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the work and family legal center

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Ensuring Safe & Healthy Pregnancies in the Workplace

Why We Need the Bipartisan Pregnant Workers Fairness Act Now

Background: The U.S. Supreme Court's Ruling in *Young v. UPS*

Peggy Young, a former driver for UPS, was pushed onto unpaid leave while pregnant because of a modest lifting restriction. In March, the Supreme Court told employers that if they are accommodating most non-pregnant workers with injuries or disabilities, while refusing to accommodate most pregnant workers, they are likely violating the Pregnancy Discrimination Act by placing a significant burden on pregnant workers.

But who has to show that there's a significant burden? The pregnant woman. Most women simply don't have the luxury of time or the resources to make that happen. That's why we need the federal Pregnant Workers Fairness Act (PWFA; S1512/HR 2654), which was introduced in June with bipartisan support from both chambers of Congress. An alternative legislative proposal in Congress does not remedy the serious challenges facing pregnant workers.

Why A Legislative Fix is Necessary

- Under the framework established by the Court, a pregnant worker in Young's shoes must go through a multi-step process and investigate how other workers at her job are treated. For example, if you are pregnant and need light duty, you have to find out who else needed a similar accommodation and whether or not they got it.
- The federal PWFA would require employers to reasonably accommodate workers with "known limitations" arising from pregnancy, childbirth, or related medical conditions, unless to do so would impose an undue hardship on the employer—just like employers have to do for workers with disabilities. This simple clarification in the law codifies the original intent behind the Pregnancy Discrimination Act.
- Because it is often difficult for women in smaller workplaces, those who are new to the job, or those with little bargaining power to know what percentage of their coworkers are being accommodated or what their employers' specific accommodation policies are, these pregnant women desperately need the Pregnant Workers Fairness Act for *immediate* relief.
- Enacting the PWFA would establish a clear, national standard, and an affirmative, proactive right protecting women across the country.

Proven Track Record at the State & Local Level

- Many states and localities,[1] including Alaska, California, Connecticut, Delaware, Illinois, Louisiana, Maryland, Minnesota, Nebraska, North Dakota, New Jersey, Rhode Island, Texas, West Virginia, Philadelphia, New York City, Central Falls & Providence (Rhode Island), and Washington, DC have existing PWFA-like statutes on the books, which have been used time and time again to help pregnant women stay safe and healthy on the job.

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The PWFA Is An Important Public Health Measure that Promotes Family Economic Security and also Reduces Costs to the Country and Employers

- Women who need income but lack accommodations are often forced to continue working under unhealthy conditions, risking their own health as well as the health of their babies.[2] Physically demanding work, where accommodations are more often necessary but too often unavailable, has been associated with an increased risk for preterm birth and low birth weight.[3] Clear law not only ensures better health outcomes for women and babies, but reduced health care costs, supporting our economy. For example, the March of Dimes New York chapter estimated that encouraging healthy pregnancies could save that state *$1 billion* annually in healthcare costs.[4]
- Women are increasingly the breadwinners for families and are working later into their pregnancies than ever before. Clear law, like the New York City Pregnant Workers Fairness Act, has been proven to keep pregnant women on the job and off public assistance, shoring up family economic security.[5]
- Legislation would provide clarity so employers can anticipate their responsibilities and **avoid costly litigation**. The March of Dimes New York has also noted that employers spend more than $12 billion annually on claims related to prematurity and complicated births nationwide—preventing these complications with clearer safety standards is paramount.[6]
- After California passed similar legislation, litigation of pregnancy cases decreased, even as pregnancy discrimination cases around the country were increasing.[7] The Hawaii Civil Rights Commission reported a similar reduction in pregnancy discrimination complaints and litigation after enactment. Other states have similarly found that warnings of increased litigation post-legislative passage have not come to fruition.

The Pregnancy Discrimination Amendment Act Is A Problematic Alternative

- In June 2015, some members of Congress introduced the Pregnancy Discrimination Amendment Act (PDAA; S1590/HR2800) as an alternative to the PWFA. While we applaud these members for paying attention to this important issue, the alternative leaves many pregnant workers and their health behind, and is likely worse than the status quo.
- While the PWFA uses a familiar framework from the Americans with Disabilities Act, which has also proven successful in states and localities around the country for years, the PDAA inserts new language and confusing legal standards into an already problematic statutory framework.
- The PDAA changes the language of the existing Pregnancy Discrimination Act to say that a pregnant woman should be treated the same as other non-pregnant employees working under "similar working conditions" and with "temporary" limitations.
    - A pregnant woman who needs a water bottle still has to find another coworker who also gets a water bottle. But in addition, she now has to find another coworker in "similar working conditions" to her who is only temporarily impaired.
    - "Similar working conditions," is a phrase borrowed from the federal Equal Pay Act. Unfortunately, this term is defined very narrowly and has been used repeatedly to deny women equal rights. For example, "similar working conditions" takes into consideration the surroundings in a work environment, like temperature.[8] So should a pregnant indoor cashier at a garden shop not get a stool when an outdoor cashier with a broken foot does? That would be unfair and undermines the intent of the original Pregnancy Discrimination Act.

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- The term "temporary" is undefined in the PDAA's language. Does that mean less than a month, six months, a year, or two years? A pregnant woman could be denied an accommodation because her counterpart is permanently disabled, or even worse, she may end up waiting months to see whether her coworker recovers or whether his condition is more prolonged (in which case she is out of luck). Pregnant women cannot wait months while investigating other employees' medical conditions and determining whether they work under similar conditions. They need immediate relief to stay healthy and on the job.

- The PDAA also lacks many important provisions that the PWFA contains, which help provide much needed clarity to employers and employees.
  - The PWFA makes clear that employers cannot simply push employees onto unpaid leave when another accommodation would allow them to keep working. Forced unpaid leave requires women to lose out on critical income and have little or no time saved up for recovery from childbirth.
  - The PWFA protects employees who request reasonable accommodations from retaliation and makes sure that an employee will not have to accept an employer's unnecessary or paternalistic accommodation.
  - The PWFA contains a clear "undue hardship" exemption for businesses who truly cannot afford to provide an accommodation.
- In conclusion, between the PWFA and PDAA, there's no contest—the PWFA is clearly the better proposal for ensuring no pregnant woman has to choose between her health and her job.

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[1] For a complete list, visit: http://www.abetterbalance.org/web/ourissues/fairness-for-pregnant-workers/310.
[2] Renee Bischoff & Wendy Chavkin, *The Relationship between Work-Family Benefits and Maternal, Infant and Reproductive Health: Public Health Implications and Policy Recommendations*, (June 2008), pg. 13-17, http://otrans.3cdn.net/70bf6326c56320156a_6j5m6fupz.pdf; *see also* Mayo Clinic Staff, *Working During Pregnancy: Do's and Don'ts*, http://www.mayoclinic.com/health/pregnancy/WL00035; *see also* Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 Geo. L.J. 567, 582-84 (March 2010); Brief amici curiae of Health Care Providers, et al., *Young v. UPS*, (September 11, 2014), available at: http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/12-1226_pet_amcu_hcp-etal.authcheckdam.pdf.
[3] See, e.g. Monique van Beukering et al., *Physically Demanding Work and Preterm Delivery: A Systematic Review and Meta-Analysis*, Int'l Archives of Occupational & Envtl. Health (2014) (discussing association of prolonged standing, lifting and carrying, physical exertion, and a combination of those tasks with preterm birth).
[4] March of Dimes—New York Chapter, *Protect New York's Moms From Pregnancy Discrimination*, http://www.marchofdimes.org/pdf/newyork/Pregnancy_Discrimination_Fact_Sheet.pdf.
[5] Rachel L. Swarns, "A Pregnant Worker, Forced to Go on Unpaid Leave, Is Back on the Job," *N.Y. Times* (February 26, 2014), http://cityroom.blogs.nytimes.com/2014/02/26/a-pregnant-worker-forced-to-go-on-unpaid-leave-is-back-on-the-job/?_r=0.
[6] March of Dimes—New York Chapter, *Protect New York's Moms From Pregnancy Discrimination*, http://www.marchofdimes.org/pdf/newyork/Pregnancy_Discrimination_Fact_Sheet.pdf.
[7] Equal Rights Advocates, *Expecting A Baby, Not A Lay-Off*, pg. 25, http://www.equalrights.org/wp-content/uploads/2013/02/Expecting-A-Baby-Not-A-Lay-Off-Why-Federal-Law-Should-Require-the-Reasonable-Accommodation-of-Pregnant-Workers.pdf.
[8] Equal Employment Opportunity Commission, "Facts About Equal Pay and Compensation Discrimination," http://www.eeoc.gov/eeoc/publications/fs-epa.cfm.