

PREGNANT WORKERS FAIRNESS ACT

MAY 4, 2021.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SCOTT of Virginia, from the Committee on Education and Labor, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 1065]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 1065) to eliminate discrimination and promote women's health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Pregnant Workers Fairness Act”.

**SEC. 2. NONDISCRIMINATION WITH REGARD TO REASONABLE ACCOMMODATIONS RELATED TO PREGNANCY.**

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

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

(2) require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process referred to in section 5(7);

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

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

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

**SEC. 3. REMEDIES AND ENFORCEMENT.**

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

(1) **IN GENERAL.**—The powers, remedies, and procedures provided in sections 705, 706, 707, 709, 710, and 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4 et seq.) to the Commission, the Attorney General, or any person alleging a violation of title VII of such Act (42 U.S.C. 2000e et seq.) shall be the powers, remedies, and procedures this Act provides to the Commission, the Attorney General, or any person, respectively, alleging an unlawful employment practice in violation of this Act against an employee described in section 5(3)(A) except as provided in paragraphs (2) and (3) of this subsection.

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

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

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

(1) **IN GENERAL.**—The powers, remedies, and procedures provided in the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) to the Board (as defined in section 101 of such Act (2 U.S.C. 1301)) or any person alleging a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)) shall be the powers, remedies, and procedures this Act provides to the Board or any person, respectively, alleging an unlawful employment practice in violation of this Act against an employee described in section 5(3)(B) except as provided in paragraphs (2) and (3) of this subsection.

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

(3) **DAMAGES.**—The powers, remedies, and procedures provided in section 1977A of the Revised Statutes (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies,

and procedures this Act provides to the Board or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes).

(4) OTHER APPLICABLE PROVISIONS.—With respect to a claim alleging a practice described in paragraph (1), title III of the Congressional Accountability Act of 1995 (2 U.S.C. 1381 et seq.) shall apply in the same manner as such title applies with respect to a claim alleging a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)).

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

(1) IN GENERAL.—The powers, remedies, and procedures provided in chapter 5 of title 3, United States Code, to the President, the Commission, the Merit Systems Protection Board, or any person alleging a violation of section 411(a)(1) of such title shall be the powers, remedies, and procedures this Act provides to the President, the Commission, the Board, or any person, respectively, alleging an unlawful employment practice in violation of this Act against an employee described in section 5(3)(C) except as provided in paragraphs (2) and (3) of this subsection.

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

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

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

(1) IN GENERAL.—The powers, remedies, and procedures provided in sections 302 and 304 of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16b; 2000e–16c) to the Commission or any person alleging a violation of section 302(a)(1) of such Act (42 U.S.C. 2000e–16b(a)(1)) shall be the powers, remedies, and procedures this Act provides to the Commission or any person, respectively, alleging an unlawful employment practice in violation of this Act against an employee described in section 5(3)(D) except as provided in paragraphs (2) and (3) of this subsection.

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

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

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

(1) IN GENERAL.—The powers, remedies, and procedures provided in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16) to the Commission, the Attorney General, the Librarian of Congress, or any person alleging a violation of that section shall be the powers, remedies, and procedures this Act provides to the Commission, the Attorney General, the Librarian of Congress, or any person, respectively, alleging an unlawful employment practice in violation of this Act against an employee described in section 5(3)(E) except as provided in paragraphs (2) and (3) of this subsection.

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

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

(f) PROHIBITION AGAINST RETALIATION.—

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

(2) **PROHIBITION AGAINST COERCION.**—It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of such individual having exercised or enjoyed, or on account of such individual having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.

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

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

#### **SEC. 4. RULEMAKING.**

Not later than 2 years after the date of enactment of this Act, the Commission shall issue regulations in an accessible format in accordance with subchapter II of chapter 5 of title 5, United States Code, to carry out this Act. Such regulations shall provide examples of reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions.

#### **SEC. 5. DEFINITIONS.**

As used in this Act—

(1) the term “Commission” means the Equal Employment Opportunity Commission;

(2) the term “covered entity”—

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

(B) includes—

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

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

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

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

(3) the term “employee” means—

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

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

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

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

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

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

(5) the term “known limitation” means physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee’s representative has communicated to the employer whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102);

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

(A) any inability to perform an essential function is for a temporary period;

(B) the essential function could be performed in the near future; and

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

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

**SEC. 6. WAIVER OF STATE IMMUNITY.**

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

**SEC. 7. RELATIONSHIP TO OTHER LAWS.**

Nothing in this Act shall be construed to invalidate or limit the powers, remedies, and procedures under any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions.

**SEC. 8. SEVERABILITY.**

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

PURPOSE AND SUMMARY

When Congress passed the *Pregnancy Discrimination Act of 1978*,<sup>1</sup> which amended Title VII of the *Civil Rights Act of 1964*,<sup>2</sup> its objective was to eradicate pregnancy discrimination in the workplace and ensure that pregnant workers were treated fairly in the workplace. Yet nearly 43 years after its passage, federal law still falls short of guaranteeing that all pregnant workers have reasonable workplace accommodations. H.R. 1065, the *Pregnant Workers Fairness Act*, ensures that pregnant workers who work for employers with 15 or more employees have access to reasonable accommodations in the workplace for pregnancy, childbirth, and related medical conditions. When pregnant workers do not have access to reasonable workplace accommodations, they are often forced to choose between their financial security and a healthy pregnancy. Ensuring that pregnant workers have access to reasonable accommodations will promote the economic well-being of working mothers and their families and promote healthy pregnancies.

H.R. 1065, as amended in markup, has been endorsed by over 230 organizations: A Better Balance; American Civil Liberties Union; National Partnership for Women & Families; National Women’s Law Center; U.S. Chamber of Commerce; 1,000 Days; 2020 Mom; 9to5; ACTION OHIO Coalition For Battered Women; Advocates for Youth; AFL–CIO; African American Ministers In Action; Alaska Breastfeeding Coalition; Alianza Nacional de

<sup>1</sup> 42 U.S.C. § 2000e(k).

<sup>2</sup> 42 U.S.C. § 2000e.

Campesinas; All-Options; American Academy of Pediatrics; American Association of University Women; American Association of University Women Indianapolis; American College of Obstetricians and Gynecologists; American Federation of State, County and Municipal Employees; American Federation of Teachers; AnitaB.org; Asian Pacific American Labor Alliance, AFL-CIO; Association of Farmworker Opportunity Programs; Association of Maternal & Child Health Programs; Association of State Public Health Nutritionists; Autistic Self Advocacy Network; Baby Cafe USA; Beaufort-Jasper-Hampton Comprehensive Health Services; Black Mamas Matter Alliance; Bazelon Center for Mental Health Law; Bloom, Baby! Birthing Services; Bread For the World; Breastfeeding Coalition of Delaware; Breastfeeding Family Friendly Communities; Breastfeeding Hawaii; BreastfeedLA; Building Pathways, Inc; California Breastfeeding Coalition; California WIC Association; California Women's Law Center; Casa de Esperanza: National Latin@ Network for Healthy Families and Communities; Center for American Progress; Center for Law and Social Policy; Center for LGBTQ Economic Advancement & Research; Center for Parental Leave Leadership; Center for Public Justice; Center for Reproductive Rights; Chosen Vessels Midwifery Services; Church World Service; Clearinghouse on Women's Issues; Coalition for Restaurant Safety & Health; Coalition of Labor Union Women; Coalition on Human Needs; Congregation of Our Lady of Charity of the Good Shepherd, U.S. Provinces; Connecticut Women's Education and Legal Fund; DC Dorothy Day Catholic Worker; Disciples Center for Public Witness; Economic Policy Institute; Equality Ohio; Equal Pay Today; Equal Rights Advocates; Every Texan; Every Mother, Inc.; Family Equality; Family Values @ Work; Farmworker Justice; Feminist Majority Foundation; First Focus Campaign for Children; Futures Without Violence; Gender Equality Law Center; Gender Justice; Grandmothers for Reproductive Rights; Hadassah, The Women's Zionist Organization of America, Inc.; Health Care For America Now; Healthy Children Project, Inc.; Healthy and Free Tennessee; Healthy Mothers, Healthy Babies Coalition of Georgia; HealthyWomen; Hispanic Federation; Hoosier Action; H.R. Policy Association; Human Rights Watch; ICNA CSJ; In Our Own Voice: National Black Women's Reproductive Justice Agenda; Indiana Chapter of the American Academy of Pediatrics; Indiana Institute for Working Families; Indianapolis Urban League; Institute for Women's Policy Research; Interfaith Workers Justice; International Franchise Association; Justice for Migrant Women; Kansas Action for Children; Kansas Breastfeeding Coalition; KWH Law Center for Social Justice and Change; La Leche League Alliance; La Leche League USA; LatinoJustice PRLDEF; LCLAA; Legal Aid at Work; Legal Momentum, The Women's Legal Defense and Education Fund; Legal Voice; Mabel Wadsworth Center; Maine Women's Lobby; Mana, A National Latina Organization; March of Dimes; Maternal Mental Health Leadership Alliance; MCCOY (Marion County Commission on Youth); Methodist Federation for Social Action; Michigan Breastfeeding Network; Michigan League for Public Policy; Midwives Alliance of Hawaii; Minus 9 to 5; Mississippi Black Women's Roundtable; Mom Congress; MomsRising; Monroe County NOW; Mother Hubbard's Cupboard; Mother's Own Milk Matters; MS Black Women's Roundtable & MS Women's Economic

Security Initiative; NARAL Pro-Choice America; National Advocacy Center of the Sisters of the Good Shepherd; National Advocates for Pregnant Women; National Asian Pacific American Women's Forum; National Association for the Advancement of Colored People; National Association of Pediatric Nurse Practitioners; National Association of Social Workers; National Association of Social Workers NH Chapter; National Birth Equity Collaborative; National Center for Law and Economic Justice; National Center for Lesbian Rights; National Coalition for the Homeless; National Coalition of 100 Black Women, Inc. Central Ohio Chapter; National Coalition Against Domestic Violence; National Consumers League; National Council for Occupational Safety and Health; National Council of Jewish Women; National Council of Jewish Women Cleveland; National Council of Jewish Women, Atlanta Section; National Domestic Workers Alliance; National Education Association; National Employment Law Project; National Employment Lawyers Association; National Health Law Program; National Network to End Domestic Violence; National Organization for Women; National Retail Federation; National Urban League; National WIC Association; National Women's Health Network; NETWORK Lobby for Catholic Social Justice; New Jersey Breastfeeding Coalition; New Jersey Citizen Action; New Jersey Time to Care Coalition; New Mexico Breastfeeding Task Force; New Working Majority; North Carolina Justice Center; Northwest Arkansas Breastfeeding Coalition; Nurse-Family Partnership; Nutrition First; Ohio Alliance to End Sexual Violence; Ohio Coalition for Labor Union Women; Ohio Domestic Violence Network; Ohio Federation of Teachers; Ohio Religious Coalition for Reproductive Choice; Ohio Women's Alliance; Partnership for America's Children; Peirce Consulting LLC; Philadelphia Coalition of Labor Union Women Philly CLUW; Philadelphia NOW Education Fund; Philaposh; Physicians for Reproductive Health; Planned Parenthood Federation of America; PowHer New York; Pray First Mission Ministries; Pretty Mama Breastfeeding, LLC ; Prevent Child Abuse NC; Public Advocacy for Kids; Restaurant Opportunities Center United; RESULTS; RESULTS DC/MD; Retail Industry Leaders Association; Shriver Center on Poverty Law; SisterReach; Society for Human Resource Management; Solutions for Breastfeeding; Speaking of Birth; Southwest Women's Law Center; The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America; The Leadership Conference on Civil and Human Rights; The Little Timmy Project; The National Domestic Violence Hotline; The Ohio Women's Public Policy Network; The Women and Girls Foundation of Southwest Pennsylvania; The Women's Law Center of Maryland; The Zonta Club of Greater Queens; TIME'S UP Now; U.S. Breastfeeding Committee; Ujima Inc; The National Center on Violence Against Women in the Black Community; UltraViolet; Union for Reform Judaism; United Church of Christ Justice and Witness Ministries; United Electrical, Radio and Machine Workers of America; United Food and Commercial Workers International Union; United Spinal Association; United State of Women; United Steelworkers; United Today, Stronger Tomorrow; Universal Health Care Action Network of Ohio; VA NOW, Inc.; Virginia Breastfeeding Advisory Committee; Virginia Breastfeeding Coalition; Voices for Progress; Wabanaki Women's Coalition; We All Rise; Western Kan-

sas Birthkeeping; William E. Morris Institute for Justice (Arizona); Women and Girls Foundation of Southwest Pennsylvania; Women Employed; Women of Reform Judaism; Women's Fund of Greater Chattanooga; Women's Fund of Rhode Island; Women's Fund of Rhode Island; Women's Law Project; Women's March; Women's Media Center; Women's Rights and Empowerment Network; Women4Change; Workplace Fairness; Workplace Justice Project at Loyola Law Clinic; Worksafe; WV Breastfeeding Alliance; WV Perinatal Partnership, Inc.; YWCA Dayton; YWCA Greater Cincinnati; YWCA Mahoning Valley; YWCA McLean County; YWCA Northwestern Illinois; YWCA USA; YWCA of the University of Illinois; and ZERO TO THREE.

#### COMMITTEE ACTION

##### *112th Congress*

On May 8, 2012, Representative Jerrold Nadler (D-NY-10) introduced H.R. 5647, the *Pregnant Workers Fairness Act*. The bill had 112 Democratic cosponsors. The bill required employers to make reasonable accommodations for the known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation imposed an undue hardship on the business. The bill also made it unlawful for employers to deny employment opportunities based on the need for reasonable accommodations; to require employees to accept an accommodation they did not choose; and to require employees to take leave if another accommodation could be provided that would enable the employee to continue working. The bill was referred to the House Committees on Education and the Workforce, Administration, Oversight and Government Reform, and Judiciary. Subsequently, the Committee on Education and the Workforce referred the bill to the Subcommittee on Health, Employment, Labor, and Pensions. The Judiciary Committee referred the bill to the Subcommittee on the Constitution. No further action was taken on the bill.

On September 19, 2012, Senator Robert P. Casey, Jr. (D-PA) introduced S. 3565, the *Pregnant Workers Fairness Act*, as a companion bill to H.R. 5647. The bill had nine cosponsors: eight Democrats and one Independent. The bill was referred to the Senate Committee on Health, Education, Labor, and Pensions. No further action was taken on the bill.

##### *113th Congress*

On May 14, 2013, Representative Nadler introduced H.R. 1975, the *Pregnant Workers Fairness Act*. This bill was identical to the version introduced in the 112th Congress and had 142 Democratic cosponsors. The bill was referred to the House Committees on Education and the Workforce, Administration, Oversight and Government Reform, and Judiciary. Subsequently, the Committee on Education and the Workforce referred the bill to the Subcommittee on Workforce Protections, and the Judiciary Committee referred the bill to the Subcommittee on the Constitution and Civil Justice. No further action was taken on the bill.

On the same day, Senator Casey introduced an identical companion bill in the Senate: S. 942, the *Pregnant Workers Fairness Act*. It had 33 cosponsors: 32 Democrats and one Independent. The



bill was referred to the Committee on Health, Education, Labor, and Pensions. No further action was taken on the bill.

#### *114th Congress*

On June 4, 2015, Representative Nadler introduced H.R. 2654, the *Pregnant Workers Fairness Act*. The bill had 149 sponsors: 146 Democrats and three Republicans. This version of the bill had the same four protections as the previously introduced bills, but also added provisions protecting workers from retaliation for requesting or using reasonable accommodations, ensuring the same remedies will be available in an action against a State as in an action against any other entity, and clarifying that construal of the “reasonable accommodation” definition from the Americans with Disabilities Act would include the interactive process between employer and employee.

The bill was referred to the House Committees on Education and the Workforce, Administration, Oversight and Government Reform, and Judiciary. The Committee on Education and the Workforce referred the bill to the Subcommittee on Workforce Protections, and the Judiciary Committee referred the bill to the Subcommittee on the Constitution and Civil Justice. No further action was taken on the bill.

On the same day, Senator Casey introduced S. 1512, the *Pregnant Workers Fairness Act*, as a companion bill. This bill also maintained the same four protections from prior versions and added a provision protecting workers from retaliation for requesting or using reasonable accommodations. The bill had 31 cosponsors, including one Independent and three Republicans. It was referred to the Committee on Health, Education, Labor, and Pensions. No further action was taken on the bill.

#### *115th Congress*

On May 11, 2017, Representative Nadler introduced H.R. 2417, the *Pregnant Workers Fairness Act*. This version of the bill was identical to the one introduced in the 114th Congress. The bill had 131 cosponsors: 129 Democrats and two Republicans. The bill was referred to the House Committees on Education and the Workforce, Administration, Oversight and Government Reform, and Judiciary. The Judiciary Committee referred the bill to the Subcommittee on the Constitution and Civil Justice. No further action was taken on the bill.

On the same day, Senator Casey introduced S. 1101, the *Pregnant Workers Fairness Act*, in the Senate. This version of the bill was identical to the one introduced in the 114th Congress. The bill had 27 cosponsors: 24 Democrats, two Independents, and one Republican. The bill was referred to the Committee on Health, Education, Labor, and Pensions. No further action was taken on the bill.

#### *116th Congress*

On May 14, 2019, Representative Nadler introduced H.R. 2694, the *Pregnant Workers Fairness Act*. This version of the bill is identical to the one introduced in the 115th Congress. The bill had 241 cosponsors: 233 Democrats and 18 Republicans. The bill was re-

ferred to the House Committees on Education and Labor, Administration, Oversight and Reform, and Judiciary.

There was no Senate companion bill in the 116th Congress.

On October 22, 2019, the House Committee on Education and Labor’s Subcommittee on Civil Rights and Human Services held a hearing entitled “Long Over Due: Exploring the Pregnant Workers Fairness Act (H.R. 2694)” (2019 Subcommittee Hearing). The witnesses were: The Honorable Jerrold Nadler; Michelle Durham, former Emergency Medical Technician (EMT), Arab, AL; Iris Wilbur, Vice President of Government Affairs and Public Policy at Greater Louisville Inc.—The Metro Chamber of Commerce, Louisville, KY; Dina Bakst, Co-Founder and Co-President of A Better Balance, New York, NY; and Ellen McLaughlin, Partner at Seyfarth Shaw LLP, Chicago, IL.

On January 14, 2020, the House Committee on Education and Labor met for the markup of H.R. 2694, the *Pregnant Workers Fairness Act*. The bill was reported favorably, as amended, to the House of Representatives by a vote of 29 Yeas and 17 Nays. H.R. 2694 passed the House on September 17, 2020, with bipartisan support by a vote of 329 Yeas and 73 Nays.

#### *117th Congress*

On February 15, 2021, Representative Nadler introduced H.R. 1065, the *Pregnant Workers Fairness Act*, with four original cosponsors (including 2 Republicans). The bill is identical to the one that passed the House in the 116th Congress. The bill was referred to the House Committees on Education and Labor, Administration, Oversight and Reform, and Judiciary.

On March 18, 2021, the House Committee on Education and Labor’s Subcommittee on Workforce Protections and Subcommittee on Civil Rights and Human Services held a joint hearing entitled “*Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination*” (2021 Joint Subcommittee Hearing). The hearing examined the health and economic effects of pregnant workers’ lack of access to reasonable accommodations. The hearing also examined how H.R. 1065 would fill a gap in the existing legal framework by guaranteeing pregnant workers the right to reasonable workplace accommodations. Witnesses included Fatima Goss Graves, CEO and President of the National Women’s Law Center, Washington, DC; Camille A. Olson, Partner at Seyfarth Shaw, LLP, Chicago, IL; Dina Bakst, Co-Founder & Co-President, A Better Balance: The Work & Family Legal Center, New York City, NY; and Laurie McCann, Senior Attorney, AARP, Washington, DC.

On April 29, 2021 Senator Robert P. Casey, Jr. (D-PA) introduced S. 1486, the *Pregnant Workers Fairness Act*, as a companion bill to H.R. 1065. The bill has six cosponsors: three Democrats and three Republicans. The bill was referred to the Senate Committee on Health, Education, Labor, and Pensions. As of the date of the filing of this report, no further action has been taken on the bill.

On March 24, 2021, the House Committee on Education and Labor met for a full committee markup of H.R. 1065, the *Pregnant Workers Fairness Act*. The Committee adopted an amendment in the nature of a substitute (ANS) offered by Chairman Robert C. “Bobby” Scott (D-VA-3). The ANS incorporates the provisions of H.R. 1065 with four grammatical corrections.

Representative Russ Fulcher (R-ID-1) offered a substitute amendment to the ANS. It was nearly identical to the ANS offered by Chairman Scott, but it included a provision to exempt religious organizations from coverage under the bill and would have allowed religious organizations to deny workers reasonable accommodations under the law. The amendment was defeated by a vote of 20 Yeas and 27 Nays.

H.R. 1065 was reported favorably, as amended, to the House of Representatives by a vote of 30 Yeas and 17 Nays.

#### COMMITTEE VIEWS

The Committee on Education and Labor (Committee) is committed to protecting pregnant workers' health and economic security. No worker should have to choose between their health, the health of their pregnancy, and the ability to earn a living. H.R. 1065, the *Pregnant Workers Fairness Act* (PWFA), makes clear that pregnant workers have the right to reasonable accommodations absent undue hardship on the employer. The PWFA eliminates a lack of clarity in the current legal framework that has frustrated pregnant workers' legal rights to reasonable accommodations while providing clear guidance to both workers and employers.

#### *The Pregnancy Discrimination Act of 1978 and the Americans with Disabilities Act of 1990 are Insufficient to Guarantee Pregnant Workers Reasonable Accommodations*

Seventy-five percent of working women will become pregnant while employed at some time in their lives.<sup>3</sup> Women are increasingly either the primary or co-breadwinners of households.<sup>4</sup> As a result, more pregnant women work later into their pregnancies. Research suggests that more than 80 percent of first-time mothers work until their final month of pregnancy.<sup>5</sup> Pregnant workers may need reasonable accommodations to protect the health of both mother and baby. Reasonable accommodations can include providing seating, water, and light duty. They do not need to be, nor are they typically, complicated or costly. But when pregnant workers do not have access to the reasonable workplace accommodations they need, they are forced to choose between their financial security and a healthy pregnancy.

Although workers in need of pregnancy-related accommodations may be able to seek recourse under the *Pregnancy Discrimination Act of 1978* (PDA)<sup>6</sup> and Title I of the *Americans with Disabilities Act of 1990* (ADA),<sup>7</sup> varying interpretations have created an unworkable legal framework. This has frustrated pregnant workers' ability to secure reasonable accommodations. Under the PDA, a pregnant worker must show that her employer accommodated a co-

<sup>3</sup>Melissa Alpert, Center for American Progress, Labor Pains: Improving Employment and Income Security for Pregnant Women and New Mothers, 2 (2009), [https://cdn.americanprogress.org/wp-content/uploads/issues/2009/08/pdf/labor\\_pains.pdf?\\_ga=2.262643852.1428433223.1599244597-106194704.1597112689](https://cdn.americanprogress.org/wp-content/uploads/issues/2009/08/pdf/labor_pains.pdf?_ga=2.262643852.1428433223.1599244597-106194704.1597112689).

<sup>4</sup>Sarah Jane Glynn, Center for American Progress, Breadwinning Mothers Continue To Be the U.S. Norm, 1 (2019) [https://cdn.americanprogress.org/content/uploads/2019/05/12070012/Breadwinners2019-report1.pdf?\\_ga=2.257334027.1474637733.1598641131-106194704.1597112689](https://cdn.americanprogress.org/content/uploads/2019/05/12070012/Breadwinners2019-report1.pdf?_ga=2.257334027.1474637733.1598641131-106194704.1597112689).

<sup>5</sup>Lynda Laughlin, U.S. Census Bureau, Maternity Leave and Employment Patterns: 2006-2008 8 (2011), <https://www.census.gov/prod/2011pubs/p70-128.pdf>.

<sup>6</sup>42 U.S.C. § 2000e(k).

<sup>7</sup>42 U.S.C. §§ 12111-12117.

worker who is “similar in their ability or inability to work” (known as a comparator), which is a burdensome and often impossible standard to meet. Under the ADA, a pregnancy-related impairment that substantially limits a major life activity is a disability for which an employer may be required to provide reasonable accommodations.<sup>8</sup> However, this standard leaves women with less serious pregnancy-related impairments, and who need accommodations, without legal recourse. As explained further below, the protections under these two statutes are insufficient to ensure that pregnant workers receive the accommodations they need.

*History of Pregnant Workers’ Statutory Protections: The Pregnancy Discrimination Act of 1978*

Courts Misinterpreted Congressional Intent in Title VII of the Civil Rights Act of 1964

Congress passed Title VII of the *Civil Rights Act of 1964*<sup>9</sup> (Title VII) to eliminate discrimination in employment on the basis of race, sex, color, national origin, and religion. In 1972, the Equal Employment Opportunity Commission (EEOC) issued guidelines on pregnancy discrimination, concluding that Title VII’s prohibition against sex discrimination in the workplace included discrimination based on pregnancy.<sup>10</sup> However, in two U.S. Supreme Court decisions in the 1970s, the Court ruled that pregnancy discrimination was not considered sex discrimination.

In *Geduldig v. Aiello*,<sup>11</sup> the Court analyzed whether California’s exclusion of pregnancy-related disabilities from its disability insurance program was a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution and concluded it was not. The Court held that because benefits were not denied on the basis of gender,

[t]he California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification.<sup>12</sup>

Two years later, the Supreme Court decided *General Electric Company v. Gilbert*.<sup>13</sup> At issue in *Gilbert* was a private employee disability benefits plan that excluded pregnancy-related disability from coverage. Relying heavily on the prior decision in *Aiello*, the Court ruled that the exclusion did not constitute sex discrimination as prohibited by Title VII.<sup>14</sup>

<sup>8</sup> 29 C.F.R. § 1630.

<sup>9</sup> 42 U.S.C. § 2000e.

<sup>10</sup> 29 CFR § 1604.10(b) (1973).

<sup>11</sup> *Geduldig v. Aiello*, 417 U.S. 484 (1974).

<sup>12</sup> 417 U.S. 484, 496–97 n. 20 (1974).

<sup>13</sup> *General Electric Company v. Gilbert*, 429 U.S. 125, 135–36 (1976).

<sup>14</sup> *Id.*

With the Pregnancy Discrimination Act of 1978, Congress Sought to Overturn Supreme Court Precedent

Congress passed the PDA to overturn the Supreme Court’s erroneous interpretation of Title VII. The Senate Committee on Human Resources report for the PDA stated:

[T]he assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace. A failure to address discrimination based on pregnancy, in fringe benefits or in any other employment practice, would prevent the elimination of sex discrimination in employment.<sup>15</sup>

Congress sought, through the PDA, to codify the EEOC’s original interpretation of Title VII and “make clear that the prohibitions against sex discrimination in the act include discrimination in employment on the basis of pregnancy.”<sup>16</sup> In order to overturn *Gilbert*, the PDA amended Title VII in two parts: First, it amended the Title VII’s definition of “sex” to include discrimination on the basis of pregnancy, childbirth, or related medical conditions as sex discrimination.<sup>17</sup> In doing so, the PDA made clear that discrimination on the basis of pregnancy was discrimination on the basis of sex.<sup>18</sup> Second, it added a provision that stated that pregnant workers “shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.”<sup>19</sup> This language created the need for a pregnant worker to identify a comparable coworker, or group of coworkers, to determine whether she’s been discriminated against. According to the House Committee on Education and Labor report for the PDA:

This legislation would clearly establish that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 includes a prohibition against employment-related discrimination on the basis of pregnancy, childbirth, or related medical conditions. As an amendment to Title VII, the bill will apply to all aspects of employment—hiring, reinstatement, termination, disability benefits, sick leave, medical benefits, seniority, and other conditions of employment currently covered by Title VII. Pregnancy-based distinctions will be subject to the same scrutiny on the same terms as other acts of sex discrimination proscribed in the existing statute.<sup>20</sup>

At the 2019 Subcommittee Hearing, Ms. Bakst summarized Congress’ intent with respect to the PDA:

Thus, when Congress mandated that employers treat pregnant women the same as ‘other persons similar in their ability or inability to work’ the intended result was, and continues to be, that such treatment would lead to

<sup>15</sup> S. Rep. No. 95–331, at 3 (1977).

<sup>16</sup> *Id.* at 1.

<sup>17</sup> 42 U.S.C. § 2000e(k).

<sup>18</sup> Brief for Members of Congress as Amici Curiae Supporting Petitioner at 9, *Young v. United States Parcel Service, Inc.*, 135 S. Ct. 1338 (2015) (No. 12–1226).

<sup>19</sup> 42 U.S.C. § 2000e(k).

<sup>20</sup> H. Rep. No. 95–948, at 4 (1978).

women’s equality in the workplace. While the comparative standard has led to positive results for some pregnant workers, for far too many, equality in the workplace remains elusive.<sup>21</sup>

*Court Interpretations of the PDA Left Numerous Gaps in Protections*

Prior to 2015, the circuit courts were split on how to determine which type of workers were “similar in their ability or inability to work” or would serve as a valid and relevant comparator to a pregnant worker for the purpose of securing reasonable accommodations under the PDA. In identifying a “relevant comparator,” the majority of circuits focused on the source of the injury by comparing the pregnant worker’s treatment to those employees who had sustained non-ADA-qualifying, off-the-job injuries.<sup>22</sup> “In other words, a pregnant worker was only entitled to be treated as well (or as poorly) as those injured off the job.”<sup>23</sup> Only the Sixth Circuit interpreted the PDA to mean that if a nonpregnant worker with a lifting restriction, for example, was accommodated, then a pregnant worker with a similar lifting restriction should likewise be accommodated.<sup>24</sup>

The PDA does not affirmatively require that an employer reasonably accommodate a pregnant worker. At the 2019 Subcommittee Hearing, Ms. Bakst testified to the legal obstacles encountered by pregnant workers leading up to the landmark 2015 decision regarding the PDA in *Young v. United Parcel Service, Inc. (UPS)*:<sup>25</sup>

[W]e reviewed 200 Pregnancy Discrimination Act cases in the two years leading up to the *Young* decision and found that of those cases that dealt with an issue of pregnancy accommodation, in nearly two-thirds of cases, courts rejected the plaintiff’s PDA claim largely because the pregnant worker could not provide adequate comparators.<sup>26</sup>

The Supreme Court Decision in *Young v. United Parcel Service, Inc.* Established a New Standard That is Unworkable in Practice

In 2015, the Supreme Court decided *Young v. UPS*,<sup>27</sup> which set forth a new, controlling standard for a pregnant worker to establish a disparate treatment claim of discrimination in securing a reasonable accommodation under the PDA.

In that case, Peggy Young worked as a part-time delivery driver for UPS, and her job consisted of picking up and delivering packages. When Young became pregnant, her doctor advised her to lift no more than twenty pounds. Young, who was required by company policy to be able to lift up to 70 pounds, requested a light-duty work assignment for the duration of her pregnancy. Because UPS’s

<sup>21</sup> *Long Over Due: Exploring the Pregnant Workers Fairness Act (H.R. 2694) Before the Subcomm. on Civil Rights & Human Servs. of the H. Comm. on Educ. & Labor, 116th Cong. (2019)* (Testimony of Dina Bakst, Co-Founder & Co President, A Better Balance: The Work & Family Legal Center, at 10) [hereinafter 2019 Bakst Testimony].

<sup>22</sup> Lara Grow, *Pregnancy Discrimination in the Wake of Young v. UPS*, 19 U.P.A. J.L. & Soc. Change 133, 144, (2016).

<sup>23</sup> *Id.* at 145.

<sup>24</sup> *Id.* at 144.

<sup>25</sup> *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015).

<sup>26</sup> 2019 Bakst Testimony at 12.

<sup>27</sup> 135 S. Ct. 1338 (2015).

policy was to only grant an accommodation to employees who had been injured on the job, were eligible for an ADA accommodation, or had lost their Department of Transportation (DOT) certification, UPS denied her request for a light-duty accommodation.<sup>28</sup> UPS did not consider Young's pregnancy to constitute an on-the-job injury. Because of the unwillingness of her employer to place her on light duty due to her pregnancy-related lifting restriction, Young was forced to take an extended leave of absence without pay or medical coverage.

Young sued UPS alleging disparate treatment under the PDA and pursued her case to the U.S. Supreme Court.<sup>29</sup> In a 6–3 decision, the Supreme Court set out a new test for pregnant workers to prove that their employers acted unlawfully under the PDA when the employer denied the pregnant worker an accommodation.<sup>30</sup>

- First, a plaintiff must demonstrate “that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others ‘similar in their ability or inability to work.’”<sup>31</sup>

- Second, the employer can rebut this showing by providing “legitimate, nondiscriminatory reasons for denying her accommodation.”<sup>32</sup> In making such a showing, the Court made clear that the employer's reason “cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those (“similar in their ability or inability to work”) whom the employer accommodates.”<sup>33</sup> Essentially, the employer must provide a non-economic justification for its actions.

- Third, if the employer successfully demonstrates “legitimate, nondiscriminatory reasons” for its actions, the employee must rebut the employer's justification. The Court held that a plaintiff can rebut this argument as pretextual “by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers” and that the employer's “reasons are not sufficiently strong to justify the burden.”<sup>34</sup> The Court explained that the employee can demonstrate that the policy imposes a significant burden “by providing evidence that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers.”<sup>35</sup> But the Court failed to define “a large percentage” and, critically, who of the non-pregnant

<sup>28</sup> Lara Grow, *Pregnancy Discrimination in the Wake of Young v. UPS*, 19 U. Pa. J.L. & Soc. Change 133, 147 (2016).

<sup>29</sup> See Brief of Petitioner at 13, *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015) (Young filed suit in a Maryland District Court. The court granted summary judgement to UPS. Young appealed to the Fourth Circuit. The Fourth Circuit ruled in favor of UPS, holding that the company's policy was neutral with respect to pregnancy, as pregnant workers were treated the same as other similarly situated employees who sustained off-the-job injuries, and thus did not constitute unlawful pregnancy discrimination. Young appealed the ruling to the Supreme Court.).

<sup>30</sup> The six to three decision in *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015), was rooted in the legal framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>31</sup> *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

workers should be considered “relevant comparators” when crafting that percentage.

#### The Test Under *Young* Does Not Adequately Protect Pregnant Workers

The Court’s holding in *Young* does not guarantee pregnant workers a reasonable accommodation. Under the *Young* framework, pregnant workers face high evidentiary hurdles to prove that their employer should provide them with reasonable accommodations. The decision still requires pregnant workers who bring a failure to accommodate claim under the PDA to provide a comparator, but it did little to provide clarity as to who constitutes a relevant comparator other than to say the standard should not be “onerous” on workers.<sup>36</sup> Forcing pregnant workers to identify a comparator creates an oftentimes insurmountable hurdle.

At odds with Justice Breyer’s majority opinion in *Young* stating that the comparator standard should not be onerous on workers, testimony received at the 2019 Subcommittee Hearing points out that a requirement to establish a valid comparator “places a unique burden on pregnant workers” and “is also tone deaf to the realities of the American workplace, where workers lack clout, bargaining power, and access to their co-workers” accommodations requests or personnel files.”<sup>37</sup> Indeed, in an analysis of reasonable accommodation PDA cases decided after *Young*, “over two-thirds of workers lost their pregnancy accommodation cases. Nearly seventy percent of those losses can be traced to courts’ rejection of women’s comparators or inability to find comparators.”<sup>38</sup> Furthermore, “[s]ince the Committee’s 2019 hearing, hundreds more pregnant workers have called A Better Balance’s free and confidential legal helpline because they are unable to receive accommodations to stay healthy and working due to glaring gaps in federal legal protections.”<sup>39</sup>

Some courts have placed categorical bans on certain types of comparators.<sup>40</sup> As Ms. Bakst testified at the 2021 Joint Subcommittee Hearing:

[I]n a February 2021 case, low-wage pregnant Walmart workers needed modifications to their jobs to reduce the weight they were required to lift and the amount of time they were forced to stand. Walmart refused, under the guise of a national policy of only accommodating workers injured on the job. The Western District of Wisconsin endorsed Walmart’s failure to accommodate due to insufficient comparator evidence. Invoking *Young*, the court reasoned that, even though ‘100 percent of employees injured on-the-job’ were accommodated—while no pregnant employees were even eligible for accommodation under Walmart’s policy—the EEOC had failed to present sufficient comparator evidence.<sup>41</sup>

<sup>36</sup> *Id.*

<sup>37</sup> 2019 Bakst Testimony at 14.

<sup>38</sup> *Id.* at 3.

<sup>39</sup> *Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination Before H. Subcomm. on Civil Rights and Human Servs. & H. Subcomm. on Workforce Prots. of the H. Comm. on Educ. and Labor*, 117th Cong. (2021) (written testimony of Dina Bakst, Co-Founder & Co-President, A Better Balance, at 3) [Hereinafter 2021 Bakst Testimony].

<sup>40</sup> 2019 Bakst Testimony at 3.

<sup>41</sup> 2021 Bakst Testimony at 6.



Pregnant workers must also discredit their employer’s justification for failing to accommodate them. The *Young* decision requires that the pregnant worker demonstrate that the “employer’s policies impose a significant burden on pregnant workers.”<sup>42</sup> Ms. Bakst testified at the 2019 Subcommittee Hearing, “the ‘significant burden’ standard the Court laid out in *Young* as part of the pretext analysis in the third step of the test [sic] has also proven harmful to women. If workers are even able to make it to this step in the analysis, the ‘significant burden’ analysis remains an additional hurdle.”<sup>43</sup>

Additionally, using the *Young* framework can take years to get a remedy. As Ms. Bakst testified at the 2019 Subcommittee Hearing:

[U]nder the framework established by the court’s majority in *Young*, a pregnant worker who wants to prove unlawful treatment based on her employer’s failure to accommodate her pregnancy must go through a multi-step process that can only be fleshed out through lengthy litigation. Yet most workers we hear from simply want an accommodation to continue working and comply with their doctor’s orders. They cannot afford to wait weeks, months, or years for a court decision. Once their baby has started elementary school, it is obviously too late to ensure the pregnancy is healthy at the outset and to prevent a downward spiral of financial woes.<sup>44</sup>

Even if a pregnant worker can surmount the evidentiary hurdles under the *Young* framework, her case will likely take years, lasting well past the pregnancy and leaving her without a remedy during her pregnancy.<sup>45</sup>

To remedy the shortcomings of the PDA, Congress must step in and act. As Ms. Bakst testified at the 2021 Joint Subcommittee Hearing:

The PDA’s failure demands further action by Congress. By requiring the reasonable accommodation of pregnant workers only absent undue hardship, the [*Pregnant Workers Fairness Act*] is carefully crafted to deter and remedy [] sex discrimination in the hiring, retention, and promotion of women who could potentially become pregnant and soon-to-become mothers.<sup>46</sup>

*The History of Pregnant Workers’ Protections: The Americans with Disabilities Act of 1990*

The ADA defines a disability as “a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.”<sup>47</sup> Title I of the ADA further provides that, “[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application

<sup>42</sup> 135 S. Ct. 1338, 1354 (2015).

<sup>43</sup> 2019 Bakst Testimony at 16.

<sup>44</sup> 2019 Bakst Testimony at 21.

<sup>45</sup> See *Durham v. Rural/Metro Corp.*, 955 F.3d 1279 (11th Cir. 2020) (finding in favor of the appellant five years after she filed her initial claim with the EEOC).

<sup>46</sup> 2021 Bakst Testimony 10.

<sup>47</sup> 42 U.S.C. § 12102.

procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”<sup>48</sup> Since the passage of the ADA, there has been a significant amount of debate over whether pregnancy could ever be considered a disability under the definition above.<sup>49</sup>

Prior to the passage of the *ADA Amendments Act of 2008* (ADAAA),<sup>50</sup> the EEOC took the position that pregnancy was not an “impairment” and therefore could not be considered a disability even if it was the cause of a substantial limitation.<sup>51</sup> Courts relied on this guidance and held in a line of cases that “absent unusual circumstances, pregnancy does not constitute a ‘physical impairment’ under the ADA.”<sup>52</sup> In addition to the EEOC determination that pregnancy was not an “impairment,” EEOC regulations in 1999 listed as factors that should be considered in determining whether an individual is substantially limited in a major life activity: the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.<sup>53</sup> Given that pregnancy lasts approximately nine months and any limitations resulting from pregnancy may last only for a portion of that timespan, it is not surprising that few courts determined that pregnancy was covered by the ADA prior to the ADAAA.

#### The ADA Amendments Act of 2008 Provides Limited Protections for Pregnant Workers

Under the ADAAA, pregnancy itself may not be considered a disability but pregnant workers may have conditions that could qualify them for accommodations under the law. The ADAAA was passed in response to a series of cases in which the Supreme Court limited who could be considered disabled under the ADA and “[n]arrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.”<sup>54</sup>

In guidance related to pregnancy discrimination adopted after the ADAAA, the EEOC advised that, “[a]lthough pregnancy itself is not a disability, pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA . . . . A number of pregnancy-related impairments are likely to be disabilities, even though they are temporary, such as pregnancy-related carpal tunnel syndrome, gestational diabetes, pregnancy-related sciatica, and preeclampsia.”<sup>55</sup>

<sup>48</sup> 42 U.S.C. § 12112(a).

<sup>49</sup> Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 Va. L. Rev. 397, 407 (2000) (citing Mary Crossley, *The Disability Kaleidoscope*, 74 Notre Dame L. Rev. 621, 668–716 (1999)).

<sup>50</sup> 42 U.S.C. § 12102.

<sup>51</sup> 29 U.S.C. Pt. 1630; *See also*, U.S. Equal Emp’t Opportunity Comm’n, *The Family and Medical Leave Act, the ADA, and Title VII of the Civil Rights Act of 1964* (1995), <https://www.eeoc.gov/laws/guidance/family-and-medical-leave-act-ada-and-title-vii-civil-rights-act-1964>.

<sup>52</sup> *Villarreal v. J.E. Merit Constructors*, 895 F. Supp. 149, 152 (S.D. Tex. 1995).

<sup>53</sup> 29 C.F.R. § 1630.2.

<sup>54</sup> 42 U.S.C. § 12101 (see note on Findings and Purposes of Pub. L. 110–325).

<sup>55</sup> *Fact Sheet for Small Businesses: Pregnancy Discrimination*, U.S. Equal Emp’t Opportunity Comm’n, [https://www.eeoc.gov/eeoc/publications/pregnancy\\_factsheet.cfm](https://www.eeoc.gov/eeoc/publications/pregnancy_factsheet.cfm) (last visited Mar. 18, 2020).

The ADAAA also expanded the definition of “major life activities” to include “major bodily functions.”<sup>56</sup> Additionally, “[u]nder the ADAAA and its implementing regulations, an impairment is not categorically excluded from being a disability simply because it is temporary.”<sup>57</sup> Therefore, a pregnant worker may be a qualified individual with a disability for purposes of the ADA if her pregnancy impairs a major bodily function (such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions) or her ability to perform a major life activity (such as caring for oneself, performing manual tasks, sleeping, walking, standing, lifting, bending, speaking, learning, reading, concentrating, thinking, communicating, and working).

Although the ADAAA’s definition of disability is almost broad enough to cover any limitation related to pregnancy, courts have been reticent to apply the broad definition of disability urged by the ADAAA.<sup>58</sup> While the EEOC has been careful to adhere to the ADAAA’s expansive view of disability in the context of pregnancy, a review of the case law suggests that courts have been more aggressive in limiting the application of the ADAAA to pregnant workers. “In order to make out a prima facie case of disability discrimination under the ADA, [the plaintiff] must establish that she (1) has a ‘disability,’ (2) is a ‘qualified individual,’ and (3) has suffered an adverse employment action because of that disability.”<sup>59</sup> In order to establish the prima facie case for discrimination on the basis of an employer’s failure to make a reasonable accommodation, a plaintiff must show that: “(1) plaintiff is a person with a disability under the meaning of the ADA; (2) an employer covered by the statute had notice of [her] disability; (3) with reasonable accommodation, plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations.”<sup>60</sup>

To determine whether a plaintiff’s condition meets the legal definition of “disability,” courts must assess whether the worker has “a physical or mental impairment that substantially limits one or more major life activities of such individual.”<sup>61</sup> If the court determines that the plaintiff did not have an “impairment,” the individual will not reach the second part of the inquiry to determine whether the individual is substantially limited in one or more major life activities. Numerous courts applying the ADAAA have continued to hold that, “pregnancy, absent unusual circumstances, is not considered a disability under the ADA.”<sup>62</sup> In response to

<sup>56</sup> 42 U.S.C. § 12102.

<sup>57</sup> *Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 333 (4th Cir. 2014).

<sup>58</sup> Nicole B. Porter, *Explaining “Not Disabled” Cases Ten Years After the ADA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 *Geo. J. Poverty Law & Pol’y* 383, 392 (2019). Of nearly 1,000 ADA cases decided between 2014 and 2018, the federal courts erroneously ruled that workers were not individuals with disabilities entitled to the protections of the ADA in 210 of them.

<sup>59</sup> *Turner v. Hershey Chocolate*, 440 F.3d 604, 611 (3d Cir. 2006).

<sup>60</sup> *Monterroso v. Sullivan & Cromwell, LLP*, 591 F. Supp. 2d 567, 577 (S.D.N.Y. 2008).

<sup>61</sup> 42 U.S.C. § 12102(1)(a).

<sup>62</sup> See *Tomiwa v. PharMEDium Servs., LLC*, No. 4:16–CV–3229, 2018 U.S. Dist. LEXIS 66772, at \*13 (S.D. Tex. Apr. 20, 2018) (“Absent unusual circumstances, pregnancy and related medical conditions do not constitute a physical impairment.”); *Mayorga v. Alorica, Inc.*, No. 12–21578–CIV–HUCK/BANDSTRA, 2012 U.S. Dist. LEXIS 3043021, at \*32 (S.D. Fla. July 25, 2012) (citing, inter alia, *Selkow v. 7-Eleven, Inc.*, No. 11–CV–456–T–33EAJ, 2012 U.S. Dist. LEXIS 79265, at \*37 (M.D. Fla. June 7, 2012) (“Absent unusual circumstances, pregnancy is not considered

questions for the record for the 2019 Subcommittee Hearing submitted by Representative Suzanne Bonamici (D-OR-1), Chair of the Committee’s Subcommittee on Civil Rights and Human Services, Ms. Bakst stated:

Disturbingly, courts are finding that even when pregnant women have quite serious complications, those complications do not merit ADAAA protections . . . Courts also explicitly distinguish ‘pregnancy-related complications’ from an ADAAA qualifying ‘disability,’ thus acknowledging that even those pregnant women with complications may have no recourse under the ADAAA.<sup>63</sup>

In fact, one court stated, “only in extremely rare cases have courts found that conditions that arise out of pregnancy qualify as a disability.”<sup>64</sup> Another court acknowledged, “[a]lthough the 2008 amendments broadened the ADA’s definition of disability, these changes only have had a modest impact when applied to pregnancy-related conditions.”<sup>65</sup>

There are many cases where courts have found that even severe complications related to pregnancy do not constitute disabilities triggering ADAA protection. In *Adireje v. ResCare, Inc.*,<sup>66</sup> the court dismissed a health care worker’s ADAAA claim even though she experienced unbearable cramping, bleeding, and a miscarriage. The court held, “even if Adireje had a pregnancy-related complication . . . [she] was not disabled for purposes of the ADA because there is no evidence that her cramps limited her ability to work or other major life activities.”<sup>67</sup>

In addition to the general reticence to equate pregnancy and disability, courts have sometimes pointed to the short duration of pregnancy complications as a reason to reject an ADAAA claim. The EEOC’s guidance on the ADAAA states that, “[i]mpairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe.”<sup>68</sup> Courts continue to read a durational requirement into the ADAAA.<sup>69</sup> For ex-

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a disability—temporary or otherwise—under the ADA or FCRA.”); *Jeudy v. Holder*, No. 10-22873-CIV-HUCK/BANDSTRA, 2011 U.S. Dist. LEXIS 128746, at \*13 (S.D. Fla. Nov.7, 2011) (noting “that pregnancy is not normally considered a disability”).

<sup>63</sup>*Long Over Due: Exploring the Pregnant Workers’ Fairness Act (H.R. 2694) Before the Subcomm. on Civil Rights Human. & Servs. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019) (Questions for the record submitted by Dina Bakst, Co-Founder & Co-President, A Better Balance, at 7–10).

<sup>64</sup>*Sam-Sekur v. Whitmore Grp., Ltd.*, No. 11-CV-4938 (JFB) (GRB), 2012 U.S. Dist. LEXIS 83586, at \*24 (E.D.N.Y. June 15, 2012); see also *Wanamaker v. Westport Board of Education*, 899 F.Supp.2d 193, 211 (D. Conn. 2012) (Citing to *Sam-Sekur* and the EEOC guidance that short-term impairments must be “sufficiently severe” for the proposition that pregnancy-related conditions are only ADAAA-qualifying in rare cases. Additionally, finding plaintiff teacher could not pursue her ADA claim because she “failed to allege that her transverse myelitis limit[ed] a major life activity and that any impairment as a result of her transverse myelitis was not for a short period of time” and “no other facts indicating that [her] condition was chronic.” *Id.* at 212.).

<sup>65</sup>*Scheidt v. Floor Covering Assocs., Inc.*, No. 16-CV-5999, 2018 U.S. Dist. LEXIS 167480, at \*23–24 (N.D. Ill. Sept. 28, 2018) (holding allergies, including rashes and breathing problems, do not constitute a disability that impairs a major life activity).

<sup>66</sup>*Adireje v. ResCare, Inc.*, No. 1:18-CV-01429-TWP-DLP, 2019 U.S. Dist. LEXIS 170125 (S.D. Ind. Sept. 30, 2019).

<sup>67</sup>*Id.* at 24.

<sup>68</sup>See 29 C.F.R. § 1630 (Appendix to Part 1630, Interpretive Guidance on Title I of the Americans with Disabilities Amendments Act).

<sup>69</sup>*Love v. First Transit, Inc.*, No. 16-CV-2208, 2017 U.S. Dist. LEXIS 37716, at \*16 (N.D. Ill. Mar. 16, 2017). See also *Lang v. Wal-Mart Stores East, L.P.*, No. 13-CV-349-LM, 2015 U.S. Dist. LEXIS 44185, at \*4 (D.N.H. Apr. 3, 2015) (“[P]regnancy is not an actionable disability, unless it is accompanied by a pregnancy-related complication.”); *Annobil v. Worcester Skilled Care*

ample, one court held that “temporary, non-chronic impairments of short-duration, with little or no long term or permanent impact, are usually not disabilities.”<sup>70</sup> Regardless of the merits of the individual cases, the reality is that, as one court stated, “only in extremely rare cases have courts found that conditions that arise out of pregnancy qualify as a disability.”<sup>71</sup> As Ms. Bakst noted in her testimony at the 2021 Joint Subcommittee Hearing:

As recently as late 2020, courts have continued to affirm that pregnancy, absent complications, is not an ADA-qualifying disability meriting accommodation. Courts also continue to limit the types of pregnancy-related complications that qualify as disabilities. For instance, in 2020, one court held that a plaintiff with pregnancy complications, including preeclampsia, did not have an ADA-qualifying disability because she had ‘presented no admissible evidence of her pregnancy complications or explained how they disabled her’—despite the fact that preeclampsia is one of the three leading causes of maternal mortality.<sup>72</sup>

Given the case law, it is abundantly clear that the ADA, as amended by the ADAAA, does not provide a sufficient avenue for receiving reasonable accommodations that would allow a worker to continue to earn a living while maintaining a healthy pregnancy.<sup>73</sup>

*The Pregnant Workers Fairness Act Promotes Pregnant Workers’ Health and Economic Wellbeing*

Women comprise nearly half the U.S. workforce.<sup>74</sup> Women are the primary, sole, or co-breadwinners in nearly 64 percent of families, earning at least half of their total household income.<sup>75</sup> Not surprisingly, women are increasingly working later into their pregnancies. According to the U.S. Census Bureau, between 2006 and 2008, 88 percent of first-time mothers worked during their last trimester and 82 percent worked into their last month of pregnancy.<sup>76</sup>

*Ctr., Inc.*, No. 11–40131–TSH, 2014 U.S. Dist. LEXIS 126643, at \*36 (D. Mass. Sept. 10, 2014) (granting summary judgment for defendant where plaintiff “provides no legal argument as to whether such symptoms [including headaches, nausea and vomiting] differ from normal symptoms of pregnancy and how these complications are disabling”); *Mayorga v. Alorica, Inc.*, No. 12–21578–CIV–HUCK/BANDSTRA, 2012 U.S. Dist. LEXIS 103766, at \*5 (S.D. Fla. July 25, 2012).

<sup>70</sup> *Wanamaker v. Westport Bd. of Educ.*, 899 F. Supp. 2d 193, 211 (D. Conn. 2012).

<sup>71</sup> *Sam-Sekur v. Whitmore Grp., Ltd.*, No. 11–CV–4938 (JFB) (GRB), 2012 U.S. Dist. LEXIS 83586, at \*24 (E.D.N.Y. June 15, 2012); see also *Wanamaker v. Westport Board of Education*, 899 F. Supp. 2d 193, 211 (D. Conn. 2012) (Citing to *Sam-Sekur* and the EEOC guidance that short-term impairments must be “sufficiently severe” for the proposition that pregnancy-related conditions are only ADAAA-qualifying in rare cases. Additionally, finding plaintiff teacher could not survive her ADA claim because she “failed to allege that her transverse myelitis limit[ed] a major life activity and that any impairment as a result of her transverse myelitis was not for a short period of time” and “no other facts indicating that [her] condition was chronic.” *Id.* at 212.).

<sup>72</sup> 2021 Bakst Testimony at 11.

<sup>73</sup> *Long Over Due: Exploring the Pregnant Workers’ Fairness Act (H.R. 2694) Before the Subcomm. on Civil Rights Human. & Servs. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019) (Questions for the record submitted by Dina Bakst, Co-Founder & Co-President, A Better Balance, at 7–10).

<sup>74</sup> Catalyst, *Quick Take: Women in the Workforce—United States* (June 5, 2019), <https://www.catalyst.org/research/women-in-the-workforce-united-states/>.

<sup>75</sup> Sarah Jane Glynn, Center for American Progress, *Breadwinning Mothers Continue to be the U.S. Norm 5* (2019), <https://cdn.americanprogress.org/content/uploads/2019/05/12070012/Breadwinners2019-report1.pdf>.

<sup>76</sup> Lynda Laughlin, U.S. Bureau of the Census, *Maternity Leave and Employment Patterns of First-Time Mothers: 1961–2008 6* (2011), <https://www.census.gov/library/publications/2011/demo/p70-128.html>.

When pregnant workers are not provided reasonable accommodations on the job, they are oftentimes forced to choose between economic security and their health or the health of their babies.

#### Reasonable Accommodations for Pregnant Workers Promote Healthy Pregnancies

According to the American College of Obstetricians and Gynecologists (ACOG), providing reasonable accommodations to pregnant workers is critical for the health of women and their children.<sup>77</sup> Depending on the circumstances of the pregnancy, physicians recommend that pregnant women avoid or limit certain risks in the workplace, including exposure to certain compounds, heavy lifting, overnight work, extended hours, or prolonged periods of sitting or standing.<sup>78</sup> Some studies have shown increased risk of miscarriage, preterm birth, low birth weight, urinary tract infections, and fainting as a result of these exposures.<sup>79</sup>

According to ACOG, these health risks can be addressed with simple accommodations such as: seating; water; closer parking; flexible hours; appropriately sized uniforms and safety apparel; additional breaktime to use the bathroom, eat, and rest; excusing the worker from strenuous activities; and excusing the worker from activities that involve exposure to compounds not safe for pregnancy.<sup>80</sup> A 2014 survey found that the most common temporary pregnancy-related accommodation sought (71 percent of participants) was more frequent breaks (e.g., bathroom breaks).<sup>81</sup>

A 2014 survey issued by the National Partnership for Women and Families estimated that one quarter million pregnant workers are denied their requests for reasonable workplace accommodations nationally each year.<sup>82</sup> Additionally, women of color are especially impacted as they are more likely to work in low wage, physically demanding jobs. In written testimony submitted for the record for the 2019 Subcommittee Hearing, Emily Martin of the National Women's Law Center stated:

[O]ver 40 percent of full-time workers in low-wage jobs report that their employers do not permit them to decide when to take breaks, and roughly half report having very little or no control over the scheduling of hours. This culture of inflexibility can lead to reflexive denials when workers in low-wage jobs seek pregnancy-related accommodations, which is of particular concern given that more than one in five (20.9%) pregnant workers is employed in a low-wage job. Moreover, pregnant Black women and Latinas are disproportionately represented in low-wage jobs. Nearly one in three Black and Latina pregnant work-

<sup>77</sup>The American College of Obstetricians and Gynecologists, *Employment Considerations During Pregnancy and the Postpartum Period* 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>.

<sup>78</sup>*Id.* at, e120.

<sup>79</sup>Dina Bakst et al., *A Better Balance, Long Overdue: It's Time for the Federal Pregnant Workers Fairness Act 23* (2019), <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf>.

<sup>80</sup>*Id.*

<sup>81</sup>Nat'l Partnership for Women and Families, *Listening to Mothers: The Experiences of Expecting and New Mothers in the Workplace 2* (2014), <https://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/listening-to-mothers-experiences-of-expecting-and-new-mothers-experiences.pdf>.

<sup>82</sup>*Id.* at 3.

ers hold low-wage jobs (30.0 percent and 31.3 percent, respectively). This means a lack of clear legal rights to pregnancy accommodations likely hits Black women and Latinas particularly hard.<sup>83</sup>

When simple accommodations like those suggested by ACOG are not provided, the impacts on a worker’s health and pregnancy can be deadly. At the 2019 Subcommittee Hearing, Representative Steve Cohen (D–TN–9) highlighted a constituent’s experience at a warehouse in Memphis, TN:

Memphis has a plant that XPO ran. It was the subject of a major story in the New York Times concerning work conditions there and particularly pregnant women . . . One of the former employees, Ms. Tasha [Murrell] brought her doctor’s note instructing that she do no heavy lifting. The supervisor did not accommodate the doctor’s note, nor reassign her to a different area. Ms. [Murrell] continued doing her assigned work of lifting boxes weighing almost 50 pounds. As a result, she suffered a miscarriage.<sup>84</sup>

At the 2019 Subcommittee Hearing, Representative Jahana Hayes (D–CT–5), a member of the Committee, described her experience when reasonable accommodations were not provided to her at work:

I was a working mom, an educator who had an uneventful pregnancy. I was not older [sic] I did not have any complications and what I thought was a reasonable accommodation [became] a tremendous inconvenience. I was a classroom teacher and all I needed was to go to the bathroom which I thought was a reasonable request to ask but you can imagine in a high school with more than 1,000 kids, to get coverage, I was often told ‘well you just had your break’ or ‘we only have two more periods before it’s time for lunch.’ And thinking that I have to go right now was just something that I just dealt with which led to further complications with bladder issues so what started out as an uneventful pregnancy ended up having complications as a result of this minor accommodation not being met.<sup>85</sup>

With the COVID–19 pandemic ravaging the country, pregnant workers are in even greater need of reasonable accommodations. According to the Centers for Disease Control and Prevention (CDC), “pregnant people might be at an increased risk for severe illness from COVID–19.”<sup>86</sup> Pregnant women who contract COVID–19 “are more likely to be hospitalized and are at increased risk for intensive care unit (ICU) admission and receipt of mechanical ven-

<sup>83</sup> Long Overdue: Exploring the Pregnant Workers Fairness Act (H.R. 2694). Before the Subcomm. on Civil Rights & Human Servs. of the H. Comm. on Educ. & Labor, 116th Cong. (2019) (Statement of Emily Martin, Vice President for Education and Workplace Justice, National Women’s Law Center, at 3).

<sup>84</sup> House Committee on Educ. & Labor, *Long Over Due: Exploring the Pregnant Workers’ Fairness Act*, YouTube (Oct. 22, 2019), [https://www.youtube.com/watch?time\\_continue=2&v=SI3WK-7KVNE&feature=emb\\_logo](https://www.youtube.com/watch?time_continue=2&v=SI3WK-7KVNE&feature=emb_logo) (See statement of Rep. Steve Cohen, at 1:52:15).

<sup>85</sup> House Committee on Educ. & Labor, *Long Over Due: Exploring the Pregnant Workers’ Fairness Act*, YouTube (Oct. 22, 2019), [https://www.youtube.com/watch?time\\_continue=2&v=SI3WK-7KVNE&feature=emb\\_logo](https://www.youtube.com/watch?time_continue=2&v=SI3WK-7KVNE&feature=emb_logo) (See statement of Rep. Jahana Hayes, at 1:08:43).

<sup>86</sup> Pregnancy & Breastfeeding, Ctr. For Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnancy-breastfeeding.html> (last visited Aug. 31, 2020).

tilation than nonpregnant women.”<sup>87</sup> A recent study in Washington state found that the COVID–19 infection rate for pregnant people was 70 percent higher than similarly aged adults.<sup>88</sup> One study of pregnant women in Philadelphia found that Black and Hispanic women are “five times more likely to be exposed to coronavirus.”<sup>89</sup>

As Ms. Bakst testified at the 2021 Joint Subcommittee Hearing:

Preserving pregnant workers’ economic security is especially important at a time when the COVID–19 pandemic has disproportionately harmed women, especially women of color in low-wage occupations, with many experts suggesting that it could take years to undo the damage to women’s economic equality, and that many women will experience long-term damage to their career trajectories, earnings, and retirement security. While the PWFA was needed long before the pandemic, it has taken on a new urgency as a critical measure necessary to keep women healthy and attached to the workforce.<sup>90</sup>

Guaranteed reasonable accommodations could be pivotal in pregnant workers maintaining healthy pregnancies both during COVID–19 and beyond.

#### Reasonable Accommodations for Pregnant Workers Promote Families’ Economic Stability

Families increasingly rely on pregnant workers’ income. Seventy-five percent of women will be pregnant and employed at some point in their careers.<sup>91</sup> In 2017, 41 percent of mothers were the sole or primary breadwinners in their households, and one-quarter of mothers were co-breadwinners, bringing home 25 percent to 49 percent of earnings for their families.<sup>92</sup> Ensuring pregnant workers have reasonable accommodations helps ensure that pregnant workers remain healthy and earn an income when they need it the most. Pregnant mothers want, and oftentimes need, to keep working during their pregnancies, both for income and to retain health insurance.<sup>93</sup> According to an analysis from the non-profit organization A Better Balance:

Many pregnant workers are forced to use up allotted leave time early, sometimes even before they give birth, leaving no time remaining for recovery from childbirth.

<sup>87</sup> Pregnancy Data, Ctr. For Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/special-populations/pregnancy-data-on-covid-19.html> (last visited August 31, 2020).

<sup>88</sup> Erica M. Lokken et al., Higher SARS–CoV–2 Infection Rate in Pregnant Patients (February 16, 2021), [https://www.ajog.org/article/S0002-9378\(21\)00098-3/fulltext](https://www.ajog.org/article/S0002-9378(21)00098-3/fulltext)

<sup>89</sup> News Release, Penn Medicine News, Pregnant Black and Hispanic Women Five Times More Likely to Be Exposed to Coronavirus (July 29, 2020), <https://www.pennmedicine.org/news/news-releases/2020/july/pregnant-black-and-hispanic-women-five-times-more-likely-to-be-exposed-to-coronavirus>.

<sup>90</sup> 2021 Bakst Testimony 13.

<sup>91</sup> Dina Bakst et al., A Better Balance, Long Overdue: It’s Time for the Federal Pregnant Workers Fairness Act 23 (2019), <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf>.

<sup>92</sup> Sarah Jane Glynn, Center for American Progress, Breadwinning Mothers Continue to be the U.S. Norm 5 (2019), <https://cdn.americanprogress.org/content/uploads/2019/05/12070012/Breadwinners2019-report1.pdf>.

<sup>93</sup> A Better Balance, Pregnant and Jobless: Thirty-Seven Years after Pregnancy Discrimination Act, Pregnant Women Still Choose Between a Paycheck and a Healthy Pregnancy 11 (2015), <https://www.abetterbalance.org/wp-content/uploads/2017/01/PregnantandJobless.pdf>.



Others are fired when they request accommodations or exhaust their leaves of absence, and then face a particularly difficult time re-entering the workforce as new mothers. Some women lose their health benefits when they are fired or forced onto unpaid leave and then must switch providers and/or delay medical care while securing replacement health insurance. For women who lose their health insurance shortly before going into labor, they could be looking at staggering healthcare costs for childbirth, which averages \$30,000 for a vaginal delivery and \$50,000 for a C-section in the U.S.<sup>94</sup>

Pregnant workers who are pushed out of the workplace might feel the effects for decades, losing out on everything from 401(k) or other retirement contributions to short-term disability benefits, seniority, pensions, social security contributions, life insurance, and more.<sup>95</sup> In her testimony at the 2021 Joint Subcommittee Hearing, Ms. Bakst recounted the experiences of two women who suffered severe economic consequences because their employers would not provide them with accommodations:

Armanda Legros—a single mother forced out of work because her employer refused to provide a lifting accommodation—lost the ability to feed her children. “Once my baby arrived,” she told Congress in 2014, “just putting food on the table for him and my four-year-old was a challenge. I was forced to use water in his cereal at times because I could not afford milk.” Natasha Jackson—the primary breadwinner for her family—was also forced out of her job because her employer refused to let her work with a lifting restriction in place. Her dream of home ownership vanished and, instead, her family struggled to find stable housing.<sup>96</sup>

Guaranteeing reasonable accommodations for pregnant workers also promotes women’s labor force participation. In a letter to Congress, eighteen leading members of the employer community encouraged Congress to pass the PWFA because “[w]omen’s labor force participation is critical to the strength of our companies the growth of our economy and the financial security of most modern families”<sup>97</sup> As Ms. Wilbur testified at the 2019 Subcommittee Hearing:

The Act would help boost our country’s workforce participation rate among women. In states like Kentucky, which ranks 44th in the nation for female labor force participation, we know one contributor to this abysmal statistic is a mother or soon-to-be mother who is forced out or quits a job due to a lack of reasonable workplace accommodations. We can help prevent such situations by clearly laying the groundwork for an informed dialogue between

<sup>94</sup> Dina Bakst et al., *A Better Balance, Long Overdue: It’s Time for the Federal Pregnant Workers Fairness Act* 23 (2019), <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf>.

<sup>95</sup> 2021 Bakst Testimony at 13.

<sup>96</sup> 2021 Bakst Testimony at 12–13.

<sup>97</sup> Letter from Adobe et al., to Members of Congress (June 17, 2020) <https://www.nationalpartnership.org/our-work/resources/economic-justice/coalition/an-open-letter-in-support-of-PWFA-from-private-sector-employers.pdf>.

employers and employees on how these employees can continue working safely and productively throughout the course of a pregnancy and afterwards.<sup>98</sup>

*The Pregnant Workers Fairness Act Ensures Workers Have the Right to Reasonable Accommodations*

The PWFA establishes a pregnant worker’s right to reasonable accommodations and eliminates the evidentiary hurdles to defend that right. It applies to private sector employers with 15 or more employees as well as public sector employers. Covered employers must make reasonable accommodations and cannot deny employment opportunities for job applicants or employees affected by a “known limitation” related to pregnancy, childbirth, or a related medical condition.<sup>99</sup> Under the PWFA, a “known limitation” means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the pregnant worker or her representative has communicated to the employer. Similar to the ADA, employers are not required to make an accommodation if it imposes an undue hardship on an employer’s business.

For private sector employees and job applicants, the PWFA is written to mirror the enforcement powers, procedures, and remedies established under the *Civil Rights Act of 1964*.<sup>100</sup> A court may award lost pay, interest, compensatory damages, punitive damages, costs, reasonable attorneys’ fees, and experts’ fees, to the extent that such relief is available under the law. For public sector employees and job applicants, the PWFA provides mirrors the powers, remedies, and procedures under the *Congressional Accountability Act*,<sup>101</sup> Title V of the United States Code,<sup>102</sup> Section 717 of the *Civil Rights Act of 1964*,<sup>103</sup> and the *Government Employee Rights Act of 1991*.<sup>104</sup> For both the private and public sectors, if the employer engaged in good faith negotiations with the employee during the interactive process but the parties cannot agree to a reasonable accommodation, the employer is not liable for certain damages.<sup>105</sup>

*The Pregnant Workers Fairness Act Mirrors Key Provisions of the Americans with Disabilities Act of 1990*

The PWFA requires private sector employers with 15 or more employees and public sector employers to make “reasonable accommodations” to the “known limitations” related to pregnancy, childbirth, or related medical conditions of a “qualified” employee unless doing so would be an “undue hardship” for the employer. Additionally, the PWFA uses ADA terminology to require the use of the “interactive process” for establishing reasonable accommodations.

<sup>98</sup> *Long Over Due: Exploring the Pregnant Workers’ Fairness Act (H.R. 2694) Before the Subcomm. on Civil Rights & Human Servs. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019) (Written testimony of Iris Wilbur, Vice President of Government Affairs & Public Policy, Greater Louisville Inc.—The Metro Chamber of Commerce, at 2).

<sup>99</sup> National Partnership For Women And Families, *Pregnant Workers Fairness Act Section by Section 1* (2019), <http://www.nationalpartnership.org/our-work/resources/workplace/pregnancy-discrimination/pregnant-workers-fairness-act-section-by-section.pdf>.

<sup>100</sup> 42 U.S.C. § 2000e.

<sup>101</sup> 2 U.S.C. § 1301.

<sup>102</sup> 3 U.S.C. § 411.

<sup>103</sup> 42 U.S.C. § 2000e–16.

<sup>104</sup> 42 U.S.C. § 2000e–16b.

<sup>105</sup> Back pay, front pay, and injunctive relief are still available.

### The Pregnant Workers Fairness Act Includes a Wide Array of Pregnancy-Related Conditions

Throughout the bill’s text, the PWFA ensures that workers have access to reasonable accommodations for conditions connected with a pregnancy, not just a pregnancy itself. Section 2 guarantees workers reasonable accommodations for the “known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee.” The bill further defines “known limitations” to mean a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee has communicated to the employer, whether or not such limitation meets the definition of disability outlined in the ADA. The definition of “known limitation” allows the worker to communicate her need for a reasonable accommodation. However, this provision is broad and recognizes that there may be times when a worker’s representative may communicate this request on her behalf. Importantly, PWFA does not import the ADA’s definition of disability, but rather requires employers to make accommodations to the “known limitations” related to pregnancy, childbirth, or related medical conditions.

### Only “Qualified Employees” are Eligible for the Pregnant Workers Fairness Act’s Reasonable Accommodations

The PWFA limits which employees are eligible for reasonable accommodations to those employees and applicants who are qualified. The definition of qualified under PWFA is similar to the definition used in the ADA, which requires that the applicant or employee must “satisfy job requirements for educational background, employment experience, skills, licenses, and any other qualification standards that are job related and be able to perform those tasks that are essential to the job (“essential functions”), with or without reasonable accommodation.”<sup>106</sup>

The PWFA defines a qualified employee as “an employee or applicant who, with or without reasonable accommodations, can perform the essential functions of the employment position.”<sup>107</sup> PWFA’s “qualified individual” definition deviates from the ADA’s by providing the following caveat: “[E]xcept that an employee or applicant shall be considered qualified if—(A) any inability to perform an essential function is for a temporary period; (B) the essential function could be performed in the near future; and (C) the inability to perform the essential function can be reasonably accommodated.”<sup>108</sup>

This language was inserted into the PWFA to make clear that the temporary inability to perform essential functions due to pregnancy, childbirth, or related medical conditions does not render a worker “unqualified.” There is precedent under the ADA for the temporary excusal of essential functions and there may be a need for a pregnant worker to temporarily perform other tasks or otherwise be excused from performing essential functions before fully returning to her position once she is able. For example, under the

<sup>106</sup>*The ADA: Your Responsibilities as an Employer*, U.S. Equal Emp’t Opportunity Comm’n (Jan. 15, 1997) <https://www.eeoc.gov/facts/ada17.html#:~:text=Essential%20functions%20are%20the%20basic,tasks%20are%20essential%20to%20performance.>

<sup>107</sup>H.R. 1065, 117th Cong. § 5(6) (2021) (as reported).

<sup>108</sup>*Id.*

ADA, courts have found workers are entitled to reasonable accommodations if they only need a finite leave of absence or a transfer that would allow them to perform the essential functions of the job “in the near future.”<sup>109</sup>

Because the ADA’s “essential functions” language is similar to the PWFA, current understanding of “essential functions” under the ADA is instructive, although not determinative, to the PWFA. According to the EEOC, factors to consider in determining if a function is “essential” under the ADA include:

- whether the reason the position exists is to perform that function;
- the number of other employees available to perform the function or among whom the performance of the function can be distributed; and
- the degree of expertise or skill required to perform the function.<sup>110</sup>

In the ADA context, a written job description prepared before advertising or interviewing for a job will be considered as evidence of “essential functions,” but it is not the only evidence considered. Other kinds of evidence that the EEOC will consider include:

- the actual work experience of present or past employees in the job;
- the time spent performing a function;
- the consequences of not requiring that an employee perform a function; and
- the terms of a collective bargaining agreement.<sup>111</sup>

#### The Pregnant Workers Fairness Act Uses the Reasonable Accommodation Framework Within the Americans with Disabilities Act of 1990

The PWFA uses the term “reasonable accommodation,” as defined under the ADA, throughout the bill’s text. Under the ADA, a “reasonable accommodation” means:

- (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
- (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or
- (iii) Modifications or adjustments that enable a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.<sup>112</sup>

Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, and the provision of quali-

<sup>109</sup> See, e.g. *Robert v. Bd. of Cty. Comm’rs of Brown Cty., Kans.*, 691 F.3d 1211, 1218 (10th Cir. 2012).

<sup>110</sup> *The ADA: Your Responsibilities as an Employer*, U.S. Equal Emp’t Opportunity Comm’n (Jan. 15, 1997) <https://www.eeoc.gov/facts/ada17.html#:~:text=Essential%20functions%20are%20the%20basic,tasks%20are%20essential%20to%20performance.>

<sup>111</sup> *Id.*

<sup>112</sup> 29 C.F.R. § 1630.2(o).

fied readers or interpreters are all included in a non-exhaustive list of possible ADA accommodations.<sup>113</sup>

The Job Accommodation Network (JAN), an ADA technical assistance center funded by the U.S. Department of Labor’s Office of Disability Employment Policy (ODEP), lists numerous potential accommodations related to disabilities that might arise during pregnancy, including more than 20 suggested accommodations just for a lifting restriction related to pregnancy; the PWFA would include all of these accommodations as possibilities as well. Other possible accommodations that would be available under the PWFA include, but are not limited to, scheduling due to morning sickness or prenatal appointments, job reassignment, additional restroom breaks, access to water to prevent dehydration, assistance with manual labor, and modified seating. Under the ADA, “[a] qualified individual with a disability may work part-time in his/her current position, or occasionally take time off, as a reasonable accommodation if it would not impose an undue hardship on the employer.”<sup>114</sup> Similarly, leave is one possible accommodation under the PWFA, including time off to recover from delivery. However, Section 2(4) of the PWFA makes clear that an employer “cannot require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided.”<sup>115</sup>

#### Employers are Not Required to Provide Reasonable Accommodations that Create an Undue Hardship

As with the ADA, Section 2 of the PWFA does not require employers to provide reasonable accommodations that would impose an undue hardship on the employer. Under the ADA, an undue hardship is a “significant difficulty or expense incurred by a covered entity, when considered in light of a variety of factors including the structure and overall resources of the employer and the impact of the accommodation on the operations of the covered entity.”<sup>116</sup> Moreover, although “undue hardship” under the ADA is always determined on a case-by-case basis, “[i]n general, a larger employer with greater resources would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer with fewer resources.”<sup>117</sup> Like the ADA, the PWFA seeks to balance the interests of the employer and employee and, although there may be some costs associated with making a reasonable accommodation, the “undue hardship” standard limits the employer’s exposure both to overly burdensome accommodation requests and lawsuits that would attempt to hold the employer liable for failing to provide a prohibitively expensive accommodation.

<sup>113</sup> 42 U.S.C. § 12111.

<sup>114</sup> U.S. Equal Emp’t Opportunity Comm’n, The Family and Medical Leave Act, the ADA, and Title VII of the Civil Rights Act of 1964 (1995), <https://www.eeoc.gov/laws/guidance/family-and-medical-leave-act-ada-and-title-vii-civil-rights-act-1964>.

<sup>115</sup> H.R. 1065, 117th Cong. § 2(4) (2021) (as reported).

<sup>116</sup> 29 C.F.R. § 1630.2.

<sup>117</sup> *What is Considered an “Undue Hardship” for a Reasonable Accommodation?*, ADA National Network, <https://adata.org/faq/what-considered-undue-hardship-reasonable-accommodation> (last visited Mar. 19, 2020).

The Pregnant Workers Fairness Act Uses the Americans with Disabilities Act of 1990’s “Interactive Process” for Reasonable Accommodations

The PWFA explicitly references the “interactive process” that has long been used under the ADA—and even before that under Section 504 of the *Rehabilitation Act of 1973*<sup>118</sup>—to determine an effective reasonable accommodation.<sup>119</sup> In the context of the ADA, the interactive process “simply means that employers and employees with disabilities who request accommodations work together to come up with accommodations.”<sup>120</sup> In some cases under the PWFA, the worker will request an accommodation that will easily address a known limitation of pregnancy, rendering the “interactive process” either unnecessary or virtually non-existent. For example, a pregnant worker who is in the last trimester of her pregnancy who usually stands to do her job may request a stool to sit on. In this case, the worker’s pregnancy is likely known to the employer or readily apparent, and the solution is inexpensive, readily available, and—depending on the exact nature of the job—minimally disruptive to the employer’s operation. As Ms. Bakst stated at the 2019 Subcommittee Hearing:

The beauty of the flexible reasonable accommodation standard within the PWFA is that it makes no assumptions about what pregnant workers may need or not need, and therefore it ensures that the law does not perpetuate gender inequality by providing women with overly broad and unnecessary protections. Instead, in recognition that every pregnancy and workplace is different, the PWFA requires only an interactive process between employer and employee to determine whether a reasonable accommodation will allow the worker to continue working without jeopardizing her health.<sup>121</sup>

However, under the ADA, there may be times when the “interactive process” is critical to providing reasonable accommodations, and an employer may be committing a prohibited act of discrimination if it fails to engage in the interactive process in good faith. In interpreting the ADA, one court noted, “[t]he ADA imposes upon employers a good-faith duty to engage [with their employees] in an interactive process to identify a reasonable accommodation. This duty is triggered when an employee communicates her disability and desire for an accommodation—even if the employee fails to identify a specific, reasonable accommodation.”<sup>122</sup> This good-faith duty will apply to employers under the PWFA.

Under the PWFA, once an employer has been made aware of a “known limitation” related to pregnancy, childbirth, or a related medical condition, the employer will be required to engage with the employee in the process of identifying a reasonable accommodation. According to the JAN, there are six steps to the interactive process under the ADA: recognizing the request, gathering information in-

<sup>118</sup> 29 U.S.C. § 701.

<sup>119</sup> See, e.g., *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112 (9th Cir. 2000), *rev’d on other grounds*, *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

<sup>120</sup> *Accommodation and Compliance: Interactive Process*, Job Accommodation Network, <https://askjan.org/topics/interactive.cfm> (last visited Mar. 19, 2020).

<sup>121</sup> Bakst Testimony at 23 (2019).

<sup>122</sup> *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 581 (4th Cir. 2015).

cluding documentation of disability, exploring accommodation options, choosing an accommodation, implementing the accommodation, and monitoring the effectiveness of the accommodation.<sup>123</sup>

Under the PWFA, the interactive process would operate in a similar way for pregnant workers as it has for decades under the ADA. Both the employer and employee are responsible for engaging in the interactive process in good faith. Not all of the steps are required in determining reasonable accommodations for pregnant workers; oftentimes, the interactive process can take place in a short amount of time.

An employee who fails to engage in the interactive process may not later claim that their employer failed to accommodate their disability under the ADA, or the known limitations of pregnancy under the PWFA; numerous courts have rejected claims under the ADA on these grounds.<sup>124</sup> Additionally, an employer will not be liable for failure to engage in the interactive process if the employee ultimately fails to demonstrate either the existence of a reasonable accommodation that would allow her to perform the essential functions of the position<sup>125</sup> or a reasonable accommodation in which the employee's essential functions could be temporarily excused.

#### *The Pregnant Workers Fairness Act Provides Clarity for Employers*

As of April 2021, 30 states, the District of Columbia, and 4 cities require employers to provide accommodations to pregnant workers. Still, workers and employers face a patchwork of state and local laws that leave many pregnant workers with no protections at all. Ms. Wilbur urged Congress to create a federal standard during the 2019 Subcommittee Hearing, “Greater Louisville is home to many multi-state businesses and corporate headquarters, so the ability to have uniformity related to pregnant worker accommodations throughout our region and entire country is important. Therefore, [Greater Louisville Inc.—The Metro Chamber of Commerce] urges Congress to advance the PWFA at the federal level.”<sup>126</sup>

By guaranteeing pregnant workers the right to reasonable accommodations in the workplace, the PWFA could also decrease employers' legal uncertainty. Ms. Wilbur attested to this at the 2019 Subcommittee Hearing:

The PWFA also gives much-needed clarity because it explicitly provides ‘reasonable accommodations’ for pregnant and new mothers, in addition to the proper procedures for providing them, thereby increasing the potential to resolve requests for accommodations quickly and informally (as employers have done for decades for workers with disabilities) and reducing the potential for costly litigation. We believe that the Act will lead to a reduction, not an increase, in litigation for precisely this reason. At least two

<sup>123</sup> *Accommodation and Compliance: Interactive Process*, Job Accommodation Network, <https://askjan.org/topics/interactive.cfm> (last visited Mar. 19, 2020).

<sup>124</sup> *Griffin v. United Parcel Serv., Inc.*, 661 F.3d 216, 225 (5th Cir. 2011) (quoting *Louisegeed v. Akzo Nobel Inc.*, 178 F.3d 731, 734 (1999)).

<sup>125</sup> *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 581 (4th Cir. 2015) (internal quotation marks omitted).

<sup>126</sup> *Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694) Before the Subcomm. on Civil Rights & Human Servs. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019) (Written testimony of Iris Wilbur, Vice President of Government Affairs & Public Policy, Greater Louisville Inc.—The Metro Chamber of Commerce, at 2).

states with pregnant worker accommodation laws have reported a reduction in litigation since the laws went into effect. Before Kentucky’s law was enacted this summer, our employers were forced to navigate a complex web of federal laws and court decisions to figure out what their obligations are when it comes to appropriately accommodating pregnant workers and new mothers. Clearly defining what constitutes ‘reasonable accommodations’ and when an employer is and is not obligated to provide them will establish important guidance for businesses, especially the smaller and mid-size companies we represent who cannot afford expensive legal advisors.<sup>127</sup>

The PWFA would provide clarity and uniformity for employers and would not come at significant cost to employers. The JAN found that “fifty-seven percent of requested accommodations by employees were granted at no cost, while thirty-six percent of employers reported a one-time cost.”<sup>128</sup>

*The Pregnant Workers Fairness Act Does Not Alter Religious Exemptions That May Exist Under Current Law*

The PWFA does not change existing exemptions for religious employers under current law.<sup>129</sup> Further, the PWFA remains neutral with respect to claims that may be brought under the *Religious Freedom Restoration Act* (RFRA)<sup>130</sup> and does not include language exempting PWFA-covered employers from RFRA’s provisions. Although religious employers may claim that a required accommodation is a substantial burden on their free exercise of religion under RFRA, it is the position of the Committee that nondiscrimination provisions are a compelling government interest and the least restrictive means to achieve the policy of equal employment opportunity. Unfortunately, in recent years, RFRA claims undermined nondiscrimination requirements in a way that harms third parties.<sup>131</sup> RFRA cannot and should not be used to create exemptions that would harm the rights of third parties, including pregnant workers.<sup>132</sup>

The substitute amendment to the ANS offered by Representative Fulcher would open the door to employers seeking religious exemp-

<sup>127</sup> *Id.*

<sup>128</sup> Job Accommodation Network, Workplace Accommodations: Low Cost, High Impact 3 (2019) <https://askjan.org/publications/Topic-Downloads.cfm?pubid=962628&action=download&pubtype=pdf>.

<sup>129</sup> Religious organizations may be afforded a limited exemption from, for example, Title VII of the Civil Rights Act of 1964’s prohibition on religious discrimination. *See e.g., Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) (“The language and the legislative history of Title VII both indicate that the statute exempts religious institutions only to a narrow extent.”) Furthermore, the Supreme Court has recognized a constitutional “ministerial exception” to civil rights laws for some employees who preach and teach the faith and carry out important religious functions. It is a wholesale exemption from civil rights laws and could apply to PWFA as it applies to other civil rights laws.

<sup>130</sup> 42 U.S.C. § 2000bb.

<sup>131</sup> Meg Kinnard, *In lawsuit, a Catholic mother from Simpsonville alleges discrimination by Miracle Hill*, Greenville News (South Carolina) (Feb. 15, 2019), <https://www.greenvilleonline.com/story/news/2019/02/15/greenville-miracle-hills-ministries-foster-agency-lawsuit/2881913002/>.

<sup>132</sup> The Establishment Clause of the First Amendment limits the government’s ability to provide religious exemptions from generally applicable laws for religious or moral reasons. The Constitution requires that any “accommodation must be measured so that it does not override other significant interests” or have a “detrimental effect on any third party.” *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005); *Burwell v. Hobby Lobby Stores, Inc.*, 123 S. Ct. 2751, 2781 n. 37 (citing *Cutter*, 544 U.S. at 720). Providing such an exemption under the PWFA would undoubtedly cause harm to women.



tions from providing a reasonable accommodation to their pregnant workers. Ms. Bakst testified at 2021 Joint Subcommittee Hearing, “[a]ccording to an A Better Balance legal analysis, none of the nearly 1,000 court cases invoking the Title VII religious exemption involve an employer objecting to providing pregnancy accommodations; therefore from a legal standpoint, inserting an exemption for religious employers is simply extraneous and unnecessary.”<sup>133</sup>

Further, Ms. Bakst testified that not only is the exemption “already unnecessary” but also that “ample escape hatches already exist for religious employers.”<sup>134</sup> She added that “I would hope that most employers, especially those that are religious, would be amenable to providing such simple measures to their employees to safeguard their well-being.”<sup>135</sup>

*The Pregnant Workers Fairness Act Enjoys Broad Bipartisan Support*

According to a recent poll, 89 percent of voters favor the PWFA, with 69 percent of voters strongly favoring it.<sup>136</sup> The PWFA has “high levels of support across the political spectrum including Republicans (81%), Independents (86%), and Democrats (96%) along with Trump voters (80%) and Clinton voters (97%), very conservative voters (80%), and liberals (95%).”<sup>137</sup> The PWFA is about ensuring that pregnant workers can stay safe and healthy on the job by being provided reasonable accommodations for pregnancy, childbirth, or related medical conditions unless those accommodations are an undue burden for the employer. The PWFA is one crucial step needed to reduce the disparities pregnant workers face by ensuring that pregnant women, and especially pregnant women of color, can remain safe and healthy at work.

SECTION-BY-SECTION ANALYSIS

*Section 1. Short title*

This section states that the title of the bill is the *Pregnant Workers Fairness Act* (the Act or this Act).

*Section 2. Nondiscrimination with regard to reasonable accommodations related to pregnancy*

This section makes it unlawful for a covered entity to:

- Fail to provide reasonable accommodations for pregnant workers (Pregnant workers covered under the Act are those qualified employees with known limitations related to pregnancy, childbirth, or related medical conditions. Covered entities do not have to provide reasonable accommodations if doing so would cause them undue hardship.);
- Require pregnant workers to accept an accommodation other than a reasonable accommodation arrived at through the interactive process (as set forth in Section 5);

<sup>133</sup> 2021 Bakst Testimony at 16.

<sup>134</sup> 2021 Bakst Testimony at 17.

<sup>135</sup> 2021 Bakst Testimony at 17.

<sup>136</sup> Brian Nienaber, The Tarrance Group, Pregnant Workers Fairness Act Survey Memo 2 (2020), [https://www.aclu.org/sites/default/files/field\\_document/pwfa\\_survey\\_memo\\_2-20-20\\_1\\_1\\_2.pdf](https://www.aclu.org/sites/default/files/field_document/pwfa_survey_memo_2-20-20_1_1_2.pdf).

<sup>137</sup> *Id.*

- Deny employment opportunities to pregnant workers because of the need for a reasonable accommodation;
- Require a pregnant worker to take paid or unpaid leave if another reasonable accommodation can be provided; or
- Take adverse employment actions against a pregnant worker for requesting or using a reasonable accommodation.

### *Section 3. Remedies and enforcement*

In general under this section, pregnant workers alleging pregnancy discrimination under the Act shall have the same rights and remedies available to those employees alleging discrimination on the basis of race, color, religion, sex, or national origin under Title VII of the *Civil Rights Act of 1964*,<sup>138</sup> the *Congressional Accountability Act of 1995*,<sup>139</sup> Chapter 5 of Title 3 of the United States Code,<sup>140</sup> Section 717 of the *Civil Rights Act of 1964*,<sup>141</sup> and the *Government Employee Rights Act of 1991*.<sup>142</sup> Remedies include equitable relief, including back pay, and reasonable attorney's fees. Claimants may also be awarded compensatory and punitive damages.<sup>143</sup>

*Prohibition Against Retaliation.* The Act makes it unlawful to coerce, intimidate, threaten, or interfere with any individual who has exercised rights provided under the Act or who has helped another individual exercise rights provided under the Act.

*Limitation.* The Act provides covered entities with a good faith defense. The Act provides that certain damages may not be awarded if the covered entity demonstrates good faith in engaging in the interactive process with the pregnant worker to identify and make a reasonable accommodation. This provision mirrors a similar provision under the *Americans with Disabilities Act of 1990*.<sup>144</sup>

### *Section 4. Rulemaking*

This section requires the EEOC to issue regulations, including examples of reasonable accommodations under the Act, within two years.

### *Section 5. Definitions*

This section defines the following key terms used throughout the Act.

*Commission.* The term Commission refers to the Equal Employment Opportunity Commission (EEOC).

*Covered Entity.* A covered entity includes a private sector employer who has 15 or more employees, employment agencies, labor organizations, legislative branch employers, executive branch employers, governmental agencies (including state and local governments and the government of the District of Columbia), political subdivisions, units of the judicial branch of the Federal Govern-

<sup>138</sup> 42 U.S.C. § 2000e.

<sup>139</sup> 2 U.S.C. § 1301.

<sup>140</sup> 3 U.S.C. § 411.

<sup>141</sup> 42 U.S.C. § 2000e-16.

<sup>142</sup> 42 U.S.C. § 2000e-16b.

<sup>143</sup> Punitive damages generally cannot be awarded to employees of the legislative, judicial, or executive branch. Compensatory and punitive damages are subject to statutory caps. For employers with 15–100 employees, the limit is \$50,000. For employers with 101–200 employees, the limit is \$100,000. For employers with 201–500 employees, the limit is \$200,000. For employers with more than 500 employees, the limit is \$300,000.

<sup>144</sup> 42 U.S.C. § 12101.

ment having positions in the competitive service, and the offices of state and local elected officials.

*Employee.* An employee is someone who is employed by a private-sector employer; this includes job applicants. The term employee also includes those in the legislative branch; the executive branch; certain federal judicial branch employees (those with positions in the competitive service); and state and local government employees, including those who work for elected officials.

*Person.* A person is defined the same way such term is defined under Title VII of the *Civil Rights Act of 1964*.

*Known Limitation.* A known limitation means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee has communicated to the employer, whether or not such limitation meets the definition of disability outlined in the *Americans with Disabilities Act of 1990*.

*Qualified Employee.* A qualified employee is an employee, or job applicant, who, with or without reasonable accommodation, can perform the essential functions of the job (essential function). An individual is considered qualified if any inability to perform an essential function is for a temporary period, the essential function could be performed in the near future, and the inability to perform the essential function can be reasonably accommodated.

*Reasonable Accommodation.* A reasonable accommodation is defined the same way such term is defined under the *Americans with Disabilities Act of 1990*. This definition adopts the requirement for a good faith interactive negotiation between employers and employees to determine a reasonable accommodation (interactive process). Under the Act, reasonable accommodations would be provided in light of known limitations related to pregnancy, rather than a disability.

*Undue Hardship.* An undue hardship is defined the same way such term is defined under the *Americans with Disabilities Act of 1990*. An undue hardship means an action requiring significant difficulty or expense, when considering factors such as the nature and cost of the accommodation and the employer's overall financial resources.

#### *Section 6. Waiver of State immunity*

This section makes clear that States shall not be immune from the Act under the 11th amendment to the U.S. Constitution.

#### *Section 7. Relationship to other laws*

This section makes clear that nothing in the Act limits pregnant workers' rights under a federal, State, or local law that provides greater or equal protection.

#### *Section 8. Severability*

This section states that if any portion of the Act is found unconstitutional, the remainder of the Act shall not be affected.

#### EXPLANATION OF AMENDMENTS

The amendments, including the amendments in the nature of a substitute, are explained in the descriptive portions of this report.

## APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Pursuant to section 102(b)(3) of the *Congressional Accountability Act of 1995*, Pub. L. No. 104-1, H.R. 1065, as amended, applies to terms and conditions of employment within the legislative branch. Section 5(2)(B)(i) includes an employing office as defined by section 101 of the *Congressional Accountability Act of 1995* (2 U.S.C. 1301) and section 411(c) of title 3, United States Code, in the definition of a “covered entity.”

## UNFUNDED MANDATE STATEMENT

Pursuant to Section 423 of the *Congressional Budget and Impoundment Control Act of 1974*, Pub. L. No. 93-344 (as amended by Section 101(a)(2) of the *Unfunded Mandates Reform Act of 1995*, Pub. L. No. 104-4), the Committee traditionally adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office (CBO) pursuant to section 402 of the *Congressional Budget and Impoundment Control Act of 1974*. Section 4 of the *Unfunded Mandates Reform Act of 1995* excludes from the application of that Act any legislative provisions that would establish or enforce statutory rights prohibiting discrimination. CBO has determined that the bill falls within that exclusion because it would extend protections against discrimination in the workplace based on sex to employees requesting reasonable accommodation for pregnancy, childbirth, or related medical conditions.

## EARMARK STATEMENT

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1065 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as described in clauses 9(e), 9(f), and 9(g) of rule XXI.

## ROLL CALL VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following roll call votes occurred during the Committee’s consideration of H.R. 1065:

Date: 3/24/21

## COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE

Roll Call: 1

Bill: H.R. 1065

Amendment Number: 2

Disposition: **Defeated by a vote of 20 - 27**Sponsor/Amendment: **Fulcher/FOXX\_014.XML**

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. SCOTT (VA) (Chairman)		X		Mrs. FOXX (NC) (Ranking)	X		
Mr. GRIJALVA (AZ)		X		Mr. WILSON (SC)	X		
Mr. COURNTEY (CT)		X		Mr. THOMPSON (PA)	X		
Mr. SABLAN (MP)		X		Mr. WALBERG (MI)	X		
Ms. WILSON (FL)			X	Mr. GROTHMAN (WI)	X		
Ms. BONAMICI (OR)		X		Ms. STEFANIK (NY)	X		
Mr. TAKANO (CA)		X		Mr. ALLEN (GA)	X		
Ms. ADAMS (NC)		X		Mr. BANKS (IN)	X		
Mr. DESAULNIER (CA)		X		Mr. COMER (KY)	X		
Mr. NORCROSS (NJ)			X	Mr. FULCHER (ID)	X		
Ms. JAYAPAL (WA)		X		Mr. KELLER (PA)	X		
Mr. MORELLE (NY)		X		Mr. MURPHY (NC)	X		
Ms. WILD (PA)		X		Ms. MILLER-MEEKS (IA)	X		
Mrs. MCBATH (GA)		X		Mr. OWENS (UT)	X		
Mrs. HAYES (CT)		X		Mr. GOOD (VA)		X	
Mr. LEVIN (MI)		X		Mrs. MCCLAIN (MI)	X		
Ms. OMAR (MN)		X		Mrs. HARSHBARGER (TN)	X		
Ms. STEVENS (MI)		X		Mrs. MILLER (IL)		X	
Ms. LEGER FERNANDEZ (NM)		X		Mrs. SPARTZ (IN)	X		
Mr. JONES (NY)		X		Mr. FITZGERALD (WI)	X		
Ms. MANNING (NC)		X		Mr. CAWTHORN (NC)	X		
Mr. MRVAN (IN)		X		Mrs. STEEL (CA)	X		
Mr. BOWMAN (NY)		X		<i>Vacancy</i>			
Mr. POCAN (WI)		X		<i>Vacancy</i>			
Mr. CASTRO (TX)		X					
Ms. SHERRILL (NJ)		X					
Mr. YARMUTH (KY)		X					
Mr. ESPAILLAT (NY)			X				
Mr. KWEISI MFUME (MD)			X				

TOTALS: Ayes: 20

Nos: 27

Not Voting: 4

Total: 53 / Quorum: 27 / Report: 27

(29 D - 24 R)

\*Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

\*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.

Date: 3/24/2021

## COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE

Roll Call: 2

Bill: H.R. 1065

Amendment Number: Motion

Disposition: Adopted by a vote of 30 - 17

Sponsor/Amendment: Bowman/to report to the House with an amendment and with the recommendation that the amendment be agreed to, and the bill as amended, do pass

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. SCOTT (VA) (Chairman)	X			Mrs. FOXX (NC) (Ranking)		X	
Mr. GRIJALVA (AZ)	X			Mr. WILSON (SC)	X		
Mr. COURNTEY (CT)	X			Mr. THOMPSON (PA)		X	
Mr. SABLAN (MP)	X			Mr. WALBERG (MI)		X	
Ms. WILSON (FL)			X	Mr. GROTHMAN (WI)		X	
Ms. BONAMICI (OR)	X			Ms. STEFANIK (NY)	X		
Mr. TAKANO (CA)	X			Mr. ALLEN (GA)		X	
Ms. ADAMS (NC)	X			Mr. BANKS (IN)		X	
Mr. DESAULNIER (CA)	X			Mr. COMER (KY)	X		
Mr. NORCROSS (NJ)			X	Mr. FULCHER (ID)		X	
Ms. JAYAPAL (WA)	X			Mr. KELLER (PA)		X	
Mr. MORELLE (NY)	X			Mr. MURPHY (NC)		X	
Ms. WILD (PA)	X			Ms. MILLER-MEEKS (IA)	X		
Mrs. MCBATH (GA)	X			Mr. OWENS (UT)		X	
Mrs. HAYES (CT)	X			Mr. GOOD (VA)		X	
Mr. LEVIN (MI)	X			Mrs. MCCLAIN (MI)		X	
Ms. OMAR (MN)	X			Mrs. HARSHBARGER (TN)		X	
Ms. STEVENS (MI)	X			Mrs. MILLER (IL)		X	
Ms. LEGER FERNANDEZ (NM)	X			Mrs. SPARTZ (IN)	X		
Mr. JONES (NY)	X			Mr. FITZGERALD (WI)		X	
Ms. MANNING (NC)	X			Mr. CAWTHORN (NC)		X	
Mr. MRVAN (IN)	X			Mrs. STEEL (CA)		X	
Mr. BOWMAN (NY)	X			<i>Vacancy</i>			
Mr. POCAN (WI)	X			<i>Vacancy</i>			
Mr. CASTRO (TX)	X						
Ms. SHERRILL (NJ)	X						
Mr. YARMUTH (KY)	X						
Mr. ESPAILLAT (NY)			X				
Mr. KWEISI MFUME (MD)			X				

TOTALS: Ayes: 30

Nos: 17

Not Voting: 4

Total: 53 / Quorum: 27 / Report: 27

(29 D - 24 R)

\*Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

\*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.

## STATEMENT OF PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause (3)(c) of rule XIII of the Rules of the House of Representatives, the goals of H.R. 1065 are to establish an affirmative right to reasonable accommodations for workers with known limitations relating to childbirth, pregnancy, or related medical conditions without imposing an undue hardship for employers.

## DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c)(5) of rule XIII of the Rules of the House of Representatives, the Committee states that no provision of H.R. 1065 establishes or reauthorizes a program of the Federal Government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

## HEARINGS

Pursuant to clause 3(c)(6) of rule XIII of the Rules of the House of Representatives, the Committee on Education and Labor’s Subcommittee on Workforce Protections and Subcommittee on Civil Rights and Human Services held a joint hearing on March 18, 2021, entitled “*Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination*,” which was used to consider H.R. 1065. The hearing examined the health and economic effects of pregnant workers’ lack of access to reasonable accommodations. The hearing also examined how H.R. 1065 would fill a gap in the existing legal framework by guaranteeing pregnant workers the right to reasonable workplace accommodations. Witnesses included Fatima Goss Graves, CEO and President of the National Women’s Law Center, Washington, DC; Camille A. Olson, Partner at Seyfarth Shaw, LLP, Chicago, IL; Dina Bakst, Co-Founder & Co-President, A Better Balance: The Work & Family Legal Center, New York City, NY; and Laurie McCann, Senior Attorney, AARP, Washington, DC.

## STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee’s oversight findings and recommendations are reflected in the descriptive portions of this report.

## NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

Pursuant to clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the *Congressional Budget and Impoundment Control Act of 1974*, and pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the *Congressional Budget and Impoundment Control Act of 1974*, the Committee has received the following cost estimate for H.R. 1065 from the Director of the Congressional Budget Office:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, April 5, 2021.*

Hon. ROBERT C. "BOBBY" SCOTT,  
*Chairman, Committee on Education and Labor,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1065, the Pregnant Workers Fairness Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Lindsay Wylie.

Sincerely,

PHILLIP L. SWAGEL,  
*Director.*

Enclosure.

<b>H.R. 1065, Pregnant Workers Fairness Act</b>			
As ordered reported by the House Committee on Education and Labor on March 24, 2021			
By Fiscal Year, Millions of Dollars	2021	2021-2026	2021-2031
Direct Spending (Outlays)	*	*	*
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	*	*	*
Spending Subject to Appropriation (Outlays)	*	5	not estimated
Statutory pay-as-you-go procedures apply?	Yes	<b>Mandate Effects</b>	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2032?	No	Contains intergovernmental mandate?	Excluded from UMRA
		Contains private-sector mandate?	Excluded from UMRA
* = between zero and \$500,000.			

H.R. 1065 would require all public-sector employers and any private-sector employers with more than 15 workers to make reasonable accommodations for the known limitations related to pregnancy, childbirth, or related medical conditions of employees and job applicants.<sup>1</sup> The bill would not require employers to make any accommodation that would impose an undue hardship on business operations. Under the bill, the Equal Employment Opportunity Commission (EEOC) would be required to issue regulations to implement the bill within two years of enactment.

Using information from the EEOC, CBO expects that for the first three years after the regulations are issued, the volume of claims related to pregnancy discrimination that EEOC receives would increase by about 20 percent (roughly an additional 500 claims) each year. (The EEOC expects that after three years, the number of

<sup>1</sup> Current law provides protections to pregnant workers who are denied reasonable accommodations by their employers. However, the Supreme Court has ruled that a pregnant worker may bring a claim against an employer only if the petitioner can demonstrate that the employer has provided accommodations to workers with similar limitations who are not pregnant (*Young v. United Parcel Service Inc.*, 575 U.S. 12, 1226 (2015), <https://go.usa.gov/xG4jx>, PDF, 230 KB), H.R. 1065 would allow pregnant workers to bring such claims without meeting that requirement.



pregnancy discrimination claims would return to prior levels as employers adjust to the new regulations.) To meet that initial workload, CBO estimates that the commission would need eight additional employees, at a cost of about \$5 million over the 2021–2026 period. Such spending would be subject to the availability of appropriated funds. For fiscal year 2021, the Congress appropriated \$404 million for all of the EEOC’s operations.

Enacting the bill could affect direct spending by some agencies that are allowed to use fees, receipts from the sale of goods, and other collections to cover operating costs. CBO estimates that any net changes in direct spending by those agencies would be negligible because most of them can adjust amounts collected to reflect changes in operating costs.

CBO has not reviewed H.R. 1065 for intergovernmental or private-sector mandates. Section 4 of the Unfunded Mandates Reform Act excludes from the application of that act any legislative provisions that would establish or enforce statutory rights prohibiting discrimination. CBO has determined that the bill falls within that exclusion because it would extend protections against discrimination in the workplace based on sex to employees requesting reasonable accommodation for pregnancy, childbirth, or related medical conditions.

The CBO staff contacts for this estimate are Lindsay Wylie (for federal costs) and Lilia Ledezma (for mandates). The estimate was reviewed by Leo Lex, Deputy Director of Budget Analysis.

#### COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 1065. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the *Congressional Budget and Impoundment Control Act of 1974*.

#### CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

The bill does not change existing law for purposes of clause 3(e) of rule XIII of the Rules of the House of Representatives.

ZOE LOFGREN, CALIFORNIA  
CHAIRPERSON

COMMITTEE CORRESPONDENCE

RODNEY DAVIS, ILLINOIS  
RANKING MINORITY MEMBER

*Congress of the United States*

*House of Representatives*

COMMITTEE ON HOUSE ADMINISTRATION

1309 Longworth House Office Building  
Washington, D.C. 20515-6157  
(202) 225-2061  
<https://cha.house.gov>

March 24, 2021

The Honorable Robert C. "Bobby" Scott  
Chairman, Committee on Education and Labor  
U.S. House of Representatives  
2176 Rayburn House Office Building  
Washington, DC 20515

HOUSE ADMIN MAR 24 '21 PM01:47

Dear Chairman Scott:

I am writing to you concerning H.R. 1065, the Pregnant Workers Fairness Act. There are certain provisions in the legislation which fall within the Rule X jurisdiction of the Committee on House Administration.

In the interest of permitting your committee to proceed expeditiously to floor consideration, the Committee on House Administration agrees to forego action on the bill. This is done with the understanding that the Committee on House Administration's jurisdictional interests over this and similar legislation are in no way diminished or altered. In addition, the Committee reserves its right to seek conferees on any provisions within its jurisdiction which are considered in a House-Senate conference and requests your support if such a request is made.

I would appreciate your response confirming this understanding with respect to H.R. 1065 and ask that a copy of our exchange of letters on this matter be included in your committee report on the bill and in the *Congressional Record* during consideration of the bill on the House floor.

Sincerely,

  
Zoe Lofgren  
Chairperson

- cc: The Honorable Nancy Pelosi, Speaker of the House  
The Honorable Rodney Davis, Ranking Member, Committee on House Administration  
The Honorable Virginia Foxx, Ranking Member, Committee on Education and Labor  
The Honorable Jason Smith, Parliamentarian



COMMITTEE ON  
EDUCATION AND LABOR  
U.S. HOUSE OF REPRESENTATIVES  
2176 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6100

March 25, 2021

MAJORITY MEMBERS:  
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SCOTT FITZGERALD, WISCONSIN  
MADISON CANTHON, NORTH CAROLINA  
MICHELLE STEEL, CALIFORNIA  
VACANCY

The Honorable Zoe Lofgren  
Chairperson  
Committee on House Administration  
1309 Longworth House Office Building  
Washington, DC 20515

Dear Chairperson Lofgren:

In reference to your letter of March 24, 2021, I write to confirm our mutual understanding regarding H.R. 1065, the "Pregnant Workers Fairness Act."

I appreciate the Committee on House Administration's waiver of consideration of H.R. 1065 as specified in your letter. I acknowledge that the waiver was granted only to expedite floor consideration of H.R. 1065 and does not in any way waive or diminish the Committee on House Administration's jurisdictional interests over this or similar legislation.

I would be pleased to include our exchange of letters on this matter in the committee report for H.R. 1065 and in the *Congressional Record* during floor consideration of the bill to memorialize our joint understanding.

Again, thank you for your assistance with this matter.

Very truly yours,

Robert C. "Bobby" Scott  
Chairman

cc: The Honorable Rodney Davis, Ranking Member, Committee on House Administration  
The Honorable Virginia Foxx, Ranking Member, Committee on Education and Labor  
The Honorable Nancy Pelosi, Speaker  
The Honorable Steny Hoyer, Majority Leader  
The Honorable Jason Smith, Parliamentarian

JERROLD NADLER, New York  
CHAIRMAN

JIM JORDAN, Ohio  
RANKING MEMBER

ONE HUNDRED SEVENTEENTH CONGRESS

**Congress of the United States**

**House of Representatives**

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951  
judiciary@hhs.gov

March 23, 2021

The Honorable Bobby Scott  
Chairman  
House Committee on Education and Labor  
2175 House Office Building  
Washington, DC 20515

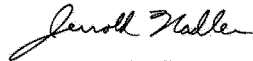
Dear Chairman Scott:

This is to advise you that the Committee on the Judiciary has now had an opportunity to review the provisions in H.R. 1065, the "Pregnant Workers Fairness Act," that fall within our Rule X jurisdiction. I appreciate your consulting with us on those provisions. The Judiciary Committee has no objection to your including them in the bill for consideration on the House floor, and to expedite that consideration is willing to forgo action on H.R. 1065, with the understanding that we do not thereby waive any future jurisdictional claim over those provisions or their subject matters.

In the event a House-Senate conference on this or similar legislation is convened, the Judiciary Committee reserves the right to request an appropriate number of conferees to address any concerns with these or similar provisions that may arise in conference.

Please place this letter into the *Congressional Record* during consideration of the measure on the House floor. Thank you for the cooperative spirit in which you have worked regarding this matter and others between our committees.

Sincerely,



Jerrold Nadler  
Chairman

c: The Honorable Jim Jordan, Ranking Member, Committee on the Judiciary  
The Honorable Jason Smith, Parliamentarian  
The Honorable Virginia Foxx, Ranking Member, Committee on Education and Labor



COMMITTEE ON  
EDUCATION AND LABOR  
U.S. HOUSE OF REPRESENTATIVES  
2176 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6100

April 28, 2021

MAJORITY MEMBERS:  
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BURRESS OWENS, UTAH  
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DANNA HARSHBARGER, TENNESSEE  
MARY E. MILLER, ILLINOIS  
VICTORIA SPARTZ, INDIANA  
SCOTT FITZGERALD, WISCONSIN  
MADISON CRAWFORD, NORTH CAROLINA  
MICHELLE STEEL, CALIFORNIA  
JULIA LETLOW, LOUISIANA  
VACANCY

The Honorable Jerrold Nadler  
Chairman  
House Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Nadler:

In reference to your letter of March 23, 2021, I write to confirm our mutual understanding regarding H.R. 1065, the "Pregnant Workers Fairness Act."

I appreciate the Committee on the Judiciary's waiver of consideration of H.R. 1065 as specified in your letter. I acknowledge that the waiver was granted only to expedite floor consideration of H.R. 1065 and does not in any way waive or diminish the Committee on the Judiciary's jurisdictional interests over this or similar legislation.

I would be pleased to include our exchange of letters on this matter in the committee report for H.R. 1065 and in the *Congressional Record* during floor consideration of the bill to memorialize our joint understanding.

Again, thank you for your assistance with this matter.

Very truly yours,

Robert C. "Bobby" Scott  
Chairman

cc: The Honorable Jim Jordan, Ranking Member, Committee on the Judiciary

The Honorable Virginia Foxx, Ranking Member, Committee on Education and Labor  
The Honorable Nancy Pelosi, Speaker  
The Honorable Steny Hoyer, Majority Leader  
The Honorable Jason Smith, Parliamentarian

CAROLYN B. MALONEY, NEW YORK  
CHAIRWOMAN

ONE HUNDRED SEVENTEENTH CONGRESS

JAMES COMER, KENTUCKY  
RANKING MINORITY MEMBER

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-8143

Maloney 0621 224-8224  
Mancini 0202 648-3074  
<https://oversight.house.gov>

April 28, 2021

The Honorable Robert C. "Bobby" Scott  
Chairman  
Committee on Education and Labor  
U.S. House of Representatives  
Washington, D.C. 20515


Dear Chairman Scott:

I am writing to you concerning H.R. 1065, the Pregnant Workers Fairness Act. There are certain provisions in the legislation that fall within the Rule X jurisdiction of the Committee on Oversight and Reform.

In the interest of permitting your Committee to proceed expeditiously on this bill, I am willing to waive this Committee's right to sequential referral. I do so with the understanding that by waiving consideration of the bill, the Committee on Oversight and Reform does not waive any future jurisdictional claim over the subject matters contained in the bill that fall within its Rule X jurisdiction. I request that you urge the Speaker to name members of this Committee to any conference committee that is named to consider such provisions.

Please place this letter into the Congressional Record during consideration of the measure on the House floor. Thank you for the cooperative spirit in which you have worked regarding this matter and others between our respective Committees.

Sincerely,

  
Carolyn B. Maloney  
Chairwoman

cc: The Honorable James Comer, Ranking Member  
Committee on Oversight and Reform

The Honorable Virginia Foxx, Ranking Member  
Committee on Education and Labor





COMMITTEE ON  
EDUCATION AND LABOR  
U.S. HOUSE OF REPRESENTATIVES  
2176 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6100

April 29, 2021

MAJORITY MEMBERS:  
Chairman

RAÚL M. GRIJALVA, ARIZONA  
JOE COURTNEY, CONNECTICUT  
GREGORIO KILLI CAMACHO SABLÁN,  
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FREDERICA S. WILSON, FLORIDA  
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JAMES COMER, KENTUCKY  
RUSS FULCHER, IDAHO  
FRED KELLER, PENNSYLVANIA  
DREWRY E. BURRITT, NORTH CAROLINA  
MARIANNETTE MILLER-MEEKS, IOWA  
BURRESS OWENS, ILLINOIS  
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DIANA HARSHBARGER, TENNESSEE  
MARY E. MILLER, ILLINOIS  
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SCOTT FITZGERALD, WISCONSIN  
MADISON COWTHORN, NORTH CAROLINA  
MICHELLE STEEL, CALIFORNIA  
JULIA LETLOW, LOUISIANA  
VACANCY

The Honorable Carolyn B. Maloney  
Chairwoman  
House Committee on Oversight and Reform  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairwoman Maloney:

In reference to your letter of April 28, 2021, I write to confirm our mutual understanding regarding H.R. 1065, the "Pregnant Workers Fairness Act."

I appreciate the Committee on Oversight and Reform's waiver of consideration of H.R. 1065 as specified in your letter. I acknowledge that the waiver was granted only to expedite floor consideration of H.R. 1065 and does not in any way waive or diminish the Committee on Oversight and Reform's jurisdictional interests over this or similar legislation.

I would be pleased to include our exchange of letters on this matter in the committee report for H.R. 1065 and in the *Congressional Record* during floor consideration of the bill to memorialize our joint understanding.

Again, thank you for your assistance with this matter.

Very truly yours,

Robert C. "Bobby" Scott  
Chairman

cc: The Honorable James Comer, Ranking Member, Committee on Oversight and Reform  
The Honorable Virginia Foxx, Ranking Member, Committee on Education and Labor  
The Honorable Nancy Pelosi, Speaker  
The Honorable Steny Hoyer, Majority Leader  
The Honorable Jason Smith, Parliamentarian

## MINORITY VIEWS

### INTRODUCTION

Committee Republicans unequivocally believe discrimination of any kind is abhorrent and should not be tolerated, and that unlawful discrimination should not be permitted. This is why federal laws already protect workers from discrimination in the workplace, including discrimination because of pregnancy.

### PURPOSE OF H.R. 1065

H.R. 1065, the *Pregnant Workers Fairness Act*, is a stand-alone bill that would create a new federal statute. The bill makes it unlawful for an employer not to provide reasonable accommodations for known limitations related to the pregnancy, childbirth, or related medical conditions of an employee or applicant unless the employer can demonstrate the accommodation would impose an undue hardship on the operation of the business.<sup>1</sup> H.R. 1065 is intended to address perceived shortcomings in the Supreme Court’s 2015 decision in *Young v. United Parcel Service, Inc. (Young)*.<sup>2</sup> In that case, the Supreme Court applied the requirements of the *Pregnancy Discrimination Act of 1978* (PDA), which is part of Title VII of the *Civil Rights Act of 1964* (CRA), and states discrimination because of “sex” includes discrimination because of “pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.”<sup>3</sup>

In *Young*, a part-time driver for United Parcel Service (UPS) named Peggy Young requested an accommodation of light duty due to her pregnancy and her doctor’s recommendation that she not lift over 20 pounds. UPS refused the request and did not allow her to return to work because lifting over 20 pounds was an essential function of her job. Notably, UPS accommodated on-the-job injuries with light-duty assignments but did not offer light duty to employees who had medical conditions unrelated to a work injury. UPS based its decision on the provisions of a collective bargaining agreement.<sup>4</sup>

The Supreme Court ruled in favor of Ms. Young, vacating the judgment of the lower court, and held that a pregnant employee can potentially establish discrimination under the PDA by alleging the employer denied a request for an accommodation and the employer accommodated others similar in their ability or inability to

<sup>1</sup>H.R. 1065, 117th Cong. § 2(1) (2021).

<sup>2</sup>575 U.S. 206 (2015).

<sup>3</sup>42 U.S.C. § 2000e(k).

<sup>4</sup>In 2014, UPS changed its policy to make pregnant employees eligible for light-duty assignments prior to oral argument at the Supreme Court, but the Court proceeded with the case. Brief for Respondent at 11, *Young v. United Parcel Serv.*, 575 U.S. 206 (2015) (No. 12–1226).

work. The Court indicated that under the PDA, a plaintiff can reach a jury trial by showing “the employer’s policies impose a significant burden on pregnant workers” and the employer’s non-discriminatory reasons for the policies are not “sufficiently strong to justify the burden.”<sup>5</sup> Differential treatment between pregnant workers and other workers is a factor in determining whether the employer’s policies impose a significant burden on pregnant workers and whether the employer’s non-discriminatory reasons are sufficiently strong to justify the burden. However, the Court did not agree that pregnancy accommodations must automatically be provided to the same extent as any other accommodations, including on-the-job injury accommodations. In addition, the Court noted that statutory changes to Title I of the *Americans with Disabilities Act of 1990* (ADA) in the *Americans with Disabilities Act Amendments Act of 2008*, which were made after the facts at issue in *Young* occurred, “may limit the future significance” of the Court’s interpretation of the PDA because Congress “expanded the definition of ‘disability’ under the ADA to make clear that ‘physical or mental impairment[s] that substantially limit[]’ an individual’s ability to lift, stand or bend are ADA-covered disabilities.”<sup>6</sup>

H.R. 1065 explicitly requires a reasonable accommodation for known limitations related to pregnancy, childbirth, or related medical conditions without reference to whether other workers’ limitations, injuries, or impairments have been accommodated, but it does so as a stand-alone bill that does not amend the PDA or the ADA.

NEGOTIATED IMPROVEMENTS TO THE PREGNANT WORKERS  
FAIRNESS ACT

Prior to a previous Committee markup of the *Pregnant Workers Fairness Act* in the 116th Congress,<sup>7</sup> significant progress was made negotiating bipartisan compromises, and Committee Republicans commend Chairman Robert C. “Bobby” Scott (D-VA) for his willingness to negotiate on several issues. In the 117th Congress, H.R. 1065 includes the language which addresses the important concerns raised by Republicans, resulting in a much-improved product compared to the bill as introduced in the 116th Congress. However, as was the case with the bill considered in the 116th Congress, one significant issue remains to be addressed in H.R. 1065 relating to protections for religious organizations which will be discussed in more detail in another section of the Minority Views.

*Essential Functions Requirement*

At a hearing on the *Pregnant Workers Fairness Act* in the 116th Congress on October 22, 2019, Representative Jerrold Nadler (R-NY), the bill’s author, testified before the Subcommittee on Civil Rights and Human Services that the legislation uses “the frame-

<sup>5</sup> 575 U.S. at 229.

<sup>6</sup> *Id.* at 218–19. The plaintiff did not petition the Supreme Court to review whether UPS had violated the ADA. The Court noted that the Equal Employment Opportunity Commission (EEOC) issued regulations in 2014 interpreting the ADA to require employers to accommodate employees whose temporary lifting restrictions originated off the job. *Id.* at 219.

<sup>7</sup> H.R. 2694, 116th Cong. (2019).

work and language of the ADA.”<sup>8</sup> Accordingly, H.R. 1065 incorporates the ADA definitions of “reasonable accommodation” and “undue hardship.”<sup>9</sup> The ADA prohibits employment discrimination “on the basis of disability,” which can include “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.”<sup>10</sup> However, to qualify for potential protection under the ADA, the employee or applicant must be able to “perform the essential functions of the employment position,” “with or without reasonable accommodation.”<sup>11</sup>

The *Pregnant Workers Fairness Act* as introduced in the 116th Congress did not include a requirement that the employee or applicant be able to perform the essential functions of the job, with or without reasonable accommodation. Ms. Ellen McLaughlin, a partner with Seyfarth Shaw LLP specializing in labor and employment law, raised significant concerns with this omission, calling it a “key provision of the ADA” when she testified before the Subcommittee on Civil Rights and Human Services in 2019. She stated:

The types of accommodation that an employer must provide under the ADA are numerous and defined, but they do not extend to accommodating an employee who remains unable to perform the essential functions of the job even with those accommodations. By eliminating the essential function criteria, the Bill appears to require employers to take steps to keep the employee on the job regardless of her ability to continue to perform the core functions of the job. The consequences for employers—and employees—are unclear. Does this require an employer to keep an employee in a position despite being unable to perform the core tasks associated with that position—effectively allowing the employee to report for work but not do the job? If an employee cannot work mandatory overtime due to pregnancy and mandatory overtime is clearly an essential job function, is the pregnant employee—unlike the employee with a disability under the ADA—excused from working the mandatory overtime? Or does it require an employer to reassign the employee to a totally different position and, if so, can the employer make appropriate wage adjustments to reflect the compensation in that job?<sup>12</sup>

To address these concerns, H.R. 1065 adds a requirement that the employee or applicant be “qualified,” meaning the individual, “with or without reasonable accommodation, can perform the essential functions of the employment position.”<sup>13</sup> In addition, to address concerns from supporters of H.R. 1065 that workers with

<sup>8</sup> *Long Over Due: Exploring the Pregnant Workers’ Fairness Act (H.R. 2694): Hearing Before the Subcomm. on Civ. Rights & Hum. Serv. of the H. Comm. on Educ. & Lab.*, 116th Cong. (2019) (statement of Rep. Jerrold Nadler at 4).

<sup>9</sup> H.R. 1065, 117th Cong. § 5(7) (2021).

<sup>10</sup> 42 U.S.C. § 12112(a), (b)(5).

<sup>11</sup> *Id.* § 12111(8).

<sup>12</sup> *Long Over Due: Exploring the Pregnant Workers’ Fairness Act (H.R. 2694): Hearing Before the Subcomm. on Civ. Rights & Hum. Serv. of the H. Comm. on Educ. & Lab.*, 116th Cong. (2019) (statement of Ellen McLaughlin, Partner, Seyfarth Shaw LLP, at 7–8) (emphasis in original) [hereinafter McLaughlin Statement].

<sup>13</sup> H.R. 1065, 117th Cong. § 5(6) (2021).

known limitations related to pregnancy who are temporarily unable to perform an essential function be able to receive an accommodation, the bill includes an exception that an employee or applicant “shall be considered qualified if—(A) any inability to perform an essential function is for a temporary period; (B) the essential function could be performed in the near future; and (C) the inability to perform the essential function can be reasonably accommodated.”<sup>14</sup>

This compromise language maintains the ADA essential-function requirement while indicating it is also appropriate to consider other ADA forms of reasonable accommodation such as “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, . . . and other similar accommodations”—which are incorporated in H.R. 1065 through its adoption of the ADA definition of reasonable accommodation—as well as leave.<sup>15</sup> The “essential functions” language in H.R. 1065 thus incorporates the ADA concept of “essential functions,” although temporary limitations related to pregnancy must also be considered when determining the appropriate reasonable accommodation. Moreover, under H.R. 1065, to trigger the exception to the essential functions requirement, the limitation must be “temporary,” the essential function at issue must be something that would be performed in the “near future,” and the limitation can be “reasonably accommodated,” which could include leave. H.R. 1065 therefore does not require an employer to allow an employee to report for work but not do the job.

A key part of the ADA interactive process that takes place between a worker and employer to determine a reasonable accommodation is often a discussion of the essential functions of the worker’s job. Establishing what are and are not essential functions is often critical in determining whether the employee can stay in the current position with a reasonable accommodation or whether another accommodation—such as job restructuring, a modified work schedule, reassignment to a vacant position, or leave—is needed. In its definition of the term “qualified individual,” the ADA states that “consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.”<sup>16</sup> This is a practical, commonsense provision in the ADA because it is the employer who must ultimately choose the duties and assignments of each position so the enterprise as a whole can function and thrive. Under H.R. 1065, courts will also need to consider the employer’s judgment regarding the essential functions of the job.

Like the ADA, H.R. 1065 does not require “red circle” pay rates for employees reassigned to vacant positions as reasonable accommodations. A red circle pay rate is a higher than normal pay rate for the job classification. Under the ADA and H.R. 1065, if a reasonable accommodation consists of reassignment to a vacant position, the pay can be commensurate with the vacant position’s nor-

<sup>14</sup>*Id.*

<sup>15</sup>42 U.S.C. § 12111(9)(B); *see also* EEOC, EMPLOYER-PROVIDED LEAVE AND THE AMERICANS WITH DISABILITIES ACT (“Granting Leave as a Reasonable Accommodation”).

<sup>16</sup>42 U.S.C. § 1A 12111(8).

mal rate, even if this pay rate is lower than the rate for the employee's current position.<sup>17</sup>

*Definition of Known Limitations*

The ADA includes a broad, comprehensive definition of “disability” so workers and employers understand what impairments are covered by the statute.<sup>18</sup> In contrast, the *Pregnant Workers Fairness Act*, as introduced in the 116th Congress, did not define “known limitations” related to pregnancy, childbirth, and related medical conditions. Ms. McLaughlin in her testimony explained why a definition of this central term is needed:

The phrase “known limitations” is clearly different than the definition of a covered disability under the ADA, and appears to be an express rejection of that term. While the definitions of the ADA may be imperfect, they have been interpreted and analyzed by courts over a period of years, and employers are familiar with and have been applying the ADA standards for some time. The decision to not cross-reference the ADA indicates that a different scope of coverage is intended by the drafters of the Bill. It is entirely unclear, however, what scope of coverage is intended, and precisely how that coverage differs from a covered disability under the ADA. Given the language of the Bill, it appears that any limitation of any type is covered, as long as the employer is aware of it.<sup>19</sup>

To address these concerns, H.R. 1065 includes a definition of “known limitation,” although this definition is far from being as detailed or specific as the ADA definition of “disability.” The bill defines “known limitation” as a “physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee’s representative has communicated to the employer whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102).”<sup>20</sup> Thus the “known limitation” must be a “physical or mental condition” related to pregnancy, and it must be communicated to the employer, who is not under an obligation to guess or take affirmative steps to find out whether the worker has a limitation.

H.R. 1065’s definition confirms “known limitation” goes beyond the ADA definition of “disability” by stating the condition can qualify “whether or not such condition meets the definition of disability specified in [the ADA].” Supporters of H.R. 1065 were concerned

<sup>17</sup> See, e.g., JOB ACCOMMODATION NETWORK, TECHNICAL ASSISTANCE MANUAL FOR TITLE I OF THE ADA ch. 3.10.5, <https://askjan.org/publications/ada-specific/Technical-Assistance-Manual-for-Title-I-of-the-ADA.cfm#spy-scroll-heading-32> (employer may reassign individual to lower-graded position and does not have to maintain the individual’s salary at the level of the higher-graded position).

<sup>18</sup> 42 U.S.C. § 12102(1) (“The term ‘disability’ means . . . a physical or mental impairment that substantially limits one or more major life activities. . . .”); *id.* § 12102(2)(A) (“[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”); *id.* § 12102(2)(B) (“[A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”).

<sup>19</sup> McLaughlin Statement, *supra* note 12, at 7.

<sup>20</sup> H.R. 1065, 117th Cong. § 5(5) (2021).

the already broad ADA definition of “disability” has not been interpreted by all courts to include limitations associated with pregnancy, including healthy pregnancies.

While the definition in H.R. 1065 of “known limitation” falls far short of the specificity and detail of the ADA definition of “disability,” this compromise language defining “known limitation” is not completely open-ended and will give workers and employers some guidance. As a backstop, H.R. 1065’s incorporation of the ADA definition of “reasonable accommodation” places a limit on an employer’s obligations—i.e., the requested accommodation must be reasonable and proportional under the bill. A minor limitation will presumably only require a minor accommodation.

### *Interactive Process*

Under the ADA, a reasonable accommodation will often be determined through a balanced, interactive process involving dialogue between the worker and the employer.<sup>21</sup> H.R. 1065 incorporates the definition of “reasonable accommodation” from the ADA, including a reference to the interactive process that is typically used.<sup>22</sup> However, Sections 2(2) and 2(4) of the *Pregnant Workers Fairness Act* as introduced in the 116th Congress seemed to give the employee unilateral veto power over offered accommodations, in contrast to the ADA’s balanced, interactive process for determining reasonable accommodations.<sup>23</sup> Ms. McLaughlin raised concerns about Section 2(2) in her testimony:

The Bill also includes a provision that allows an employee to *not* accept an accommodation offered by the employer . . . Does this provision really contemplate that the employee can veto an accommodation proposed by the employer? Are there any limits to that veto right?<sup>24</sup>

She had similar concerns with Section 2(4), which seemed to give the employee unilateral veto power over an offered accommodation of leave:

[T]he Bill contemplates that a pregnant employee cannot be required to go on leave if another accommodation would address the “known limitations” of that employee . . . What if the pregnant worker is still physically capable of performing the job, but it would expose the fetus to unsafe conditions, such as lead or radiation? Under circumstances such as those, employers should be able to require the

<sup>21</sup> See 29 C.F.R. § 1630.2(o)(2)(3) (“To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”).

<sup>22</sup> See H.R. 2694, 116th Cong. § 5(5) (2019) (“[T]he terms ‘reasonable accommodation’ and ‘undue hardship’ have the meanings given such terms in section 101 of the [ADA] and shall be construed as such terms have been construed under such Act and as set forth in the regulations required by this Act, including with regard to the interactive process that will typically be used to determine an appropriate reasonable accommodation.”).

<sup>23</sup> See *id.* § 2(2) (unlawful to “require a job applicant or employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation that such applicant or employee chooses not to accept, if such accommodation is unnecessary to enable the applicant or employee to perform her job”); *id.* § 2(4) (unlawful to “require an employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of an employee”).

<sup>24</sup> McLaughlin Statement, *supra* note 12, at 8 (emphasis in original).



pregnant worker not to report to the job site, but the Bill appears to prohibit such a requirement.

It is also unclear what happens if the accommodation sought by the employee creates an undue hardship on the employer. Using the ADA scheme, the employer would be able to place the worker on leave, but Section 2(4) of the Bill suggests that the employer cannot place the worker on leave if an accommodation exists that would address the “known limitation,” even if that accommodation results in an undue hardship.<sup>25</sup>

To address these concerns, H.R. 1065 amends Section 2(2) to incorporate explicitly the ADA’s balanced, interactive process. Under Section 2(2) in H.R. 1065, it is unlawful to “require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process referred to in section 5(7) [of the Act].” This compromise language makes clear reasonable accommodations agreed upon through the interactive process, including an accommodation of leave, are not subject to a unilateral veto by the employee. The longstanding and well-developed ADA interactive process will be the framework for accommodations under Sections 2(2) and 2(4) in H.R. 1065.

In determining a reasonable accommodation under the ADA, when a “need for an accommodation is not obvious,” an employer may require the employee to provide medical “documentation of the need for the accommodation.”<sup>26</sup> Because H.R. 1065 incorporates the ADA definition of “reasonable accommodation,” including the interactive process between the employee and employer typically used to determine a reasonable accommodation, the bill presumably allows employers to require such documentation when the need for an accommodation is not obvious.

In addition, the ADA includes a defense the employer can raise if the employer has a “qualification standard” that includes a “requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.”<sup>27</sup> The Supreme Court has ruled this includes a direct threat that may be posed to the individual’s own health or safety.<sup>28</sup> The Occupational Safety and Health Administration has noted that “exposure to reproductive hazards in the workplace is an increasing health concern.”<sup>29</sup> Under H.R. 1065, if the workplace environment—such as exposure to chemical, physical, or biological hazards—poses a threat to the health or safety of the pregnant employee, the employer will be able to take into account such threats to health or safety in determining a reasonable accommodation, including through the interactive process with the employee.

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<sup>25</sup> *Id.* at 8–9.

<sup>26</sup> 29 C.F.R. pt. 1630, App. at 37–38.

<sup>27</sup> 42 U.S.C. § 12113(b).

<sup>28</sup> See *Chevron USA, Inc. v. Echazabal*, 536 U.S. 73, 83 (2002).

<sup>29</sup> U.S. DEPT OF LAB., OCCUPATIONAL SAFETY & HEALTH ADMIN., REPRODUCTIVE HAZARDS, <https://www.osha.gov/SLTC/reproductivehazards/index.html>.

### *Fifteen-employee Threshold*

Title VII of the CRA and Title I of the ADA only apply to employers with 15 or more employees.<sup>30</sup> *The Pregnant Workers Fairness Act* as introduced in the 116th Congress did not include a similar limitation of coverage, even though the bill is intended to address the Supreme Court’s 2015 decision in *Young* interpreting the PDA (which is part of Title VII), and even though, as Rep. Nadler testified, the legislation uses the framework of the ADA. To address this omission and conform the bill to Title VII’s and the ADA’s coverage, H.R. 1065 only applies to employers with 15 or more employees by incorporating this limitation from Section 701(b) of the CRA.<sup>31</sup>

### *Good Faith Efforts*

The CRA states that damages shall not be awarded in ADA cases if the employer “demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity.” . . .<sup>32</sup> This is a sensible provision in the CRA so that damages are not available if the employer has made good faith efforts through the ADA interactive process to determine a reasonable accommodation.

Such a provision was not included in the *Pregnant Workers Fairness Act* as introduced in the 116th Congress, but H.R. 1065 includes this provision so that damages are not available under the bill if the employer has made good faith efforts through the interactive process with the worker to determine a reasonable accommodation for the worker’s known limitations related to pregnancy, childbirth, and related medical conditions.<sup>33</sup> H.R. 1065’s remedies conform to the CRA’s remedies and will further encourage employers to make good faith efforts to determine reasonable accommodations under the bill through the balanced, interactive process.

### *Rulemaking Authority*

H.R. 1065 requires the Equal Employment Opportunity Commission (EEOC) to issue regulations within two years of the bill’s enactment. As introduced in the 116th Congress, the rulemaking section in the *Pregnant Workers Fairness Act* stated: “Such regulations shall provide examples of reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions *that shall be provided to a job applicant or employee affected by such known limitations unless the covered entity can demonstrate that doing so would impose an undue hardship.*”<sup>34</sup>

The italicized phrase was too prescriptive. It seemed to indicate that the examples of reasonable accommodations in EEOC’s regulation are mandatory, even if they do not apply to the specific employer and employee because of circumstances that are different than those outlined in the example. To address this concern, H.R.

<sup>30</sup> 42 U.S.C. § 2000e(b); *id.* § 12111(5)(A).

<sup>31</sup> H.R. 1065, 117th Cong. § 5(2)(B)(i) (2021).

<sup>32</sup> 42 U.S.C. § 1981a(a)(3).

<sup>33</sup> H.R. 1065, 117th Cong. § 3(g) (2021).

<sup>34</sup> H.R. 2694, 116th Cong. § 4 (2019) (emphasis added).

1065 does not include the phrase “that shall be provided to a job applicant or employee affected by such known limitations unless the covered entity can demonstrate that doing so would impose an undue hardship.” Excluding this phrase clarifies that the examples in the regulation are merely examples of potential reasonable accommodations and not mandatory.<sup>35</sup>

UNRESOLVED CONCERN WITH H.R. 1065

The CRA is the nation’s flagship civil rights law. Title VII of the CRA includes a limited but longstanding provision stating that the statute will not apply to a “religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”<sup>36</sup> This provision allows religious organizations to make religiously based employment decisions so they are not compelled to violate their faith. They can make employment decisions based on the worker’s religion conforming to the organization’s religion, including following the religious tenets of the organization,<sup>37</sup> but the CRA provision is not a license to discriminate in employment on other grounds.<sup>38</sup> The CRA provision applies to “the entire realm of the employment arena,” not just the hiring of individuals.<sup>39</sup> Title I of the ADA includes a similar provision.<sup>40</sup>

H.R. 1065 is stand-alone legislation that does not amend any law and does not incorporate the CRA religious-organization protection or any provision protecting religious organizations. During negotiations over the *Pregnant Workers Fairness Act* in the 116th Congress, Committee Republicans requested inclusion of such a provision, but it is not included in H.R. 1065. Ms. Camille Olson testified before the Subcommittee on Civil Rights and Human Services and Subcommittee on Workforce Protections at a joint hearing on several disparate bills, including H.R. 1065, on March 18, 2021. She noted in her testimony that amending the PDA, which is a part of Title VII of the CRA, would have the salutary effect of integrating H.R. 1065 with Title VII, the contours and interpretations of which employers are already familiar, and which would incorporate the religious-organization protection from Title VII.<sup>41</sup> As

<sup>35</sup> See H.R. 1065, 117th Cong. § 4 (2021).

<sup>36</sup> 42 U.S.C. § 2000e-1(a).

<sup>37</sup> See, e.g., *Gosche v. Calvert High Sch.*, 997 F. Supp. 867, 872 (N.D. Ohio 1998) (religious school could make adherence to moral standards of the church a requirement for continued employment), *affirmed by* 181 F.3d 101 (6th Cir. 1999).

<sup>38</sup> See, e.g., *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) (while “religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin”).

<sup>39</sup> *Hopkins v. Women’s Div., Gen. Bd. of Glob. Ministries*, 238 F. Supp.2d 174, 180 (D.D.C. 2002).

<sup>40</sup> 42 U.S.C. § 12113(d) (“This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. . . . [A] religious organization may require that all applicants and employees conform to the religious tenets of such organization.”).

<sup>41</sup> *Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination: Hearing Before the Subcomm. on Civ. Rights & Human Serv. & Subcomm. on Workforce Protections of the H. Comm. on Educ. & Lab.*, 117th Cong. (2021) (statement of Camille Olson, Partner, Seyfarth Shaw LLP, at 37).

Ranking Member Virginia Foxx (R-NC) stated during the Committee markup, without the religious-organization protection, H.R. 1065 could force a religious organization to make employment decisions in violation of the organization's faith.<sup>42</sup>

For example, if an employee working for a religious organization requests time off to have an abortion procedure, H.R. 1065 could require the organization to comply with this request as a reasonable accommodation of known limitations related to pregnancy, childbirth, or related medical conditions. This accommodation could be required to include paid leave if the employee is eligible for paid medical leave as part of the employer's workplace policies. These kinds of accommodations, however, could be contrary to the organization's religious beliefs, placing the organization in a position of either violating federal law or violating its faith.

Religious-organization protections are a common feature of state pregnancy-accommodation laws. A Democrat-invited witness at the October 22, 2019, Subcommittee on Civil Rights and Human Services hearing on the *Pregnant Workers Fairness Act* pointed to Kentucky's recently-enacted law requiring reasonable accommodations for pregnant workers as a model of a successful pregnant-worker accommodation law for Congress to consider.<sup>43</sup> The Kentucky law includes a religious-organization protection very similar to Title VII's protection.<sup>44</sup> At least 15 other states and the District of Columbia have pregnancy-nondiscrimination or pregnancy-accommodation laws that include a religious-organization protection similar to Title VII's. The states include Arkansas, Hawaii, Iowa, Maine, Nebraska, New Jersey, New York, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Wisconsin, and Wyoming.<sup>45</sup>

Committee Democrats contend religious organizations are already protected by the *Religious Freedom Restoration Act of 1993* (RFRA), and inclusion of the CRA's religious-organization protection is unnecessary. RFRA states the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," except that the government "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest." An organization "may assert" a violation of RFRA "as a claim or defense in a judicial proceeding and obtain appropriate relief" against the government.<sup>46</sup>

<sup>42</sup> Press Release, Comm. on Educ. & Lab. Republicans, FOXX Opening Statement at Markup of H.R. 7, H.R. 1065, and H.R. 1195 (Mar. 24, 2021), <https://republicans-edlabor.house.gov/news/documentsingle.aspx?DocumentID=407342>.

<sup>43</sup> See *Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694): Hearing Before the Subcomm. on Civ. Rights & Hum. Serv. of the H. Comm. on Educ. & Lab.* (2019) (statement of Iris Wilbur, Vice President of Gov't Affairs & Pub. Pol'y, Greater Louisville Inc.).

<sup>44</sup> See KY. REV. STAT. ANN. § 344.090 ("[I]t is not an unlawful practice for . . . [a] religious corporation, association, or society to employ an individual on the basis of his religion to perform work connected with the carrying on by such corporation, association, or society of its religious activity.")

<sup>45</sup> See ARK. CODE ANN. § 16-123-103; D.C. CODE § 2-1401.03; HAW. REV. STAT. § 378-3; IOWA CODE § 216.6; ME. STAT. tit. § 5, § 4573-A; NEB. REV. STAT. § 48-1103; N.J. STAT. ANN. 10:5-12; N.Y. EXEC. LAW § 296.11; OHIO REV. CODE ANN. § 4112.02(P); Okla. Stat. tit. 25, § 1307; S.C. CODE ANN. § 1-13-80; TENN. CODE ANN. § 4-21-405; TEX. LAB. § 21.109; UTAH CODE ANN. § 34A-5-102(i); WISC. STAT. § 111.337; Wyo. Stat. Ann. § 27-9-102(b).

<sup>46</sup> *Id.* § 2000bb-1.

Unfortunately, RFRA does not render the inclusion of a religious-organization protection in H.R. 1065 unnecessary. The CRA's provision provides stronger protections than those in RFRA. The CRA provision limits the statute's application with respect to religiously based employment decisions. Under the CRA, the federal government and the courts cannot interfere with these decisions if the organization is a religious organization and its employment decisions are based on the organization's religion. RFRA, on the other hand, merely provides a defense to governmental action and creates a balancing test to determine whether the government may impose a burden on the exercise of religion. Under RFRA, the federal government may substantially burden the exercise of religion if it demonstrates the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.

If H.R. 1065 is enacted, federal agencies enforcing it and private plaintiffs will argue in the courts that the requirements in the Act are furthering a compelling governmental interest, i.e., clarifying the nondiscrimination rights of pregnant workers. Lower courts have ruled that nondiscrimination laws and policies serve a compelling governmental interest with respect to RFRA claims.<sup>47</sup> After likely meeting this burden in a case brought under H.R. 1065, the federal agency or private plaintiff would next argue an accommodation pursuant to H.R. 1065 is the least restrictive means to further this interest. At best, it is unclear whether a religious organization raising RFRA as a defense will be able to overcome these arguments in federal court. Indeed, Mr. J. Matthew Sharp, Senior Counsel with the Alliance Defending Freedom, noted in his testimony at a hearing on RFRA before the Committee on Education and Labor on June 25, 2019, that courts rule in favor of the federal government and against those attempting to be free of a substantial burden on their religion in over 80 percent of RFRA cases.<sup>48</sup> To ensure religious organizations are not forced to violate their faith in complying with H.R. 1065, the bill should include the CRA's provision limiting the application of the Act with respect to the religiously based employment decisions of religious organizations.

#### REPUBLICAN AMENDMENT

Committee Republicans offered one amendment during the Committee markup.<sup>49</sup> This substitute amendment offered by Representative Russ Fulcher (R-ID), Ranking Member of the Subcommittee on Civil Rights and Human Service, included H.R. 1065 in its entirety and simply added language incorporating the religious-orga-

<sup>47</sup> See, e.g., *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 592 (6th Cir. 2018) ("EEOC's compelling interest in eradicating discrimination"), *aff'd*, *Bostock v. Clayton Cty.*, 140 S.Ct. 1731 (2020); *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 876 F. Supp. 445, 462 (E.D.N.Y. 1995) (compelling interest in "eliminating and preventing" discrimination), *aff'd in part, rev'd in part on other grounds*, 85 F.3d 839 (2d Cir. 1996).

<sup>48</sup> *Do No Harm: Examining the Misapplication of the "Religious Freedom Restoration Act": Hearing Before the H. Comm. on Educ. & Lab.*, 116th Cong. 53 (June 25, 2019) (statement of J. Matthew Sharp, Senior Couns., Alliance Defending Freedom) (citing Lucien J. Dhooze, *The Religious Freedom Restoration Act at 25: A Quantitative Analysis of the Interpretative Case Law*, 27 WM. & MARY BILL OF RTS. J. 153, 193, 198 (2018)).

<sup>49</sup> *Markup of H.R. 1065, Pregnant Workers Fairness Act, Before the H. Comm. on Educ. & Lab.*, 117th Cong. (Mar. 24, 2021) (substitute amendment offered by Rep. Russ Fulcher (R-ID)).

nization protection from the CRA. Representative Fulcher's substitute amendment acknowledges the improvements made to H.R. 1065 when compared to the bill introduced in the 116th Congress, as discussed above. Although H.R. 1065 is not the bill Committee Republicans would write given a blank slate, the improvements included provide sufficient clarity to pregnant workers and employers regarding their rights and responsibilities, with the exception of the omission relating to religious organizations. All Democrats present voted against the amendment.

#### CONCLUSION

Committee Republicans strongly believe workplaces should be free of discrimination, and pregnant workers deserve effective protections against workplace discrimination. Committee Republicans have long supported workplace protections for pregnant workers, including those in the PDA and ADA. To address circumstances in which pregnant workers may not be receiving reasonable accommodations from employers, Committee Republicans support the existing provisions in H.R. 1065 as a compromise measure that includes sufficient clarity regarding the bill's application to workers and employers. However, the omission of a protection for religious organizations, which is a longstanding part of the CRA—the nation's flagship civil rights law—must be addressed so religious organizations are not faced with a conflict between their faith and the requirements of federal law. Committee Republicans stand ready to continue working with Committee Democrats to find a bipartisan agreement on this outstanding issue.

VIRGINIA FOXX,  
*Ranking Member.*  
 GLENN "GT" THOMPSON.  
 TIM WALBERG.  
 GLENN GROTHMAN.  
 RICK W. ALLEN.  
 JIM BANKS.  
 JAMES COMER.  
 RUSS FULCHER.  
 FRED KELLER.  
 GREGORY F. MURPHY, M.D.  
 LISA C. McCLAIN.  
 DIANA HARSHBARGER.  
 VICTORIA SPARTZ.  
 SCOTT FITZGERALD.  
 MADISON CAWTHORN.  
 JULIA LETLOW.

