

The purpose of the Pregnant Workers Fairness Act (H.R. 2694) is to keep pregnant workers healthy and on the job. It is a flexible framework that is not one-size fits all. It puts a familiar model in place similar to the Americans with Disabilities Act so that pregnant workers can receive reasonable accommodations unless it would cause an undue hardship on employers.

1. Is this a serious problem?

Yes. At A Better Balance we speak with pregnant workers every day who are struggling, especially as the country faces an unprecedented pandemic, to maintain their jobs and a healthy pregnancy when all they need is a temporary accommodation to stay healthy and working. Women of color are especially impacted as they are more likely to work in low-wage, physically demanding jobs. [Learn more about the stories of the women we have worked with over the years here](#) – their stories reveal the devastating consequences that are unfolding around the country because the U.S. lacks an explicit statutory right to pregnancy accommodations.

2. Doesn't the Pregnancy Discrimination Act already address this issue?

The PDA bans discrimination against pregnant workers and specifies that pregnant workers should be treated the same as those who are “similar in their ability or inability to work.” This standard places a unique burden on pregnant workers to identify someone else in the workplace who was provided accommodations in order to obtain their own medically necessary accommodation,¹ a burden not placed on workers with disabilities. According to a recent report by A Better Balance two-thirds of workers lost their pregnancy accommodation cases post-*Young v. UPS* — a Supreme Court case many hoped would provide clarity but unfortunately did not. The majority of these losses can be traced to courts’ rejection of women’s comparators or inability to find a comparator.²

3. Doesn't the Americans With Disabilities Act already address this issue?

Pregnancy is not itself a disability under the law.³ Therefore, a pregnant worker who has no complications but seeks an accommodation in order to avoid a complication will not be able to get an accommodation under the ADA. Furthermore, even though the ADA is supposed to provide protections for pregnancy-related disabilities and the law was expanded in 2008, courts have interpreted the ADA Amendments Act in a way such that it has done little to expand coverage even for many pregnant workers with serious health complications.⁴

4. Doesn't the Family and Medical Leave Act already address this issue?

Although a very important protection, the Family and Medical Leave Act is not the statutory scheme pregnant workers need when they require reasonable accommodations, like a stool to sit on, a water bottle, or light duty, to continue working. The FMLA provides workers with up to twelve weeks of unpaid leave for pregnancy-related illness, recovery from childbirth, and other pregnancy-related incapacity. More than 40 percent of workers are ineligible for FMLA protections and many more cannot afford to take time off unpaid.⁵ Workers who are forced to use up their FMLA leave entitlement when forced off the job during pregnancy are then often unable to use its protections to care for their new baby, one of the intended uses of the FMLA.

5. What does “known limitation” mean?

Responsive to the U.S. Chamber of Commerce’s point that employers needed more clarity on this term, the bill now includes a definition of “known limitation” which means 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 the conditions meets the definition of disability under the ADA. The definition ensures a pregnant worker need not have a pregnancy-related disability in order to receive an accommodation but rather can get an accommodation for a physical or mental condition related to pregnancy, childbirth, and related medical conditions.

6. What does “reasonable accommodation” mean?

The definition in the bill comes straight from the Americans with Disabilities Act so it is already familiar to employers. The PWFA also explicitly includes the familiar interactive process framework from the ADA to ensure that employers and employees are engaging in good faith to find a workable accommodation. The employee can identify accommodations that she believes may work, and the employer must respond by either providing that accommodation or finding another that also allows the employee to work without jeopardizing their health, absent undue hardship.

7. What are common types of reasonable accommodation in the pregnancy context?

Examples of the most common pregnancy accommodations include a stool, being able to carry a water bottle, help with lifting, extra bathroom breaks, or a temporary light duty position.

8. How would a business prove “undue hardship”?

This language comes from the ADA so employers are familiar with how to prove undue hardship. A showing of undue hardship is a fact-specific inquiry. It's defined as an action requiring significant difficulty or expense considering a number of factors, including: 1) The nature and cost of the accommodation; 2) the overall financial resources of the facility and the impact of the accommodation on operations of the facility; 3) the overall financial resources of the employer, including the number of employees; and 4) the type of operations on the employer, such as the geographic separateness of the facilities.

9. Won't this bill constitute special treatment for pregnant workers?

This is not about special treatment but equal treatment for pregnant workers who need time limited accommodations to stay healthy and working, just like the Americans with Disabilities was designed to open up doors and provide equal opportunities for workers with disabilities. In 1990, the ADA put in place a reasonable accommodation framework for workers with disabilities. The PWFA would level the playing field by modeling that same framework for pregnant workers in need of reasonable accommodations.

10. Are any types of employers exempted from this law?

The PWFA applies to employers with 15 or more employees, so exempts the smallest employers. In addition, the ministerial exception which is a constitutional right established through case law and grants religious organizations an exemption from anti-discrimination law would likely also apply to the PWFA as it does other anti-discrimination laws. Furthermore, the PWFA does not include an explicit exemption from the Religious Freedom Restoration Act and thus an individual may still argue that the federal government and federal laws are substantially burdening their religious exercise. The bill does not include the Title VII language regarding religious employers because this is a very different context. A Better Balance analyzed the 934 court cases involving the Title VII religious exemption and none of those cases involved a religious employer stating religious opposition to providing a reasonable pregnancy accommodation and only one involved a pregnancy-related accommodation at all, but the case was not about an employer objecting to the requested accommodation on religious grounds. Instead, they simply wanted to be exempted wholesale from the application of the law and the court actually granted that exemption under the ministerial exception grounded in the Constitution, not the Title VII exemption.⁶

11. Some employers are already providing accommodation to pregnant workers - why do we need a law?

Employers are confused about their obligations to pregnant workers because federal law is currently so unclear regarding pregnancy accommodations. Although we have heard that many employers are already providing accommodations, the consequences to the many workers still not being accommodated are devastating. Workers in low-wage occupations are the least likely to be getting these accommodations and do not have a safety net if pushed off the job. In other situations, the employers may mean well, but lower down managers do not understand, resulting in confusion and litigation. Finally, without the power of the law on their side, many pregnant workers fear turning in their doctor's notes and even requesting accommodations. This should upset even those employers who do make accommodations.

12. Will this bill be onerous on businesses?

No. In fact, this law benefits businesses by preventing costly litigation and providing clear guidelines so employers can anticipate their responsibilities and retain valuable employees and reduce turnover costs. There is currently a lot of confusion about employers' responsibilities when it comes to providing reasonable accommodations to pregnant workers. Accommodations for pregnancy are also extremely inexpensive, usually costing nothing at all.

13. Will this bill lead to employers not hiring pregnant women?

To the contrary, this law will help employers retain valuable employees. This is a workforce development issue. Women are currently being pushed out of the workforce so this will help recruit female employees, increase employee retention and morale, and reduce employee turnover and training costs. In the 30 states that already have these protections, this fear has not come to pass. It's already illegal not to hire someone based on pregnancy and businesses can't afford to not hire women in this historically tight labor market, where women now make up more than 50% of the workforce.

14. Why can't this be resolved with more education?

We need the power of the law for women in these situations desperate for immediate resolution. For over 40 years, courts and the EEOC have been trying to interpret the PDA framework. While we thought a Supreme Court case in 2015 may have helped in this regard, we now know it did not. That is why we need to update the law itself to put a new framework in place that will provide clarity and clear up the confusion once and for all.

For more information see:

- [A Better Balance's Congressional Testimony from the Pregnant Workers Fairness Act hearing](#)
- [A Better Balance's Report *Long Overdue: It Is Time for the Pregnant Workers Fairness Act*](#)
- [A Better Balance Pregnant Workers Fairness Resources page](#)
- [A Better Balance Fact Sheet: The Pregnant Workers Fairness Act](#)

¹ See DINA BAKST, ELIZABETH GEDMARK & SARAH BRAFMAN, A BETTER BALANCE, LONG OVERDUE 13 (2019), <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf> (citing A BETTER BALANCE, PREGNANT AND JOBLESS: THIRTY-SEVEN YEARS AFTER PREGNANCY DISCRIMINATION ACT, PREGNANT WOMEN STILL CHOOSE BETWEEN A PAYCHECK AND A HEALTHY PREGNANCY 5 (2015)).

² *Id.* at 13–16 (listing all post-*Young v. UPS* cases wherein courts held employers were permitted to deny pregnant workers accommodations under the Pregnancy Discrimination Act).

³ See Dina Bakst, Congressional Testimony at 15, *Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694): Hearing Before the Subcomm. on Civil Rights and Human Services of the H. Comm. on Ed. & Lab.*, 116th Cong. (2019), <https://edlabor.house.gov/download/10/22/2019/baksttestimony102219> (citing, e.g., *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 553 (7th Cir.

2011) (citing EEOC guidance stating “[c]ourts that consider these regulations consistently find that pregnancy, absent unusual circumstances, is not a physical impairment”); *Brown v. Aria Health*, No. CV 17-1827, 2019 WL 1745653, at *4 (E.D. Pa. Apr. 17, 2019) (“A routine pregnancy is not considered a disability within the meaning of the ADA.”); *Hannis-Miskar v. N. Schuylkill Sch. Dist.*, No. 3:16CV142, 2016 WL 3965209, at *3 (M.D. Pa. July 22, 2016) (“Because plaintiff fails to assert complications with her pregnancy, she has failed to plead a disability under the ADA.”); *Selkow v. 7-Eleven, Inc.*, No. 11-456, 2012 WL 2054872, at *14 (M.D. Fla. June 7, 2012) (“Absent unusual circumstances, pregnancy is not considered a disability . . .”); see also 29 C.F.R. pt. 1630 app. (“Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments.”). See also Dina Bakst, Responses to Questions for the Record at 6, *Long Over Due: Exploring the Pregnant Workers’ Fairness Act (H.R. 2694): Hearing Before the Subcomm. on Civil Rights and Human Services of the H. Comm. on Ed. & Lab.*, 116th Cong. (2019) (on file with author).

⁴ See A BETTER BALANCE: THE PREGNANT WORKERS FAIRNESS ACT: LEGAL BACKGROUNDER (2020), <https://www.abetterbalance.org/resources/the-pregnant-workers-fairness-act-legal-backgrounder/> (detailing the legal reasons why the Pregnancy Discrimination Act, Americans with Disabilities Amendments Act, and Family and Medical Leave Act are inadequate at providing protections for pregnant workers who need accommodations for limitations related to pregnancy, childbirth, and related medical conditions).

⁵ See HELEN JORGENSEN & EILEEN APPELBAUM, CTR. FOR ECON. & POLICY RESEARCH, EXPANDING FEDERAL FAMILY AND MEDICAL LEAVE COVERAGE: WHO BENEFITS FROM CHANGES IN ELIGIBILITY REQUIREMENTS? 3 (Feb. 2014), <http://cepr.net/documents/fmlaeligibility-2014-01.pdf>.

⁶ See *Combs v. Central Texas Annual Conference of United Methodist Church*, 173 F.3d 343 (5th Cir. 2000): Plaintiff was a reverend who took approved leave for her pregnancy. She suffered severe post-partum complications and needed additional leave. Upon returning, she was terminated. She filed a complaint with the EEOC, who dismissed her claim based on the Title VII 702 exemption. She filed suit, and the court held that the Constitutional ministerial exception barred her claim.