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Long Overdue

**The Pregnant Workers Fairness Act is
a Critical Measure to Remove Barriers
to Women's Workplace Participation
and Promote Healthy Pregnancies**

JUNE 2021 UPDATE



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The Pregnant Workers Fairness Act is a Critical Measure to Remove Barriers to Women's Workplace Participation and Promote Healthy Pregnancies **JUNE 2021 UPDATE**

By Dina Bakst, Elizabeth Gedmark, Sarah Brafman, and Meghan Racklin

A BETTER BALANCE, a national nonprofit advocacy organization, uses the power of the law to advance justice for workers, so they can care for themselves and their loved ones without jeopardizing their economic security. Through legislative advocacy, direct legal services and strategic litigation, and public education, our expert legal team combats discrimination against pregnant workers and caregivers and advances supportive policies like paid sick time, paid family and medical leave, fair scheduling, and accessible, quality childcare and eldercare. When we value the work of providing care, which has long been marginalized due to sexism and racism, our communities and our nation are healthier and stronger.

Call A Better Balance's national legal helpline at 1-833-NEED-ABB for free and confidential information about your workplace rights around caring for yourself and your family.

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Executive Summary

For over a decade, A Better Balance has been leading the movement to remedy the second-class treatment facing pregnant workers, especially women of color in low-wage jobs, and to lift up the voices of the workers who have been forced to choose between their paycheck and a healthy pregnancy.¹ Those injustices have come into sharper relief with the onset of the COVID-19 pandemic and millions of women forced out of the workplace due to pregnancy and caregiving needs, or forced to put their health at risk as essential workers. The time to level the playing field and ensure pregnant workers can fully participate in the workforce is now. To do that, Congress must pass the Pregnant Workers Fairness Act.

In the two years since we published [Long Overdue](#), which laid out the critical need for the federal Pregnant Workers Fairness Act, the legislation has made significant progress. The Pregnant Workers Fairness Act passed the House of Representatives twice, first in September 2020 and again in May 2021, with overwhelming bipartisan support, including the support of both Democratic and Republican House leadership. Major business groups including the U.S. Chamber of Commerce, Society for Human Resources Management, the National Restaurant Association, and others are also calling for the bill's passage because of the clarity it provides employers and the critical role it will play in keeping pregnant workers healthy and attached to the workforce.² Yet, the Pregnant Workers Fairness Act is still not law and because of that, pregnant workers are **still** being forced out of work or onto unpaid leave or forced to risk their health because of gaps in our nation's laws.³ Congress must pass the Pregnant Workers Fairness Act into law without delay and send it to the President's desk.



1. Pregnant workers are still being denied the accommodations they need to stay healthy and working due to gaps in the Pregnancy Discrimination Act and the Americans with Disabilities Act.

As laid out in our 2019 [Long Overdue](#) report and Congressional testimony, over two-thirds of pregnant workers are losing their pregnancy accommodation cases under the Pregnancy Discrimination Act (PDA) because the current legal standard, laid

out in the Supreme Court case *Young v. UPS*, puts a uniquely burdensome standard on pregnant workers to jump through legal hoops to show that someone else in their workplace received similar accommodations to them in order to receive their own medically necessary accommodations, a burden not put on workers with disabilities.⁴ *Long Overdue* lays out case after case where pregnant workers are being denied reasonable accommodations because of the burdensome *Young* standard.⁵ Unfortunately, the problem has persisted. In 2021, pregnant workers continue to be denied access to justice due to this unjust legal standard.

For example, in the last year:

- ◆ **Julia Barton**, a corrections officer who was denied pregnancy accommodations to avoid toxic fumes, high temperatures, prolonged standing, and pushing over 100 pounds,⁶ lost her August 2020 case because she could not meet *Young's* onerous comparator standard.⁷
- ◆ **A group of low-wage pregnant retail workers** who needed modifications to their jobs to reduce the weight they were required to lift and the amount of time they were forced to stand lost their February 2021 case because the court found—even though all employees with on-the-job injuries were accommodated—they did not have sufficient comparator evidence.⁸

Pregnant workers can try to bypass this arduous journey of proof by seeking reasonable accommodations under the Americans with Disabilities Act (ADA). However, for many pregnant workers, the Americans with Disabilities Act, too, is continuing to fail to address their needs.⁹ Although pregnant workers with qualifying disabilities are covered by this law, millions of pregnant workers with medical needs, but not disabilities, are left out in the cold—for example, pregnant workers who need modest accommodations such as a stool, extra water or restroom breaks, or a temporary reprieve from heavy lifting to prevent complications.¹⁰ As we laid out extensively in recent Congressional testimony, over the years, courts have repeatedly held that pregnancy, on its own, is not a disability and therefore the ADA does not entitle pregnant workers to even modest accommodations.¹¹ As recently as just a few months ago, courts have continued to affirm that pregnancy, absent complications, is not an ADA-qualifying disability meriting accommodation.¹²

Furthermore, even pregnant workers who have serious complications are losing their Americans with Disabilities Act cases.

- ◆ For instance, in 2020, one court held that a plaintiff with pregnancy complications, including preeclampsia, did not have an ADA-qualifying disability¹³—despite the fact that preeclampsia is one of the three leading causes of maternal mortality.¹⁴



2. Pregnant workers continue to be forced to risk their economic security—in the midst of a global pandemic that has had a disproportionate impact on women’s careers.

The Pregnant Workers Fairness Act is a necessary measure to keep women healthy and attached to the workforce as the economy recovers. As we also laid out in [Long Overdue](#) and in Congressional testimony, without the protection of a federal Pregnant Workers Fairness Act, pregnant workers, especially women in low-wage and physically demanding jobs, have often experienced dire economic consequences when pushed out or terminated for needing accommodations.¹⁵ Nearly two-thirds of women are the primary or co-breadwinner for their families;¹⁶ those who are pushed onto leave often must use up saved paid or unpaid leave they had hoped to reserve to recover from childbirth, and then, unable to afford more time without a paycheck, must return to the workforce much earlier than planned or medically advisable.

In addition to income, workers often lose health insurance as a result of losing their jobs, forcing them to delay or avoid critical pre- or post-natal care, or leaving them with crippling medical bills.¹⁷ Prospects of promotion, advancement, and retirement savings also disappear, especially as it becomes more difficult to reenter the workforce after becoming a mother.¹⁸

To this day, we continue to hear from hundreds of pregnant workers through our free legal helpline who are fired or forced out instead of being granted the timely reasonable accommodations they need to protect their health and keep their jobs. The options they routinely face—risk your health or lose your paycheck—reinforce the stereotype that pregnancy, motherhood, and employment are irreconcilable and defy the purpose of the Pregnancy Discrimination Act. This choice between a healthy pregnancy and economic security has become, and remains, increasingly impossible during an ongoing global pandemic, especially for those on the frontlines as essential workers.

- ◆ In 2020, at the height of the pandemic, we heard from **Tesia**, a pregnant retail worker in Missouri, who was forced out of work after her employer refused to let her keep a water bottle with her after the store’s water fountain was shut down due to concerns about COVID-19.¹⁹

Preserving pregnant workers’ economic security was a matter of critical importance before the pandemic, but now, with experts suggesting that it could take years to undo the pandemic’s damage to women’s economic equality,²⁰ the federal Pregnant Workers Fairness Act has taken on a new urgency.

3. Urgent action is needed to support maternal health and pregnancy accommodations are one critical solution.

Support for the Pregnant Workers Fairness Act has also grown among advocacy organizations focused on safeguarding and improving maternal health.



Accommodations are often low or no-cost²¹ but high impact, helping to prevent miscarriage, preterm birth, low-birth weight, preeclampsia, birth defects, and more.²²

- ◆ In November 2020, we heard from **Jordan**, a cashier at a large retailer in Mississippi, who was forced onto unpaid leave after her employer refused to give her a lifting accommodation, more frequent breaks to drink water and sit, and reduced schedule, even though she had experienced preterm contractions and severe dehydration requiring medical attention.²³

While the pandemic has created new risks and challenges for pregnant workers, America's inexcusably and inequitably high maternal morbidity and mortality statistics predate the pandemic. Rates of maternal morbidity and mortality are disproportionately high for women of color—for example, Black women experience maternal mortality at three to four times the rate of white women, and Indigenous women face similarly high rates.²⁴ The PWFA is a crucial measure to address these unacceptable disparities.

4. While five more states have passed pregnancy accommodations laws in the last two years, including Tennessee, pregnant workers deserve the right to reasonable accommodation no matter where they live.



Since the publication of [Long Overdue](#), five additional states—Tennessee, Oregon, Maine, Virginia, and New Mexico—have passed pregnancy accommodations laws bringing the total number of states with additional protections for pregnant workers to 30. Most recently, on June 22, 2020, Tennessee's pregnancy accommodations law passed with unanimous support in the legislature and strong support from the business community, including support from all four of the state's major urban Chambers of Commerce.²⁵ This represents enormous progress, but state-by-state progress is not enough. There is an urgent need for federal action.

[Long Overdue](#) made a clear case for the federal Pregnant Workers Fairness Act. Two years and a global pandemic later, it has become only clearer that urgent action is needed to ensure that pregnant workers can receive the accommodations they need to remain healthy and on the job. Congress has the opportunity to pass this bill this session. The clear lessons of the COVID-19 pandemic, the support of businesses and employee-rights groups, and the voices of the countless pregnant workers who could have been helped by a federal PWFA in the last two years all point to one thing: The time for the Pregnant Workers Fairness Act is now—pregnant workers cannot, and should not have to, wait any longer.

Introduction

Long Overdue: It Is Time for the Federal Pregnant Workers Fairness Act, published in May 2019, made clear that, more than four decades after the passage of the Pregnancy Discrimination Act (PDA), pregnant workers are still being treated like second-class citizens, forced to choose between their job and a healthy pregnancy.²⁶ The reason for this is clear: Due to gaps in federal law, pregnant workers are too often unable to receive the reasonable accommodations they need to stay both healthy and working. As a result, pregnant workers, disproportionately Black and Latinx women in low-wage, inflexible, and physically demanding jobs, are routinely fired or forced out on unpaid leave—or are forced to risk their health—instead of being granted a temporary, reasonable accommodation that would allow them to keep working and maintain a healthy pregnancy. We have documented these issues in numerous reports over the years.²⁷

Long Overdue concluded this country needs the Pregnant Workers Fairness Act for three clear reasons:

1. We surveyed case law following the Supreme Court case *Young v. UPS*—a case that was supposed to provide clarity around pregnancy accommodations—and found two-thirds of pregnant women were still losing their Pregnancy Discrimination Act accommodation cases largely because they needed to show someone similarly situated in their workplace was given a similar accommodation, a uniquely burdensome and onerous standard that treats pregnant workers like second-class citizens;
2. Pregnancy accommodations help keep women healthy and attached to the workforce and also make good business sense; and
3. States have been stepping in to the fill gaps but state-by-state change is not enough. Every pregnant worker, no matter where they live, deserves respect, dignity, and equality at work. As *Long Overdue* made clear, a federal law creating a clear right to reasonable accommodations based on pregnancy—the Pregnant Workers Fairness Act (PWFA)—is the only solution.

Two years and a global pandemic after *Long Overdue*'s publication, it has become only clearer that urgent action is needed to ensure that pregnant workers can receive the accommodations they need to remain healthy and on the job. The COVID-19 pandemic has laid bare the urgent need for solutions to keep women attached to the workforce. Workers, disproportionately Black and Latina women,²⁸ have exited the workforce in droves due to lack of pregnancy accommodations, caregiving



responsibilities,²⁹ and a lack of supportive work-family policies.³⁰ At the same time, millions of women remain in the workforce, with women of color disproportionately represented in frontline, often low-wage, jobs such as fast-food, retail, and cashiering,³¹ where they continue to face structural biases that prevent them from caring for themselves and loved ones and maintaining economic security.

The bipartisan federal Pregnant Workers Fairness Act, which would require employers to provide reasonable accommodations to employees for pregnancy, childbirth, and related medical conditions, unless such accommodation would cause an undue hardship for the employer, is the way forward.³² The PWFA uses the familiar reasonable accommodation framework, modeled after the Americans with Disabilities Act, to create a clear, understandable standard.

Congress has the opportunity to pass this bill—H.R. 1065/S. 1486—this year. The clear lessons of the COVID-19 pandemic, the support of businesses and employee-rights groups, and the voices of the countless pregnant workers who could have been helped by a federal PWFA in the last two years all point to one thing: The time for action is now—pregnant workers cannot, and should not have to, wait any longer.

I. Pregnant workers are still being denied the accommodations they need due to gaps in federal law

[Long Overdue](#) detailed the failures of federal law to address pregnant workers' need for accommodations. Two years later, these gaps in federal law persist, leaving pregnant workers without clear rights and employers confused about their obligations.

The Pregnancy Discrimination Act is Still Failing Pregnant Workers

As described in [Long Overdue](#), the Pregnancy Discrimination Act “is not cutting it for pregnant workers in need of accommodations to stay healthy and on the job. In 2015, in *Young v. UPS*,³³ the Supreme Court set a new legal standard for evaluating pregnancy accommodation cases under the PDA, a standard that employers and employees alike hoped would provide clarity in a muddled legal landscape. Unfortunately, for too many women it did not.”³⁴ In some ways, the *Young* decision furthered the purposes of the PDA, but post-*Young*, pregnant workers must still overcome the significant barrier posed by the “comparator” standard—that is, they must prove that someone else “similar in their ability or inability to work” was accommodated in order to be entitled to an accommodation. [Long Overdue](#)

demonstrated that, largely due to the “comparator” standard, the PDA continues to fail pregnant workers. In fact, the analysis in [Long Overdue](#) found that, in two-thirds of cases that brought accommodations claims under the PDA after *Young*, pregnant workers were still losing their claims.³⁵

Two years later, pregnant workers seeking accommodations continue to lose their PDA claims due to an unjust legal standard. For example, in an August 2020 case, Julia Barton, a corrections officer, needed minor pregnancy accommodations to avoid toxic fumes, high temperatures, prolonged standing, and pushing over 100 pounds—a request her employer denied.³⁶ As a result, Barton was forced onto unpaid leave.³⁷ The court affirmed her employer’s refusal to accommodate, reasoning that, under *Young*, Barton’s inability to “describe what, if any, reasonable accommodations were offered to other corrections officers outside of the protected group (pregnant women),” was fatal to her claim.³⁸

Likewise, in a February 2021 case, a group of low-wage pregnant 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.³⁹ Their employer refused, under the guise of a national policy of only accommodating workers injured on the job.⁴⁰ The Western District of Wisconsin endorsed the company’s failure to accommodate due to insufficient comparator evidence.⁴¹ **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 the company’s policy—the EEOC had failed to present sufficient comparator evidence.**⁴²



Indeed, seven years after the Supreme Court published its complicated *Young* decision, some courts still fail even to apply the appropriate test (as announced by the Supreme Court in *Young*) in PDA accommodation cases.⁴³ Recently, one court even stated, incorrectly, that plaintiffs “must show that a comparator was treated more favorably in nearly identical circumstances”⁴⁴—an overly rigid standard unsupported by the Court’s decision in *Young*.

These recent decisions further illustrate how steep a barrier *Young* and its comparator standard have erected to proving pregnancy discrimination in court. As we wrote in [Long Overdue](#), “[p]regnant workers’ own experiences should be enough to prove discrimination, irrespective of comparators or a significant burden

showing, just as it is for workers with disabilities, who do not have to jump through these evidentiary hoops in order to receive the accommodations they need.”⁴⁵

Even when pregnant workers have evidence that similarly-situated employees were treated more favorably, the comparator standard creates an unnecessary hurdle not required of employees with disabilities, and makes what could and should be a simple process for receiving accommodations into a lengthy, labyrinthine challenge that many pregnant workers are not able to navigate while also managing their pregnancies and their work.

- ♦ **Charlotte**,⁴⁶ a pregnant nurse in Pennsylvania, was advised by her doctor to avoid contact with patients who had tested positive for, or were suspected to have, COVID-19. Her employer accommodated others with restrictions by placing them on other units or allowing them to shift to remote roles, but they told her they would not accommodate her. She was forced to use her PTO when assigned to COVID-19 units. However, she did not have much PTO available, and so she also had to work on units with COVID-positive patients several times, risking her health and the health of her pregnancy.

Moreover, since *Long Overdue*'s publication, hundreds more 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.

- ♦ We heard from **Jennifer**, a nurse practitioner in Texas. She found out that she was pregnant right before the pandemic started. As a frontline healthcare worker, she was concerned about pregnancy and COVID-19, and her doctor advised her to limit her exposure. She was doing well maintaining her safety even in a challenging environment, but then her employer reassigned her to a higher-risk area. When she was approximately seven months pregnant, she asked for the same basic safety precautions that were given to a male doctor who had an autoimmune condition. Her employer denied her request and told her she was no good to them pregnant—she was forced onto unpaid leave for the rest of her pregnancy and replaced with a non-pregnant worker.

“I was devastated. I needed to work to support my family . . . I was put into a position to choose between safety and supporting my family . . . The whole situation was terrifying. It's common sense not to discriminate against a pregnant woman, but unless the law reflects that, it's going to keep happening. I know I speak for moms out there, when I say we are exhausted. **A pregnant woman is valuable. We're valuable to the country, we're valuable to the workforce, and it's time that we start getting treated that way.**” —*Jennifer, nurse practitioner in Texas*

- ♦ And we heard from **Jacqueline**, a massage therapist in Pennsylvania,⁴⁷ who called us in June 2020. After being closed for several months due to the coronavirus, her employer invited all full-time employees to return to work as the spa was preparing to reopen and asked them to sign a document stating they agreed to return to their full-time schedules. Jacqueline was in her third trimester of pregnancy and asked to return to work on a part-time basis due to her pregnancy-related medical needs, which she had previously raised with her employer. For example, she had experienced cramping in her uterus and had gone to the emergency room upon the advice of her OB/GYN due to difficulty breathing. Her employer said they could not accommodate her and wished her luck. When she asked for clarification about whether she was still an employee, she received no response.

Pregnancy Discrimination Is Pervasive in the Public Sector as Well as Private Sector

While the examples provided above highlight the problems that persist among private employers, state employers also have a long history of participating in, and fostering, unconstitutional sex discrimination, including gender-role stereotyping, by failing to provide reasonable accommodations to allow pregnant women to be both mothers and wage earners.⁴⁸

In Oklahoma, Clarisa Borchert, a childcare attendant, informed her employer, a state university child care center, that she was pregnant.⁴⁹ When Borchert’s doctor recommended a 20-pound lifting restriction—which Borchert believed would allow her to continue to care for infants—the state told her that she would not be permitted to work “with restrictions of *any* kind.”⁵⁰ The gender-based animus underlying the state’s blanket refusal to accommodate Borchert’s pregnancy was revealed by the “daily disparaging comments” made by Borchert’s boss and other employees about her pregnancy.⁵¹ For instance, in response to Borchert’s “severe and ongoing nausea and vomiting caused by her pregnancy,” her boss told her to “get over it” and accused her of feigning illness, telling Borchert that she “wasn’t really sick.”⁵² Soon thereafter, the state issued Borchert a Separation Notice.⁵³

In North Carolina, Lauren Burch, a special agent, informed her employer, the state alcohol enforcement agency, that she was pregnant.⁵⁴ On her doctor’s advice, Burch requested light duty status to avoid “situations that would put her at risk for physical altercations.”⁵⁵ Her state employer approved the request but assigned her



to a worksite that “required a daily, six-hour round-trip commute” (for which she was provided “no work credit for travel time” and was forced to use “her personal vehicle at her own expense”).⁵⁶ The state refused to grant her an assignment with a shorter commute—despite Burch’s doctor’s recommendation that she travel no more than 1.5 hours—and pushed her onto unpaid leave.⁵⁷

In Kansas, Deanna Porter, a psychiatric aide, informed her employer, a state hospital, that she was pregnant. When Porter’s doctor advised that she avoid lifting more than 40 pounds, the state refused to allow Porter to work with the lifting restriction in place and sent her home.⁵⁸ Shortly thereafter, she was terminated.⁵⁹

Due to a combination of gaps in the law and narrow judicial interpretations,⁶⁰ Congress’s efforts through the PDA⁶¹ to eradicate “the pervasive presumption that women are mothers first, and workers second”⁶² have “proved ineffective for a number of reasons.”⁶³ The PDA’s failure to combat states’ record of unconstitutional gender discrimination demands further action by Congress.⁶⁴ Where, as here, “Congress ha[s] already tried unsuccessfully” to remedy violations of equal protection and such “previous legislative attempts ha[ve] failed,” then “added prophylactic measures” are justified and, indeed, imperative.⁶⁵ The Pregnant Workers Fairness Act (PWFA) is just such a measure.

The PWFA is narrow, tailored, and targeted to combat gender discrimination, including invalid sex role stereotypes about the place of “mothers or mothers-to-be”⁶⁶ in the work sphere.⁶⁷ By requiring reasonable accommodation of pregnant workers only where doing so would not cause employers undue hardship, the PWFA is carefully crafted to deter and quickly remedy unconstitutional sex discrimination in the hiring, retention, and promotion of young (potentially-pregnant) women and soon-to-become mothers.⁶⁸ Moreover reasonable accommodations for pregnancy are inherently time-limited,⁶⁹ and the vast majority of accommodations pregnant workers need, like the right to carry a water bottle or sit on a stool at a retail counter, are low-cost or no-cost.⁷⁰ The minimal (or non-existent) economic cost of a pregnancy accommodation is one reason major industry groups, such as the U.S. Chamber of Commerce, champion the PWFA.

Most pregnant workers want, and need, to be able to receive an accommodation promptly so they can continue earning income while maintaining a healthy pregnancy. But the lack of clarity under the PDA leaves many without the ability to obtain the accommodations they need.



The Americans with Disabilities Act Does Not Meet the Needs of Pregnant Workers

Pregnant workers left behind by the PDA may try to turn, instead, to the Americans with Disabilities Act (ADA). However, as we laid out extensively in our March 2021 Congressional testimony, for many pregnant workers, the Americans with Disabilities Act, too, is continuing to fail to address their needs.⁷¹ Although the ADA provides an explicit right to reasonable accommodation for workers with disabilities, most pregnancy-related conditions are not deemed “disabilities” as required to trigger protection under the law.⁷²

First and foremost, a pregnant worker who has no complications but seeks an accommodation in order to prevent a complication from arising, will not be able to get an accommodation under the ADA. As recently as late 2020, courts have continued to affirm that pregnancy, absent complications, is not an ADA-qualifying disability meriting accommodation.⁷³

Furthermore, even though Congress expanded the ADA in the 2008 ADA Amendments Act and in theory it should provide accommodations for workers with pregnancy-related disabilities, courts have interpreted the ADA Amendments Act in a way that did little to expand coverage even for those pregnant workers with serious health complications.



- ◆ In 2020, one court held that a plaintiff with pregnancy complications, including preeclampsia, did not have an ADA-qualifying disability⁷⁴—despite the fact that preeclampsia is one of the three leading causes of maternal mortality.⁷⁵

As one court recently concluded, “[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.”⁷⁶ Thus, even in scenarios where pregnant workers have presented very serious complications related to pregnancy, courts have still been unwilling to recognize those as ADA-qualifying disabilities because the complication did not amount to an “impairment” in the courts’ view, and/or their pregnancy complication did not substantially limit a major life activity.⁷⁷ Examples of pregnancy-related complications that did not merit ADA protections even after Congress amended the law include high-risk pregnancy, hyperemesis gravidarum, and pregnancy-related bleeding.⁷⁸

2. Pregnant workers continue to be forced to risk their economic security—in the midst of a global pandemic that has had a disproportionate impact on women’s careers

As Dina Bakst, A Better Balance Co-Founder and Co-President, testified in the House of Representatives in March 2021, “the PWFA was needed long before the pandemic, [but] it has taken on a new urgency as a critical measure necessary to keep women healthy and attached to the workforce.”⁷⁹ The COVID-19 pandemic has both shined a light on and heightened a crisis of care in the United States, emphasizing the inequitable burdens that fall on those who balance competing demands from work and care responsibilities. This crisis often starts when pregnant workers find themselves unsupported at work as they seek to maintain their health, the health of their pregnancies, and their economic security while pregnant—a delicate balancing act that has been made only more difficult by the economic precarity and increased health risks many pregnant workers have faced during the pandemic.

This bias and inflexibility that often starts when women become pregnant snowballs into lasting economic⁸⁰ and health disadvantages.⁸¹ We call this the “pregnancy penalty.”⁸² As the pandemic continues, and as many people return to work and the country starts to emerge from an economic recession, it is more necessary than ever that pregnant workers are able to balance maintaining a healthy pregnancy with maintaining their economic security. The COVID-19 pandemic has disproportionately harmed women, especially women of color in



low-wage occupations.⁸³ Rebuilding the workforce post-pandemic cannot mean a return to a pre-pandemic status quo that too often failed to enable women and families to maintain their economic security.

Without the protection of a federal Pregnant Workers Fairness Act, pregnant workers, especially women in low-wage and physically demanding jobs, have often experienced dire economic consequences when pushed out or terminated for needing accommodations. Nearly two-thirds of women are the primary or co-breadwinner for their families;⁸⁴ those who are pushed onto leave often must use up saved paid or unpaid leave they had hoped to reserve to recover from childbirth, and then, unable to afford more time without a paycheck, must return to the workforce much earlier than planned or medically advisable. In addition to income, workers often lose health insurance because of termination or jobs loss, forcing them to delay or avoid critical pre- or post-natal care, or leaving them with crippling medical bills.⁸⁵ Prospects of promotion, advancement, and retirement savings also disappear, especially as it becomes more difficult to reenter the workforce after becoming a mother.⁸⁶

For example, at the height of the pandemic, Tesia, a pregnant retail worker in Missouri, called A Better Balance's free legal helpline.⁸⁷ Tesia worked in an area of the store with hot temperatures and little access to water. She called us because the store's water fountain had been shut down due to COVID-19 safety concerns. To avoid experiencing dehydration, which can trigger significant health consequences during pregnancy, she asked her manager if she could keep a water bottle behind the counter. He refused. Frightened for the health of her pregnancy, she was forced out of her job.

"I never expected to be treated badly, it really threw me off. I thought because the conditions were kind of bad with the heat, the slick floors, and multiple COVID cases going around, that things would be different and I would be able to be accommodated. But I wasn't. . . . They told me I would have to take unpaid leave, or I would have to quit. So, I decided that it would be best for my health and the health of my child to quit my position, and this caused my financial situation to be entirely different. I wasn't able to save money like I had planned, because as we all know, babies, children, are very expensive, with diapers and formula and the many other things that they're going to need." —*Tesia, retail worker in Missouri*

Preserving pregnant workers' economic security was a matter of critical importance before the pandemic, but now, with experts suggesting that it could take years to undo the pandemic's damage to women's economic equality,⁸⁸ the federal Pregnant Workers Fairness Act has taken on a new urgency. The Pregnant Workers Fairness Act is a necessary measure to keep women healthy and attached to the workforce as the economy recovers.

3. Business support for pregnancy accommodations has grown stronger

In the last two years, the business community has expressed its strong support for the Pregnant Workers Fairness Act. The bill under consideration in Congress this session reflects extensive negotiations between the U.S. Chamber of Commerce and advocates that ensures the bill remains strong for employees and clear for employers, and the bill has garnered significant support from businesses.⁸⁹ The U.S. Chamber of Commerce supports the federal Pregnant Workers Fairness Act because “ensuring that expectant mothers have every option to stay active in the workplace is good for women, families, and business. This legislation reduces confusion by establishing clear guidelines and a balanced process that works for employers and employees alike.”⁹⁰ The Society for Human Resources Management (SHRM) also supports the bill, as do major corporations including Adobe, Cigna, Levi Strauss, L’Oréal, and Microsoft, among others.⁹¹

In an open letter to the House of Representatives in advance of their vote on the bill this session, several major business associations wrote that “[t]his bipartisan bill is a strong reminder that through good faith negotiations, legislative solutions to important workplace questions and problems can be found. We believe that Congress should pass H.R. 1065 with no changes.”⁹² **The consensus is clear: The Pregnant Workers Fairness Act is good for business.**

Twelve Major Business Associations Sent a Letter to Congress in Support of the PWFA:

- ◆ U.S. Chamber of Commerce
- ◆ Society for Human Resource Management
- ◆ Associated Builders and Contractors
- ◆ BASF Corporation
- ◆ College and University Professional Association for Human Resources
- ◆ Dow
- ◆ HR Policy Association
- ◆ International Franchise Association
- ◆ National Restaurant Association
- ◆ National Retail Federation
- ◆ pH-D Feminine Health
- ◆ Retail Industry Leader Association

4. It has only become clearer that urgent action is needed to support maternal health

The federal Pregnant Workers Fairness Act also has a key role to play when it comes to improving maternal health. While many pregnant workers are able to safely work through their pregnancies without need for accommodations many, especially those in physically demanding jobs—disproportionately women of color⁹³—may need modest accommodations in order to stay healthy during pregnancy.⁹⁴ For some, physically-demanding jobs, as described in [Long Overdue](#), can increase the risk of miscarriage or preterm birth, put pregnant workers at risk of falls and injuries, and lead to other maternal and infant health problems, including low-birth weight, preeclampsia, birth defects, and more.⁹⁵ In many cases, modest, low-cost accommodations, such as access to a water bottle, additional bathroom breaks, a stool to sit on, or help with heavy lifting can significantly reduce these risks.⁹⁶

The pandemic has also exacerbated the challenges pregnant workers face in profound ways, especially as data now shows contracting COVID-19 while pregnant can lead to an increased risk of severe illness and death, making immediate passage of the Pregnant Workers Fairness Act all the more crucial.⁹⁷ For example, in November 2020, we heard from Jordan, a cashier at a large retailer in Mississippi.⁹⁸ When Jordan began to experience preterm contractions, her health care provider requested that she stop lifting heavy objects and reduce her schedule. Her employer ignored her request and required that she continue to lift boxes. Her employer also refused to grant her more frequent breaks to drink water or sit, even though she experienced severe dehydration that required medical attention. Worried about the consequences of not receiving these accommodations, her doctor advised that she go on unpaid leave, forcing her to lose critical income.



While the pandemic created new risks and challenges for pregnant workers, America's inexcusably and inequitably high maternal morbidity and mortality statistics predate the pandemic. Rates of maternal morbidity and mortality are disproportionately high for women of color—for example, Black women experience maternal mortality at three to four times the rate of white women, and Indigenous women face similarly high rates.⁹⁹ These statistics paint a troubling picture of the legacy and ongoing presence of racism embedded both in medical care and in the social determinants of health, including workplace treatment.



Indeed, while Black women make up 14.3 percent of the population, nearly 30 percent of pregnancy discrimination complaints are filed by Black women.¹⁰⁰ At the same time, as mentioned above, Black women, Latinx, and immigrant women are disproportionately likely to work in the kind of low-wage, physically-demanding jobs in which requests for modest accommodations are most necessary and most often ignored.

Passage of a federal Pregnant Workers Fairness Act has emerged as one key tool to improve maternal and infant health overall, and to eliminate racial disparities in maternal and infant health. Accordingly, numerous organizations dedicated to eliminating racial disparities in maternal health outcomes have become vocal supporters of the federal PWFA in the last two years. For Black women, “putting a national pregnancy accommodation standard in place . . . has the potential to improve some of the most serious health consequences Black pregnant people experience.”¹⁰¹ As the Black Mamas Matter Alliance and other organizations dedicated to promoting Black maternal health wrote in a September 2020 letter to Congress in support of the Pregnant Workers Fairness Act:

“Faced with the threat of termination . . . Black pregnant people are often forced to keep working which can compromise their health and the health of their pregnancy. . . . Black women have the highest incidence of preterm birth and yet we know that workplace accommodations such as reducing heavy lifting, bending, or excessive standing can help prevent preterm birth, the leading cause of infant mortality in this country. Black women are also at higher risk of preeclampsia, which is one of the leading causes of maternal mortality. We are still learning about how to prevent this dangerous medical condition, yet we know that simply allowing workers to take bathroom breaks can prevent urinary tract infections which are strongly associated with preeclampsia.”¹⁰²

— Black Mamas Matter Alliance & organizations dedicated to supporting Black maternal health and ending racial injustice

Maternal Health Equity Groups Support the Federal PWFA

In a 2021 letter to Congress in support of the federal PWFA, forty-three maternal health equity groups wrote:

“Unfortunately, too many pregnant workers, particularly pregnant people of color, face barriers to incorporating even these small changes to their workdays. For example, Black women experience maternal mortality rates three to four times higher than white women, with Indigenous women similarly experiencing disproportionately high rates. The circumstances surrounding these alarming statistics can often be attributed to a lack of access to care, including due to inflexible workplaces, and deep biases in racial understanding. Various social determinants such as health, education, and economic status drastically influence the outcomes of pregnancy for Black women leading to severe pregnancy-related complications. . . . Black pregnant workers along with Latinx and immigrant women are disproportionately likely to work in physically demanding jobs that may lead to workers needing modest accommodations to ensure a healthy pregnancy. Too often, however, those requests are refused or ignored, forcing pregnant workers of color to disproportionately contend with unsafe working conditions. . . . The Pregnant Workers Fairness Act is a measured approach to a serious problem. As organizations dedicated to maternal health and closing racial disparities in pregnancy and birth outcomes, we understand the importance of reasonable workplace accommodations to ensure that pregnant persons can continue to provide for their families and have safe and healthy pregnancies. We collectively urge swift passage of the Pregnant Workers Fairness Act.”



5. Progress towards a clear right to pregnancy accommodations has been made at the state level, but gaps remain

In 2019, *Long Overdue* made the case for urgent action to ensure that pregnant workers have a clear right to the accommodations they need to maintain their health and their economic security while pregnant. Since then, an additional five states—Tennessee, Oregon, Maine, Virginia, and New Mexico—have responded to that need, passing state-level pregnancy accommodations laws with broad bipartisan support.¹⁰³

Most recently, Tennessee passed their state pregnancy accommodations law with unanimous support.¹⁰⁴ The bill had the strong support of all four of the state’s major metropolitan Chambers of Commerce—Chattanooga, Knoxville, Memphis, and Nashville—who, in their joint legislative agenda, called the bill’s provision of reasonable accommodations for pregnant workers absent any undue hardship on their employer a “commonsense requirement[.]”¹⁰⁵ Many Tennessee businesses also supported the law, and the Tennessee Chamber of Commerce and Tennessee NFIB took a neutral position on the bill after negotiations to provide clarifying language.



- ◆ In the Tennessee State Senate, the bill was championed by Republican State Senator Becky Duncan Massey, who described the bill as “a commonsense bill to help provide clear guidelines for employers and employees on how to navigate pregnancy in the workplace.”¹⁰⁶ She emphasized that “no pregnant woman in Tennessee should have to choose between her job and her health during a pregnancy,” and as “pro-family, pro-business.”¹⁰⁷

This represents enormous progress, and is a clear indication that the need for stronger workplace protections for pregnant workers is recognized throughout the country. And state laws are working—for example, Catherine,¹⁰⁸ a retail worker

in New York State, requested to sit on a stool midway through her pregnancy to address her swollen feet. Her boss refused, saying he didn't like how it would look if customers saw her sitting. But after she explained the New York Pregnant Workers Fairness Act to her boss, she was allowed to use the stool as needed.

Spotlight on the Tennessee Pregnant Workers Fairness Act

- ◆ Passed on June 22, 2020 and went into effect on October 1, 2020
- ◆ Passed with unanimous support
- ◆ Strongly supported by all four of the state's major metropolitan Chambers of Commerce—Chattanooga, Knoxville, Memphis, and Nashville—and many Tennessee businesses, with the TN Chamber and TN NFIB taking a neutral position on the bill after negotiations to provide clarifying language
- ◆ Key Quotes:
 - ◆ "The Tennessee Pregnant Workers Fairness Act is a commonsense bill to help provide clear guidelines for employers and employees on how to navigate pregnancy in the workplace." – Sen. Massey (R, lead sponsor)
 - ◆ "At a time when our state and country are facing an unprecedented public health crisis, this legislation is essential to protect the health and economic security of pregnant women and provide critical guidance to employers." – Rep. Hurt (R, lead sponsor)

However, state-by-state progress is not enough. As the workforce adapts to the post-pandemic future—including by moving to start new jobs or adapting to long-term remote work—pregnant workers need, and deserve swift federal action to ensure that their rights do not depend on where they live. And businesses deserve a clear, understandable federal standard. It is federal law that is at the root of the problem, and it is federal law that must be fixed.

In the last two years, there has been enormous progress towards a federal Pregnant Workers Fairness Act. In the two years since [Long Overdue](#) was published, much progress toward passing the federal PWFA has been made. In October 2019, prior to the onset of the pandemic, the federal Pregnant Workers Fairness Act received a hearing in the House of Representatives for the first time, showing remarkable momentum for the legislation. A Better Balance Co-Founder and Co-President Dina Bakst testified at that hearing as a legal expert and lifted up the voices of workers with whom ABB has worked,





making it very clear that the Pregnancy Discrimination Act (PDA) and Americans with Disabilities Act (ADA) are not adequate solutions for pregnant workers in need of accommodations. This was based on A Better Balance’s analysis of the case law showing that women are losing their PDA and ADA cases due to fundamental gaps in the law and from firsthand experience working with thousands of women who are still being fired or forced onto leave, or forced to risk their health, for needing accommodations.¹⁰⁹

Additionally, Iris Wilbur, Vice President of Government Affairs & Public Policy for Greater Louisville Inc., testified that in the wake of the successful passage of Kentucky’s statewide pregnancy accommodations law businesses need the “clarity and uniformity” that a federal law would bring.¹¹⁰ She described the federal PWFA as “pro-business and pro-workforce,” and explained that it would help business improve female labor force participation and employee retention, while reducing training costs and the potential for costly litigation by proving clear standards.¹¹¹

Following the hearing, the majority and minority of the House Education & Labor Committee, as well as members of both the advocacy and business communities, including the U.S. Chamber of Commerce, came together to strengthen the bill and ensure it provides strong protections for employees and necessary clarity for employers.¹¹² The bill passed the House in September 2020 with overwhelming bipartisan support but did not have time to pass the Senate given its proximity to the end of the Congressional session.¹¹³

In March 2021, the federal Pregnant Workers Fairness Act received another hearing in the House,¹¹⁴ with ABB Co-President Dina Bakst testifying again, this time highlighting the crucial role this bill would play in rebuilding an equitable economy in the wake of the pandemic and staggering statistics of women,

including pregnant women, leaving the workforce, one in which pregnant workers do not have to choose between the health of their pregnancy and their economic security and are not forced out of the workforce at a time when it's crucial we be doing all we can to ensure women can return to and participate in the labor force. The bill—championed by Representatives on both sides of the aisle, including Rep. Jerry Nadler (D-NY), Rep. John Katko (R-NY), Rep. Jaime Herrera Beutler (R-WA), Chairman Bobby Scott (D-VA), and Rep. Lucy McBath (D-GA)—passed the House in May 2021 with overwhelming bipartisan support, including the support of both Democratic and Republican House leadership.¹¹⁵

Statements from the May 2021 House Floor Vote:

- ◆ “This choice between work and pregnancy is a fallacy, and can be remedied with a reasonable accommodation.” – Rep. Jerry Nadler (D-NY)
- ◆ “This bipartisan bill provides pregnant workers with an affirmative right to reasonable—and I stress the word reasonable—accommodations in the workplace, while creating a clear and navigable standard for employers to follow. These accommodations are minor—as simple as providing an employee with extra restroom breaks or a stool to sit on.” – Rep. John Katko (R-NY)
- ◆ “If we can see pregnancy as a part of community, a journey of life for our good, the good of all, and the good of our Nation, then we accept that it requires reasonable accommodation at work when someone is pregnant.” – Rep. Jeff Fortenberry (R-NE)
- ◆ “It is unacceptable that in 2021, pregnant workers can still be denied basic workplace accommodations that help them stay healthy during their pregnancy.” – Rep. Bobby Scott (D-VA)
- ◆ “Our mothers deserve these federal protections. I believe that we all want to support our working mothers. Allowing these simple accommodations can make the difference between being forced out of a job and providing a living for themselves and for their families.” – Rep. Lucy McBath (D-GA)

The bill is now ready for Senate action, with a group of bipartisan legislators, Senators Bob Casey (D-PA), Bill Cassidy (R-LA), Jeanne Shaheen (D-NH), Shelley Moore Capito (R-WV), Tina Smith (D-MN), and Lisa Murkowski (R-AK), leading the effort with introduction of the same language that the House passed on May 14, 2021. Congress can, and must, pass this bill this session. Pregnant workers are a critical part of the American workforce and cannot wait any longer for the Pregnant Workers Fairness Act.

Endnotes

- 1 See Dina Bakst, Opinion, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES, Jan. 30, 2012, at A25, <https://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html>.
- 2 Letter from Associated Builders & Contractors, et al., to U.S. Representatives (May 13, 2021), <https://www.abetterbalance.org/resources/business-coalition-letter-to-the-house-of-representatives-in-support-of-pwfa/>.
- 3 See, e.g., DINA BAKST, ELIZABETH GEDMARK & SARAH BRAFMAN, A BETTER BALANCE, LONG OVERDUE: IT IS TIME FOR THE FEDERAL PREGNANT WORKERS FAIRNESS ACT (2019) [hereinafter LONG OVERDUE], <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf>; *Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination: Hearing Before the Subcomms. On Civil Rights and Human Services and Workforce Protections of the H. Comm. On Ed. & Lab.*, 117th Cong. (2021), [hereinafter *Bakst 2021 Testimony*], <https://edlabor.house.gov/imo/media/doc/BakstDinaTestimony0318211.pdf> (testimony of Dina Bakst); *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), [hereinafter *Bakst 2019 Testimony*], <https://edlabor.house.gov/download/10/22/2019/baksttestimony102219> (testimony of Dina Bakst); A Better Balance & Nat'l Women's Law Ctr., IT SHOULDN'T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS 7 (2013) [hereinafter IT SHOULDN'T BE A HEAVY LIFT], <https://www.abetterbalance.org/resources/it-shouldnt-be-a-heavy-lift/>; A BETTER BALANCE, THE CASE FOR THE PREGNANT WORKERS FAIRNESS ACT, IN STORIES, <https://www.abetterbalance.org/the-case-for-the-pregnant-workers-fairness-act-in-stories/> (last visited Mar. 11, 2021).
- 4 LONG OVERDUE, *supra* note 3, at 14-16; *Bakst 2019 Testimony*, *supra* note 3, at 14-16, <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf>.
- 5 LONG OVERDUE, *supra* note 3, at 14-16, <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf>.
- 6 See Pls. Br. in Opp'n to Mot. to Dismiss at 4, *Barton v. Warren Cty.*, No. 1:19-cv-01061-GTS-DJS (N.D.N.Y. Aug. 7, 2020), ECF No. 5.
- 7 *Barton v. Warren Cty.*, No. 1:19-CV-1061 (GTS/DJS), 2020 WL 4569465, at *14 (N.D.N.Y. Aug. 7, 2020) (Barton's claim under New York's pregnancy accommodations law was dismissed on timeliness grounds—since her suit was against a public officer, a state statute providing only 90 days for her to serve notice of her complaint applied; in contrast, under federal law, she had a 300-day statute of limitations).
- 8 *Equal Emp't Opportunity Comm'n v. Wal-Mart Stores East, LP*, No. 18-cv-783-bbc, 2021 WL 664929 (W.D. Wis. Feb. 19, 2021). Walmart subsequently changed its policy. *Id.* at *4.
- 9 *Bakst 2021 Testimony*, *supra* note 3, at 10-12.
- 10 See Dina Bakst, *Peggy Young's Victory is Not Enough*, U.S. NEWS & WORLD REPORT (Mar. 26, 2015), <https://www.usnews.com/opinion/economic-intelligence/2015/03/26/peggy-young-supreme-court-victory-is-not-enough-for-pregnant-workers>.
- 11 *Bakst 2021 Testimony*, *supra* note 3, at 10-12; *Bakst 2019 Testimony*, *supra* note 3, at 17-20.
- 12 See, e.g., *Andrews v. Eaton Metal Prods., LLC*, No. 20-CV-00176-PAB-NYW, 2020 WL 5821611, at *8 (D. Colo. Sept. 8, 2020), *report and recommendation adopted*, No. 20-CV-00176-PAB-NYW, 2020 WL 5815059 (D. Colo. Sept. 30, 2020) (holding that, under federal law, Plaintiff's "pregnancy . . . do[es] not fall under the scope of the ADA" and "thus, Plaintiff's allegations are insufficient to state a claim under the ADA for discrimination, failure to accommodate, or failure to promote").
- 13 *Shaw v. T-Mobile*, No. 18-2513-DDC-GEB, 2020 WL 5231309, at *12 (D. Kan. Sept. 2, 2020).
- 14 Labib Ghulmiyyah & Baha Sibai, *Maternal Mortality from Preeclampsia/Eclampsia*, 36 SEMINARS IN PERINATOLOGY 56 (2012), <https://www.sciencedirect.com/science/article/abs/pii/S0146000511001571>.
- 15 See LONG OVERDUE, *supra* note 3, at 14-16, <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf>; *Bakst 2021 Testimony*, *supra* note 3, at 12-13; *Bakst 2019 Testimony*, *supra* note 3, at 4-9.
- 16 See *Bakst 2019 Testimony*, *supra* note 3, at 4.
- 17 *Id.* at 8.
- 18 *Id.* at 8-9.
- 19 Missouri does not have a state Pregnant Workers Fairness Act.

- 20 See, e.g., CONGRESSIONAL RES. SERV., THE COVID-19 PANDEMIC: LABOR MARKET IMPLICATIONS FOR WOMEN (2020), <https://fas.org/sgp/crs/misc/R46632.pdf>; Julie Kashen, Sarah Jane Glynn, & Amanda Novello, *How COVID-19 Sent Women Backward*, CTR. FOR AM. PROGRESS (Oct. 30, 2020, 9:04 AM), <https://www.americanprogress.org/issues/women/reports/2020/10/30/492582/covid-19-sent-womens-workforce-progress-backward/>; André Dua et al., MCKINSEY, *ACHIEVING AN INCLUSIVE US ECONOMIC RECOVERY* (2021), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/achieving-an-inclusive-us-economic-recovery>.
- 21 JOB ACCOMMODATION NETWORK, ACCOMMODATION AND COMPLIANCE SERIES, *WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT 4* (2015), <https://askjan.org/publications/Topic-Downloads.cfm?pubid=962628>.
- 22 See LOUISVILLE DEP'T OF PUB. HEALTH & WELLNESS, *PREGNANT WORKERS HEALTH IMPACT ASSESSMENT 5-7* (2019), <https://louisvilleky.gov/document/pregnant-workers-hia-final-02182019pdf>; see also *Bakst 2019 Testimony*, *supra* note 3, at 26-28.
- 23 Mississippi does not have a state Pregnant Workers Fairness Act.
- 24 See, e.g., CTRS. FOR DISEASE CONTROL & PREVENTION, *Racial and Ethnic Disparities Continue in Pregnancy-Related Deaths* (Sept. 5, 2019), <https://www.cdc.gov/media/releases/2019/p0905-racial-ethnic-disparities-pregnancy-deaths.html>.
- 25 2020 Big 4 Chambers State Legislative Agenda, (2020), <https://www.knoxvillechamber.com/wp-content/uploads/2020/08/Metro-Chamber-Legislative-Agenda.pdf>.
- 26 LONG OVERDUE, *supra* note 3, at 23-24 (noting that, “losing out on even one paycheck, let alone multiple, can spell financial ruin for families”), <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf>.
- 27 See, e.g., IT SHOULDN'T BE A HEAVY LIFT, *supra* note 3, at 7; DINA BAKST & PHOEBE TAUBMAN, *A BETTER BALANCE, THE PREGNANCY PENALTY: HOW MOTHERHOOD DRIVES INEQUALITY & POVERTY IN NEW YORK CITY 3* (2014) [hereinafter *THE PREGNANCY PENALTY*], https://www.abetterbalance.org/wp-content/uploads/2016/11/ABB_PregnancyPenalty-Report-2014.pdf.
- 28 See Ella Koeze, *A Year Later, Who Is Back to Work and Who Is Not?*, N.Y. TIMES (Mar. 9, 2021), <https://www.nytimes.com/interactive/2021/03/09/business/economy/covid-employment-demographics.html> (reporting that Black and Hispanic women experienced more dramatic job loss after the onset of the pandemic than any other demographic, with Hispanic women experiencing a 24 percent decrease and Black women a nearly 20 percent decrease in employment from February 2020 to April 2020, compared to less than 15 percent for white men; and also have experienced the slowest recovery, with nearly 10 percent fewer Black women employed in March 2021 than were employed a year ago, compared with 5 percent fewer white men); see also Jocelyn Frye, *On the Frontlines at Work and at Home: The Disproportionate Economic Effects of the Coronavirus Pandemic on Women of Color*, CTR. FOR AM. PROGRESS (Apr. 23, 2020, 9:00 AM), <https://www.americanprogress.org/issues/women/reports/2020/04/23/483846/frontlines-work-home/> (finding that women of color disproportionately work in industries experiencing significant pandemic-related job losses).
- 29 See *New Survey: Facing Caregiving Challenges, Women Leaving the Workforce at Unprecedented Rates*, BIPARTISAN POL'Y CTR. (Oct. 28, 2020), <https://bipartisanpolicy.org/blog/facing-caregiving-challenges/> (finding that “nearly one quarter of the women who have left work since the coronavirus pandemic began did so to manage their caregiving responsibilities”); see also Nate Rattner & Thomas Franck, *Black and Hispanic Women Aren't Sharing in the Job Market Recovery*, CNBC (Mar. 5, 2021, 2:08 PM EST), <https://www.cnbc.com/2021/03/05/black-and-hispanic-women-arent-sharing-in-the-job-market-recovery.html>.
- 30 See, e.g., Gary Claxton & Larry Levitt, *Paid Sick Leave is Much Less Common for Lower-Wage Workers in Private Industry*, HENRY J. KAISER FAM. FOUND. (March 10, 2020), <https://www.kff.org/other/issue-brief/paid-sick-leave-is-much-less-common-for-lower-wage-workers-in-private-industry/>; Diana Boesch, *The Urgent Case for Permanent Paid Leave: Lessons Learned from the COVID-19 Response*, CTR. FOR AM. PROGRESS (Sept. 1, 2020, 9:00 AM), <https://www.americanprogress.org/issues/women/reports/2020/09/01/489914/urgent-case-permanent-paid-leave/>.
- 31 See Hye Jin Rho, Hayley Brown, & Shawn Fremstad, *A Basic Demographic Profile of Workers in Frontline Industries*, CTR. FOR ECON. & POLICY RESEARCH (Apr. 7, 2020), <https://cepr.net/a-basic-demographic-profile-of-workers-in-frontline-industries/>.
- 32 LONG OVERDUE, *supra* note 3, at 53, <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf>.
- 33 *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015).
- 34 LONG OVERDUE, *supra* note 3, at 5, <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf>.
- 35 *Id.*
- 36 See *Pls. Br. in Opp'n to Mot. to Dismiss at 4*, *Barton v. Warren Cty.*, No. 1:19-cv-01061-GTS-DJS (N.D.N.Y. Aug. 7, 2020), ECF No. 5.

37 *Id.*

38 *Barton v. Warren Cty.*, No. 1:19-CV-1061 (GTS/DJS), 2020 WL 4569465, at *14 (N.D.N.Y. Aug. 7, 2020) (Barton’s claim under New York’s pregnancy accommodations law was dismissed on timeliness grounds since her suit was against a public officer, a state statute providing only 90 days for her to serve notice of her complaint applied; in contrast, under federal law, she had a 300-day statute of limitations).

39 *Equal Emp’t Opportunity Comm’n v. Wal-Mart Stores East, LP*, No. 18-cv-783-bbc, 2021 WL 664929 (W.D. Wis. Feb. 19, 2021).

40 *Id.* at *2. Walmart subsequently changed its policy. *Id.* at *4.

41 *Id.* at *10–11.

42 *Id.* at * 10 (noting that the EEOC failed to provide evidence of “what percentage of non-pregnant workers not injured on the job were provided accommodations or forced to take leave”).

43 *See, e.g., Pennucci-Anderson v. Ochsner Health Sys.*, No. CV 19-271-DPC, 2021 WL 242862, at *5 (E.D. La. Jan. 25, 2021) (stating, incorrectly, that plaintiffs “must show that a comparator was treated more favorably in *nearly identical circumstances*” (emphasis added)); *Santos v. Wincor Nixdorf, Inc.*, No. 19-50046, 2019 WL 3720441 (5th Cir. Aug. 7, 2019) (finding that the plaintiff failed to make out her *prima facie* case because she “did not present sufficient evidence to allow the conclusion that a non-pregnant employee was treated differently in *nearly identical circumstances*” (emphasis added)); *Tomiwa v. PharMEDium Servs., LLC*, No. 4:16-CV-3229, 2018 WL 1898458, at *4–5 (S.D. Tex. Apr. 20, 2018) (failing to cite *Young* or apply the appropriate test when granting the employer summary judgment on a PDA claim brought by a pharmacy technician who was fired after requesting bed rest because, among other reasons, she could not identify similarly situated employees who were provided accommodations); *Pawlow v. Dep’t of Emergency Servs. & Pub. Prot.*, 172 F. Supp. 3d 568, 575 (D. Conn. 2016) (failing to cite *Young* or apply the appropriate test when dismissing a PDA claim brought by a police officer who alleged that she was required to go home to express breast milk, was forced to pump in an area used to make bullets, and was punished for needing to pump and finding that the plaintiff’s state law pregnancy accommodations claim—brought before the state’s PWFA was passed—was barred by the 11th Amendment); *Agee v. Mercedes-Benz U.S. Intern., Inc.*, No. 7:12-cv-4014-SLB, 2015 WL 1419080, at *2 (N.D. Ala. Mar. 26, 2015) (failing to cite *Young* or apply the appropriate test when granting the employer summary judgment on an assembly line worker’s PDA claim that she was terminated after requesting to work no more than forty hours per week, reasoning that the information she provided about co-workers who were accommodated was not based on her “personal knowledge”).

44 *Pennucci-Anderson*, 2021 WL 242862, at *5 (emphasis added).

45 LONG OVERDUE, *supra* note 3, at 19, <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf>.

46 Name has been changed.

47 Pennsylvania does not have a state Pregnant Workers Fairness Act.

48 *Bakst 2021 Testimony*, *supra* note 3, at 7–10.

49 *See Borchert v. Oklahoma*, No. 04CV0839 CVE/SAJ, 2006 WL 228913, at *1 (N.D. Okla. Jan. 30, 2006).

50 *Id.* at *1–2 (emphasis added).

51 *Id.* at *3.

52 *Id.*

53 *Id.* at *7.

54 *See Burch v. North Carolina Dep’t of Public Safety*, 158 F. Supp. 3d 449, 454 (E.D.N.C. 2016).

55 *Id.* at 455.

56 *Id.*

57 *Id.* at 455–56.

58 *See Porter v. Kansas*, 757 F. Supp. 1224, 1227–28 (D. Kans. 1991).

59 *Id.* at 1228.

60 *See Bakst 2019 Testimony*, *supra* note 3, at 11–17; *Bakst 2021 Testimony*, *supra* note 3, at 4–10.

- 61 See *Bakst 2019 Testimony*, *supra* note 3, at 21–22 (“Congress enacted the PDA to end longstanding practices by which employers forced women out of the workplace as a matter of course when they became pregnant. These practices were based on the notions that pregnancy is incompatible with work, that a pregnant woman’s proper place was at home, and that pregnancy should signal the end of a woman’s working life.” (quoting Br. of Am. C.L. Union & A Better Balance et al. as Amici Curiae Supporting Petitioner, *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015) (No. 12-1226), at 8)); see also 123 Cong. Rec. 7,539 (1977) (statement of Sen. Williams) (stating that PDA intended to address “the outdated notion that women are only supplemental or temporary workers—earning ‘pin money’ or waiting to return home to raise children full-time”).
- 62 *Hibbs*, 538 U.S. at 736 (quoting *The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor*, 99th Cong., 100 (1986)).
- 63 *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966).
- 64 See Reva Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEORGETOWN L. J. 167, 220–221, 225–26 & n.324 (2020) [hereinafter *The Pregnant Citizen*] (documenting “the centuries of state action that helped engender the sex-role understandings about a mother’s place that continue to limit prospects, both for the pregnant and the potentially pregnant, in the marketplace, education, and politics”).
- 65 *Hibbs*, 538 U.S. at 737; see also *Katzenbach*, 383 U.S. at 308, 314 (recognizing that additional legislation was “an appropriate means for carrying out Congress’ constitutional responsibilities” to enforce the Constitution because “the previous legislation has proved ineffective”).
- 66 *Hibbs*, 538 U.S. at 736 (citation omitted).
- 67 Moreover, the PFWA ensures that state employers conduct the “individualized determination” into each pregnant worker’s ability to continue working, as required under the Due Process Clause of the Fourteenth Amendment. See *LaFleur*, 414 U.S. at 644; *Turner*, 423 U.S. at 46.
- 68 See *The Pregnant Citizen*, *supra* note 64, at 225 (“The reasonable accommodation framework relieves individual employees of the burden of proving animus: of showing that an employer’s inflexible imposition of workplace standards reflects sex stereotyping that flows from the invidious assumption that pregnant workers are not competent or committed workers.”); *id.* at 225 n.322 (citing *IT SHOULDN’T BE A HEAVY LIFT*, *supra* note 3, at 7 (“When a woman worker is already seen as an outsider, her pregnancy and any requests for changes in her job related to the pregnancy can be taken as further evidence that the job is inappropriate for a woman, leading employers to refuse to make accommodations.”)).
- 69 See *Bakst 2019 Testimony*, *supra* note 3, at 24.
- 70 See *Bakst 2021 Testimony*, *supra* note 3, at 13 & n.84; see also *Bakst 2019 Testimony*, *supra* note 3, at 23 & n.103.
- 71 *Bakst 2021 Testimony*, *supra* note 3, at 10–12; *Bakst 2019 Testimony*, *supra* note 3, at 17–20.
- 72 See *Bakst 2019 Testimony*, *supra* note 3, at 17–20.
- 73 See, e.g., *Andrews v. Eaton Metal Prods., LLC*, No. 20-CV-00176-PAB-NYW, 2020 WL 5821611, at *8 (D. Colo. Sept. 8, 2020), report and recommendation adopted, No. 20-CV-00176-PAB-NYW, 2020 WL 5815059 (D. Colo. Sept. 30, 2020) (holding that, under federal law, Plaintiff’s “pregnancy . . . do[es] not fall under the scope of the ADA” and “thus, Plaintiff’s allegations are insufficient to state a claim under the ADA for discrimination, failure to accommodate, or failure to promote”).
- 74 *Shaw v. T-Mobile*, No. 18-2513-DDC-GEB, 2020 WL 5231309, at *12 (D. Kan. Sept. 2, 2020).
- 75 *Ghulmiyyah & Sibai*, *supra* note 14.
- 76 *Scheidt v. Floor Covering Assocs., Inc.*, No. 16-cv-5999, 2018 WL 4679582, at *6 (N.D. Ill. Sept. 28, 2018).

- 77 Dina Bakst, Responses to Questions for the Record at 7, *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) (citing *Tomiwa v. PharmEDIUM Servs., LLC*, No. 4:16-CV-3229, 2018 WL 1898458, at *5 (S.D. Tex. Apr. 20, 2018) (dismissing plaintiff's ADA claim because, despite the two emergency surgeries she had to undergo for a high risk pregnancy, the court said "[a]bsent unusual circumstances, pregnancy and related medical conditions do not constitute a physical impairment," under the ADA)); *Bakst 2019 Testimony*, *supra* note 3, at 19 (citing *Colon v. Sabic Innovative Plastics US, LLC*, No. 115CV651MADDJS, 2017 WL 3503681, at *7 (N.D.N.Y. Aug. 15, 2017) ("The only evidence that Plaintiff presented in support of her position that her high-risk pregnancy was a disability is the fact that her doctor diagnosed her with a high risk pregnancy. Plaintiff does not claim that her high-risk pregnancy substantially limited in any way her...major life activity.")).
- 78 See A Better Balance, THE PREGNANT WORKERS FAIRNESS ACT: LEGAL BACKGROUNDER, <https://www.abetterbalance.org/wp-content/uploads/2020/02/Long-Overdue-Primer-PWFA.pdf>.
- 79 See *Bakst 2021 Testimony*, *supra* note 3, at 13.
- 80 See *Bakst 2019 Testimony*, *supra* note 3, at 8-9 (explaining how, when pregnant workers are forced off the job, they lose income, retirement contributions, health insurance, and "other long-term benefits earned on the job," leading to "economic inequality over the long run, exacerbating the wage gap, and negatively affecting families as a whole, not to mention the harm it causes the economy . . . in its effect on women's labor force participation") (footnotes omitted); LONG OVERDUE, *supra* note 3, at 23-24 (noting that, "losing out on even one paycheck, let alone multiple, can spell financial ruin for families").
- 81 See LONG OVERDUE, *supra* note 3, at 25-26 (noting that heavy lifting, long work hours, and extensive standing can lead to miscarriage and preterm birth), <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf>; LOUISVILLE DEP'T OF PUB. HEALTH & WELLNESS, *supra* note 22, at 7 ("Accommodating pregnant workers, upon their request, is critical for reducing poor health outcomes including miscarriage; low birth weight; preterm birth; birth defects; dehydration; insufficient amniotic fluid and related birth outcomes; unnecessary pain resulting from excessive standing, bending, or lifting; [and] urinary tract infections and related risk of preeclampsia."); *Bakst 2019 Testimony*, *supra* note 3, at 17-20, 26-27.
- 82 THE PREGNANCY PENALTY, *supra* note 27, at 3.
- 83 See Lulu Garcia-Navarro, *The Economic Fallout of the Pandemic Has Had a Profound Effect on Women*, NPR (Jan. 31, 2021), <https://www.npr.org/2021/01/31/962528953/the-economic-fallout-of-the-pandemic-has-had-a-profound-effect-on-women>; see also Koeze, *supra* note 28.
- 84 See *Bakst 2019 Testimony*, *supra* note 3, at 4.
- 85 *Id.* at 8.
- 86 *Id.* at 8-9.
- 87 Missouri does not have a state Pregnant Workers Fairness Act.
- 88 See, e.g., CONGRESSIONAL RES. SERV., *supra* note 20; Kashen, Glynn, & Novello, *supra* note 20; André Dua et al., *supra* note 20.
- 89 See, e.g., U.S. Chamber of Commerce Applauds House Passage of the Pregnant Workers Fairness Act, (May 14, 2021, 12:45 PM), <https://www.uschamber.com/press-release/us-chamber-of-commerce-applauds-house-passage-of-the-pregnant-workers-fairness-act-0>; an open letter in support of the Pregnant Workers Fairness Act from leading private-sector employers, <http://www.nationalpartnership.org/our-work/resources/workplace/coalition/an-open-letter-in-support-of-PWFA-from-private-sector-employers.pdf> (last visited May 10, 2021).
- 90 U.S. Chamber of Commerce Applauds Committee Approval of Pregnant Workers Fairness Act, (Jan. 14, 2020), <https://www.uschamber.com/press-release/us-chamber-of-commerce-applauds-house-passage-of-the-pregnant-workers-fairness-act>.
- 91 An open letter in support of the Pregnant Workers Fairness Act from leading private-sector employers, <http://www.nationalpartnership.org/our-work/resources/workplace/coalition/an-open-letter-in-support-of-PWFA-from-private-sector-employers.pdf> (last visited May 10, 2021).
- 92 Letter from Associated Builders & Contractors, et al., to U.S. Representatives (May 13, 2021), <https://www.abetterbalance.org/resources/business-coalition-letter-to-the-house-of-representatives-in-support-of-pwfa/>.
- 93 See IT SHOULDN'T BE A HEAVY LIFT *supra* note 3, at 7.

- 94 The American Coll. of Obstetricians and Gynecologists, *ACOG Committee Opinion No. 733: Employment Considerations During Pregnancy and the Postpartum Period*, 131 *OBSTETRICS & GYNECOLOGY* e115, e120 (Apr. 2018) [hereinafter ACOG Committee Opinion No. 733], <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/04/employment-considerations-during-pregnancy-and-the-postpartum-period>.
- 95 See LONG OVERDUE, *supra* note 3, at 25-26, <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf>; LOUISVILLE DEP'T OF PUB. HEALTH & WELLNESS, *supra* note 22, at 5-7; see also Bakst 2019 Testimony, *supra* note 3, at 26-27.
- 96 LOUISVILLE DEP'T OF PUB. HEALTH & WELLNESS, *supra* note 22.
- 97 See Erica M. Lokken et al., *Disease Severity, Pregnancy Outcomes, and Maternal Deaths Among Pregnant Patients with Severe Acute Respiratory Syndrome Coronavirus 2 Infection in Washington State*, *AM. J. OBSTETRICS & GYNECOLOGY* 1.e1, 1.e3, 1.e5 (2021), <https://www.ajog.org/action/showPdf?pii=S0002-9378%2821%2900033-8> (finding that pregnant patients were hospitalized and died at significantly higher rates than similarly-aged nonpregnant patients in Washington State); Pregnant People, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnant-people.html> (Mar. 5, 2021) (noting that “pregnant people are at an increased risk for severe illness from COVID-19 when compared to non-pregnant people”).
- 98 Mississippi does not have a state Pregnant Workers Fairness Act.
- 99 See, e.g., CTRS. FOR DISEASE CONTROL & PREVENTION, *Racial and Ethnic Disparities Continue in Pregnancy-Related Deaths* (Sept. 5, 2019), <https://www.cdc.gov/media/releases/2019/p0905-racial-ethnic-disparities-pregnancy-deaths.html>.
- 100 Nora Ellmann and Jocelyn Frye, *Efforts to Combat Pregnancy Discrimination*, *CTR. FOR AM. PROGRESS* (Nov. 2, 2018), <https://www.americanprogress.org/issues/women/news/2018/11/02/460353/efforts-combat-pregnancy-discrimination/>.
- 101 Letter from Black Mamas Matter Alliance, et al., to U.S. Representatives 2 (Sept. 11, 2020), https://www.abetterbalance.org/wp-content/uploads/2020/09/PWFA_SignOnLetterForFloorVote_BlackMaternalHealthLetter.pdf.
- 102 *Id.* at 1-2 (internal quotations and citation omitted).
- 103 See A BETTER BALANCE, *FACT SHEET: STATE AND LOCAL PREGNANT WORKERS FAIRNESS LAWS*, <https://www.abetterbalance.org/resources/fact-sheet-state-and-local-pregnant-worker-fairness-laws/> (last updated Jan. 28, 2021).
- 104 *See id.*
- 105 2020 Big 4 Chambers State Legislative Agenda, *supra* note 25.
- 106 TN Sen. Sess., 63rd Legislative Day (2020) (statement of Sen. Massey).
- 107 *Id.*
- 108 Name has been changed.
- 109 See Bakst 2019 Testimony, *supra* note 3.
- 110 *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/imo/media/doc/WilburTestimony1022192.pdf> (testimony of Iris Wilbur).
- 111 *Id.*
- 112 See A Better Balance, *THE PREGNANT WORKERS FAIRNESS ACT: BILL EXPLAINER*, https://www.abetterbalance.org/wp-content/uploads/2020/02/PWFA-Bill-Explainer_2.17.21.pdf.
- 113 Pregnant Workers Fairness Act, H.R. 2694: Roll Call No. 143, 117th Cong. (2021), <https://clerk.house.gov/Votes/2021143>.
- 114 See *Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination: Hearing Before the Subcomm. on Civil Rights and Human Services of the H. Comm. on Ed. & Lab.*, 117th Cong. (2021), <https://edlabor.house.gov/hearings/fighting-for-fairness-examining-legislation-to-confront-workplace-discrimination>.
- 115 Pregnant Workers Fairness Act, H.R. 1065: Roll Call No. 195, 116th Cong. (2020), <https://clerk.house.gov/Votes/2020195>.



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