the meanings of terms in PWFA.[55] However, there are also some key textual differences that are important to emphasize. This section explains PWFA's statutory mandates in detail, as well as relevant materials in the legislative history of the Act, the EEOC's regulations and guidance, and caselaw and regulatory guidance under the pre-existing federal laws. Importantly, PWFA does not supplant state, local, or federal laws that may apply to provide "greater or equal protection" for pregnant workers or others affected by childbirth or related medical conditions.[56] Thus, the discussion that follows establishes the floor, not the ceiling, of what may be required by applicable laws.

A. Reasonable Accommodation and the Interactive Process

PWFA makes it unlawful for a covered employer to refuse to provide a "reasonable accommodation" to a "qualified employee" for "known imitations" related to "pregnancy, childbirth, or related medical conditions," unless doing so would impose an "undue hardship" on the employer.[57] In many respects, this requirement parallels the ADA's mandate to provide reasonable accommodations for an employee with a disability. However, there are some important differences between the statutory mandates, particularly with respect

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[54] 42 U.S.C. § 2000gg-1(1) (specifying it is an unlawful employment practice for a covered entity to not make "reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee," unless it can demonstrate that it would "impose an undue hardship" on the entity).

[55] *See, e.g.*, Bragdon v. Abbott, 525 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) (when "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"); *see id.* (highlighting importance of also noting where Congress "departed" from the prior statute).

[56] 42 U.S.C. § 2000gg-5(a)(1).

[57] *Id.* § 2000gg-1(1).

to determining whether an individual is "qualified" to perform the "essential functions" of the job.

PWFA incorporates the ADA's definitions for "reasonable accommodation" and "undue hardship," [58] and it specifies that these terms "shall be construed" as they are under the ADA *and* the EEOC's regulations to implement PWFA.[59] The statutory language is general and flexible. As specified in the ADA, "reasonable accommodation" "may include . . . making existing facilities . . . readily accessible and usable" and "job restructuring, part-time or modified work schedules, reassignment to a vacant position, [and] . . . appropriate modification of . . . policies."[60] PWFA states that the EEOC's rules implementing PWFA "shall provide examples of reasonable accommodations" that could be applicable in this context.[61] Thus, Congress has explicitly delegated to the EEOC the authority to provide further clarification as to the meaning of this term as used in PWFA, and its interpretation should receive deference from courts.[62]

The EEOC's rule defines reasonable accommodation generally as modifications or adjustments to the work environment or the "manner

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[58] *See id.* § 2000gg(7) ("[T]he terms 'reasonable accommodation' and 'undue hardship' have the meanings given such terms in section 12111 of this title [the ADA].").

[59] *See id.* (providing the terms "shall be construed" as they are under the ADA "and as set forth in the regulations required by this chapter [the PWFA]").

[60] 42 U.S.C. § 12111(9).

[61] *See* 42 U.S.C. § 2000gg-3(a).

[62] As this article is being finalized for publication, in April 2024, administrative deference regimes are in flux. Current Supreme Court doctrine suggests that the EEOC's regulations interpreting PWFA should receive significant deference from the courts. *See generally* U.S. v. Mead Corp., 533 U.S. 218 (2001) (indicating when Congress expressly delegates lawmaking authority to an agency and the agency properly acts upon this delegation, courts should defer to the regulation unless it is arbitrary or capricious or manifestly contrary to the statute); *see also* Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) (specifying that generally courts should defer to an agency's reasonable interpretations of ambiguous statutory language). However, the Supreme Court is considering two cases that argue *Chevron* should be overruled. *See* Loper Bright Enters. v. Raimondo, No. 22-451; Relentless, Inc. v. Dep't of Com., No. 22-1219. The decisions in those cases have not yet been issued. Whatever the outcome of those cases, courts should give careful consideration to the EEOC's interpretation of the "reasonable accommodation" provision, and PWFA more generally. The EEOC thoroughly explains the reasoning behind its proposed rules and interpretive guidance, and it has longstanding expertise in implementing related laws. *See generally* Skidmore v. Swift, 323 U.S. 134 (1944) (identifying these as factors that should increase judicial deference to agency interpretations).

or circumstances" under which the work is customarily performed, as well as temporary suspensions of essential functions of the position.[63] The rule then provides an extensive and non-exhaustive list of potential accommodations, including: job-restructuring; part-time or modified work schedules; breaks for use of the restroom, drinking, eating, or resting; modification of uniforms, equipment, and devices, including devices to assist with lifting or carrying; modification of policies relating to sitting or standing; telework; and leave.[64] Several of the state PWFAs include similar lists of possible accommodations, while also generally specifying that they are simply illustrative and not meant to be exhaustive.[65]

As in the ADA context, reasonable accommodations are only required if they would not impose an "undue hardship," which is defined as "requiring significant difficulty or expense," when considered in light of the employer's size and resources, as well as the nature of the accommodation requested.[66] The EEOC's rule lists several factors to be weighed in making this assessment.[67] It also identifies four routine accommodations—allowing an employee to keep water accessible and drink as needed, allowing extra bathroom breaks, allowing modification of sitting and standing rules, and allowing breaks as necessary for eating or drinking—that it characterizes as "predictable assessments" that will "in virtually all cases" be deemed to be reasonable accommodations that do not impose an undue hardship when requested by an employee who is pregnant.[68] The rule further provides that generally requests for these

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[63] *See* 29 C.F.R. § 1636.3(h).

[64] *See id.* at § 1636.3(*i*); *see also* 29 C.F.R. part 1636, app. § 1636.3(*i*) (providing additional extensive discussion of the reasonable accommodations listed in the regulation and several sample factual scenarios illustrating how various requests should be analyzed under the statutory and regulatory framework).

[65] *See generally State Pregnant Workers Fairness Laws*, A BETTER BALANCE, https://www.abetterbalance.org/resources/pregnant-worker-fairness-legislative-successes [https://perma.cc/SRW2-X3CH] (Apr. 12, 2023) (providing descriptions of state and local PWFAs).

[66] *See* 42 U.S.C. § 2000gg(7) (incorporating definition from ADA found in 42 U.S.C. § 12111(10)).

[67] *See* 29 C.F.R. § 1636(j) (identifying factors to be considered as including the nature and net cost of the accommodation, overall financial resources of the facility and the covered entity, the type of operations of the facility and covered entity, and the impact of the accommodation on the operation of the facility, including the impact on other employees).

[68] *See id.* at 1636.3(j)(4)(i)–(iv).

accommodations should be granted quickly,[69] without requiring external documentation[70] or an extended "interactive process"[71] to discuss the need and possible responses.

The more general point is that many accommodations addressing common needs under PWFA, including but not limited to those specified as "predictable assessments," are low-cost or no-cost and thus unlikely to constitute an "undue hardship," even for relatively small employers with limited resources.[72] Employers should therefore promptly provide such support when it is requested. Employers should also ensure that they comply with more general workplace rules regarding restroom access and mandatory break times,[73] as that

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[69] *See id.* at § 1636.4(a)(1)(vi) (specifying that delay in providing the accommodations identified in the "predictable assessment" list will "virtually always result in a finding of unnecessary delay" and accordingly a violation of PWFA).

[70] *See id.* § 1636.3(*l*)(1)(iii) (providing that it would be unreasonable for an employer to require documentation beyond an employee's self-confirmation that she is pregnant if she is requesting one of the accommodations identified on the "predictable assessment" list); *see also id.* at § 1636.3(*l*)(4) (defining "self-confirmation" for this purpose).

[71] *See* 29 C.F.R. part 1636, app. § 1636.3(k) (specifying that the interactive process can be a "single informal conversation or a short email exchange" and providing examples of such brief interactions leading to the grant of accommodations included on the predictable assessment list); *see also infra* text accompanying notes 87–90 (discussing the potential informality of the interactive process generally).

[72] In the preamble to the final rule, the EEOC identified several additional accommodations, including uniform modifications, use of a close parking space, and use of a workspace close to a bathroom or lactation space, that commenters suggested should be added to the "predictable assessment" list. *See* Regulations to Implement the Pregnant Workers Fairness Act, 89 Fed. Reg. at 29126–27. The agency agreed that such accommodations were "common and simple," and it indicated that in most instances, they likewise would not impose an undue hardship; however, it declined to add them to the list on the grounds that they might be less easily applied across a broad category of jobs or were less frequently mentioned in the legislative history. *See id.* The agency also emphasized that even with respect to the accommodations that *are* on the predictable assessment list, a specific employer may still be able to show that the proposed accommodation would pose an undue hardship in the particular circumstance. *See id.*

[73] *See, e.g.*, *Restrooms and Sanitation Requirements*, OSHA, https://www.osha.gov/restrooms-sanitation [https://perma.cc/C9R3-94RR] (summarizing OSHA regulations and letters of interpretation as establishing

could decrease that extent to which workers need to ask for such supports as a special "accommodation."

There are some key textual differences between PWFA and the ADA that are important to highlight. First, although PWFA, like the ADA, specifies that an employee requesting accommodations must be a "qualified employee," it defines that term differently than does the ADA. The definition *starts* with language that is identical to how the term is defined in the ADA—"an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position"[74]—but PWFA includes an important limitation on that language not found in the ADA:

> . . . except that an employee or applicant shall be considered qualified if—
>
> (A) any inability to perform an essential function is for a temporary period;
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> (B) the essential function could be performed in the near future; and
>
> (C) the inability to perform the essential function can be reasonably accommodated.[75]

In the regulations, the EEOC interprets "temporary" to mean "lasting for a limited time, not permanent," and it also specifies that, at least for pregnant employees, "in the near future" means generally within forty weeks, or the duration of a full-term pregnancy.[76]

PWFA's explicit indication that a temporary inability to perform an essential function of a job does not necessarily render an employee

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employers "must allow workers to leave their work locations to use a restroom when needed" and "avoid imposing unreasonable restrictions on restroom use"); *see also Meal and Rest Break Laws in the Workplace: 50-State Survey*, JUSTIA, https://www.justia.com/employment/employment-laws-50-state-surveys/meal-and-rest-break-laws-in-the-workplace-50-state-survey [https://perma.cc/ZY42-P4WQ] (providing citations and links to state laws requiring breaks).

[74] 42 U.S.C. § 2000gg(6); *see also* 42 U.S.C. § 12111(8) (same language in the ADA).

[75] 42 U.S.C. § 2000gg(6).

[76] *See* 29 C.F.R. § 1636.3(f)(2); *see also* 29 C.F.R. part 1636, app. § 1636.3(f)(2) (discussing rationale for the presumption that for pregnant employees, "in the near future" generally means 40 weeks and that for conditions other than a current pregnancy, the meaning of the phrase could vary). The guidance also indicates that it may be appropriate to temporarily suspend essential functions both during a pregnancy and upon return to work after a period of leave). *See id.*

unqualified is very important. In the ADA context, courts have interpreted the "qualified employee" language exceptionally narrowly, particularly since the ADA Amendments Act was enacted.[77] Whatever the merits of that body of caselaw, it should not be blithely applied in the PWFA context. As the Supreme Court has observed in other contexts, when one statute is a model for a different statute, but Congress makes some changes to the relevant language, it's important to note the significance of those modifications.[78] Here, the distinction makes good sense. Most limitations related to pregnancy, childbirth, and related medical conditions will, by definition, be of limited duration. Therefore, it may be much easier for an employer to temporarily accommodate a need under PWFA by redeploying tasks to other employees, or simply putting off some tasks, than it would be to do so on a long-term basis for a more permanent disability. The specific additional language included in PWFA makes clear that employers, and ultimately courts, must be attuned to these temporal distinctions.

Second, PWFA requires accommodations for "known limitations" related to pregnancy, childbirth, or medical conditions, but it is very explicit that this is *not* the same standard as governs assessment of whether a condition qualifies as a disability under the ADA. In PWFA, "known limitations" is defined as a:

> physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee's representative has communicated to the employer, *whether or not such condition meets the definition of disability specified [in the ADA].*[79]

Thus, it would clearly be improper for an employer or a court to conclude that PWFA does not apply simply because a condition does not meet the ADA standard of "substantially limiting a major life activity." The regulations further amplify this distinction, by defining

[77] *See generally, e.g.*, Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1 (2014) (describing and critiquing this caselaw).

[78] *See, e.g.*, Lorillard v. Pons, 434 U.S. 575, 581 (1978) (highlighting importance of noting where Congress "departed" from a statute used as a model); *see also* H.R. REP. NO. 117-27, at 27-28 (2021) (explaining the additional language was inserted to "make clear" that a temporary inability to perform essential functions does not render a worker "unqualified," and also noting that there is precedent under the ADA for temporary excusal of existing functions).

[79] *See* 42 U.S.C. § 2000gg(4) (emphasis added); *see also* 29 C.F.R. § 1636.3(a)(2) (defining limitation).

"physical or mental condition" as an "impediment that may be modest, minor, and/or episodic."[80] Any limitation stemming from a physical or mental condition connected to pregnancy, childbirth, or related medical condition (a phrase discussed in subsection C below) should be eligible for accommodations. This includes conditions that may have existed before the pregnancy but were exacerbated by the pregnancy. It also includes health care related to such conditions, such as prenatal visits, and measures that are intended to alleviate pain or avoid health risks, such as reducing exposure to chemicals that might be dangerous to the developing fetus.[81]

PWFA does specify, however, that the condition be "known" to the employer. This is similar to the ADA, which generally requires that an employer understand a request for an accommodation is because of a disability, or the FMLA, which provides an employer must understand that there is an FMLA-qualifying reason for a request for leave. However, as in those contexts, PWFA should not be interpreted to require "magic words," such as "I need a reasonable accommodation for my pregnancy-related limitation," and certainly there is no requirement that an employee explicitly reference PWFA.[82] It should be enough that the employee (or her representative) asks her supervisor, manager, human resources department, or other appropriate personnel in her workplace for some kind of workplace support or modification of a standard workplace rule or policy and makes clear in some way that the request is related to pregnancy, childbirth, or a related medical condition.[83]

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[80] 29 C.F.R. § 1636.3(a)(2).

[81] *See id.* ("The physical or mental condition may be that an employee . . . has a need or problem related to maintaining their health or the health of the pregnancy . . . [and] when an employee is seeking health care related to pregnancy, childbirth, or a related medical condition itself."); *see also* 29 C.F.R. part 1636, app. § 1636.3(a)(2) (interpretive guidance further discussing meaning of "limitation" and "related to, affected by, or arising out of").

[82] *See* 29 C.F.R. § 1636.3(d) (specifying that the communication may be made "orally, in writing, or by another effective means" and that it "need not … be in a specific format [or] use specific words"); *cf.* Leeds v. Potter, 249 F. App'x 428, 449–50 (6th Cir. 2007) (providing that in the ADA context, "an employee need not use the magic words 'accommodation' or even 'disability,' [but] the request does need to make it clear from the context that it is being made in order to conform with existing medical restrictions") (citation omitted).

[83] *See* 29 C.F.R. § 1636.3(a) & (d) (defining "known" as meaning the employee, applicant, or her representative has "communicated" the limitation to a supervisor, manager, human resources personnel, or by following steps in the employer's policy to request an accommodation).

Once an employee has communicated her needs to her employer, PWFA specifies that they "typically" should discuss options through an "interactive process;"[84] this is likewise borrowed from the disability law, where it is found in the regulations implementing the ADA.[85] In that context, it is well established that both parties are expected to participate in the interactive process in "good faith."[86] An employee generally cannot categorically veto an accommodation *that would address* her needs (other than a specific limitation on forced leave discussed below), but she may—and should—have space to discuss concerns about a proposed accommodation and to suggest alternatives. The same is true for an employer. The hope, as articulated in the PWFA statute, is that they jointly "arrive" at a solution that works for both.[87]

The interactive process should be practical and flexible.[88] The EEOC's PWFA regulations define it is as an "informal" process designed to identify the limitation and change at work that is needed due to the limitation, "if either of these is not clear from the request," as well as potential reasonable accommodations.[89] The rule further

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[84] *See* 42 U.S.C. § 2000gg(7) (specifying that an "interactive process . . . will typically be used to determine an appropriate reasonable accommodation"). Notably the statute provides that the interactive process will "typically" be used, not that it will "always" be used; certain routine accommodations might be granted with minimal or no interactive process, beyond the employee or applicant conveying the request itself. *See infra* text accompanying notes 88–90.

[85] *See* 29 C.F. R. § 1630.2(*o*)(3) (ADA regulations specifying it may be necessary for the employer to initiate an "informal, interactive process with the individual with the disability" to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations").

[86] *See, e.g.*, Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000), *rev'd on other grounds*, U.S. Airways, Inc., v. Barnett, 535 U.S. 391 (2002) (denying summary judgment where there was factual dispute as to whether employer participated in good faith in the interactive process).

[87] 42 U.S.C. § 2000gg-1(2) (providing it is an unlawful employment practice 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").

[88] *See, e.g.*, Katherine A. Macfarlane, *Disability Without Documentation*, 90 FORDHAM L. REV. 59, 66–67 (2021) (describing the roots of the interactive process in the ADA context and the intention that it be informal and flexible); *see also id.* at 70–81 (critiquing caselaw developing the doctrine as unduly formalistic, particularly with respect to requirements that the employee provide medical documentation).

[89] 29 C.F.R. § 1636.3(k).

provides that there are "no rigid steps that must be followed."[90] In other words, routine requests could often be resolved through a quick conversation, or even no conversation at all. For example, if an employee indicates that she is pregnant and would like permission to sit on a stool, and her supervisor approves the request, they've engaged in a successful "interactive process." In many instances, there will be no external record of an effective interactive process, as there will never be the need for an administrative charge to be filed, let alone a complaint in court. However, if the process breaks down and a complaint is filed, courts or regulators should be conscious of the power differential that often exists in this negotiation.[91]

PWFA's statutory language does not explicitly address whether an employer may request supporting documentation, such as medical certification of the relevant limitation, in response to a request for an accommodation; if so, what kind of documentation would be sufficient; and what privacy expectations would apply to any provided documentation. Accommodation statutes take a variety of approaches with respect to documentation. There are some state PWFAs that prohibit asking for documentation for certain common requests related to pregnancy.[92] These state provisions probably remain applicable, since PWFA is explicit that it does not preempt more protective state or local laws.[93] Courts and the EEOC have also typically suggested that employers should not require documentation in connection with requests for religious accommodations under Title

[90] *Id.* The accompanying interpretive guidance references a step-by-step process based on a similar step-by-step process that the agency developed in the context of implementing the ADA, but it also emphasizes that in many instances, a "simple conversation will be sufficient" and that "a covered entity and an employee do not have to complete all or even some of these steps." 29 C.F.R. part 1636, app. § 1636.3(k) ¶ 111.

[91] For a critique of the interactive process in the ADA context, arguing that it tends to advantage employers because they have comparatively more power, see generally Shirley Lin, *Bargaining for Integration*, 96 N.Y.U. L. REV. 1826 (2021).

[92] *See, e.g.*, MASS. GEN. LAWS ch. 151B, § 4(1)(E)(c) (2023) (specifying that an employer may not request documentation for requests to provide more frequent breaks, seating, limits on lifting more than twenty pounds, or space for expressing breast milk).

[93] 42 U.S.C. § 2000gg-5(a)*; see also, e.g.*, Joseph J. Lynnett, Katharine C. Weber & Catherine A. Cano, *Complying with New Federal Pregnant Workers Fairness Act, PUMP for Nursing Mothers Act*, JACKSON LEWIS (Jan. 4, 2023), https://www.jacksonlewis.com/publication/complying-new-federal-pregnant-workers-fairness-act-pump-nursing-mothers-act [https://perma.cc/U245-NFPC] (making the point that state limitations on certification would likely still apply).

VII.[94] The ADA's statutory language does not address documentation explicitly; however, the ADA is generally interpreted to permit employers to request documentation when the need for the accommodation is not "obvious."[95] Notably, even statutes that *do* explicitly address documentation, such as the Family and Medical Leave Act, establish discretionary policies, under which employers "may" choose to ask for certification from a health care provider.[96]

In PWFA, the statutory silence with respect to documentation should make it clear that documentation is not *required.* Employers can—and one would hope, will—grant accommodations for many basic needs related to pregnancy, childbirth, or related medical conditions without requiring documentation. This approach obviously facilitates quick resolution of requests for support and thus it can help promote worker productivity and health. It also means employers avoid any potential liability from failing to safeguard properly employee health information or for unreasonably delaying the granting of accommodations.

The more challenging question under the statute is whether and under what circumstances employers will be *permitted* to require documentation before granting a request for an accommodation. The regulation and guidance promulgated by the EEOC provide a detailed discussion of potential documentation requirements.[97] First, the regulation confirms that a covered entity is "not required to seek supporting documentation."[98] Further, it provides that employers are only permitted to seek "documentation that is reasonable under the circumstances," and it specifies that it would not be reasonable to

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[94] *See* Macfarlane, *supra* note 88, at 92–95 (discussing caselaw and agency guidance on point).

[95] *See, e.g.*, EEOC, EEOC-CVG-2000-4, ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE ADA (July 27, 2000), https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees#6 [https://perma.cc/F9M5-LKND] (scroll down to number 7) (generally adopting a rule that documentation may be requested specifying the need for accommodation of a disability if it is not obvious); Macfarlane, *supra* note 88, at 70–89 (discussing and critiquing this agency guidance and caselaw reaching similar conclusions).

[96] *See* 29 U.S.C. § 2613(a) ("An employer *may* require that a request for leave . . . be supported by a certification issued by a health care provider.") (emphasis added).

[97] *See* 29 C.F.R. § 1636.3(*l*); 29 C.F.R. part 1636 app. § 1636.3(*l*).

[98] 29 C.F.R. § 1636.3(*l*).

require documentation when a need is "obvious" or when the employer already has "sufficient information" to determine that a PWFA-covered limitation exists that requires a change at work.[99] The regulation also states that an employer should not ask for documentation beyond the employee's "self-confirmation" of the relevant condition if a pregnant employee is seeking one of the accommodations included in the "predictable assessment" list—that is, extra bathroom breaks, access to water at a work station, extra breaks to eat or drink, or modification of rules regarding sitting or standing—or a lactating employee is seeking accommodations related to pumping at work.[100]

In situations where documentation would be permitted, the regulation provides it should be limited to "reasonable documentation," which it defines as documentation that confirms the employee has a condition related to pregnancy, childbirth, or a related medical condition, and that a change at work is necessary to respond to that condition.[101] It suggests that documentation could be provided by a wide variety of health care providers, including doctors, nurses, doulas, midwives, lactation consultants, and therapists.[102] The interpretive guidance also points out that it may be difficult for employees to obtain immediate appointments, especially early in a pregnancy, and that employers should consider providing interim accommodations if an employee has tried but cannot immediately obtain documentation.[103] It can also be expensive to obtain such paperwork, especially for workers who do not have health insurance that can cover the costs of such visits. Unnecessarily onerous documentation requirements might be deemed unlawful interference

[99] *Id.* at § 1636.3(*l*)(1); *see also* 29 C.F.R. part 1636 app. § 1636.3(*l*)(1)(*i*) (interpretive guidance explaining, for example, that it would not be reasonable to require documentation when an obviously pregnant employee asks for a uniform modification or related safety gear).

[100] *See* 29 C.F.R. § 1636.3(*l*)(1)(iii), (iv); *see also id.* at § 1636.3(*l*)(4) (defining "self-confirmation" as a simple statement confirming the relevant physical or mental condition and specifying that the statement can be "made in any manner" and that employers may not "require that the statement be in a specific format, use specific words, or be on a specific form").

[101] *See* 29 C.F.R. § 1636.3(*l*)(2).

[102] *See* 29 C.F.R. § 1636.3(*l*)(3).

[103] *See* 29 C.F.R. part 1636, app. § 1636.3(*l*) ¶121.

with the "exercise or enjoyment of PWFA rights," and thus violate the statute's separate prohibition on coercive acts.[104]

If medical documentation is requested and provided, employers should keep such documentation private and separate from an employee's general personnel file.[105] As the EEOC explains in its guidance, even though PWFA does not include specific provisions regarding confidentiality of medical information, PWFA covers the same range of employers as does the ADA.[106] And under the ADA, employers are required to keep medical documentation provided by employees, applicants, and former employees confidential; the interpretive guidance for PWFA specifies that this includes any "medical information provided voluntarily and medical information provided as part of the reasonable accommodation process."[107]

In addition to considering the EEOC's regulations and guidance for PWFA, employers seeking to understand their obligations under the new law could also look to how the terms "reasonable accommodations," "undue hardship," and other related concepts have

[104] *See* 42 U.S.C. § 2000gg-2(f)(2); *see also infra* text accompanying notes 129–34 (discussing the coercion provisions); 29 C.F.R. part 1636, app. § 1636.5(f)(2) ¶14 (explaining that seeking documentation when it is not reasonable under the circumstances could violate the prohibition against coercion).

[105] *See, e.g.*, *Confidentiality of Medical Information Under the ADA*, JAN: CONSULTANT'S CORNER (Vol. 11: 1), https://askjan.org/publications/consultants-corner/vol11iss01.cfm [https://perma.cc/Z3NU-EAJW] (advising such documentation should only be available to authorized personnel). As Laura Kessler points out, privacy may be especially important in this context, given the sensitive nature of much information related to reproductive health. *See* Laura T. Kessler, *Reproductive Justice at Work: Employment Law After* Dobbs v. Jackson Women's Health Organization, 109 CORNELL L. REV. ___, *69–71 (forthcoming 2024) (draft on file with author).

[106] 29 C.F.R. part 1636, app. § 1636.7(a)(1) ¶¶ 14–20 (discussing interaction between PWFA and the ADA as it relates to prohibition on disability-related inquiries and medical examinations and protection of confidential information); *see also id.* app. § 1636.3(*l*)(4) ¶¶146–48 (discussing how the relationship between the two statutes imposes confidentiality requirements regarding documentation provided under PWFA).

[107] *Id.* app. § 1636.7(a)(1) ¶15; *see also id.* at ¶¶ 15–17 (referencing 29 C.F.R. § 1630.14(b), (c) and other EEOC materials relating to confidentiality of documentation under the ADA). Some courts interpret the ADA's privacy rules more narrowly to only apply to information received as part of an employer-initiated medical inquiry or exam. *See* Kessler, *supra* note 105, at *59–60 (discussing and critiquing gaps in the privacy protections under the ADA).

been developed under ADA regulations and caselaw.[108] However, any such analysis should be sensitive to the fact that the meaning of these terms is not static. In particular, prior caselaw specifying that an employee cannot perform the "essential functions" of a job remotely, that remote work is generally not a "reasonable accommodation," or that it would impose an "undue hardship" should be reevaluated in the wake of the COVID-19 pandemic.[109] As employers responded to COVID, it became clear that *many* jobs could be done remotely, at least for a limited period of time. This can be an important accommodation to consider under PWFA. For example, an employee ordered on bedrest near the end of a pregnancy might ask to keep working remotely; in many positions, this could be a reasonable accommodation, and this would allow her to save any available paid or unpaid leave for use after the baby was born.[110] In its PWFA regulation, the EEOC specifically references telework as a potential reasonable accommodation.[111]

The Center for WorkLife Law has created a detailed list of accommodations that may be required during a typical pregnancy, accommodations that may be appropriate to avoid hazardous work, and accommodations that may be required for certain common complications caused or exacerbated by pregnancy.[112] It also

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[108] *See generally, e.g.*, 29 C.F.R. § 1630.2(o), (p) (generally describing the meaning of these terms under the ADA); *id.* app. § 1630.2(o) (making clear the statutory list of potential accommodations is illustrative but not exhaustive, and noting particularly that accommodations could include permitting use of accrued paid leave or providing additional unpaid leave, providing reserved parking, and altering job requirements); EEOC, EEOC-CVG-2003-1, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA (2002), https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada [https://perma.cc/9ELC-33YF] (further describing potential accommodations).

[109] *See generally, e.g.*, D'Andra Millsap Shu, *Remote Work Disability Accommodations in the Post Pandemic Workplace: The Need for Evidence-Driven Analysis*, 95 TEMP. L. REV. 201 (2023); Michelle A. Travis, *A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility*, 64 WASH. U. J. L. & POL'Y 203 (2021).

[110] *Cf.* Mosby-Meachem v. Memphis Light, Gas & Water Div., 883 F.3d 595, 603–06 (6th Cir. 2018) (holding, in a pre-COVID case, that remote work was a reasonable accommodation for a pregnant lawyer ordered on bedrest and distinguishing prior caselaw holding in-person attendance was generally essential).

[111] *See* 29 C.F.R. § 1636.3(*i*)(2).

[112] *See generally* WORKLIFE LAW, *supra* note 16.

addressed accommodations that may be appropriate for conditions that may be deemed "related medical conditions," such as lactation, fertility treatment, miscarriage, abortion, and menstruation.[113] The federally-funded Job Accommodation Network (JAN) offers a wealth of helpful information regarding accommodations for disabilities, and it provides one-on-one consultations with employers or workers on workplace accommodations that can address particular needs.[114] Many of these could be applicable to pregnancy and related conditions, as well as ADA-covered disabilities. JAN also has studied the economics of accommodations by surveying employers. It finds that *more than half* of accommodations cost absolutely *nothing*; of those that did have a cost, the median expenditure was only $300.[115] Moreover, employers consistently report that the "benefits . . . received from making workplace accommodations far outweigh the associated costs."[116] This cost-benefit analysis is even more likely to be true in the PWFA context, as most of the needs will be relatively short-term.[117]

B. Other Unlawful Actions: Forced Accommodations or Leave, Denial of Employment Opportunities, and Retaliation or Coercion

In addition to its core requirement that employers provide reasonable accommodations, PWFA addresses several other distinct employer practices. One provision protects employees from being *required* to accept accommodations *other* than those arrived at through the interactive process.[118] This helps ensure that workers are granted a real opportunity to have a voice in determining an effective accommodation. It also helps counter stereotypes that pregnant workers are necessarily incapable, which can result in pregnant

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[113] *See infra* Part III.C.

[114] *See generally About JAN*, JAN, https://askjan.org/about-us/index.cfm [https://perma.cc/Z9ZJ-EEBC].

[115] *See Accommodation and Compliance: Low Cost, High Impact*, JAN, https://askjan.org/topics/costs.cfm [https://perma.cc/2K47-BMNN] (Apr. 5, 2024).

[116] *Id.*

[117] *Cf.* Regulations to Implement the Pregnant Workers Fairness Act, 89 Fed. Reg. at 29175–77 (making similar point when estimating costs associated with implementing PWFA).

[118] *See* 42 U.S.C. § 2000gg-1(2).

workers being denied opportunities. For example, many pregnant persons are comfortable traveling late into pregnancy. If a pregnant employee has not asked for any kind of accommodation, but her supervisor assumes she would not want to take a business trip, and "accommodates" her by asking a coworker to take the trip instead, the pregnant worker may lose out on a valuable professional experience. The supervisor in this scenario may not have held any animosity against the employee because of her pregnancy; in fact, the supervisor may have thought that she was doing the pregnant worker a "favor." Nonetheless, such preemptive "accommodations" can still disadvantage pregnant workers.[119]

A separate provision in PWFA protects employees from being *required* to take paid or unpaid leave if another reasonable accommodation can meet their needs.[120] Under prior law, employees who asked for support related to pregnancy, and had such requests denied, were often then involuntarily placed on leave.[121] This meant many would exhaust any accrued paid leave and FMLA-required time off prior to the birth of the child, meaning that they would not have any available leave *after* the birth.[122] Employees were also sometimes fired during the pregnancy when accrued time ran out. This could mean significant financial harm from the loss of a paycheck, and for many, also the loss of health insurance. For some limitations in some jobs, leave may be the best or only reasonable accommodation for a

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[119] *See also* 29 C.F.R. part 1634, app. § 1636.4(b) (discussing examples of practices that could violate this provision and noting that it applies regardless of whether the employee or applicant has a limitation). By contrast, if a pregnant employee asks for an accommodation—and thus initiates the interactive process—she may ultimately be expected to accept an accommodation other than her preferred choice. For example, if an employee who was eight-months pregnant indicated that she would need a business class or first-class airline ticket to be comfortable traveling to a business meeting, and the employer convincingly demonstrates that her suggested accommodation would be an undue hardship, and proposes that she do the meeting virtually instead, a court might deem the alternative to be a reasonable accommodation, so long as the employee was able to participate in the meeting in a truly effective manner.

[120] *See* 42 U.S.C. § 2000gg-1(4).

[121] *See, e.g.*, H.R. REP. NO. 117-27, at 24–26 (2021) (citing testimony by Dina Bakst and findings reported by BAKST ET AL., *supra* note 12).

[122] *See id.*

pregnant worker, but that should be decided jointly by the employer and the employee.[123]

PWFA also includes provisions that are functionally antidiscrimination protections. The statute prohibits denying an opportunity to a qualified employee based on the need to make reasonable accommodations under the Act,[124] and also taking an adverse action against an employee because she requested or used a reasonable accommodation under the Act.[125] The ADA offers similar protections.[126] In many cases, these protections might complement the antidiscrimination protections offered by Title VII, as amended by the PDA, which prohibits discrimination based on pregnancy, childbirth, or related medication conditions.[127]

Finally, a separate section of PWFA includes more general anti-retaliation language. One clause specifies that it is unlawful for "any person" to discriminate against an employee for having "opposed" any act made unlawful by PWFA or participated in any way in an investigation, proceeding, or hearing.[128] A separate clause prohibits coercion, intimidation, threats, or interference with the exercise of rights under the statute.[129] These provisions are modeled on

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[123] This may be either unpaid or paid leave, depending on what is available to the employee. The regulations provide that an employee should be able to choose whether to use paid or unpaid leave to meet PWFA-related needs, at least if the employer allows employees using leave for reasons unrelated to pregnancy, childbirth, or related medical conditions to make such a choice. *See* 29 C.F.R. § 1636.3(*i*)(3); *see also id.* at part 1636, app. § 1636.3(h)(2) ¶¶ 60–64 (discussing range of matters related to leave as a reasonable accommodation).

[124] *See* 42 U.S.C. § 2000gg-1(3); *see also* 29 C.F.R. § 1636.4(c) (regulation discussing this provision); *id.* at part 1636, app. § 1636.4(c) (interpretative guidance on this provision).

[125] *See* 42 U.S.C. § 2000gg-1(5); *see also* 29 C.F.R. § 1636.4(e) (regulation discussing this provision); *id.* at part 1636, app. § 1636.4(e) (interpretative guidance on this provision).

[126] *See* 42 U.S.C. § 12112(b)(5)(B).

[127] *See* 42 U.S.C. § 2000e(k). It is worth noting that the PDA protections can apply any time pregnancy, childbirth, or a related medical condition is at least a "motivating factor" in an adverse action. *See* 42 U.S.C. § 2000e-2(m). It is likely that the PWFA provisions will be interpreted to require a plaintiff to establish but-for causation.

[128] *See* 42 U.S.C. § 2000gg-2(f)(1).

[129] *See id.* § 2000gg-2(f)(2).

provisions in Title VII and the ADA,[130] and they will likely be interpreted similarly. The anti-retaliation language will likely be interpreted to prohibit any adverse act that would dissuade a reasonable person from pursuing a complaint, even if there was no direct economic impact on the employee.[131] It will likely protect not only the person seeking an accommodation, but also others close to her, such as a spouse or partner,[132] as well as anyone who testifies or assists a worker in asserting her rights under PWFA. There has been less litigation under the ADA's anti-interference language;[133] however, EEOC guidance and some caselaw suggests its scope is broader than the more general anti-retaliation language.[134] In its regulations and guidance for PWFA, the agency likewise suggests the anti-coercion provision reaches conduct that would not necessary satisfy the "materially adverse" standard required for retaliation claims.[135]

C. Scope of "Pregnancy, Childbirth, or Related Medical Conditions"

PWFA requires accommodations for the known limitations of "pregnancy, childbirth, or related medical conditions."[136] This language is not separately defined in PWFA itself, but it is borrowed from the federal PDA, which has precisely the same phrasing; thus, it

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[130] *See* 42 U.S.C. § 2000e-3 (Title VII general anti-retaliation provision); 42 U.S.C. § 12203(a) (ADA general anti-retaliation provision); *id.* § 12203(b) (ADA anti-interference provision). The ADA's anti-interference provisions are modeled on the Fair Housing Act. *See* 42 U.S.C. § 3617.

[131] *See* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 56 (2006) (interpreting the anti-retaliation language in Title VII).

[132] *See, e.g.*, Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 172 (2011).

[133] *See, e.g.*, Nicole Buonocore Porter, *Disabling ADA Retaliation Claims*, 19 NEV. L.J. 823, 827 (2019) (reviewing ADA retaliation caselaw and noting that "most of the ADA retaliation cases claim violations of the main anti-retaliation provision").

[134] *See* EEOC, EEOC-CVG-2016-1, ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES § III (2016), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#III._ADA [https://perma.cc/BG3R-HRCX]; *see also, e.g.*, Brown v. City of Tucson, 336 F.3d 1181, 1192 (9th Cir. 2003) (characterizing the anti-interference provisions as addressing a "broader class of persons against less clearly defined wrongs" than the anti-retaliation provisions).

[135] *See* 29 C.F.R. part 1636, app. § 1636.5(f)(2).

[136] 42 U.S.C. § 2000gg-1(1).

is appropriate to look to interpretation of the PDA language by the EEOC and by courts when determining the meaning of this language in PWFA.[137] The scope of pregnancy and childbirth is relatively clear; most disputes are likely to focus on which medical conditions are properly deemed "related" to pregnancy and childbirth. A full explication of this language—and how it should be interpreted, given that it was enacted to override a decision by the Supreme Court that adopted an unduly narrow definition of the meaning of discrimination because of "sex" in Title VII—is outside the scope of this article.[138] This section is simply intended to provide a basic overview of how the PWFA regulations and accompanying guidance interpret the statutory phrase and how that interpretation relates to prior caselaw and regulatory guidance considering the analogous language in the PDA.

The PWFA regulation defines "related medical condition" as "medical conditions relating to the pregnancy or childbirth of the specific employee in question."[139] It then provides an extensive—but explicitly non-exhaustive—list of conditions related to the female reproductive process that it states are, or may be depending on the circumstances, within the scope of this language. This includes menstruation; conditions such as nausea and swollen feet that are common in so-called "normal" pregnancies; many distinct

[137] *See* 42 U.S.C. § 2000e(k); *see, e.g.*, Bragdon v. Abbott, 525 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.")

[138] Several years ago, I discussed then-applicable caselaw interpreting how this language applied to lactation. *See* Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 553–54 (2009). More recently, I have discussed how it applies to menstruation. *See generally* Deborah A. Widiss, *Menstruation Discrimination and the Problem of Shadow Precedents*, 41 COLUM. J. GENDER & L. 235 (2021). In those pieces, I argued the PDA should be understood as reinterpreting the pre-existing prohibition on discrimination on the basis of "sex," such that it should inform interpretation of other statutes—such as Title IX—that likewise prohibit discrimination on the basis of sex. That analysis turns in part on the PDA's structure as a statutory definition, as well as the fact that it was enacted to override a Court decision interpreting Title VII's original language. Somewhat different reasoning would apply regarding accommodations under PWFA, since the "pregnancy, childbirth, or related medical conditions" language is the actual operative language of the statute.

[139] 29 C.F.R. § 1636.3(b).

complications that can arise during pregnancy; termination of a pregnancy "via miscarriage, stillbirth, or abortion"; preterm labor; and lactation and conditions related to lactation.[140] The rule also includes various conditions, such as carpal tunnel syndrome, high blood pressure, depression, and anxiety, that are often heightened or exacerbated by pregnancy,[141] with the instruction that such conditions are covered *if* in the particular case at hand the condition is related to pregnancy or childbirth.[142]

The interpretive guidance for the rule provides extensive support from prior EEOC guidance and judicial interpretations of the PDA, as well as the expertise of medical professionals, for the inclusion of the various conditions on the list.[143] I think the agency has offered a reasonable interpretation of the statutory language. That said, a significant share of the comments submitted to the EEOC in response to the proposed rule objected to some aspects of the agency's interpretation of "related medical condition," particularly the explicit inclusion of abortion,[144] and some courts may not defer to the EEOC's interpretation of the language in some respects. The balance of this section discusses some key conditions that have been the subject of earlier litigation under the PDA and that are likely to arise with frequency under PWFA.

It is quite well established that lactation is a "related medical condition" within the meaning of the PDA, and accordingly that PWFA should be interpreted to require employers to make reasonable accommodations for lactation.[145] In this respect, it will likely work in

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[140] *See id.*

[141] *See id.*

[142] *See id.* part 1636, app. § 1636.3(b).

[143] *See id.*

[144] In the preamble to the final rule, the agency includes an extensive discussion of the range of comments it received in response to the inclusion of abortion. *See* Regulations to Implement the Pregnant Workers Fairness Act, 89 Fed. Reg. at 29104–14. In terms of absolute numbers, slightly more comments disagreed with than supported the inclusion of abortion, but both views were very well represented. *See id.* at 29104 (reporting the Commission received approximately 54,000 (mostly form) comments from individuals opposing the inclusion of abortion and approximately 40,000 (mostly form) comments from individuals supporting the inclusion of abortion).

[145] *See, e.g.*, Hicks v. City of Tuscaloosa, 870 F.3d 1253, 1259–60 (11th Cir. 2017); EEOC v. Houston Funding II, Ltd., 717 F.3d 425, 428 (5th Cir. 2013); EEOC

conjunction with provisions in the Fair Labor Standards Act (FLSA), as amended by the PUMP for Nursing Mothers Act, that generally require employers to provide workers "reasonable break time" to express breastmilk (for up to one year after the birth of a child) and access to a clean, private, non-restroom space in which to do so.[146] A lactating employee might, for example, use PWFA to ask for modification of a uniform to better accommodate breastfeeding,[147] or for permission to carry a water bottle or extra snacks, while using the FLSA provisions to address break time needs. PWFA might also be helpful for a worker who seeks to schedule modifications to allow her to physically nurse her baby—for example, if an employer has on-site childcare—rather than express breast milk, or to be relieved from work travel if it would interfere with her ability to pump or breastfeed, or for breaktime and space to express breastmilk after the one-year period covered by the FLSA.

It is also well established that miscarriage is a "related medical condition" to pregnancy, in the sense that courts have readily recognized that employees who face discrimination at work because of a miscarriage have viable pregnancy discrimination claims.[148] An employee who suffers a miscarriage should accordingly be able to use PWFA to ask for time off for physical or mental recovery. Likewise, several cases have held that infertility treatments that are specific to one sex are within the ambit of the PDA's "related medical conditions" language.[149] Thus, under PWFA, an employee undergoing infertility

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2015 PREGNANCY GUIDANCE, *supra* note 42, § I.A.4(b); *see also* Regulations to Implement the Pregnant Workers Fairness Act, 89 Fed. Reg. at 29102 (noting that only a handful of comments questioned including lactation as a "related medical condition" and explaining why these comments were not persuasive).

[146] *See* 29 U.S.C. § 218d(a)(1).

[147] *Cf. Hicks*, 870 F.3d at 1256–57 (discussing breastfeeding police officer who sought alternative duties that would not expose her to gunfire because her bulletproof vest could cause infected milk ducts).

[148] *See* Laura T. Kessler, *Miscarriage of Justice: Early Pregnancy Loss and the Limits of U.S. Employment Law*, 108 CORNELL L. REV. 543, 558–60 (2023) (collecting cases recognizing such discrimination claims).

[149] *See, e.g.*, Hall v. Nalco Co., 534 F.3d 644, 648–49 (7th Cir. 2008) (employee terminated for taking time off to undergo in vitro fertilization stated a viable sex discrimination claim); Pacourek v. Inland Steel Co., 858 F. Supp. 1393, 1403–04 (N.D. Ill. 1994). In the preamble to the final regulation, the EEOC discusses these and other cases in some detail, as well as prior EEOC guidance, and shows how they support its conclusion that infertility treatments "sought by an

treatments such as in vitro fertilization should be able to ask for schedule modifications to allow for relevant medical appointments.

The EEOC's inclusion of abortion in the PWFA regulation builds on its longstanding interpretation of abortion as within the ambit of the PDA, as in cases where women have been fired for having or considering having an abortion.[150] Courts have also consistently held that such discrimination states a viable PDA claim.[151] Accordingly, workers can reasonably request under PWFA that employers provide accommodations for needs—including time off—related to abortion.[152] However, PWFA specifies that it shall not be construed to require an "employer-sponsored health plan to pay for or cover any particular item, procedure, or treatment."[153] This means an employee could not

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employee with the capacity to become pregnant" will generally be deemed to be within the scope of PWFA. *See* Regulations to Implement the Pregnant Workers Fairness Act, 89 Fed. Reg. at 29102; *see also* Ming-Qi Chu, *Abortion Rights Are Pregnancy Rights: Interpreting the Scope of Pregnancy-Related Medical Conditions Under Title VII*, 27 EMP. RIGHTS & EMP. POL'Y J. 184, 200–03 (2024) (discussing this caselaw). By contrast, several courts have held that infertility-related discrimination in healthcare plans is permissible. *See id.* at 203–08 (discussing and critiquing this caselaw).

[150] *See* EEOC 2015 PREGNANCY GUIDANCE, *supra* note 42, § I.A.4.c. ("Title VII protects women from being fired for having an abortion or contemplating an abortion."); Questions and Answers on the Pregnancy Discrimination Act, Public Law 95-555, 92 Stat. 2076 (1978), 29 C.F.R. pt. 1604 app. introduction (2023) ("A woman is therefore protected against such practices as being fired, or refused a job or promotion, merely because she is pregnant or has had an abortion.").

[151] *See, e.g.*, Doe v. C.A.R.S. Prot. Plus, Inc., 527 F.3d 358, 364 (3d Cir. 2008) (PDA prohibits employer from discriminating against employee because she obtained an abortion); Turic v. Holland Hosp., Inc., 85 F.3d 1211, 1214 (6th Cir. 1996) (PDA violated by discharge of employee for considering having an abortion); *see also* Chu, *supra* note 149, at 208 ("[C]ourts considering whether the terms 'pregnancy, childbirth, and related medical conditions' include abortion have *all held in the affirmative.*") (emphasis added); *id.* at 208–15 (providing detailed analysis of applicable federal district and appellate cases).

[152] Notably, at least some members of Congress interpreted PWFA to encompass such requests (albeit in the context of arguing that there should be a limited exemption for religious organizations). *See* H.R. REP. NO. 117-27, at 60 (2021) (minority view asserting that "if an employee . . . requests time off to have an abortion procedure, [PWFA] could require the organization to comply with this request as a reasonable accommodation" and arguing accordingly for an exemption for religious-based organizations); *see also* Regulations to Implement the Pregnant Workers Fairness Act, 89 Fed. Reg. at 29109–10 (discussing conflicting statements in the legislative history of the bill regarding whether abortion was within the ambit of the statutory language).

[153] *See* 42 U.S.C. § 2000gg-5(a)(2).

use PWFA to ask for her employer to pay for abortion-related expenses under a health plan. The regulation's specific reference to abortion is controversial, and it will certainly be challenged by some employers. Indeed, within days of the final rule being published (and shortly before this article was published), seventeen states filed a lawsuit arguing that the agency exceeded its authority by interpreting the law to require accommodations for abortion.[154]

Finally, although prior case law is not uniform, there is ample support for the EEOC's conclusion that "at a minimum, menstruation is covered . . . when it has a nexus to a current or prior pregnancy or childbirth."[155] Menstruation is a necessary precursor to pregnancy, menstrual disorders often cause infertility, and menopause, the cessation of menstruation, marks the end of potential pregnancy.[156] There is a growing body of work exploring how menstrual periods can impact work and how employers can better support menstruating employees.[157] Menstruating employees generally need regular access to bathrooms, ideally stocked with menstrual products and facilitating disposal of used products. As noted above, general workplace safety rules are supposed to ensure workers can use the restroom when necessary.[158] However, to the extent that existing policies might be inadequate to meet certain menstruation-related needs, menstruators may be able to use PWFA to ask for extra restroom breaks, schedule flexibility to receive treatment for

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[154] *See* Tennessee et al. v. Equal Employment Opportunity Comm'n, 2:24-CV-84 (E.D. Ark., complaint filed Apr. 25, 2024).

[155] Regulations to Implement the Pregnant Workers Fairness Act, 89 Fed. Reg. at 29101 (discussing cases concerning menstruation and noting that discrimination on the basis of menstruation may violate Title VII's more general prohibition on sex discrimination, even if in some instances it might not be deemed a "related medical condition" to pregnancy); *see also* Marcy L. Karin & Deborah A. Widiss, *Periods, (Peri)Menopause, and PWFA*, ___ HARV. J. L. & GENDER ___, *12–17 (forthcoming 2025) (on file with author) (providing detailed discussion of case law and EEOC decisions on point).

[156] *See id.* at *6–10 (discussing science of menstruation and its relation to pregnancy).

[157] *See generally, e.g.*, BRIDGET J. CRAWFORD & EMILY GOLD WALDMAN, MENSTRUATION MATTERS: CHALLENGING THE LAW'S SILENCE ON PERIODS (2022); Bridget J. Crawford, Emily Gold Waldman, & Naomi R. Cahn, *Working Through Menopause*, 99 WASH. U. L. REV. 1531 (2022); Marcy L. Karin, *Addressing Periods at Work*, 16 HARV. L. & POL'Y REV. 449 (2022); Karin & Widiss, *supra* note 155; Deborah A. Widiss, *Time Off Work for Menstruation: A Good Idea?* 98 N.Y.U. L. REV. ONLINE 170 (2023).

[158] *See Restrooms and Sanitation Requirements*, *supra* note 73.

menstrual disorders, and other support. The ADA, as well, can apply to some health conditions associated with menstruation or menopause, such as endometriosis, a condition that causes significant levels of pain during menstruation.[159]

In summary, prior caselaw and regulatory guidance interpreting the PDA provide significant support for the EEOC's conclusion in its PWFA regulation that the term "related medical conditions" includes lactation, miscarriage, sex-specific infertility-treatments, at least some menstruation-related needs, as well as abortion, although this last will likely be the subject of significant litigation. All of these conditions are closely related to pregnancy and childbirth and thus within a reasonable interpretation of the statutory language. Notably, many of these conditions evoke discomfort, or even hostility. This squeamishness may reflect the male paradigm around which our public spaces—including work—are organized. Employers may refuse to accommodate these needs because they hold gender-based stereotypes that presume that anyone experiencing these conditions has diminished capacity generally. By ensuring more robust support for these conditions, PWFA can advance sex-based equality more generally. That said, the statutory language is gender-neutral, so it should apply to non-binary, genderqueer and trans-persons who may also experience these conditions.[160]

D. Coverage, Enforcement, and Remedies

PWFA largely adopts the coverage, enforcement, and remedies rules that apply to Title VII, which have also been incorporated into the ADA.[161] Thus, PWFA applies to private sector employers with at least fifteen employees, adopting the specific definitions for

[159] *See* Karin & Widiss, *supra* note 155, at *16–17; Karin, *supra* note 157, at 478–80.

[160] Although the EEOC's rule does not explicitly address application to non-binary, genderqueer, and trans-persons, some of the examples that the EEOC provides in the interpretative guidance reference persons who use the non-gendered pronoun "they." *See, e.g.*, 29 C.F.R. part 1636, app. § 1636.3(*i*), Example #31 ("Ava is a police officer and is pregnant. They ask their union representative for help getting a larger uniform."); *id.* at app. § 1636.5(f)(2), Example #64 ("Arden is dealing with complications from their recent childbirth.").

[161] 42 U.S.C. § 2000gg-1.

"employer" set forth in Title VII.[162] It also covers many federal and state public employers.[163] The definition of covered "employee" is also borrowed from Title VII and the comparable civil rights laws governing public employment.[164] Part-time as well as full-time employees are thus covered, as are applicants for jobs, but PWFA does not require employers to make accommodations for independent contractors (at least so long as they are properly classified as such).

Ideally, most enforcement of PWFA will occur informally and quickly. Employees who are affected by pregnancy, childbirth, or related medical conditions will go to their employers to request accommodations. In the best-case scenario, employers will recognize their obligations under PWFA, engage in good faith in the interactive process, and provide support promptly.[165] As noted above, the interactive process could be as simple as a conversation, and many requests should be granted without requiring any documentation. If a more extended process is required, employers should consider the possibility of providing interim accommodations that allow the employee to continue to work productively, while they work together to consider options.

If a conversation is not enough to secure adequate support, some employees may find success by more formally submitting a "demand letter," perhaps written by a lawyer, explaining the new law and asking for resolution of the issue.[166] Or employees may be able to work with a union representative to make such demands. In all these scenarios, support could be provided without recourse to the courts. And, notably, in states that have already implemented PWFAs, the overall number of pregnancy-related discrimination claims has

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[162] *See id.* § 2000gg(2) (incorporating definition of employer from Title VII, 42 U.S.C. § 2000e(b)).

[163] *See id.*

[164] *See id.* § 2000gg(3); *see also* 29 C.F.R. part 1636, app. § 1636 Part II (noting that throughout the regulations "employee" should be understood to include applicant and former employees, where relevant).

[165] In its rule, the EEOC specifies that "unnecessary delay" in providing a reasonable accommodation can itself violate PWFA, even if the support is ultimately provided. *See* 29 C.F.R. § 1636.4(a)(1); *see also id.* part 1363 app. § 1636.4(a)(1) (discussing this aspect of the regulation).

[166] For a template letter, see, for example, *Sample Letters to Give to Your Employer About the Pregnant Workers Fairness Act*, A BETTER BALANCE, https://www.abetterbalance.org/resources/sample-letters-to-give-to-your-employer-about-the-pregnant-workers-fairness-act [https://perma.cc/9UVP-64LR] (Nov. 8, 2023).

decreased as compared to the pre-PWFA period.[167] This suggests the laws are functioning as intended—providing workable solutions without any litigation.

However, in cases where the process breaks down, employees might need to take more formal action. For employees covered by Title VII, PWFA incorporates that statute's procedures.[168] This means individuals seeking to enforce PWFA in court will generally need to exhaust their administrative remedies by filing charge with the EEOC or comparable state agency before filing in court. They will have 180 or 300 days from the unlawful employment action to file a charge.[169] In many instances, the relevant unlawful action would be the final denial of an accommodation. In other instances, the unlawful action might be the date on which an employee denied an accommodation quit a job, if she could show a constructive discharge, or the date on which an employer unlawfully retaliated against an employee for having requested an accommodation (even an accommodation that was granted).

Ideally, the agency process might offer the opportunity for a relatively quick resolution of a matter through the free mediation process that the EEOC operates. However, the agency's website indicates that the average processing time for mediation is eighty-four days.[170] While that is very fast compared to most litigation (or even the agency's investigation process),[171] it's still too long for the time-sensitive nature of many pregnancy-related requests. To address this, the agency might consider whether it could expedite PWFA-related requests for mediation. There has also been a rapid growth of employers requiring employees to agree to arbitrate virtually any

[167] *See* sources cited *supra* notes 40–41.

[168] *See* 42 U.S.C. § 2000gg-2(a).

[169] *See* 42 U.S.C. § 2000e-5(e)(1). The 300-day limit applies if the state where they are filing has a state agency that also enforces antidiscrimination laws. *See id.*

[170] *See Resolving a Charge*, EEOC, https://www.eeoc.gov/employers/resolving-charge [https://perma.cc/D5Y8-77Z4] (scroll down to "Mediation").

[171] *See What You Can Expect After You File a Charge*, EEOC, https://www.eeoc.gov/what-you-can-expect-after-you-file-charge [https://perma.cc/U8J3-5C4C] (scroll down to "Investigation") (indicating the agency takes on average about ten months to investigate a charge).

kind of employment claim.[172] There are many reasons to be concerned about the pervasiveness of mandatory arbitration and the ways it tends to disadvantage workers;[173] however, the relatively quick process it provides might be suited to resolving at least some kinds of PWFA claims.[174]

When a private employer fails to provide an accommodation, or commits any of the other unlawful acts addressed by the statute, PWFA incorporates the full range of equitable and legal relief available under Title VII, including compensatory and punitive damages, subject to caps based on the size of the employer.[175] If a claim is based on the denial of a reasonable accommodation, compensatory and punitive damages are not available *if* an employer can prove it took "good faith efforts, in consultation with" the employee to "identify" and make available a "reasonable accommodation that would provide such employee with an equally effective opportunity" as the specific accommodation requested by the employee.[176] This language is modeled on an analogous provision that applies to disability claims under the ADA.[177] It works together with the expectation that generally the employer and employee will engage in an interactive process to identify one or more effective accommodations.

It is foreseeable that some significant number of workers denied accommodations will end up quitting their jobs, rather than risk medical harm to themselves or the fetus. Accordingly, constructive

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[172] *See, e.g.*, Alexander J. Colvin, *The Metastasization of Mandatory* Arbitration, 94 CHI.-KENT L. REV. 3, 9–10 (2019) (reporting results of a 2017 study that found that more than half of private sector non-union workers were subject to mandatory arbitration clauses).

[173] *See, e.g.*, *id.* at 22–23; *see also, e.g.*, Mark Gough, *A Tale of Two Forums: Employment Discrimination of Outcomes in Arbitration and Litigation*, 74 ILR REV. 875 (2021) (discussing studies showing employee win rates and monetary awards are lower in arbitration than litigation).

[174] A federal law enacted in 2022 excuses sexual harassment claims from mandatory arbitration. *See* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFASASHA), Pub. L. No. 117-90, § 2(a), 136 Stat. 26 (2022) (codified at 9 U.S.C. § 402(a)). Since pregnancy discrimination is a form of sex discrimination, *see* 42 U.S.C. § 2000e(k), EFASASHA should arguably excuse mandatory arbitration of *harassment* claims based on pregnancy; however, most PWFA claims would likely fall outside its ambit.

[175] *See* 42 U.S.C. § 2000gg-2(a).

[176] *Id.* § 2000gg-2(g).

[177] *See* 42 U.S.C. § 1981a(a)(3).

discharge caselaw may be important. The general standard will be, as in any context, whether a reasonable employee in that position would have felt compelled to quit.[178] In enforcing the PDA, courts have recognized that this analysis must be sensitive to the particular—and often highly time-sensitive—needs of pregnancy, childbirth, lactation, and other related medical conditions. Thus, for example, in one recent case, a police officer who was breastfeeding asked to be assigned to a desk position so she would not be required to wear a bulletproof vest that might interfere with lactation.[179] When this request was denied, she quit rather than risk an infection that could disrupt her milk supply or the dangers that would come from patrolling without a properly-fitting vest.[180] The court—properly I would submit—upheld the jury's finding that she had made out a constructive discharge claim.[181] Courts apply PWFA should take a similarly nuanced approach to considering circumstances under which a reasonable person might feel compelled to quit.

When PWFA was debated, many Republican members of Congress expressed general support for the bill, but indicated they were concerned about how it might apply to religious employers.[182] PWFA as a standalone bill did not explicitly address religion at all, and Republican efforts to amend the bill to include such a provision failed. The version ultimately enacted, as part of the omnibus funding bill, includes a "rule of construction" specifying that PWFA will be subject to the "applicability to religious employment" set forth in Title VII.[183] The referenced section in Title VII provides that a "religious

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[178] *See, e.g.*, Pa. State Police v. Suders, 542 U.S. 129, 141–43 (2004).

[179] *See* Hicks v. Tuscaloosa, 870 F.3d 1253, 1256–57 (11th Cir. 2017) (arguing under the Pregnancy Discrimination Act's requirement to treat pregnant employees the "same" as others with similar limitations that the department should have allowed her to transfer to a desk position because it had allowed others to make such changes).

[180] *See id.* at 1257.

[181] *See id.* at 1260–61.

[182] *See, e.g.*, 167 Cong. Rec. H2324 (May 14, 2021) (statement of Rep. Virginia Foxx, expressing general support for the "underlying principle" of PWFA but indicating that she would not vote for it because it did not include a religious exemption); *id.* at H2325 (similar statement by Rep. Julia Letlow); *see also* H.R. REP. NO. 117-27, at 59–62 (2021) (concerns expressed by Republican members of the committee regarding the lack of an explicit exception for religious organizations).

[183] *See* 42 U.S.C. § 2000gg-5(b) (referencing the standard for religious employers codified at 42 U.S.C. § 2000e-1(a)).

corporation, association, educational institution, or society" may "employ[] … individuals of a particular religion to perform work connected with the carrying on" by such entity "of its activities."[184] This is not a general exception to most of the mandates of Title VII. Rather, it responds to the fact that Title VII prohibits most employers from making decisions on the basis of religion, and it creates a narrow exception that allows certain religious entities to consider religion when making hiring decisions. This provision does *not* excuse compliance from Title VII's prohibition on discrimination on the basis of sex, race, color, or national origin.

The EEOC's rule implementing this provision in PWFA is quite brief. It simply repeats the statutory language and notes that PWFA does not limit the rights an entity may have under the U.S. Constitution or other civil rights statutes.[185] This a (somewhat oblique)[186] reference to the possibility that some religious employers might seek to be excused from PWFA's requirements pursuant to the court-created "ministerial exception,"[187] the Religious Freedom Restoration Act,[188] or the First Amendment. In the interpretive guidance for the rule, the agency confirms that it intends to assess the application of religious-related defenses on a "case-by-case" basis, consistent with the framework it uses to evaluate such defenses under other antidiscrimination statutes enforced by the EEOC.[189] There will likely be litigation regarding how PWFA applies to religious organizations. These are particularly likely to arise if employees make

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[184] 42 U.S.C. § 2000e-1(a).

[185] *See* 29 C.F.R. § 1636.7(b).

[186] In the preamble introducing the rule, the agency discusses comments it received related to these doctrines and explains why it will evaluate such claims on a case-by-case basis. *See* Regulations to Implement the Pregnant Workers Fairness Act, 89 Fed. Reg. at 29148–55 (discussing potential claims that could be advanced related to the "ministerial exception," Religious Freedom Restoration Act, and the First Amendment's protection of freedom of religion, speech, and association).

[187] *See, e.g.*, Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049, 2063–66 (2020) (recognizing a "ministerial" exception that precludes interference with a religious organization's hiring decisions related to employees who play a ministerial role in the organization).

[188] *See* 42 U.S.C. § 2000bb-1 (providing the government may substantially burden a person's exercise of religion only if it demonstrates it is in furtherance of a "compelling government interest" and is the "least restrictive means" of furthering that interest).

[189] 29 C.F.R. part 1636, app. § 1636.7(b).

requests for accommodations for conditions (e.g., fertility treatments or abortions) that are counter to some religious doctrines.[190] Courts may conclude that some religious entities are sometimes excused from compliance with PWFA. However, any suggestion that PWFA has a general "religious exemption" is incorrect.

IV. PWFA IN POST-*DOBBS* AMERICA

PWFA addresses pressing needs, and it provides essential benefits to workers in *all* states, no matter their policies on abortion. That said, the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, holding that the federal Constitution does not generally protect the right to an abortion, makes PWFA even more important.[191] As of April 2024, abortion is entirely outlawed or severely restricted in about half of the states; this is the result of newly-enacted laws and pre-existing laws that sprang into effect when *Roe* was overturned.[192] Court challenges, primarily based on state constitutional claims, temporarily enjoined enforcement of some of the laws,[193] but many have ultimately been found to be

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[190] I have previously discussed such issues as applied to discrimination claims based on non-marital pregnancy. *See generally* Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 98 B.U. L. REV. 2083 (2017).

[191] 597 U.S. 215 (2022).

[192] *See, e.g.*, *After* Roe *Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state [https://perma.cc/XP2C-YX76] [hereinafter *After* Roe *Fell*] (providing an interactive map, updated in real time, of different states' abortion laws and identifying twenty-four states as states where abortion is either completely illegal or where there is "hostile" legislation in place that severely restricts access); *Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INST., https://states.guttmacher.org/policies [https://perma.cc/C5U5-EGRQ] (Mar. 25, 2024) (providing similar interactive map that uses slightly different classifications and identifies twenty-eight states as at least "restrictive"); Larissa Jimenez, *60 Days After* Dobbs*: State Legal Developments on Abortion*, BRENNAN CTR. FOR JUST. (Aug. 24, 2022), https://www.brennancenter.org/our-work/research-reports/60-days-after-dobbs-state-legal-developments-abortion [https://perma.cc/9GGS-9PUW] (explaining how pre-existing restrictive legislation became effective and how bills further restricting abortion were introduced in many states).

[193] *See, e.g.*, Mabel Felix, Laurie Sobel & Alina Salganicoff, *Legal Challenges to State Abortion Bans Since the* Dobbs *Decision*, KFF (Jan. 20, 2023), https://www.kff.org/womens-health-policy/issue-brief/legal-challenges-to-state-

permissible.[194] State legislatures are also still considering new bans.[195]

Many states have also narrowed dramatically the scope of exceptions under which abortions may be permitted—when they would otherwise be prohibited—to protect the "health" of the mother. According to the *New York Times*, eight states ban abortion without any exception for patients with severe health risks.[196] An additional sixteen states nominally have exceptions, for at least some patients with severe health risks, but many of the exceptions are very hard to satisfy and/or so unclear that doctors are not sure when they are applicable.[197] For example, several states' laws allow abortions when it is necessary "prevent death or a serious risk of substantial and irreversible physical impairment of a major bodily function."[198] However, the key terms of "serious risk" and "substantial and irreversible" and "major bodily function" all require judgment calls

abortion-bans-since-the-dobbs-decision [https://perma.cc/B688-LQDT] (discussing different theories used to challenge abortion bans and identifying twenty different cases, brought in fourteen states, that were pending as of January 19, 2023).

[194] *See, e.g.*, Kate Zernike, *Indiana Supreme Court Upholds Abortion Ban*, N.Y. TIMES (June 30, 2023), https://www.nytimes.com/2023/06/30/us/indiana-abortion-ban-upheld.html [https://perma.cc/R6J2-DHAT] (click the view the live page link) (describing court decisions in Indiana and North Carolina that allowed almost-complete bans to take effect).

[195] *See, e.g.*, *State Legislation Tracker: Major Developments in Sexual & Reproductive Health*, GUTTMACHER INST., https://www.guttmacher.org/state-legislation-tracker [https://perma.cc/SG9R-CTVX] (tracking pending bills).

[196] *See* Amy Schoenfeld Walker, *Most Abortion Bans Include Exceptions. In Practice, Few Are Granted*, N.Y. TIMES (Jan 21, 2023), https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html [https://perma.cc/JQ2R-J4UG] (identifying Idaho, North Dakota, South Dakota, Wisconsin, Oklahoma, Arkansas, Tennessee, and Mississippi as states without any exceptions for health risks).

[197] *See id.* (identifying states with narrow exceptions for health and then discussing disagreements between doctors and hospital lawyers over what health conditions qualify); *see also, e.g.*, Dov Fox, *The Abortion Double Bind*, 113 AM. J. PUB. HEALTH 1068 (2023) (discussing ambiguity in abortion exceptions for health); Mabel Felix, Laurie Sobel & Alina Salganicoff, *A Review of Exceptions in State Abortions Bans: Implications for the Provision of Abortion Services*, KFF (May 18, 2023), https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortions-bans-implications-for-the-provision-of-abortion-services [https://perma.cc/JL8B-N8AV] (similar).

[198] *See* Felix et al., *supra* note 193 (identifying Arizona, Florida, Indiana, Ohio, and Wyoming as including this language).

that are difficult to make, and may delay care while doctors consult with lawyers.[199]

Other states have responded to *Dobbs* by expanding access to abortion, or they have simply preserved the general framework developed under *Roe*.[200] Voters in several states, including some generally considered conservative, have supported constitutional amendments that protect or expand abortion rights, sometimes in response to restrictions passed by state legislatures.[201] Several states have also enacted protections designed to shield medical providers from prosecution for treating patients who have traveled from states with bans; some of these laws are intended to protect providers who mail abortion medication to patients in states with bans as well.[202]

Accordingly, while specific details of access in particular states will continue to evolve, the general pattern is clear. In large swathes of the South, Midwest, and Great Plains, abortions (both so-called "elective" abortions and those responding to health needs that fall short of any applicable exceptions)[203] are banned entirely or are only

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[199] *See id.* (identifying this particular language as vague and meaning that it can "leave determination of whether an abortion can be legally provided to lawyers for the institution in which the clinician practices); Walker, *supra* note 196 (discussing disagreement between doctor and lawyers about whether health condition would satisfy Ohio's standard).

[200] *See After* Roe *Fell*, *supra* note 192 (identifying eleven states as having expanded access, and an additional twelve states as protecting abortion rights); *Interactive Map: US Abortion Policies and Access After Roe*, *supra* note 192 (identifying eighteen states, plus the District of Columbia, as having protective or very protective laws in place).

[201] *See generally* Mabel Felix, Laurie Sobel & Alina Salganicoff, *Addressing Abortion Access Through State Ballot Initiatives*, KFF (Feb. 9, 2024), https://www.kff.org/womens-health-policy/issue-brief/addressing-abortion-access-through-state-ballot-initiatives [https://perma.cc/A2KP-8VRF]

[202] *See, e.g.*, *Interactive Map: US Abortion Policies and Access After Roe*, *supra* note 192 (identifying fifteen states as having shield laws intended protect providers from investigations by other states in at least some circumstances); Pam Belluck, *Abortion Shield Laws: A New War Between the States*, N.Y. TIMES, https://www.nytimes.com/2024/02/22/health/abortion-shield-laws-telemedicine.html [https://perma.cc/X3WC-UPZL] (click the "view the live page" link) (Feb. 23, 2024) (identifying six states that have passed laws intended to shield medical providers from prosecution for using telemedicine to prescribe abortion medication and then mail abortion pills to patients).

[203] "Elective" abortion is a term generally used to refer to abortions that are not medically indicated by maternal or fetal health conditions. For a thoughtful

available in the very first weeks of pregnancy. By contrast, on the West coast and in the Northeast, and in scattered additional states, abortion is generally accessible up until viability and for medical needs subsequently. This bifurcated landscape will likely endure for the foreseeable future, absent further changes in federal law. That said, the Supreme Court is currently considering a challenge to access to medication abortion that could limit access to medication abortion even in states where it is legal.[204]

Studies are beginning to paint a fuller picture of how these seismic legal changes have impacted pregnant persons and medical providers. Somewhat surprisingly, the overall number of abortions seems to have remained steady, or perhaps even increased, since *Dobbs* was decided.[205] However, there have been large geographic shifts. Abortions have largely disappeared in states with very stringent restrictions or absolute bans, and they have risen sharply in states where abortion remains legal, particularly those that border states with bans.[206] This obviously suggests that a significant number

critique of the use of the term, arguing that it is often used as a moral judgment, see Katie Watson, *Why We Should Stop Using the Term "Elective Abortion,"* 20 AMA J. ETHICS 1175, 1176 (2018).

[204] *See* FDA v. All. for Hippocratic Medicine, No. 23-235 (argued Mar. 26, 2024); *see also generally* David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Pills*, 76 STAN. L. REV. 317 (2024) (discussing range of strategies being employed to attempt to limit access to medication abortion, as well as counter movements to increase access to abortion pills).

[205] *See, e.g.*, SOC'Y OF FAM. PLANNING, #WECOUNT PUBLIC REPORT APRIL 2022 TO SEPTEMBER 2023, at 10–11 (Feb. 28, 2024), https://societyfp.org/wp-content/uploads/2024/02/SFPWeCountPublicReport_2.28.24.pdf [https://perma.cc/T7FM-G4S6] (finding overall number of abortions has remained relatively steady since *Dobbs* was decided); *see also* Isaac Maddow-Zimet & Candace Gibson, *Despite Bans, Number of Abortions in the United States Increased in 2023*, GUTTMACHER INST. (Mar. 19, 2024), https://www.guttmacher.org/2024/03/despite-bans-number-abortions-united-states-increased-2023 [https://perma.cc/99RR-ZMYL] (reporting a 10 percent increase in abortions since 2020). These studies generally do not include self-managed abortions, which have also risen sharply after *Dobbs*. *See generally* Abigail R.A. Aiken, Elisa S. Wells & Rebecca Gomperts, *Provision of Medications for Self-Managed Abortion Before and After the* Dobbs v. Jackson Women's Health Organization *Decision*, JAMA ONLINE (Mar. 25, 2024), https://jamanetwork.com/journals/jama/fullarticle/2816817 [https://perma.cc/YL52-LQK7].

[206] *See* SOC'Y OF FAM. PLANNING, *supra* note 205, at 4 (showing abortions in states with bans falling to almost 0); Maddow-Zimet & Gibson, *supra* note 205 (finding abortions in states bordering ban states increased on average 37%).

of people are traveling from states with bans to states without bans to receive abortion care. Researchers speculate that the overall increase in abortions also likely reflects the additional financial support for those seeking abortions that became available after *Dobbs* and increased access to medication abortion via telemedicine.[207]

The effects of *Dobbs* have thus been somewhat mitigated—but in ways that may exacerbate certain inequalities. The first published study examining changes in the birth rate after *Dobbs* reports both ethnic/racial and geographical disparities.[208] On average, in states with bans, the birthrate increased 2.3 percent as compared to comparable states without bans, but the increase was notably higher for women of color than for white women.[209] The rise in birthrates also generally correlated with the increase in distance a person would have to travel to reach an abortion provider.[210] In Missouri, where the average increase in travel was just two miles—from St. Louis to across the river in Illinois—the birth rate increased only 0.4 percent.[211] By contrast, in Texas, where the average increase was 453 miles, or about a day of driving, the birth rate increased 5.1 percent.[212] These disparities are likely to widen further. Immediately after *Dobbs*, donations to abortion funds, which help poor women cover the costs of the procedure and travel, rose dramatically; donations have since "slowed to a trickle" and many funds are therefore cutting back or closing.[213]

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[207] *See* SOC'Y OF FAM. PLANNING, *supra* note 205, at 5; Maddow-Zimet & Gibson, *supra* note 205.

[208] *See* Daniel Dench, Mayra Pineda-Torres & Caitlen Myers, *The Effects of the* Dobbs *Decision on Fertility* 4 (IZA Inst. of Lab. Econ. Discussion Paper Series No. 16608, Nov. 2023), https://docs.iza.org/dp16608.pdf [https://perma.cc/NX4B-T975].

[209] *See id.* at 10, 12 (reporting an average increase for non-Hispanic White women of 3 percent, for non-Hispanic Black women of 3.8 percent and Hispanic women of 4.7 percent). The researchers note that the differences shown for Black women do not reach conventional standards of statistical significance but are in accordance with previous studies showing that the impact on fertility of abortion restrictions are higher for non-White women. *See id.*

[210] *Id.* at 13–14.

[211] *Id.* at 13, 27.

[212] *Id.* at 27.

[213] Bryce Covert, *As Costs and Demand Skyrocket, Abortion Funds Struggle to Keep Up*, THE NATION (Dec. 7, 2023),

Almost two years of post-*Dobbs* restrictions have also shown how abortion bans increase the risks associated with pregnancy.[214] Health care providers practicing in states with bans that include only narrow, or no, exceptions for protecting the health of the pregnant person report regularly seeing patients where standard medical practice indicates an abortion is warranted, but where the providers feel they cannot provide an abortion under the new laws.[215] This includes a wide range of pregnancy complications and fetal anomalies, as well as patients presenting with health risks unrelated to the pregnancy, such as cancer.[216] Sometimes this means pregnant women travel to

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https://www.thenation.com/article/society/abortion-funds-dobbs [https://perma.cc/B2H4-9F8V]; *see also, e.g.*, Allison McCann, *What It Costs to Get an Abortion Now*, N.Y. TIMES (Sept. 28, 2022), https://www.nytimes.com/interactive/2022/09/28/us/abortion-costs-funds.html [https://perma.cc/L3R9-NWVL] (estimating total costs for illustrative patients ranging from $1300 to almost $5000, with the variation reflecting both differences in travel distances and the complexity of the medical procedure).

[214] *See generally, e.g.*, Brittny Frederiksen, Usha Ranji, Ivette Gomez & Alina Salganicoff, *A National Survey of OBGYNs' Experiences After* Dobbs, KFF (June 21, 2023), https://www.kff.org/womens-health-policy/report/a-national-survey-of-obgyns-experiences-after-dobbs [https://perma.cc/TTC2-GQ6X]; DANIEL GROSSMAN, CAROLE JOFFE, SHELLY KALLER, KATRINA KIMPORT, ELIZABETH KINSEY, KLAIRA LERMA, NATALIE MORRIS & KARI WHITE, ANSIRH, CARE POST-ROE: DOCUMENTING CASES OF POOR QUALITY CARE SINCE THE *DOBBS* DECISION (2023), https://www.ansirh.org/sites/default/files/2023-05/Care%20Post-Roe%20Preliminary%20Findings.pdf, [https://perma.cc/6T7T-XL3R]; LIFT LOUISIANA, PHYSICIANS FOR HUM. RTS., RHIMPACT & CTR. FOR REPROD. RTS., CRIMINALIZED CARE: HOW LOUISIANA'S ABORTION BANS ENDANGER PATIENTS AND CLINICIANS (2024) https://reproductiverights.org/wp-content/uploads/2024/03/Criminalized-Care-Report-Updated-as-of-3-15-24.pdf [https://perma.cc/D4CQ-DCD2]; Maya Manian, *The Impact of* Dobbs *on Health Care Beyond Wanted Abortion Care*, 51 J. L., MED. & ETHICS 592 (2023); Erika L. Sabbath, Samantha M. McKetchnie, Kavita S. Arora & Mara Buchbinder, *US Obstetrician-Gynecologists' Perceived Impacts of Post-*Dobbs v. Jackson *State Abortion Bans*, JAMA NETWORK OPEN (Jan. 17, 2024), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2814017 [https://perma.cc/CFS3-ZHPD].

[215] *See, e.g.*, LIFT LOUISIANA ET AL., *supra* note 214, at 23–26 ("Almost all clinicians discussed experiences with pregnant patients who had a serious health condition that did not fall within the bans' allowed exceptions for medical emergencies.").

[216] *See, e.g.*, GROSSMAN ET AL., *supra* note 214, at 7–16; Manian, *supra* note 214, at 594–95; *see also* Elizabeth Kukura, *Pregnancy Risk and Coerced Interventions*

states where they can receive abortions.[217] In other cases, abortion care is simply denied, or delayed until both doctors and lawyers are convinced that the risk has become extreme enough to qualify as life threatening and a medical emergency.[218] Denial or delay of abortion care in such cases can cause considerable physical and emotional pain, and it can decrease future fertility or cause other lasting health harms.[219] Strict abortion laws are also now compromising miscarriage care, meaning many women are experiencing far more extended bleeding and other potential health risks after experiencing a miscarriage.[220] Providers express significant distress at having to practice medicine under these conditions,[221] as well as fear about potential consequences if they are found to have violated state bans.[222]

PWFA does not directly change access to reproductive health care, but it can help address some of these challenges. First, as discussed above, courts and the EEOC have consistently interpreted the PDA's protections for "pregnancy, childbirth, or related medical conditions"

After Dobbs*,* 76 SMU L. REV. 105, 107–22 (2023) (discussing range of risks relating to preexisting conditions and complications where bans may interfere with standard medical treatment).

[217] *See, e.g.*, GROSSMAN ET AL., *supra* note 214, at 7, 10–11 (discussing examples of cases where patients had to travel out of state for abortions to address pregnancy complications).

[218] *See, e.g.*, Sabbath et al., *supra* note 214, at 3–4 ("Many participants described needing to delay medically necessary care until patients were at risk of death or permanent impairment."); LIFT LOUISIANA ET AL., *supra* note 214, at 24 ("[N]early every clinician relayed an account in they and/or their colleagues delayed abortion care until complications were worsened to the point where the patient's life was irrefutably at risk.").

[219] *See, e.g.*, GROSSMAN ET AL., *supra* note 214, at 10 (describing how delay caused by having to travel out of state to meant surgery was required to treat ectopic pregnancy); LIFT LOUISIANA ET AL., *supra* note 214, at 23–26 (describing negative physical and emotional effects of delay); Manian, *supra* note 214, at 595.

[220] *See, e.g.*, GROSSMAN ET AL., *supra* note 214, at 14 (discussing delays in miscarriage care); LIFT LOUISIANA ET AL., *supra* note 214, at 26–28 (similar); *see also* Felix et al., *supra* note 193 (discussing how abortion laws can delay miscarriage care and increase risk associated with pregnancy loss).

[221] *See, e.g.*, Sabbath et al., *supra* note 214, at 5 ("[W]hen describing their moral distress [over not being able to follow clinical standard due to legal constraints], participants used words like muzzled, handcuffed, and straightjacketed.").

[222] *See id.* (reporting 87 percent of providers "reported worries about practicing in an uncertain legal climate"); Frederiksen et al., *supra* note 214, at 4 (about 60 percent of ob-gyns practicing in states with bans report being "very" or "somewhat concerned" about their own legal risk).

as encompassing abortion.[223] This accords with the plain language of the phrase—it is certainly reasonable to conclude that abortion is "related to" pregnancy—and it provides strong support for the EEOC's specific reference to abortion within the PWFA regulations.[224] PWFA provides that it cannot be used to challenge an employer's refusal to pay, under its health insurance policy, for specific medical procedures; this would preclude a claim regarding refusal to pay for costs associated with an abortion.[225] However, workers could reasonably claim that PWFA requires accommodation for other abortion-related needs. Most obviously, pregnant workers in states with stringent abortion restrictions might be able to use PWFA to request leave from work to travel to states where abortion is permitted—and workers in any state might be able to use PWFA for time off to obtain and recover from the procedure.

This is crucially important. Many low-wage jobs operate under a strict attendance-based absence policy, where any absence generates a "point" and workers are routinely terminated if they accrue too many points.[226] There is no federal guarantee of vacation time, personal time, or sick time, and many low-wage workers receive little (or no) paid time off under their employers' discretionary benefit policies.[227] PWFA can help ensure workers can take a limited period of leave, without risking loss of their job. To make this effective, it will be essential to enforce PWFA's antidiscrimination and antiretaliation provisions, as well as the PDA, to ensure that workers who use PWFA

[223] *See supra* text accompanying notes 150–51.

[224] 29 C.F.R. § 1636.3(b) (including termination of pregnancy "via miscarriage, stillbirth, or abortion," as within the ambit of "related medical conditions"); *see also supra* text accompanying note 140.

[225] *See* 42 U.S.C. § 2000gg-5(a); *see also* 29 C.F.R. part 1636, app § 1636.7(a)(2) (discussing the regulation implementing this provision and stating explicitly "nothing in the PWFA requires, or forbids, an employer to pay for health insurance benefits for an abortion").

[226] *See generally e.g.*, DINA BAKST, ELIZABETH GEDMARK & CHRISTINE DINAN, A BETTER BALANCE, MISLED & MISINFORMED: HOW SOME U.S. EMPLOYERS USE "NO FAULT" ATTENDANCE POLICIES TO TRAMPLE ON WORKERS' RIGHTS (AND GET AWAY WITH IT) (2020) https://www.abetterbalance.org/wp-content/uploads/2020/06/Misled_and_Misinformed_A_Better_Balance-1-1.pdf [https://perma.cc/FH2T-USGN] (reviewing and critiquing such absence policies).

[227] *See* U.S. BUREAU OF LAB. STAT., NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES tbl.7 (2022) (showing almost half of the lowest 10 percent of earners in the civilian workforce do not receive any paid personal, sick, family leave, or vacation days).

to access abortion care do not face subsequent discrimination or harassment at work.[228]

PWFA can also, of course, play an important role in supporting maternal health during pregnancy. Even before *Dobbs*, abortion access was unequal, but *Dobbs* accentuates the wealth-based inequality in access to abortion, meaning low-wage and poor women are more likely to carry unplanned, and potentially unwanted, pregnancies to term.[229] The early study of *Dobbs*' effect on fertility rates concludes that almost a quarter of pregnant women who would have sought abortions were "trapped" by bans and unable to obtain them.[230] As discussed above, low-wage workers are also more likely work in physically-demanding and highly-regulated workplaces where even small changes, such as access to a stool or water, may require a formal "accommodation" request. PWFA helps ensure that pregnant workers who need such support at work will receive it. Notably, relatively small accommodations like regular access to restrooms or schedule flexibility to attend prenatal appointments can reduce the likelihood that complications develop.

PWFA can also help address the needs of pregnant workers with high-risk pregnancies or more serious medical complications. Many such conditions develop, or can only be diagnosed, in the second or third trimester of a pregnancy. For example, a pregnant worker with high blood pressure, which often begins after twenty weeks of pregnancy, may experience damage to her kidneys, liver, heart, and brain.[231] Some women with dangerously high blood pressure during

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[228] *See supra* text accompanying notes 124–35.

[229] *See, e.g.*, Elizabeth B. Harned & Liza Fuentes, *Abortion Out of Reach: The Exacerbation of Wealth Disparities After* Dobbs v. Jackson Women's Health Organization, ABA HUMAN RIGHTS (Jan. 6, 2023) https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/wealth-disparities-in-civil-rights/abortion-out-of-reach [https://perma.cc/GEZ5-DTG7] (noting wealth inequality impacts access to contraception, insurance, resources to travel for abortions, and legal risks that may flow from self-managing abortion). *See generally* DIANA GREEN FOSTER, THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCE OF HAVING—OR BEING DENIED—AN ABORTION (2021) (finding that women who sought and were denied an abortion had worse outcomes on many measures than women who were able to receive the procedure).

[230] *See* Dench et al., *supra* note 208, at 14.

[231] *See, e.g.*, *High Blood Pressure (Hypertension) During Pregnancy*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/diseases/4497-gestational-

pregnancy opt to terminate the pregnancy[232]—however, it's not clear that such risks would qualify as justifying an abortion in states that have only narrow (or no) health-based exceptions to an abortion ban.[233] A worker in this situation could use PWFA to ask for schedule flexibility to attend extra prenatal medical appointments or for permission to work remotely if she is ordered on bed rest.[234] Again, many pregnant workers who request such support would not consider terminating the pregnancy; PWFA would be essential even without *Dobbs* to respond to those needs. My point is simply that the proliferation of stringent restrictions on abortion access makes PWFA even more important because more women will be carrying medically risky pregnancies to term.

V. CONCLUSION

The new federal PWFA was the result of more than a decade of advocacy. Too often, under prior laws, pregnant workers were denied even simple, low-cost accommodations they needed to protect their health—or they were forced out of jobs when they asked for such support. Businesses were also not well-served by the prior confusing patchwork of federal and state laws. PWFA addresses those needs by guaranteeing support for pregnancy, childbirth, and related medical conditions.

However, PWFA will only achieve its promise if employers and employees understand the law's protections. This article explains PWFA's statutory mandate in detail. It shows how the general

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hypertension [https://perma.cc/GCE9-D2ZC] (noting high blood pressure puts persons at risk of seizures, strokes, kidney failures, liver problems, and blood clots and that 6–8 percent of pregnant persons experience pregnancy-induced high blood pressure).

[232] *See generally, e.g.*, Racheal Robertson, *6 Scenarios Where Abortion Can Be Lifesaving*, EVERYDAY HEALTH (Sept. 28, 2022), https://www.everydayhealth.com/abortion/scenarios-where-abortion-can-be-life-saving (identifying abortion as potentially necessary to address pulmonary hypertension and severe preeclampsia, both of which are forms of high blood pressure).

[233] *See, e.g.*, Fox, *supra* note 197, at 1070 (noting that it is unclear under many states' abortion bans whether providing an abortion to a patient who has a 30–50 percent chance of dying with ongoing pregnancy would be permissible).

[234] *See High Blood Pressure (Hypertension) During Pregnancy, supra* note 231 (noting that treatment for hypertension in pregnancy may require more frequent prenatal visits and bed rest).

requirement to provide reasonable accommodations, unless they constitute an undue hardship, and to engage in an interactive process to determine an appropriate accommodation is borrowed from the ADA. That said, PWFA differs in important ways from the ADA, most notably in its explicit recognition that an employee may be qualified even if she is temporarily unable to perform some essential functions of her job. PWFA also makes clear that a pregnant worker cannot be forced to take leave if another accommodation would meet her needs, and it prohibits adverse actions for asking for, or receiving, support. The EEOC's regulations also specify that many simple accommodations—such as ensuring a worker can access water or snacks, or use a seat—will almost never constitute an undue hardship, and that employers should promptly grant requests for these kinds of support without requiring documentation or an extended interactive process.

The article also explains how the "pregnancy, childbirth, or related medical conditions" language is borrowed from the PDA. In that context, it has been interpreted to include a variety of conditions related to female reproduction, including miscarriage, lactation, infertility treatments, menstruation, and abortion. This suggests that workers might reasonably use PWFA to ask for accommodations for limitations that result from any of those conditions, as well. Finally, the article highlights how the rapid growth in bans on abortion, in the wake of the Supreme Court's decision in *Dobbs*, makes PWFA even more essential, as it means more women will be carrying pregnancies—including medically-risky pregnancies—to term.

PWFA is a major new federal statute, passed with bipartisan support and endorsed by both leading business organizations and workers' rights advocacy groups. It's a commonsense solution to a common problem—one that will help ensure that pregnant and postpartum workers across the country are treated fairly and with dignity, and that they can receive the support they need to stay healthy and economically secure through a pregnancy.