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the work and family legal center

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October 10, 2023

Raymond Windmiller
Executive Officer
Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Re: RIN 3046-AB30, Regulations To Implement the Pregnant Workers Fairness Act (29 C.F.R. Part 1636)

Dear Mr. Windmiller:

We are pleased to submit this comment in response to the U.S. Equal Employment Opportunity Commission ("EEOC," "the agency," or "the Commission") Notice of Proposed Rulemaking ("NPRM"), RIN 3046-AB30, Regulations to Implement the Pregnant Workers Fairness Act ("PWFA"), 42 U.S.C. §§ 2000gg *et seq.*[1] **We strongly support** the bipartisan[2] proposed rule and accompanying guidance (the "Interpretive Guidance"). We write with recommendations to further clarify and strengthen the rule, to ensure that it reflects the full protections of the statute.

A Better Balance's Expertise

A Better Balance is a national, non-profit legal services and advocacy organization that 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. Among our chief priorities is advancing the rights of pregnant, postpartum, and lactating workers and workers with related medical conditions.

[1] Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714 (proposed Aug. 11, 2023) (to be codified at 29 C.F.R. pt. 1636) [hereinafter PWFA Proposed Rule].
[2] *See* Press Release, U.S. Equal Emp. Opportunity Comm'n, *EEOC Issues Proposed Rule to Implement the Pregnant Workers Fairness Act* (Aug. 7, 2023), https://www.eeoc.gov/newsroom/eeoc-issues-proposed-rule-implement-pregnant-workers-fairness-act ("'As an advocate for the passage of the PWFA itself, I am proud to have collaborated with my fellow Commissioners to propose a bipartisan rule to help implement this important law,' said Commissioner Andrea R. Lucas.").

A Better Balance led[3] the national movement to pass the federal PWFA, first drawing attention to the problem in our co-president's 2012 *New York Times* op-ed and spurring Representative Jerrold Nadler to introduce legislation to fix it.[4] In the decade since, we led the fight to pass the PWFA, collaborating with lawmakers and a range of diverse stakeholders to draft and refine the statutory text, testifying repeatedly before Congress[5] and at numerous briefings on the need for the law, and bringing the voices of low-wage pregnant and postpartum workers to lawmakers and the public to ensure that workers' lived experiences directly informed the legislation.[6]

We also have been at the forefront of efforts to pass PWFAs in states and municipalities across the country.[7] Following passage, we advocated successfully for state and local agencies to robustly publicize and enforce the laws, including by issuing regulations and guidance,[8] giving

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[3] *See* DINA BAKST, ELIZABETH GEDMARK & SARAH BRAFMAN, A BETTER BALANCE, WINNING THE PREGNANT WORKERS FAIRNESS ACT (2023), https://www.abetterbalance.org/winning-pwfa/.

[4] Dina Bakst, Opinion, *Pregnant, and Pushed out of a Job*, N.Y. TIMES (Jan 30, 2012), https://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html; Press Release, Rep. Jerrold Nadler, Nadler Seeks to Ensure Protections for Pregnant Women in the Workplace (Feb. 16, 2012), https://nadler.house.gov/news/documentsingle.aspx?DocumentID=390969; Democratic Women's Caucus, *Democratic Women's Caucus, Reps. Nadler, Scott, McBath Hold Virtual Press Conference Ahead of Vote to Defend Pregnant Workers' Rights*, FACEBOOK (Sept. 18, 2020), https://www.facebook.com/watch/?v=909577469570357 (statement of Rep. Jerrold Nadler) ("Nearly ten years ago, I read an Op-Ed in The New York Times by Dina Bakst, an attorney with A Better Balance who had been representing pregnant workers seeking accommodations to help them stay on the job throughout their pregnancy. Ten years and countless meetings later we are finally here getting ready for a hopefully bipartisan vote on the floor.").

[5] *Fighting for Fairness: Examining Legislation to Confront Workforce Discrimination (H.R. 1065): Hearing Before the Subcomms. on Civil and Human Services and Workforce Protections of the H. Comm. on Ed. & Lab.*, 117th Cong. (2021) [hereinafter *2021 Bakst Testimony*]; https://www.abetterbalance.org/resources/written-testimony-in-support-of-pregnant-workers-fairness-act-and-pump-act-for-fighting-for-fairness-congressional-hearing/ (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 *2019 Bakst Testimony*], https://www.abetterbalance.org/resources/written-testimony-in-support-of-the-pregnant-workers-fairness-act-for-long-over-due-congressional-hearing/ (testimony of Dina Bakst).

[6] BAKST, GEDMARK & BRAFMAN, WINNING THE PREGNANT WORKERS FAIRNESS ACT, *supra* note 3.

[7] *See State Pregnant Workers Fairness Laws*, A BETTER BALANCE, https://www.abetterbalance.org/resources/pregnant-worker-fairness-legislative-successes/ (last updated Sept. 29, 2023); *see also* A BETTER BALANCE, FROM STATEHOUSES TO CONGRESS: PAVING THE WAY FOR THE FEDERAL PREGNANT WORKERS FAIRNESS ACT (2022), https://www.abetterbalance.org/wp-content/uploads/2022/02/PWFA-Statehouses-to-Congress-Report.pdf.

[8] *See, e.g.*, A Better Balance, Comment Letter to N.Y.C. Comm'n on Human Rights on Proposed Rules on Discrimination Based on Pregnancy Childbirth, or Related Medical Conditions (Nov. 12, 2020), https://www.abetterbalance.org/resources/comment-on-nycchrs-proposed-rules-on-discrimination-based-on-pregnancy-childbirth-or-related-medical-conditions (comment on proposed regulations implementing New York City's PWFA); *see also* CONN. COMM'N ON HUM. RIGHTS & OPPORTUNITIES, LEGAL ENFORCEMENT GUIDANCE: PREGNANCY, CHILDBIRTH, OR RELATED CONDITIONS AT WORK 3 (Apr. 2019), https://portal.ct.gov/-/media/CHRO/20190412RevisedProposedPregnancyGuidancepdf.pdf (legal enforcement guidance implementing Connecticut's PWFA, which was directly informed by A Better Balance's recommendations); LA. COMM'N ON HUMAN RIGHTS, PREGNANCY AND CHILDBIRTH NONDISCRIMINATION LAW (PCNL): WHAT YOU SHOULD KNOW,

us crucial insight into the kinds of clarity that employers and workers need and that agency regulations and guidance can and should provide.

Importantly, we run a national free and confidential legal helpline, through which we speak with many thousands of workers every year, disproportionately low-wage working women of color.[9] Prior to passage of the federal PWFA, we heard daily from pregnant and postpartum workers in jurisdictions with state and local PWFAs, allowing us to gain a keen understanding of how PWFA laws were working on the ground and how agencies could best effectuate the intent of the new laws. We also heard daily from workers in states without PWFAs, especially during the COVID-19 pandemic, highlighting the urgent need to pass a federal law to protect workers in every corner of the country.[10]

In the three months since the federal PWFA went into effect, we have received calls on our helpline from over 300 workers in 44 states across the country with questions about the new law. These direct, one-on-one conversations with pregnant and postpartum workers have positioned us well to observe how the federal PWFA is currently working across many different sectors and industries, including healthcare, education, retail, fast food, child care, manufacturing, security, public safety, and government. These conversations have also illuminated subjects where workers, employers, health providers, and other stakeholders would benefit from greater clarity from the Commission through regulation and guidance.

Our recommendations in this comment reflect and are rooted in what we are hearing every day from workers seeking to marshal this new civil rights law to safeguard their health and the health of their pregnancies, protect their paychecks, and fight for their right to be full humans at work.[11]

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https://gov.louisiana.gov/assets/docs/LCHRPCNLFLYERed.pdf (last accessed Oct. 5, 2023) (same, for guidance interpreting Louisiana's PWFA).

[9] *See Get Help*, A BETTER BALANCE, https://www.abetterbalance.org/get-help/ (last visited Oct. 5, 2023).

[10] Dina Bakst, Letter to the Editor, *Pregnant Workers and COVID-19*, N.Y. TIMES (Nov. 9, 2020), https://www.nytimes.com/2020/11/09/opinion/letters/pregnant-workers-covid-19.html; *see also* A BETTER BALANCE, 2021 ISSUE BRIEF: THE PANDEMIC & THE PREGNANT WORKERS FAIRNESS ACT (2021), https://www.abetterbalance.org/wp-content/uploads/2021/10/PWFA-Issue-Brief_FINAL_10.27.21.pdf.

[11] *See* Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEORGETOWN L.J. 167, 220–226 (2020), https://law.yale.edu/sites/default/files/documents/faculty/papers/the_pregnant_citizen_siegel_final_pdf.pdf (explaining how the PWFA works to foster equal citizenship and attack sex-based stereotypes and gendered workforce exclusions); *see also* Reva B. Siegel, *Pregnancy as a Normal Condition of Employment*, 59 WILLIAM & MARY L. REV. 969 (2018), https://scholarship.law.wm.edu/wmlr/vol59/iss3/5/.

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Where possible we have indicated the worker's industry. Except where noted, all stories reflect the experiences of workers seeking accommodations after the federal PWFA went into effect.

The PWFA Is An Expansive, Groundbreaking Law That Requires a Robust Rule to Fully and Faithfully Effectuate Congressional Intent

Since the PWFA went into effect, our helpline staff has been moved to hear from dozens and dozens of low-wage workers who called to thank us for working to pass the law, and to tell us just how transformative it has been in their lives and in the lives of their growing families. Indeed, the PWFA's impact has been immediate and striking: In some cases, workers have shared with us that before June 27, 2023—the PWFA's effective date—their employers automatically denied or outright ignored their requests for accommodation; after June 27, they suddenly approved them.

Getting the accommodations they need and deserve has allowed workers to protect their health and their pregnancies, and has shielded many from the economic precarity that used to accompany pregnancy, when employers would automatically push workers out of their jobs rather than accommodate their health needs.[12] We also have seen the new legal right to accommodation give pregnant workers a strong sense of dignity and belonging in the workforce, making clear that pregnancy and work need not be incompatible, reducing stigma and stereotyping, and reinscribing pregnancy as an ordinary, routine part of employment.

[12] *See generally* DINA BAKST, ELIZABETH GEDMARK & SARAH BRAFMAN, A BETTER BALANCE, LONG OVERDUE: IT IS TIME FOR THE PREGNANT WORKERS FAIRNESS ACT (2019), https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf (describing the problem).

Even as we have witnessed the PWFA's groundbreaking benefits for many workers, we do not wish to tell an overly-cheerful story about the law's early successes. As described throughout our comment, we also hear regularly from workers—particularly low-wage women of color—whose employers have violated their rights under the new law, providing ineffective accommodations, delayed accommodations, or no accommodations at all; subjecting workers to arduous documentation requirements that delay or outright frustrate their ability to obtain the accommodations they need; misleading workers about their rights; forcing workers onto unpaid leaves they do not seek and on which they cannot survive; and outright firing workers under punitive attendance policies for exercising their legally-protected right to time off under the PWFA.

In order to faithfully and fully effectuate the letter and spirit of the law, the EEOC must issue regulations and guidance that are robust, clear, and comprehensive. We believe the EEOC has done so in its bipartisan proposed regulation, and we offer recommendations for how the agency may further strengthen and clarify the final rule. Only then will the PWFA's promise—of ensuring no worker has to choose between their health and their paycheck—become a lived reality in warehouses, storefronts, schools, and hospitals across the country.

Overview of Comment

We wholeheartedly commend the EEOC for its workable and legally-grounded proposed regulations and guidance reflecting the strong protections and broad scope of the PWFA. Because we have heard firsthand from hundreds of workers applying this groundbreaking new law to their own specific situations, we know just how invaluable the agency's clear, commonsense, and measured rule will prove to workers seeking accommodations in workplaces across the country, and to employers seeking to comply with their obligations.

We especially commend the EEOC for recognizing:

- That a worker is still "qualified" for their job even if they need some of their job duties excused due to pregnancy, childbirth, or related conditions;
- That leave is a reasonable accommodation under the PWFA, including intermittent time off for prenatal and postnatal healthcare appointments, postpartum depression, and recovery from childbirth;
- The high bar of "undue hardship" and the helpful, workable use of the "predictable assessment" approach;
- The strong prohibitions on retaliation and interference, especially in the unlawful maintenance and application of "no fault" attendance policies; and
- The appropriately-expansive scope of the terms "known limitation" and "pregnancy, childbirth, or related medical conditions"—which have long been understood to include lactation, fertility, miscarriage, and abortion—which furthers the statutory purpose to promote workers' health and financial security.

In addition, we thank the Commission for including a wide range of concrete, illustrative hypotheticals throughout the rule, which will help ensure workers and employers understand their rights and responsibilities.

Key Recommendations

To further strengthen the proposed regulation and Interpretive Guidance, we recommend the Commission:

1. Add additional kinds of accommodations to the list of accommodations for which requiring supporting documentation is not reasonable (such as rest breaks, uniform or dress code modifications, and time off to recover from childbirth and attend certain healthcare appointments) (§ 1636.3(l)(1)(iii));
2. Clarify that the statute requires no "magic words" or "two-part" test in order to trigger an employer's obligation to engage in the interactive process, and sharpen the definition of "interactive process" to help workers and employers better understand their role and responsibilities under the statute (§ 1636.3(d));
3. Clarify that failure to provide an interim reasonable accommodation for urgent health needs violates the statute, as does punishing a worker for needing unforeseeable leave as a reasonable accommodation for a health emergency (§ 1636.3(h));
4. Clarify the appropriate sources of evidence of a worker's "essential functions," in accordance with the PWFA's novel statutory text and the legislative record (§ 1636.3(g)(2));
5. Add to the "predictable assessments" list additional kinds of accommodations that will, in virtually all cases, result in a finding of no undue hardship (such as rest breaks, uniform or dress code modifications, and moving an employee's workstation closer to a restroom) (§ 1636.3(j)(4));
6. Reflect the statute's broad, expansive coverage of conditions by: (i) re-emphasizing workers' right to accommodations needed to prevent problems or complications from arising, and (ii) deleting the Interpretive Guidance's medically inaccurate discussion of whether or not a condition is sufficiently "related" to pregnancy (since pregnancy is a major bodily change that affects nearly every bodily system) (§ 1636.3(b));
7. Clarify that unnecessary delay at *any point* during the accommodation process may violate the PWFA (§ 1636.4(a));
8. Explicitly state that it is unlawful to penalize or threaten to penalize workers for PWFA-protected absences, regardless of whether they are new, part-time, or temporary/seasonal employees, and that it is likewise unlawful to fail to adjust or clarify attendance policies/procedures (including "points," bonus, and 90-day probationary policies) and mandatory overtime policies as a reasonable accommodation under the PWFA (§§ 1636.3(h), 1636.3(i), 1636.5);
9. Clarify that the definition of "in the near future" extends to generally one-year postpartum (two years for lactation) (§ 1636.3(f)(2)(ii)); and
10. Clarify that the statutory provision "good faith efforts" shields employers from damages liability only in extremely limited circumstances (§ 1636.5).

Discussion and Recommendations

We detail our recommendations below.

For ease of reading, we have **bolded** our recommendations. For our strongest recommendations, we use and bold the words "we strongly urge" or "we urge." Where we offer specific proposed text for use in the final regulations and guidance, we have <u>underlined</u> it.

I. 1636.1 Purpose

We support the proposed regulation and Interpretive Guidance regarding the purpose of the PWFA.

II. 1636.2 Definitions — General

We support the proposed regulation and Interpretive Guidance concerning general definitions.

III. 1636.3 Definitions — Specific to PWFA

A. 1636.3(a)(1) — Known

We support the definition of "known," which is drawn closely from the statute.

B. 1636.3(a)(2) — Limitation

PROPOSED REGULATION § 1636.3(a)(2)

We strongly support the proposed regulation's definition of "physical or mental condition" as "an impediment or problem that may be modest, minor, and/or episodic."[13] We particularly commend the Commission for recognizing that modest, minor, and episodic impediments "do[] not need to meet the definition of disability from the Americans with Disabilities Act" ("ADA") to be covered by the PWFA.[14] In our experience speaking with hundreds of callers since the PWFA went into effect in late June 2023, some employers continue to seriously misunderstand the law, insisting incorrectly that workers must have a "disability" in order to have a right to accommodations under the PWFA. For example, Kaitlyn, a nurse, contacted our helpline after her employer and union told her that they "absolutely do not have to accommodate a pregnant worker," absent disability. Likewise, a bank employee experiencing nausea and pelvic pain

[13] PWFA Proposed Rule, 88 Fed. Reg. at 54767.
[14] *Id.*

called us after her employer told her that her medical documentation was insufficient because it did not contain a specific diagnosis. In addition, we hear almost daily from pregnant workers whose employers have told them to fill out "ADA" forms to document their "disability,"[15] even though they are not claiming to have disabilities and are seeking accommodation solely for pregnancy-related health needs. As the Commission appropriately recognizes, the text of the PWFA (as well as the legislative record) is clear on this matter: "[T]he term 'known limitation' means physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions . . . *whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990*."[16]

Still, there is more we believe the Commission can and should do to make clear to employers and workers the broad scope of the PWFA's coverage. Specifically, **we urge** the agency to modify the definition of "physical or mental condition" to expressly include the following underlined text: "an impediment, problem, or need that may be modest, minor, and/or episodic. The physical or mental condition may also be that an employee or applicant affected by pregnancy, childbirth, or related medical conditions has a need or a problem related to maintaining their health or the health of the pregnancy . . . "

- As the agency appropriately[17] recognizes in both its proposed regulation and Interpretive Guidance, the statute protects workers who have a "need" related to "maintaining their health or the health of their pregnancy,"[18] which includes "avoiding risk to the employee's or applicant's health or to the health of their pregnancy."[19]

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[15] *See* discussion *infra* Section O (providing examples of helpline callers forced to provide ADA paperwork in order to obtain pregnancy accommodations under the PWFA, even though they were not claiming to have a disability).

[16] 42 U.S.C. 2000gg(4) (emphasis added).

[17] Congress passed the PWFA specifically to ensure that workers with limitations related to pregnancy, childbirth, or related medical conditions could get the accommodations they need to prevent problems or complications from ever arising. *See, e.g.,* H. Comm. on Ed. & Lab., *Long Over Due: Exploring the Pregnant Workers' Fairness Act*, YOUTUBE (Oct. 22, 2019), https://www.youtube.com/watch?v=SI3WK-7KVNE (statement of Rep. Jahana Hayes, at 1:08:43) (testifying to her experience as a teacher, with an uncomplicated pregnancy, who developed bladder-related complications as the result of being denied bathroom breaks); 168 CONG. REC. H10527 (daily ed. Dec. 23, 2022) (statement of Rep. Jerrold Nadler) (describing the need for accommodations to prevent complications from arising and noting that "[w]hen pregnant women are denied accommodations, they face health risks including miscarriage and premature births" and "[t]hose who continue to work without necessary accommodations, because they can't afford not to work, risk a range of health complications"); H.R. REP. NO. 117-27, pt. 1, at 22 (describing the need for a right to reasonable accommodations to allow "pregnant women [to] avoid or limit certain risks in the workplace, including exposure to certain compounds, heavy lifting, overnight work, extended hours, or prolonged periods of sitting or standing" so as to prevent or reduce the "increased risk of miscarriage, preterm birth, low birth weight, urinary tract infections, and fainting as a result of these exposures"); *id.* at 23 (describing the need for reasonable accommodation to avoid COVID-19 infection, given pregnant people's "increased risk for severe illness from COVID-19"); *Markup of H.R. 1065 Pregnant Workers Fairness Act*, 117th Cong., at 54:46 (2021), https://www.youtube.com/watch?v=p6Ie2S9sTxs (statement of Rep. Kathy Manning) (describing the purpose of the PWFA as ensuring pregnant workers can "deliver healthy babies while maintaining their jobs").

[18] PWFA Proposed Rule, 88 Fed. Reg. at 54767.

[19] PWFA Proposed Rule, 88 Fed. Reg. at 54773 & n.3.

- The reason to add the word "need" to the very first sentence of the definition, alongside "problem" and "impediment"—rather than use the term solely in the second sentence—is to better help employers and courts understand the scope of limitations the PWFA covers.[20] (Such framing should be mirrored in the Commission's public education materials, as well.)
- In our experience fielding helpline calls from workers, many employers still do not understand that a worker is entitled to accommodation for ordinary pregnancy-related symptoms and needs, including avoiding a risk or complication from arising in the first place.
    - For example, a nurse contacted our helpline after her doctor advised her to request light duty (office) work in order to reduce the risk that the stress of her full-duty job would exacerbate her already-high blood pressure. Rather than accommodate her health needs, her employer forced her onto leave—demonstrating that greater clarity about the obligation to accommodate ordinary "needs" is urgently needed.
- We have likewise heard from dozens of workers who are unsure whether they have a right to accommodation for ordinary needs stemming from pregnancy, childbirth, or related medical conditions, suggesting that workers too would benefit from greater clarity from the agency. For example:
    - A deputy sheriff contacted us to learn her rights after she was advised by her doctor to seek temporary reassignment because the restrictiveness of her bullet-proof vest could decrease her milk supply (as it had during a prior pregnancy).
    - A mail delivery worker contacted our helpline to ask whether she could seek an accommodation to reduce the hours she spent walking each day to avoid significant fatigue and discomfort in the last month of her pregnancy.
- All of these workers required accommodation for a health need that had not yet become an "impediment" or "problem" but that still required accommodations to avoid such problems down the road—a need covered by the PWFA, and a primary reason for passing the law. We believe employers will better comprehend their PWFA obligation to accommodate such needs if the agency adds the word "need" to the very first sentence of the definition (following "impediment or problem") as described above, and **we strongly urge** the agency to incorporate such language.

[20] We have seen in our state public education and enforcement work how meaningful it is for an agency to clearly convey that a PWFA statute covers ordinary needs. For example, the statutory text of the New York State PWFA requires employers to accommodate "pregnancy-related condition[s]." N.Y. EXEC. L. §§ 292.21-f, 296.3(a). The New York State Division of Human Rights has helpfully clarified that the term "pregnancy-related condition" means "[a]ny medically-advised need," including ordinary needs of uncomplicated pregnancy "such as the need for extra bathroom breaks, or increased water intake." N.Y.S. DIV. HUM. RIGHTS, GUIDANCE ON PREGNANCY DISCRIMINATION AND REASONABLE ACCOMMODATION OF PREGNANCY-RELATED CONDITIONS FOR EMPLOYERS IN NEW YORK STATE, https://dhr.ny.gov/system/files/documents/2022/08/nysdhr-guidance-pregnancy-discrimination.pdf (last accessed Oct. 5, 2023); *see also* N.Y.S. DIV. HUM. RIGHTS, PREGNANCY DISCRIMINATION IS AGAINST THE LAW, https://dhr.ny.gov/system/files/documents/2022/08/nysdhr-pregnancy-factsheet.pdf (last accessed Oct. 5, 2023). We have found the agency's clear, unambiguous statement of the breadth of needs covered extremely valuable in improving employers' and workers' understanding of the law and compliance with it.

PROPOSED GUIDANCE ON § 1636.3(a)(2)

The proposed Interpretive Guidance is similarly clear and reflective of the broad scope of the PWFA, and we support it wholeheartedly. **We especially commend** the agency's recognition that "the PWFA does not require a specific level of severity"[21]—a recognition that is grounded in the statutory text, legislative record, and purpose of the PWFA.

We offer several recommendations to strengthen this section of the guidance:

- Because the guidance likewise defines "physical or mental condition" as a "modest, minor, and/or episodic impediment or problem," **we urge** the Commission to modify the language to reflect that the statute covers an "impediment, problem, or need," for the reasons described above.
- **We suggest** the agency include a menstruation-related example in the list of physical or mental conditions that may be related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions at 88 Fed. Reg. at 54773–74.[22]
- **We support** the agency's recognition that the PWFA entitles workers to accommodation to protect their own health *and* the health of their pregnancy, which we understand to include the health of the fetus. **We suggest** the agency include an example that further demonstrates the need to accommodate needs related to fetal health/risks at 88 Fed. Reg. at 54773–74. For example, the agency could include an example such as reducing exposure to the Zika virus, which can pass from a pregnant worker to the fetus and cause birth defects.[23] The agency should make clear that such a request must be initiated by the employee and underscore, per § 1636.4(b), that employers cannot make assumptions about what is or is not safe for a pregnant worker to do "in the mistaken belief that the worker needs some type of help."[24]
- **We strongly recommend** the agency strike the following text: "To the extent that a covered entity has reasonable concerns about whether a physical or mental condition or limitation is "related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions," the employer may request information from the employee regarding the connection, using the principles set out in section 1636.3(l) about the interactive process and supporting documentation."[25]
    - The above language incentivizes inappropriate and invasive interrogation and second-guessing of employees' conditions, and creates a backdoor for requiring supporting documentation where it would not otherwise be permissible. As discussed in greater detail in our Section C discussion of 88 Fed. Reg. at 54775,

[21] PWFA Proposed Rule, 88 Fed. Reg. at 54773.
[22] For a discussion of the statute's coverage of menstruation and further recommendations on how the Commission can strengthen the final rule on this topic, *see generally* Marcy Karin & Deborah Widiss, Comment Letter on Regulations to Implement the Pregnant Workers Fairness Act NPRM (RIN 3046-AB30) (Oct. 10, 2023); Period Law, Comment Letter on Regulations to Implement the Pregnant Workers Fairness Act NPRM (RIN 3046-AB30) (Oct. 10, 2023).
[23] *About Zika*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/zika/about/index.html (last accessed Oct. 5, 2023).
[24] *See* PWFA Proposed Rule, 88 Fed. Reg. at 54740 n.149 (citing *UAW v. Johnson Controls*, 499 U.S. 187 (1991) (striking down employer's fetal protection policy that limited the opportunities of women)).
[25] PWFA Proposed Rule, 88 Fed. Reg. at 54774.

pregnancy can cause changes to every bodily system and it is not always possible for a particular condition (e.g., knee pain) to be traced to pregnancy with 100% certainty, even if it is most likely related to pregnancy. Accordingly, a healthcare provider may be unable to or feel uncomfortable so certifying. Permitting employers to require documentation to confirm if a limitation is related to pregnancy, childbirth, or a related medical condition might frustrate a worker from receiving an accommodation for a need or limitation that is almost certainly related to pregnancy, simply because the worker's provider feels unable to so certify with complete certainty. (For additional reasons to reduce the rule's reliance on supporting documentation more generally, see Section O below.)

- If the Commission is unwilling to strike the above text, then at minimum it should change "should" to "must" at 88 Fed. Reg. at 54774, so that it is clear that "even if a covered entity concludes that a limitation is not covered by the PWFA, the covered entity must consider whether the limitation constitutes a disability that is covered by the ADA." A covered entity must engage in an interactive process when on notice that an employee might have a qualifying disability under the ADA.

C. 1636.3(b) — Pregnancy, childbirth, or related medical conditions

PROPOSED REGULATION § 1636.3(b)

We strongly support the proposed regulation's definition of "pregnancy" and "childbirth" as including (but not limited to) current, past, potential, or intended pregnancy, labor, and childbirth, which accords with longstanding agency interpretation of the terms[26] and decades of case law.[27]

We recommend the Commission clarify that the term pregnancy includes (but is not limited to) "common pregnancy symptoms," such as increased bodily pain, discomfort, fatigue, changes in thirst and appetite, headaches, lightheadedness, mood changes, heartburn and indigestion, cramps, and changing body shape.

We support the proposed regulation's definition of "related medical conditions," and particularly commend the agency's inclusion of "termination of pregnancy, including via miscarriage, stillbirth, or abortion"[28] and infertility and fertility treatment, which likewise

[26] *See, e.g.*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES I.A. (June 25, 2015), https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues (explaining that the Title VII term "pregnancy, childbirth, or related medical conditions" includes "current pregnancy, past pregnancy, potential or intended pregnancy, [and] medical conditions related to pregnancy or childbirth," such as infertility treatment, use of contraception, lactation, breastfeeding, and the decision to have or not to have an abortion, among others).

[27] *See, e.g.*, PWFA Proposed Rule, 88 Fed. Reg. at 54775, n.11 (collecting cases).

[28] In addition, the agency's inclusion of "termination of pregnancy" furthers the statutory purpose of the PWFA: to promote the health and economic security of pregnant persons. *See supra* note 17 and *infra*

notes 94, 101 (citing legislative sources discussing purpose of the PWFA). Medical consensus reflects that abortion bolsters pregnant workers' mental and physical health. For example, because "[p]regnancy imposes significant physiological changes on a person's body [which] . . . can exacerbate underlying or preexisting conditions, like renal or cardiac disease, and can severely compromise health or even cause death," abortion promotes the physical health of a pregnant worker. AM. C. OF OBSTETRICIANS & GYNECOLOGISTS & PHYSICIANS FOR REPROD. HEALTH, ABORTION CAN BE MEDICALLY NECESSARY (Sept. 25, 2019), https://www.acog.org/news/news-releases/2019/09/abortion-can-be-medically-necessary.

In addition, for many people, terminating a pregnancy also provides the opportunity to have a healthy subsequent pregnancy. *See, e.g.*, Brief for Michele Coleman Mayes, Claudia Hammerman, Charanya Krishnaswami, and 365 Other Legal Professionals Who Have Exercised Their Constitutional Right To An Abortion As Amici Curiae Supporting Petitioners at 13, *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103 (2020) (No. 18-1323, No. 18-1460) ("In a matter of hours, we went from a perfectly healthy pregnancy to one that was doomed . . . We decided to terminate the pregnancy, and to give up the only chance I would ever have to hold my son, for the sake of my health . . . I know with absolute certainty that adding bureaucratic or institutional harms on top of the ones that biology and fate deliver is an unnecessary cruelty. . . . My living child could have been motherless; my husband a widower. I am here, and currently pregnant again, because I was able to receive compassionate and timely health care without state interference.").

Likewise, "[r]esearch has shown that people who face logistical barriers to accessing abortion care . . . have more symptoms of stress, anxiety, and depression." Zara Abrams, *The Facts About Abortion and Mental Health*, 53 AM. PSYCH. ASSN. 40 (Apr. 21, 2023), https://www.apa.org/monitor/2022/09/news-facts-abortion-mental-health. Needing job-protected time off to seek, travel to, obtain, and/or recover from abortion is one such logistical barrier. *See, e.g.*, Jonathan M. Bearak, Kristen Lagasse Burke & Rachel K. Jones, *Disparities & Change Over Time in Distance Women Would Need to Travel to Have an Abortion in the USA: A Spatial Analysis*, 11.2 THE LANCET E493 (Oct. 3, 2017), https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(17)30158-5/fulltext (documenting the significant distances pregnant persons in the United States must travel in order to obtain abortion, which can require overnight stays and time off work, due to bans and 24-72-hour mandatory waiting periods); *The Importance of Access to Abortion*, AM. ACADEMY OF PEDIATRICS (July 14, 2023), https://www.aap.org/en/patient-care/adolescent-sexual-health/equitable-access-to-sexual-and-reproductive-health-care-for-all-youth/the-importance-of-access-to-abortion/ (describing how "[t]raveling to a clinic requires people to take time off work" and how, "[i]n states that require mandatory waiting periods between abortion counseling and an abortion procedure, people who are pregnant may have to take multiple days off work").

Finally, pregnant workers unable to access abortion "struggle[] more financially than those who receive[] an abortion, as evidenced by lower credit scores, more bankruptcies and evictions, and higher poverty rates"—precisely the financial hardships the PWFA was meant to mitigate. Frank C. Worrell, DENYING ABORTIONS ENDANGERS WOMEN'S MENTAL AND PHYSICAL HEALTH, AM. PUB. HEALTH ASSN. (Mar. 8, 2023), https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2023.307241. This is particularly true for lower-income workers who "face greater challenges in taking time off work" and whose needs motivated passage of the PWFA. *The Importance of Access to Abortion*, AM. ACADEMY OF PEDIATRICS (July 14, 2023), https://www.aap.org/en/patient-care/adolescent-sexual-health/equitable-access-to-sexual-and-reproductive-health-care-for-all-youth/the-importance-of-access-to-abortion/.

accords with longstanding agency[29] and judicial interpretations of the term,[30] as well as medical and commonsense understandings of the term.[31] Not only does abortion

We urge the agency, however, to include additional examples of "related medical conditions" in the regulatory text to make clear the full scope of the term. For example, **we recommend** the agency:

- Add examples relating to the need to *avoid or prevent* health complications (both to the worker and to the pregnancy, including the fetus) from arising in the first place, such as risk of exposure to toxins or excessive heat. (The current examples all reflect *existing* problems or conditions, rather than the need to avoid or prevent *future* problems.)
    - As climate change worsens, we hear regularly from pregnant workers seeking to safeguard their health from dangerous heat.[32] For example, a mechanic contacted

[29] Some commenters have claimed that the EEOC's proposal to include "having or choosing not to have an abortion" as a pregnancy- or childbirth- related medical condition violates the "major questions" doctrine. This assertion is meritless. The "major questions" doctrine only applies in "extraordinary cases" where "the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2595 (2022) (citations omitted). Only those extreme cases in which an agency "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority" are subject to the major questions doctrine. *Id*. at 2610 (citation omitted). None of these indicia are applicable here. The EEOC has interpreted a brand-new statute for the first time, not claimed to newly-discover previously-unused authority. The interpretation is wholly consistent with the EEOC's longstanding interpretation of similar language under the Pregnancy Discrimination Act. Moreover, the proposed regulation falls well within the EEOC's core expertise: nondiscrimination and reasonable accommodation obligations for employees in the workplace. The economic impact of the proposed definition—requiring reasonable accommodations for having or choosing not to have an abortion, absent undue hardship to the employer—is extremely limited, and unlike the magnitude of economic impact found in recent major questions cases. And, while abortion is a topic of political concern, the proposed regulation's treatment of it is not political as contemplated under the "major questions" doctrine because requiring a reasonable accommodation does not impact legal restrictions on, or access to, abortion in the various states.

[30] *See, e.g., Doe v. C.A.R.S. Prot. Plus, Inc*., 527 F.3d 358, 364 (3d Cir. 2008) ("'[T]he legislative history of section 2000e(k) provides the following guidance: 'Because [the Pregnancy Discrimination Act] applies to all situations in which women are "affected by pregnancy, childbirth, and related medical conditions," its basic language covers women who chose to terminate their pregnancies. Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion.' H.R. CONF. REP. NO. 95–1786 at 4 (1978) as reprinted in 95th Cong., 2d Sess. 4, 1978 U.S.C.C.A.N. 4749, 4766.").

[31] *See, e.g. Facts Are Important: Abortion Is Healthcare*, AM. C. OF OBSTETRICIANS AND GYNECOLOGISTS, https://www.acog.org/advocacy/facts-are-important/abortion-is-healthcare (last visited Sept. 18, 2023).

[32] For more on the impact of climate on pregnancy, and for a discussion of the need for PWFA accommodations to be responsive to the consequences of heat and other climate concerns, *see Briefing Congress on Black Maternal Health & the Climate Crisis*, A BETTER BALANCE (June 1, 2021), https://www.abetterbalance.org/briefing-congress-on-black-maternal-health-the-climate-crisis/; Margaret H. Zhang, *Pregnant Workers and the Climate Crisis*, 91 Tenn. L. Rev. (2024 forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4421564; Human Rights Watch, *US: Heat Emergency Plans Missing Pregnancy, Racial Justice: Cities, Federal Agencies, Should Broaden*

us when her employer forced her out onto unpaid leave after she requested temporary reassignment to an air-conditioned space to protect her health. Likewise, a pregnant construction worker requested rest breaks after fainting while working outside in 100-degree summer heat. Rather than accommodate her, her employer fired her. (She contacted us shortly before the federal PWFA went into effect, from a state that already had a PWFA on the books.)

    - Excessive heat can impact pregnant workers in other ways, which the PWFA should also be understood to cover. For example, a manufacturing worker working in the 120+ degree Arizona summer heat struggled to use her employer's excessively hot, unventilated bathroom. She asked for a reasonable accommodation under the PWFA to make the bathroom usable, and her employer installed a cooling mechanism.

- Add the example of oocyte cryopreservation (egg freezing)—which workers often pursue in the absence of known "infertility" or in the absence of fertility "treatment" (due to age, cancer treatment, etc.)—as well as fertility-related diagnostics.
- Add additional examples of lactation-related conditions, such as difficulty with attachment and nipple damage. For example, we spoke with a worker, prior to the federal PWFA, who needed a remote-work accommodation so that she could breastfeed her baby directly—a medical necessity due to an anatomical condition that prevented her from using a pump to express milk.
- Add fatigue as an additional example.[33] We often hear on our helpline from workers experiencing significant fatigue that requires accommodation under the PWFA, such as being excused from mandatory overtime.
- Add menopause as an additional example of a pregnancy-related condition that affects many workers and can require accommodation.[34] For example, prior to the passage of the PWFA, we spoke to a retail worker who was ineligible for time off under the Family and Medical Leave Act ("FMLA"), and who was terminated from her job because of absences due to severe pre-menopausal bleeding—even though when she called out from

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Responses to Climate Change (Oct. 23, 2020), https://www.hrw.org/news/2020/10/23/us-heat-emergency-plans-missing-pregnancy-racial-justice; Jessica Kutz, *Working in Extreme Heat is Risky for Pregnant Workers. Advocates Say Passing the Pregnant Workers Fairness Act Could Help*, THE 19TH (Nov. 28, 2022), https://19thnews.org/2022/11/extreme-heat-pregnant-workers-fairness-act-could-help/.

[33] "Fatigue" is considered a related medical condition under state PWFA analogues. *See, e.g.*, CONN. COMM'N ON HUM. RIGHTS & OPPORTUNITIES, LEGAL ENFORCEMENT GUIDANCE, *supra* note 8, at 3 ("Pregnancy-related symptoms and conditions that may give rise to the need for reasonable accommodations or a reasonable leave of absence from work include, but are not limited to . . . fatigue."); *see also* CTR. FOR WORKLIFE LAW, PREGNANCY, CHILDBIRTH AND RELATED MEDICAL CONDITIONS: COMMON WORKPLACE LIMITATIONS & REASONABLE ACCOMMODATIONS EXPLAINED 2, https://pregnantatwork.org/wp-content/uploads/Workable-Accommodation-Ideas.pdf (last accessed Oct. 5, 2023) (explaining that "[d]uring pregnancy, people experience normal physical changes that impact numerous bodily systems" and may include "fatigue").

[34] *See, e.g., Flores v. Va. Dep't of Corrections*, No. 5:20-cv-00087, 2021 WL 668802, at *3-5 (W.D. Va. Feb. 22, 2021) (noting plaintiff's "strong argument" that "perimenopausal menstruation, as a condition which only affects those with female reproductive organs, is a related medical condition to pregnancy").

work she indicated that her absences were for medical issues and informed her manager of the specific medical problem she was having. She struggled to find a job afterward.[35]

- Add examples of conditions that are "affected by" pregnancy, childbirth, or related medical conditions—i.e., exacerbated by pregnancy or childbirth. Including additional examples will clarify that workers may need accommodations to mitigate an existing condition, chronic illness, or disability that is aggravated by pregnancy or childbirth or that is aggravated because the employee must discontinue their usual treatment or medication due to pregnancy. For example, a worker with irritable bowel syndrome ("IBS") that is exacerbated by morning sickness should be allowed to take longer lunch breaks to avoid triggering an IBS flare-up (regardless of whether their IBS was already being accommodated in other ways), and a worker who has to stop taking their usual medication for ADHD while pregnant should be eligible for accommodations related to any ADHD symptoms they experience.

PROPOSED GUIDANCE ON § 1636.3(b)

As above, **we strongly support** the agency's recognition of the broad scope of the statutory term "pregnancy, childbirth, or related medical conditions."

We have serious concerns, however, with the Interpretive Guidance's discussion at 88 Fed. Reg. at 54775 of when a medical condition is or is not "related" to pregnancy or childbirth, and **we urge** the Commission to make several changes recommended below. Currently, the EEOC's guidance encourages employers to second guess workers' own attestations regarding their medical conditions by obsessing over whether such conditions are related to or exacerbated by pregnancy. For instance, the guidance invokes "high blood pressure" as a potential example of a condition that might not be pregnancy-related and thus would not be eligible for accommodation under the PWFA.[36] But pregnancy is a major bodily change that impacts diverse bodily systems,[37] and high blood pressure in particular is an extremely dangerous condition during pregnancy and childbirth and a leading cause of maternal death.[38] Preexisting hypertension (high blood pressure) and hypertension developed before the twentieth week of pregnancy are medically categorized as "chronic hypertension" for any pregnant person carrying the diagnosis.[39] As such, high blood pressure during pregnancy is always related to pregnancy.

Likewise, medical conditions that may seem unrelated to pregnancy, such as knee pain, are often directly related to pregnancy. For example, pregnancy-related weight gain or weight

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[35] For a discussion of the PWFA's coverage of menopause-related needs, *see* Marcy Karin & Deborah Widiss, Comment Letter on Regulations to Implement the Pregnant Workers Fairness Act NPRM (RIN 3046-AB30) (Oct. 10, 2023); Period Law, Comment Letter on Regulations to Implement the Pregnant Workers Fairness Act NPRM (RIN 3046-AB30) (Oct. 10, 2023).
[36] PWFA Proposed Rule, 88 Fed. Reg. at 54775.
[37] CTR. FOR WORKLIFE LAW, COMMON WORKPLACE LIMITATIONS & REASONABLE ACCOMMODATIONS EXPLAINED, *supra* note 33, at 2.
[38] *Pregnancy and High Blood Pressure*, STANFORD MED. HEALTH CARE, https://stanfordhealthcare.org/medical-conditions/womens-health/pregnancy-and-high-blood-pressure.html (last accessed Oct. 5, 2023).
[39] *Id.*

redistribution can cause increased pressure on the knees, and pregnancy-related loosening of the ligaments can similarly impact joint pain and health.

Further, it may not always be possible for a worker, or their health provider, to determine or certify with absolute certainty that a medical condition was caused by or exacerbated by pregnancy.[40] Workers often change medical providers, or begin seeing new providers during pregnancy, making it difficult for their current providers to state with certainty when or how pregnancy has impacted pre-existing health conditions, or whether those conditions even existed prior to pregnancy. As a result, best practices guidelines for obstetricians do not distinguish between treatment of conditions based on whether they were preexisting.[41]

Based on our experience speaking to many hundreds of pregnant workers on our helpline every year, we fear that the guidance's medically-inaccurate examples and discussion will cause workers to struggle to obtain modest accommodations for conditions that are caused or exacerbated by pregnancy, simply because their provider is uncomfortable stating with absolute certainty that their condition is related to pregnancy. For example, one worker called our helpline after she was unable to obtain a note relating to her hip and back pain from her doctor , because the doctor did not feel she could certify her pain as definitively pregnancy-related. (Ultimately, the worker was able to obtain a note from another of her health providers, but it delayed the worker in obtaining the needed accommodation.)

Moreover, we anticipate that extra skepticism will fall on Black women, whose experiences are routinely dismissed and devalued by the healthcare system—a reality reflected in the maternal mortality and morbidity data as well as anecdotally on our helpline.[42] Additionally, for workers with inadequate healthcare prior to becoming pregnant, it will be especially difficult for a provider or the worker to parse out what may or may not have been discovered for the first time during pregnancy.

Finally, the regulation's over-fixation on medical conditions that are allegedly unrelated to pregnancy will disparately impact workers with disabilities who will face heightened challenges when asking their healthcare providers to define the precise role that their pregnancy is playing in their evolving health needs.

Accordingly, **we urge** the agency to:

- Delete the blood pressure example and, more generally, avoid discussions of "relatedness" that would encourage employers to second-guess or over-scrutinize workers' health needs or potentially create a dangerous loophole employers will use to avoid providing accommodations that are critical to the health of workers. Instead, the EEOC should emphasize the importance of engaging with workers in the interactive process and focusing on identifying accommodations that will not impose an undue hardship on their operations.

[40] *See* discussion *supra* Section B (discussing § 1636.3(a)(2)).
[41] *See, e.g.*, Shona L. Ray-Griffith et al., *Chronic Pain During Pregnancy: A Review of the Literature*, 10 INT. J. WOMEN'S HEALTH 153 (Apr. 9, 2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5901203/.
[42] *See* discussion *infra* Section O (discussing the potentially discriminatory impact of proposed regulation § 1636.3(l) regarding supporting documentation).

- In the alternative, if the agency believes it must include an example of a circumstance in which a need is not pregnancy-related, the agency could use the example of a worker who requests time off to attend their baby shower, which is not a pregnancy-related health need.

In addition, **we suggest** the agency add an example at 88 Fed. Reg. at 54775 of a worker who can no longer take their regular medication (such as medication for a mental health condition) upon becoming pregnant, thus causing their preexisting condition to become less manageable or to require new or different accommodations. We have heard from numerous helpline callers over the years that their preexisting mental health conditions became more difficult to manage during pregnancy—because their medical providers advised that they cease taking their regular medication during pregnancy—and thus triggered a need for accommodation. For example:

- One worker asked us how to approach her employer about potential challenges she expected to have performing her job duties after her healthcare provider advised against taking her regular ADHD medication during pregnancy because it could lead to fetal heart defects.
- Another recent caller, Megan, indicated that she was tapering off medication she could not take while pregnant, exacerbating symptoms such as extreme fatigue and exhaustion that she was experiencing during her first trimester of pregnancy.

D. 1636.3(c) — Employee representative.

PROPOSED REGULATION § 1636.3(c)

We support the proposed rule's definition of "employee representative" as including a family member, friend, or healthcare provider. **We suggest** the EEOC add "co-worker," "union representative," and "manager" to this list.[43]

The proposed rule also states that the employee's representative can include an "other representative." **We suggest** the EEOC replace "other representative" with a more descriptive definition, such as a "<u>a person who communicates to the employer the needs of the employee or applicant</u>."

PROPOSED GUIDANCE ON § 1636.3(c)

Although **we support** the guidance's definition of "employee's representative" at 88 Fed. Reg. at 54775, **we suggest** the guidance provide examples of the range of individuals who are included in the term "health care provider." Specifically **we suggest** the guidance add: "<u>'Health care provider' includes but is not limited to a physician, nurse, psychologist, therapist, social worker, lactation consultant, doula, and midwife.</u>"

[43] We ask the EEOC to make clear that only a manager who is not an employee's direct supervisor can act as the employee's third-party representative.

E. 1636.3(d) — Communicated to the employer.

DIRECTED QUESTION #1 RE: SECTION 1636.3(D): DEFINITION OF "COMMUNICATED TO THE EMPLOYER"

> *The Commission seeks comment on whether the definition of whom the employee or applicant may communicate with to start the reasonable accommodation process is appropriate, or whether it should be expanded or limited with the understanding that the process should not be burdensome for the worker.*

We urge the Commission to add "interviewer, recruiter, search firm, staffing agency, third-party benefits administrator, and any other agent of the employer" to the list of those with whom the employee or applicant may communicate to start the reasonable accommodation process.[44] On our helpline, we have heard from employees who requested pregnancy accommodations *at* the interview/application stage of the hiring process to their interviewer or recruiter, but whose needs were not then accommodated due to a failure of the interviewer/recruiter to communicate the request to HR or a supervisor *after* the individual was hired. Broadening the definition of those to whom an individual may make an accommodation request to include interviewers, recruiters, search firms, and the like would better ensure the worker receives an accommodation in a timely manner.

PROPOSED REGULATION § 1636.3(d)

We support the proposed regulation's recognition that a worker or their representative may communicate their need for accommodation verbally, in writing, or by another means. We likewise strongly support the regulation's statement that an employer may *not* require that a communication be in writing or in any particular format in order to begin the interactive process.

We strongly urge the agency to alter 1636.3(d)(3), however, to eliminate sub-prongs (i) and (ii), and change "and" to "or," so that the provision reads: "To request a reasonable accommodation, the employee or applicant, or a representative of the employee or applicant, need only communicate to the covered entity that the employee or applicant has a limitation or needs an adjustment or change at work" in order to trigger the interactive process. Making this change is necessary to comply with the clear legislative intent of the PWFA,[45] which requires an employer to engage in a good faith, interactive process to identify a reasonable accommodation only after the employee (or representative) makes the employer aware of a "known limitation" related to

[44] PWFA Proposed Rule, 88 Fed. Reg. at 54767.

[45] The PWFA's legislative record explicitly states that the PWFA requires employers to engage in the interactive process in good faith. *See* H.R. REP. NO. 117-27, pt. 1, at 30 (2021), https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf (Noting that employers have a "good-faith duty to engage [with their employees] in an interactive process to identify a reasonable accommodation. This duty is triggered when an employee communicates her disability and desire for an accommodation—even if the employee fails to identify a specific, reasonable accommodation. . . . Under the PWFA, once an employer has been made aware of a 'known limitation' related to pregnancy, childbirth, or a related medical condition, the employer will be required to engage with the employee in the process of identifying a reasonable accommodation." (internal citations and quotation marks omitted)).

pregnancy, childbirth, or a related medical condition. Workers should not be penalized because they did not use "magic words" or did not know to phrase their request in the form of a two-part inquiry (which is not required by the statutory text).

There are many circumstances, for example, where a limitation is obvious or implied, such that a worker would only think to state their need for an adjustment/change at work. Consider an eight-month pregnant worker who states that she "needs more bathroom breaks." The worker will have communicated that she needs an adjustment/change at work but will not have stated that she has a limitation. Or consider the inverse: a pregnant worker who tells her supervisor she can "no longer lift heavy boxes" but does not specifically state that she needs an adjustment or change at work. In both circumstances, under the current regulation, the worker may have potentially failed to expressly communicate both prongs of the EEOC's proposed two-pronged test—while undoubtedly having given their employer notice that should be deemed sufficient to at least trigger the employer's duty to engage in the interactive process.

In sum, requiring the worker to expressly convey both limitation *and* need, when the former has implied the latter or vice versa, would have the effect of forcing workers to use "magic words" in order to trigger the interactive process—a result contrary to the intent of the PWFA, its statutory text, and longstanding agency and judicial interpretation of the ADA.[46] Accordingly, **we urge** the agency to adopt the change we propose above, to make clear that communicating any limitation *or* need is sufficient to start the interactive process.

In addition, **we recommend** the agency:

- Revise the list of employer representatives to whom a worker may communicate their limitations. The Interpretive Guidance appropriately clarifies that employees may communicate their needs to "the people who assign them daily tasks and whom they would normally consult if they had questions or concerns." The narrower language in the proposed regulation, however—"communicating with a supervisor, manager, [or] someone who has supervisory authority for the employee"—does not capture as broad of a range of individuals to whom the employee may communicate that they have a limitation. In speaking with workers on our helpline, we find that workers often do not know the precise level of supervisory authority their apparent managers possess. Accordingly, **we recommend** replacing the phrase "who has supervisory authority" with "<u>who plays a supervisory role.</u>"
- Add the following sentence from the Interpretive Guidance (at 88 Fed. Reg. at 54775) to the regulation itself: "<u>An employee need not use specific words or any specific form or template to make a request for accommodation.</u>"
- Add "<u>interviewer, recruiter, search firm, staffing agency, third-party benefits administrator, and any other agent of the employer</u>" to the list of individuals to whom a worker can communicate their request for accommodation, for the reasons outlined in response to Directed Question #1 above.

[46] *Id.*; *see also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA, at Q1 & n.19 (2002), https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada ("To request accommodation, an individual may use 'plain English' and need not mention the ADA or use the phrase 'reasonable accommodation.'").

- Add "employee health" to the list of individuals to whom a worker can communicate their request for accommodation.

PROPOSED GUIDANCE ON § 1636.3(d)

We generally support the proposed guidance's recognition that "communicating" a need for accommodation to an employer should not be a burdensome, confusing, or overly-technical task, and should not require magic words.[47] After all, the goal of the PWFA is to make receipt of accommodations—which are often modest, temporary, and time-sensitive—straightforward and facile.[48]

We recommend, however, that the agency clarify its discussion of the role and use of forms (or other written materials) in the interactive process. Specifically, **we recommend** the agency change the words "may ask" to "may ask, but may not require," at 88 Fed. Reg. at 54775, so that the provision regarding forms reads: " . . . may ask, but may not require, the employee or applicant to fill out a form or submit the request in written form." (If the agency makes this change, it should also change "However" to "Moreover" in the following sentence.)

- In our experience on our helpline, workers with limited literacy skills or limited English proficiency can sometimes struggle to communicate their needs or limitations in writing.
- Other workers, who may have safety concerns related to their pregnancy, may likewise fear putting their request in writing. For example, a worker experiencing domestic violence by a coworker-partner may be afraid to state in writing that she is pregnant and

[47] PWFA Proposed Rule, 88 Fed. Reg. at 54775.

[48] *See e.g.*, 168 CONG. REC. S10082 (daily ed. Dec. 22, 2022) (statement of Sen. Bob Casey), https://www.congress.gov/117/crec/2022/12/22/168/200/CREC-2022-12-22.pdf ("Pregnant workers need immediate relief to remain healthy and on the job."); 166 CONG. REC. H451213 (daily ed. Sept. 17, 2020) (letter from A Better Balance), https://www.govinfo.gov/content/pkg/CREC-2020-09-17/pdf/CREC-2020-09-17-house.pdf ("Without the law on their side, these women had little legal recourse because they lived in a state without a state-level pregnant workers fairness law. On the other hand, when a pregnant worker in upstate New York—where a state pregnancy accommodation is already in place—requested to telecommute in June 2020 due to underlying health issues, she was *quickly* able to engage her employer in a good faith interactive process and her employer approved her request, allowing her to stay attached to the workforce and maintain a healthy pregnancy amidst the pandemic….However, pregnancy itself is not a disability, leaving a gap wherein many employers are in no way obligated to accommodate pregnant workers in need of *immediate* relief to stay healthy and on the job.'') (emphasis added); *id.* at H4516 (daily ed. Sept. 17, 2020) (letter from Black Mamas Matter Alliance et al.) ("The Black Maternal Health crisis remains frighteningly persistent and requires immediate attention and multi-faceted solutions…the Pregnant Workers Fairness Act will help remove one of the many barriers Black pregnant people face at work by ensuring they are afforded *immediate* relief under the law, and not thrown into financial dire straits for needing pregnancy accommodations.") (emphasis added); *Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694) Before the Subcomm. on Civil Rights & Human Servs. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019) (Written testimony of Iris Wilbur, Vice President of Government Affairs & Public Policy, Greater Louisville Inc.—The Metro Chamber of Commerce, at 2) ("The PWFA also gives much-needed clarity because it explicitly provides 'reasonable accommodations' for pregnant and new mothers, in addition to the proper procedures for providing them, thereby increasing the potential to resolve requests for accommodations *quickly and informally*…") (emphasis added) [hereinafter *2019 Wilbur Testimony*].

needs accommodation.[49] Or a worker seeking accommodation related to termination of pregnancy may fear putting such a request in writing.

- In addition, on our helpline, we often see employers weaponize extremely burdensome documentation requirements as a way to drown workers in paperwork, forcing them to submit form after form until they give up and abandon the process entirely and forgo accommodations they need and deserve. For example, since the PWFA went into effect:
    - A federal employee contacted us after her employer required her to complete a five-page "medical inquiry form" ostensibly designated for ADA disability accommodations, even though the PWFA was in effect. When she took the form to her doctor's office, the staff told her they "weren't comfortable" providing it to her doctor to fill out.
    - Likewise, a hospital worker contacted us when she was instructed to fill out a form, after the PWFA went into effect, asking for detailed information about her "disability," including what "major life activity" was affected. The form also warned (incorrectly) that "you must be qualified to perform the essential functions" of the job in order to receive an accommodation.
    - For additional examples of employers using documentation requirements to frustrate or delay workers' ability to obtain accommodations, see Section O on supporting documentation below.

In sum, the significant downsides of permitting employers to require workers to fill out (often very arduous) forms regarding their accommodation request—which could result in workers not receiving accommodations they need and are entitled to by law—greatly outweigh any employer interest in having requests put in writing by the employee themself. (Indeed, if an employer would like to have a written record of a verbal request, it is welcome to write it out itself.)

We also urge the agency make the same changes we propose above (to the regulation) to the corresponding portions of the guidance as well. For example, **we urge** the agency to eliminate references to any "two part[]" test required to trigger the interactive process, for the reasons described above.[50] At bare minimum, the guidance should be changed at 88 Fed. Reg. at 54775 to reflect that a worker need only communicate "that" they have a limitation, rather than requiring them to know to communicate specifically what the limitation is—language that would effectively import a "magic words" requirement into the PWFA.

We support the examples listed at 88 Fed. Reg. at 54775–76 of the guidance, especially examples 3 and 5, which are circumstances we hear about frequently from low-wage workers on our helpline.

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[49] For more information about the connections between pregnancy and intimate partner violence, *see* NAT'L PARTNERSHIP FOR WOMEN & FAMS., INTIMATE PARTNER VIOLENCE ENDANGERS PREGNANT PEOPLE AND THEIR INFANTS (May 2021), https://nationalpartnership.org/wp-content/uploads/2023/02/intimate-partner-violence-endangers-pregnant-people-and-their-infants.pdf; *Abuse During Pregnancy*, MARCH OF DIMES, https://www.marchofdimes.org/find-support/topics/pregnancy/abuse-during-pregnancy (last visited Oct. 5, 2023).

[50] *See, e.g.*, PWFA Proposed Rule, 88 Fed. Reg. at 54775 (stating that a request must "ha[ve] two parts" in order to trigger the interactive process).

To further strengthen the example section, **we recommend** the agency:

- Add example(s) related to lactation, such as needing pumping breaks at work.
- Add an example of a remote-work accommodation.
- Add an example of a more significant/burdensome accommodation that still must be granted (absent undue hardship), such as a temporary transfer.
- Add an example of a third party communicating the employee's limitation to the covered entity and illustrating how the covered entity should respond to the request. The example should make clear that, once the third party has made the covered entity aware of the employee's need for accommodation, the employer must engage in the interactive process directly with the employee who is in need of accommodation (not the third party).

F. 1636.3(e) — Consideration of mitigating measures.

We support this section.

G. 1636.3(f) — Qualified Employee or Applicant.

DIRECTED QUESTION #2 RE: SECTION 1636.3(F)(2)(I)–(III): DEFINITIONS OF "TEMPORARY," "IN THE NEAR FUTURE," AND "THE INABILITY TO PERFORM THE ESSENTIAL FUNCTION CAN BE REASONABLY ACCOMMODATED"

> *The Commission seeks comment regarding the proposed definitions of the terms from 42 U.S.C. 2000gg(6)(A)–(C) ("temporary," "in the near future," and "the inability to perform the essential function can be reasonably accommodated"), including: (a) whether the definition of "in the near future" post-pregnancy should be one year rather than generally forty weeks; (b) whether periods of temporary suspension of an essential function during pregnancy and post-pregnancy should be combined, and, if so, how should that be done, and what rule should be adopted to ensure that a pregnant worker is not required to predict what limitations they will experience after pregnancy given that a pregnant worker will not generally be able to do so; and (c) whether there are alternative approaches that would more effectively ensure that workers are able to seek the accommodations they need while limiting the burden on covered entities.*

We applaud the Commission's proposed rule for making clear that the PWFA's definition of "qualified employee" encompasses various common scenarios. Below, we provide further comment regarding the proposed rule's treatment of "Qualified," and offer recommendations to further clarify the definitions of "temporary," "in the near future," and "the inability to perform the essential function can be reasonably accommodated."

H. 1636.3(f)(1) — An employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position.

PROPOSED REGULATION § 1636(f)(1)

As the proposed rule appropriately sets out in § 1636.3(f)(1), one way an employee may be deemed "qualified" under the law is to be able to perform the essential functions of their job with, or without, reasonable accommodations. Many pregnant workers do not require any reasonable accommodations in order to perform their essential functions, making them "qualified" employees. For example, a pregnant real estate agent who is able to perform all of her job duties, such as showing houses, communicating offers and counteroffers, and tracking listings, without a reasonable accommodation is a qualified employee. Importantly, the PWFA still protects these individuals. For example, employers may not force them to accept an accommodation other than one derived from the interactive process, or onto a leave of absence. The proposed rule appropriately clarifies this point.

PROPOSED GUIDANCE ON § 1636(f)(1)

The Commission's proposed Interpretive Guidance offers helpful clarity on the first part of the definition of "qualified," under which employers must provide reasonable accommodations to enable a pregnant worker to perform their essential functions. We have frequently encountered this scenario with our clients and through our helpline. For example, Lyndi Trischler, a Kentucky police officer and former A Better Balance client, needed reasonable accommodations early in her pregnancy.[51] She requested modified duty or reassignment to the detective unit. She was a qualified individual under the ADA because she could have performed the essential functions of her position with a reasonable accommodation of reassignment or light/modified duty. She would also have been qualified under the PWFA (had it been in effect during her pregnancy) because she could have performed her essential functions with a reasonable accommodation.

We suggest the EEOC update the Interpretive Guidance to clarify that meeting the "qualified employee" test is a low bar under the PWFA, and that it will be a rare exception when an employee is deemed unqualified. The term "qualified employee" is not meant to act as a gatekeeper, preventing workers from accessing the law's protections. Employers—and courts—should focus not on whether an employee is "qualified," but rather on whether providing reasonable accommodations will cause them an undue hardship, an inquiry that occurs much later in the interactive process.

PROPOSED REGULATION § 1636.3(f)(1)(i)

The EEOC's proposed rule appropriately recognizes that leave is a reasonable accommodation under the PWFA and an employee remains "qualified" under the law when they need leave as an

[51] Complaint, *U.S. v. City of Florence, Ky.*, No. 2:16-cv-00190-WOB-JGW (E.D.K.Y. 2016), https://www.justice.gov/opa/file/905641/download.

accommodation.[52]

We urge the EEOC to add the following sentence to the end of § 1636.3(f)(1)(i): "Extended leave can be a reasonable accommodation." The EEOC appropriately makes clear in 1636.3(i)(3)(iv) that "a covered entity's concerns about the length, frequency, or unpredictable nature of leave requested as a reasonable accommodation are questions of undue hardship." **We urge** the EEOC to reinforce that point—that concerns about the length of leave turn exclusively on "undue hardship," which occurs much later in the interactive process—by adding our suggested language. Clarifying that "extended leave" can be a reasonable accommodation makes clear to employers that the duration of a requested leave is irrelevant to the analysis of whether an employee is "qualified."

I. 1636.3(f)(2) — An employee or applicant who cannot perform one or more of the essential functions of the employment position.

PROPOSED REGULATION § 1636.3(f)(2)

As stated above, **we applaud** the EEOC for making clear in the proposed rule that there are different ways an employee may be deemed "qualified" under the PWFA. First, under § 1636.3(f)(1) an employee or applicant is qualified when they can perform their essential job functions with or without reasonable accommodation. Under the second part of the "qualified employee" definition in § 1636.3(f)(2), an employee or applicant who is currently unable to perform all their essential job functions with a reasonable accommodation must *still* be considered qualified, and thus entitled to reasonable accommodation, if: "(A) any inability to perform an essential function is for a temporary period; (B) the essential function could be performed in the near future; and (C) the inability to perform the essential function can be reasonably accommodated." This novel statutory language is unique to the PWFA and intended to cover those workers who are affected by pregnancy, childbirth, and related medical conditions, unable to perform every essential function of the job all the time, and require a temporary excusal from performing one or more of these essential functions. **We applaud** the EEOC for appropriately recognizing that this new statutory language ensures that workers affected by pregnancy, childbirth, and related medical conditions will remain qualified even when they need a temporary excusal of an essential function in order to maintain their health or avoid health risks.

PROPOSED GUIDANCE ON § 1636.3(f)(2)

As the proposed Interpretive Guidance appropriately makes clear, the second part of the "qualified" definition does not apply to workers who are already qualified under the first part of the definition. The EEOC provides an instructive example: a worker in need of additional bathroom breaks is "qualified" because they can perform all their essential job functions while

[52] PWFA Proposed Rule, 88 Fed. Reg. at 54767 ("With respect to leave as an accommodation, the relevant inquiry is whether the employee is reasonably expected to be able to perform the essential functions, with or without a reasonable accommodation, at the end of the leave, if time off is granted…").

also taking bathroom breaks, as needed; there is no need to contemplate "the near future" or whether the need for such breaks is "temporary."

We support the Interpretive Guidance's three examples at 88 Fed. Reg. at 54776–77 (of a construction worker, a patrol officer, and a landscaper), which helpfully illustrate the PWFA's novel approach to the second part of the "qualified employee" definition. **We suggest** the Commission explicitly state, however, that in each of these examples the employee is still a "qualified employee" for purposes of the PWFA even though they are unable to perform all of their essential job functions at all times, even with reasonable accommodations. For instance, in example 1636.3 #7, the Interpretive Guidance should explain that the landscaper could still be "qualified" under the PWFA if her employer temporarily excused her essential function of lifting 35–40-pound bags and assigned her other duties, such as performing administrative tasks, weeding, watering, and ordering plants for online customers. This analysis, even though described in more depth later, would help workers and employers better understand the examples.

We urge the EEOC to remove the following language from the guidance: "If the employer establishes that all possible accommodations that would allow the employee to temporarily suspend one or more essential functions would impose an undue hardship, then the employee will not be qualified under the PWFA's second definition of qualified (because the inability to perform the essential function cannot be reasonably accommodated)."[53] As the Comment Letter from New York Attorney General Letitia James and fellow State Attorneys General explains:

> Incorporating the analysis of whether an accommodation poses an undue hardship into the definition of "qualified" is not mandated by the language of the statute or of the Proposed Rule itself, and conflates the various steps in the analysis in ways that could frustrate the purposes of the statute in several ways . . . *The Commission should therefore revise the Guidance accompanying the Proposed Rule along with corresponding examples to specify that, for purposes of the analysis of whether an employee is "qualified" under the second definition, the "reasonableness" of the accommodation should be understood without reference to the undue hardship analysis, which employers—and courts—must assess subsequently in the analysis.*[54]

We agree with the State Attorneys General's recommended language and urge the Commission to adopt it in the final rule.

PROPOSED REGULATION § 1636.3(f)(2)(i) — Temporary

The proposed regulations define "temporary" as "lasting for a limited time, not permanent, and may extend beyond 'in the near future.'" We are concerned that this definition, although

[53] PWFA Proposed Rule, 88 Fed. Reg. at 54777; *see also* discussion *infra* Section I (discussing § 1636.3(f)(2)(iii)).

[54] *See* State Attorneys General, Comment Letter on Regulations to Implement the Pregnant Workers Fairness Act NPRM (RIN 3046-AB30) (Oct. 10, 2023) (explaining that injecting "undue hardship" into the *qualified* analysis unduly permits the undue hardship analysis to be considered twice and subverts the interactive process).

technically accurate, will confuse employers about what "temporary" means, with some employers misinterpreting it to have a strict timeline or defining it as "short-term." Accordingly, **we recommend** the EEOC revise the proposed rule to clarify that "temporary" does not mean "short-term" and that there is no specific timeframe contemplated.

PROPOSED GUIDANCE ON § 1636.3(f)(2)(i) — Temporary

Although the proposed Interpretive Guidance does state that "temporary" "may extend beyond 'in the near future,'" **we recommend** the EEOC explicitly state that the inability to perform an essential function can be temporary even if longer than 40 weeks or one year. For example, the Guidance could instead say: "The rule defines the term 'temporary' to mean that the need to suspend one or more essential functions is 'lasting for a limited time' and not permanent, regardless of the duration of the 'temporary' period. As explained below, how long it may take before the essential function can be performed is further limited by the definition of 'in the near future.'"

PROPOSED REGULATION § 1636.3(f)(2)(ii) — In the Near Future

The proposed regulation states that a worker will still be a qualified employee if: "The essential function(s) could be performed in the near future, where 'in the near future' means the ability to perform the essential function(s) will generally resume within forty weeks of its suspension." While we generally support the intent of this provision, we provide several recommendations below.

As an initial matter, and in response to the agency's Directed Question #2, **we applaud** the agency for recognizing that employers must excuse essential functions for *at least* an entire course of pregnancy. Many known limitations and needs for accommodation can extend across a pregnancy, such as avoiding lifting or overnight shift work, hydrating, and taking breaks for nourishment or to avoid fatigue. Some accommodations may remain the same, even as the underlying medical need shifts. For example, a pregnant worker may first require additional bathroom breaks for morning sickness and then, later in their pregnancy, bathroom breaks to accommodate an increased need to urinate.

Shortening the time frame would lead to dangerous and perverse consequences that frustrate the purpose of the law: to allow workers to keep their jobs without risk to their health. For instance, if the "near future" time frame were shortened to 3–6 months, it would result in circumstances in which a pregnant worker is excused from heavy lifting for the first six months of their pregnancy only then to be forced into heavy lifting during the last three months of their pregnancy, risking their health or the health of their pregnancy. (This is not hypothetical: Prior to the PWFA, our Community Advocate Armanda Legros became injured doing heavy lifting at her job working for an armored truck company while she was six and a half months pregnant.)[55] Other perverse consequences could include workers trying to "save up" their ability to request reasonable accommodations for when they are further in their pregnancy, risking their health earlier on

[55] *Economic Security for Working Women: Briefing Before the S. Comm. On Health, Educ., Labor & Pensions*, 113th Cong. (2014) (testimony of Armanda Legros, A Better Balance Community Advocate), https://www.help.senate.gov/imo/media/doc/Legros2..pdf.

when they may be at most risk of miscarriage. (Again, not hypothetical: Prior to the PWFA, Tasha Murrell, a former A Better Balance client, was thirteen weeks pregnant when she had a miscarriage after she was denied reasonable accommodations on the job.)[56] Risks, health complications, and needs shift throughout a pregnancy, and a "near future" timeframe of 40 weeks appropriately captures one of the primary goals of the PWFA: protecting the health of workers and their pregnancies.

To better reflect the goals of the law, we offer several recommendations:

1. First, **we recommend** the EEOC clarify that 40 weeks is a minimum guideline and that excusing an essential function for more than 40 weeks during pregnancy must be considered through an individualized inquiry. Frequently, pregnancies can last fewer or greater than 40 weeks, often extending to, or beyond, 42 weeks of gestation.[57] In addition, due dates are often calculated inaccurately depending on the quality of prenatal care and access to high-quality pregnancy tests, leaving some workers without an accurate estimated date of delivery and requiring flexibility of these guidelines.
2. Second, **we urge** the EEOC to extend the timeframe of "in the near future" to one year for postpartum accommodations. As the Commission rightly recognizes, both the medical literature and the extension of postpartum Medicaid coverage reflect the importance of a one-year timeframe for postpartum reasonable accommodations.[58] Allowing a temporary excusal of an essential function for generally one year postpartum would advance maternal and infant health, especially for pregnant people at higher risk, including Black women, who are three times as likely to die of pregnancy-related causes than white women.[59]
3. Third, **we urge** the Commission to extend the definition of "in the near future" to *two* years postpartum for lactation-related accommodations. The American Association of Pediatrics recommends parents express milk for at least two years following childbirth, to promote both maternal and infant health.[60]

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[56] Tasha Murrell, Opinion, *A Paycheck or a Healthy Pregnancy? We Shouldn't Have to Choose*, THE HILL (Dec. 17, 2021), https://thehill.com/blogs/congress-blog/labor/586269-a-paycheck-or-a-healthy-pregnancy-we-shouldnt-have-to-choose/; Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, N.Y. TIMES (Oct. 21, 2018), https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html.

[57] *Healthy Lifestyle: Pregnancy Week By Week*, MAYO CLINIC (July 27, 2022), https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/overdue-pregnancy/art-20048287.

[58] PWFA Proposed Rule, 88 Fed. Reg. at 54724-25.

[59] *Working Together to Reduce Black Maternal Mortality*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 3, 2023), https://www.cdc.gov/healthequity/features/maternal-mortality/index.html. For example, according to Black Mamas Matter Alliance, mental health conditions are a leading cause of maternal mortality, and Black women face a higher chance of developing mood disorders and are less likely to be able to access treatment for those disorders. *See Factsheet: Black Maternal Mental Health*, BLACK MAMAS MATTER ALLIANCE, https://blackmamasmatter.org/wp-content/uploads/2022/08/Factsheet-Black-Maternal-Mental-Health.pdf (last visited Oct. 4, 2023).

[60] Joan Younger Meek et al., *Policy Statement: Breastfeeding and the Use of Human Milk*, 150 PEDIATRICS 1, 11 (2022), https://publications.aap.org/pediatrics/article/150/1/e2022057988/188347/Policy-Statement-Breastfeeding-and-the-Use-of.

Our proposal—of defining "in the near future" as 40 weeks prepartum, one year postpartum, and two years postpartum for lactation-related accommodations—is clear and workable for employers. Moreover, the public health benefits of our recommended approach far outweigh any potential minor administrative inconvenience to employers.

We urge the EEOC to clarify in the regulations themselves—not just the guidance—that the time period for excusing essential functions can "restart." The Commission is correct that the calculation for the "near future" should restart as the employee ends their pregnancy and enters the postpartum period. As the Commission indicates, it can be nearly impossible to determine what, if any, accommodations a worker may require postpartum while they are still pregnant. Many labor and delivery, lactation, and mental health maintenance plans can go awry, and many postpartum conditions are unpredictable or unforeseeable before birth. For example, an employee may plan to take six weeks off to recover from childbirth but then require an emergency C-section and require at least eight weeks to recover. Or a pregnant worker may plan to express milk twice per shift when they return to work but then find that, because their baby eats more frequently than anticipated, they must express milk three times a shift.

Finally, **we applaud** the Commission for stating that time spent on leave should not "count" in the calculation of "near future."

PROPOSED REGULATION § 1636.3(f)(2)(iii) — Can Re Reasonably Accommodated

We applaud the Commission's examples in the regulations explaining that there are many ways that employers can reasonably accommodate an employee's inability to perform essential functions of the job. These examples provide employers helpful clarity to understand their legal obligations and reflect many of the real-life scenarios we hear from workers on our free and confidential legal helpline. For example, Megan, a worker from Washington, called our helpline because she needed to be temporarily excused from attending an off-site staff retreat for pregnancy-related reasons, a request her employer could reasonably accommodate.

PROPOSED GUIDANCE ON § 1636.3(f)(2)(iii) — Can Re Reasonably Accommodated

We applaud the examples the EEOC provided in the Interpretive Guidance regarding ways employers can reasonably accommodate the excusal of an essential function.

We urge the EEOC to remove the following sentence from the guidance, for the same reasons described in our discussion above of § 1636.3(f)(2):[61] "To satisfy the PWFA's second definition of "qualified," the covered entity must be able to reasonably accommodate the inability to perform one or more essential functions without undue hardship."[62] Incorporating the undue

[61] *See* discussion *infra* Section I (discussing § 1636.3(f)(2)); *see also* State Attorneys General, Comment Letter on Regulations to Implement the Pregnant Workers Fairness Act NPRM (RIN 3046-AB30) (Oct. 10, 2023) (explaining that injecting "undue hardship" into the *qualified* analysis unduly permits the undue hardship analysis to be considered twice and subverts the interactive process).
[62] PWFA Proposed Rule, 88 Fed. Reg. at 54778.

hardship analysis in the "qualified" analysis conflates the various steps in the analysis in ways that could frustrate the purposes of the statute.

J. 1636.3(g) — Essential functions.

PROPOSED REGULATION § 1636.3(g)

We recommend altering § 1636.3(g) to add the underlined text: "*Essential functions* mean the fundamental job duties of the employment position the employee or applicant holds or desires. The term "essential functions" does not include the marginal functions of the position. Essential functions refer to discrete tasks, not conditions of employment regarding when, where, and how discrete tasks are performed."[63]

PROPOSED REGULATION § 1636.3(g)(2)

We urge the agency to alter the sources of evidence for whether a particular function is "essential" to reflect the PWFA's novel statutory text and to avoid replicating the ADA's inapposite regulatory language. The ADA's regulatory languages comes from the statutory text of the ADA—text that does not appear in the PWFA. Specifically, the ADA defines the term "qualified individual" to mean:

> [A]n individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.[64]

By contrast, the statutory text of the PWFA does *not* include consideration of the employer's judgment or written job descriptions and, therefore, the agency should not import such considerations into its PWFA regulations.

Specifically, **we urge** the EEOC:

1. Modify § 1636.3(g)(2)(i) and list it as the final factor;
2. Delete § 1636.3(g)(2)(ii);
3. Keep § 1636.3(g)(2)(iii)–(vi); and

[63] Such clarification would better advance the purpose of the statute, and better align with the agency's interpretation of similar statutes. *See* Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 58–59 (2005) ("The [ADA] statute does not define what aspects of a job constitute functions, but the statute authorizes the EEOC to issue implementing regulations, which the EEOC has provided, along with interpretive guidance, a technical assistance manual, and several enforcement guides. These sources indicate that job functions refer to discrete tasks, rather than to conditions of employment regarding when, where, and how discrete tasks are performed.").

[64] 42 U.S.C. § 12111(8).

4. Modify § 1636.3(g)(2)(vii).

With those changes, the list in § 1636.3(g)(2) would read (with new text underlined):

Evidence of whether a particular function is essential includes, but is not limited to:

i. The amount of time spent on the job <u>actually performing the task;</u>
ii. The consequences of not requiring the incumbent to perform the <u>task;</u>
iii. The current work experience <u>and judgment</u> of incumbents <u>(including the employee requesting the accommodation) and those</u> in similar jobs;
iv. The employer's <u>bona fide</u> judgment as to which <u>tasks actually are performed on the job.</u>

Below we explain these recommended changes in further detail (the sections referenced are those in the current proposed rule as opposed to our new recommended list):

1. 1636.3(g)(2)(i): Currently, the proposed rule lists the "employer's judgment" as the first metric to analyze whether an employee's function is "essential." The Interpretive Guidance is far clearer, more instructive, and reflective of the statutory intent, however, stating that, "[I]n determining whether something is an essential function, the first consideration is whether employees in the position *actually* are required to perform the function." (Emphasis added.) **We therefore recommend** the agency delete 1636.3(g)(2)(i) and replace it with the following language that better reflects the agency's intent: "<u>The employer's bona fide judgment as to which tasks actually are performed on the job</u>." Further, because the guidance appropriately recognizes that relevant evidence must include the employee's judgment as to what they can do, and because employees often know their duties and workplace best, we suggest moving down "employer's bona fide judgment" so that it appears after the employee's judgment in the § 1636.3(g)(2) list.
2. 16363.3(g)(2)(ii): As stated above, **we strongly recommend** deleting written job descriptions from the list of factors in § 1636.3(g)(2). First, job descriptions have long been used as a tool to exclude workers based on their race, national origin, age, gender, and disability. Because this same use of job descriptions is also harmful in the pregnancy context, the PWFA's drafters contemplated and decided not to incorporate reference to job descriptions (or even the employer's judgment) in the statutory text, when making an amendment in 2019 to add a definition of "qualified employee." Dina Bakst explicitly addressed this concern in her answer to a Question for the Record in November 2019:

> [U]nder the ADA, two of the primary factors in determining essential functions are "the employer's judgment as to which functions are essential[] and written job descriptions."[65]Unfortunately, many courts give overwhelming deference to employer's judgment regarding essential functions and written job descriptions. For instance, the Eighth Circuit considers an employer's judgment on essential functions "highly probative."[66] The court has further held that the "specific

[65] *See* 29 C.F.R. § 1630.2(n)(3)(i)–(ii).
[66] *See Scruggs v. Pulaski Cty., Ark.*, 817 F.3d 1087, 1093 (8th Cir. 2016) (citing *Kammueller v. Loomis, Fargo & Co.*, 383 F.3d 779, 786 (8th Cir. 2004)).

> personal experience" of a plaintiff "is of no consequence in the essential functions equation."[67] Rather, it is generally "the written job description, the employer's judgment, and the experience and expectations of all [employees in the plaintiff's position] …which establish the essential functions of the job."[68] This incentivizes employers to include certain functions as part of the job description so as to avoid having to provide the accommodation. … employers may be able to anticipate the kinds of restrictions a worker may have, such as heavy lifting or prolonged standing, and thus automatically include them as essential functions in a job description, even when they bear no real resemblance to the core functions of the job. [69]

Bakst's response directly shaped the negotiations in November and December 2019 that led to the inclusion of a definition of "qualified employee" in the statutory text of the PWFA. That definition—which did not include any reference to job descriptions—first appeared in an Amendment in the Nature of a Substitute offered by Rep. Bobby Scott at the House Committee on Education & Labor's January 2020 markup of the bill, and the Committee voted in favor of the amended language.[70] That definition—which, again, intentionally did not include the job description language found in the ADA—remained in the final version of the PWFA.

Second, job descriptions are often written without the temporary nature of pregnancy-related medical conditions in mind, making them a poor source of evidence of an individual worker's actual tasks during their pregnancy. For example, many job descriptions describe job functions that occur only annually or during very busy or seasonal periods, but that are not required on a weekly or even monthly basis. A Society for Human Resource Management ("SHRM") template of a retail job description, for instance, lists "prolonged periods of standing and the ability to lift over 15 pounds" as an essential function.[71] This may be the case in November and December, when a retail store is busy with the holiday season, but it is likely not an essential function for a pregnant retail worker due in July and requesting accommodations in June to rest and seek assistance with lifting over 15 pounds. Similarly, while a teacher's job description may describe the ability to stand and walk around a classroom as an essential function, it is not an essential function during the summer months when school is out; were a teacher placed on bedrest during the summer, walking and standing should not be deemed

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[67] *See Dropinski v. Douglas Cty., Neb.*, 298 F.3d 704, 709 (8th Cir. 2002).
[68] *Id.*
[69] *Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694) Before the Subcomm. on Civil Rights Human. & Servs. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019) (Questions for the record submitted by Dina Bakst, Co-Founder & Co-President, A Better Balance, at 13–14) [hereinafter Bakst Questions for the Record].
[70] Amendment in the Nature of a Substitute to H.R. 2694 Offered by Mr. Scott of Virginia (Jan. 12, 2020), https://democrats-edworkforce.house.gov/imo/media/doc/HR2694ANS.pdf; *see also* H.R. REP. NO. 117-27, pt. 1, at 10 (2021), https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf.
[71] *Job Descriptions: Retail Salesperson*, SOC'Y HUM. RESOURCE MGMT., https://www.shrm.org/resourcesandtools/tools-and-samples/job-descriptions/pages/retail-salesperson.aspx#:~:text=Duties%2FResponsibilities%3A&text=Answers%20customer's%20questions%20about%20merchandise,store%20point%20of%20sale%20system (last visited Oct. 5, 2023).

essential functions. Finally, although the House Committee Report does mention job descriptions, it does so to describe the ADA, and states that the ADA's interpretation is "instructive" to the PWFA, but "not determinative."[72]

3. 1636.3(g)(2)(iii)–(iv):
    a. **We suggest** adding "actually" to reflect that only job duties the specific worker *actually* performs should be deemed essential.
    b. **We suggest** replacing the terms "function" with "task." Too often, the term "function" has been misconstrued to exceed a worker's daily tasks and instead encompass "conduct" and "service."[73] Our proposed change also reflects EEOC's longtime position that certain conduct, such as attendance, does not constitute an essential function "because it is not one of 'the fundamental job duties of the employment position.'"[74]
4. 1636.3(g)(2)(v): **We suggest** removing "[t]he terms of a collective bargaining agreement" from the list of potential evidence of essential functions. Collective bargaining agreements do not reflect a specific worker's actual job duties and thus, under the PWFA, are an inappropriate source of evidence about that worker's actual essential functions.
5. 1636.3(g)(2)(vi) and (vii): **We recommend** combining these two factors and modifying them to read: "<u>The current work experience and judgment of incumbents (including the employee requesting the accommodation) and those in similar jobs.</u>" This modification better imports the concept from the Interpretive Guidance that employers—and courts—must take into account the judgment of incumbents and employees requesting accommodation regarding their actual job duties.[75]

DIRECTED QUESTION #3 RE SECTION 1636.3(G): DEFINITION OF "ESSENTIAL FUNCTIONS"

> *The Commission seeks comment on whether there are additional factors that should be considered in determining whether a function is essential for purposes of the PWFA. For example, given that many, if not all, known limitations under the PWFA will be temporary, should the definition of "essential function" under the PWFA consider whether the function is essential to be performed by the worker in the limited time for which an accommodation will be needed.*

We agree that since known limitations under the PWFA are temporary, the definition of "essential function" under the PWFA should consider whether the function is essential to be

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[72] H.R. REP. NO. 117-27, pt. 1, at 28 (2021), https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf.

[73] Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 58–59 (2005).

[74] U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA, at n. 65 (2002), https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada ("'Attendance, however, is not an essential function as defined by the ADA because it is not one of "the fundamental job duties of the employment position.' 29 C.F.R. § 1630.2(n)(1) (1997).").

[75] PWFA Proposed Rule, 88 Fed. Reg. at 54779.

performed by the worker in the limited time for which the accommodation will be needed. We appreciate the Interpretive Guidance's clarity on this point, and **we suggest** greater clarity in the final regulation itself. **We also recommend** adding other factors, including whether or not the function can easily be reassigned to other coworkers on staff.

Finally, we note that the phrase "existing light duty program" appears in the regulations in several examples and throughout the proposed guidance.[76] We recognize and appreciate that the rationale for including this phrase is to ensure employers understand that workers may be entitled to participate in such programs as an accommodation under the PWFA. We are concerned, however, that including such consistent references to these programs will leave the many employers who do not maintain such programs with the impression that they are excused from providing any type of "light duty" assignment as an accommodation under the PWFA. Accordingly, as described in Section J below, **we suggest** the EEOC refer to "existing light duty programs" in only some of its light duty-related examples, in order to make clear that all employers—regardless of whether or not they maintain such programs—must consider the availability of "light duty" work as a reasonable accommodation under the PWFA.

K. 1636.3(h) — Reasonable accommodation — generally.

DIRECTED QUESTION #4 RE: SECTION 1636.3(H): ENSURING THAT WORKERS ARE NOT PENALIZED FOR USING REASONABLE ACCOMMODATIONS

> *The Commission seeks comment on its explanation ensuring that workers are not penalized for using reasonable accommodations, whether there are other situations where this may apply, and whether examples would be helpful to illustrate this point.*

We recommend the Commission state that an "employee's pay cannot be reduced for using the reasonable accommodation of temporary excusal of meeting a production standard or quota."

- The Commission correctly notes that under the ADA, "a reasonable accommodation cannot excuse an employee from complying with valid production standards that are applied uniformly to all employees."[77] This principle is grounded in the ADA's unique requirement that employees must be able to perform the essential functions of the job, with or without a reasonable accommodation, in order to be qualified. (Indeed, the Enforcement Guidance on Reasonable Accommodation to which the agency points cites the ADA's definition of "essential functions" for support.)
- In the PWFA context, by contrast, the statutory language specifically states that essential job functions must be temporarily suspended; thus, so too must any production standards associated with suspended functions themselves be suspended. And, if such production standards must be temporarily suspended as a reasonable accommodation, then it would

[76] *See, e.g.*, PWFA Proposed Rule, 88 Fed. Reg. at 54726, 54731, 54744.

[77] PWFA Proposed Rule, 88 Fed. Reg. at 54780 & n. 49 (citing U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA, at text accompanying n. 14 (2002), http://www.eeoc.gov/laws/guidance/enforcementguidance-reasonable-accommodation-and-unduehardship-under-ada).

be a violation of the PWFA to penalize a worker (by docking their pay) for using such a reasonable accommodation.

- Accordingly, **we recommend** the agency add the language we recommend above and delete the inapposite ADA citation.

PROPOSED REGULATION § 1636.3(h)

We applaud the EEOC for its thoughtful definition of reasonable accommodation and suggest the following additions to the list of what reasonable accommodation may include.

- **We suggest** the EEOC add a new subsection 1636.3(h)(6) that reads: "Provision of interim reasonable accommodations. Interim Reasonable Accommodation means any temporary or short-term measure put in place immediately or as soon as possible after the employee requests an accommodation that allows the employee to continue working safely and comfortably while the employer and employee engage in the interactive process or the employer implements a reasonable accommodation arrived at through the interactive process." Adding "interim reasonable accommodation" to the list of reasonable accommodations will prevent delays in workers receiving time-sensitive and potentially life-saving accommodations.
- **We urge** the EEOC to add a new subsection 1636.3(h)(7) that provides an additional example of reasonable accommodations: "modifications that alleviate pain or discomfort and reduce health risks for the employee or applicant due to their known limitations related to pregnancy, childbirth, or related medical conditions." As we emphasized in our discussion of § 1636.3(a)(2) and (b) above, employers historically have refused pregnant workers accommodations due to a lack of "evidence" of a measurable and diagnosable complication, and many healthcare providers continue to believe they are not allowed to recommend accommodations without the same evidence.[78] Highlighting the law's purpose as it relates to risk and pain avoidance, therefore, is critical. This is especially so for women of color, who are more likely to work in physically demanding jobs,[79] and to have their employers and healthcare providers underestimate their pain and apply higher levels of risk tolerance toward them.[80]

[78] Am. C. Obstetricians & Gynecologists, *ACOG Committee Opinion 733: Employment Considerations During Pregnancy and the Postpartum Period*, 131 OBSTETRICS & GYNECOLOGY 115, 119 (2018), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/04/employment-considerations-during-pregnancy-and-the-postpartum-period (stating that it is generally safe to work during pregnancy without adverse effects to the pregnant person or fetus, but that accommodations are needed for workers whose jobs expose them to toxins, "very physically demanding" work, or "an increased risk of falls or injuries," as well as to address pregnancy complications like gestational diabetes) [hereinafter *ACOG Committee Opinion*].

[79] NAT'L LATINA INST. FOR REPROD. HEALTH & NAT'L WOMEN'S LAW CTR., ACCOMMODATING PREGNANCY ON THE JOB: THE STAKES FOR WOMEN OF COLOR AND IMMIGRANT WOMEN (2014), https://nwlc.org/wp-content/uploads/2015/08/the_stakes_for_woc_final.pdf.

[80] Jamila Taylor et al., *Eliminating Racial Disparities in Maternal and Infant Mortality*, CTR. AM. PROGRESS, 46 (May 2019), https://www.americanprogress.org/article/eliminating-racial-disparities-maternal-infant-mortality/; Molly R. Altman, et al. *Information and Power: Women of Color's Experiences Interacting with Health Care Providers in Pregnancy and Birth*, 238 SOC. SCI. & MED. 112491 (2019), https://doi.org/10.1016/j.socscimed.2019.112491; *see also* Saraswathi Vedam et al., *The Giving Voice to Mothers Study: Inequity and Mistreatment During Pregnancy and Childbirth in the*

PROPOSED GUIDANCE ON § 1636.3(h)

Alleviating Increased Pain or Risk to Health Due to the Known Limitation (§ 1636.3(h))

We have serious concerns with the proposed guidance on "Alleviating Increased Pain or Risk to Health Due to the Known Limitations" at 88 Fed. Reg. at 54779–80. For the reasons described in our discussion of subsections 1636.3(a)(2) and (b) above, and elaborated further below, **we strongly urge** the agency to make substantial revisions to this section, including the following changes:

- Add examples of circumstances in which the employer must accommodate the worker's limitation in order to alleviate increased pain or risk due to a known limitation. Currently, every hypothetical in this section provides examples of circumstances in which an employer does *not* have to accommodate a limitation—an approach that is unhelpful (and puzzling) in a section that nominally purports to describe the obligation to "alleviat[e] increased pain or risk to health due to the known limitation." Of course, the PWFA does not require an employer to accommodate a limitation wholly unrelated to pregnancy, but—given the multitude of bodily systems impacted by pregnancy—it is in practice extremely unlikely that workers' health limitations will be entirely unrelated to pregnancy. The guidance's overwhelming focus on the latter circumstance, then, is deeply misleading, and dangerous: It communicates to employers that they may accommodate many fewer health needs than the PWFA in fact requires, and it suggests that the Commission will allow employers to second-guess workers' needs, conducting the very kind of exacting, intrusive scrutiny of workers' health conditions that led Congress to pass the PWFA in the first place.
- For example, the agency should rework the Celia knee-pain hypothetical (example 1636.3 #10) to serve as a hypothetical of a limitation an employer *must* accommodate, absent undue hardship.
    - Pregnancy affects every part of the body, and knee pain is a classic example of a pregnancy-related limitation.[81] For instance, one study found that "knee pain is common during pregnancy" and documented over one-quarter of study

United States, 16 REPROD. HEALTH 77 (2019), https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-019-0729-2.

[81] *See, e.g.*, Serdar Kesikburun et al., *Musculoskeletal Pain and Symptoms in Pregnancy: A Descriptive Study*, 10 THERAPEUTIC ADVANCES MUSCULOSKELETAL DISEASE 229, 232 (2018), https://journals.sagepub.com/doi/epdf/10.1177/1759720X18812449 (finding a "significant increase in hand-wrist, neck, back, low back, hip, knee, and ankle-foot pain" during the third trimester of pregnancy); Robyn Horsager-Boehrer, *Top symptoms patients might not expect during pregnancy*, U. TEX. SW. MED. CTR. (Oct. 1, 2019), https://utswmed.org/medblog/top-symptoms-patients-might-not-expect-during-pregnancy/ ("Similar to gaining weight outside pregnancy, additional weight adds pressure on the joints — to the tune of 4 lbs. of pressure on the knees for every 10 lbs. of extra weight a patient carries" and causing hip and joint pain); *Neuromusculoskeletal Considerations During Pregnancy and Postpartum Provider Resource*, NAVY MED., https://www.med.navy.mil/Portals/62/Documents/NMFA/NMCPHC/root/Health%20Promotion%20and%20Wellness/Women's%20Health/Documents/Pregnancy_and_Postpartum/NMSK_Preg_Postpartum_Considerations_Provider_Resource_vF_221116.pdf (last visited Oct. 5, 2023); *see also* CTR. FOR WORKLIFE LAW, COMMON WORKPLACE LIMITATIONS & REASONABLE ACCOMMODATIONS EXPLAINED, *supra* note 33, at 2.

participants experiencing "severe" knee dysfunction during pregnancy, increasing with each trimester.[82] In other words, it is far more likely that Celia's pregnancy is *contributing* to her existing knee pain (or is increasing the risk of her pre-existing knee condition worsening)—a circumstance the PWFA would require an employer to accommodate—than that it is entirely unrelated. The guidance's hyper-fixation on identifying the knee pain's source will encourage inappropriate employer scrutiny and skepticism of workers' health limitations—precisely what the PWFA was enacted to eliminate.[83]

- Moreover, the guidance's statement that Celia's employer does not have to accommodate her "unless there is evidence" that her knee pain is exacerbated by her pregnancy is troubling, vague, and confusing. Just what kind of "evidence" would Celia have to marshal in order to make such a showing and obtain an accommodation? What if her health provider cannot determine with 100% certainty that her knee pain is definitively exacerbated by her pregnancy—even if, as population-level studies suggest, it most likely is? (Or that the limited treatment options available due to Celia's pregnancy might not sufficiently alleviate her pain, thus exacerbating her symptoms caused by pregnancy?) As noted above, on our helpline, we find there are many reasons why health providers are reticent to certify that a condition is or is not definitively caused or exacerbated by pregnancy, even when there is a high likelihood the two are related.
- Accordingly, **we urge** the agency to either delete or alter Celia's hypothetical to make clear that "The PWFA would require the employer to provide an accommodation regarding Celia's knee pain since it is affected by and/or exacerbated by Celia's pregnancy, childbirth, or related medical conditions."

- Likewise, the agency should rework the Margaret hypothetical (example 1636.3 #13) to serve as an example of a circumstance in which an employer *must* accommodate. Wrist

[82] *See, e.g.*, Miho J. Tanaka, *One-Quarter of Women in an Obstetric Population Report Severe Knee Dysfunction*, MASS. GEN. HOSP.: ADVANCES IN MOTION (Apr. 13, 2021) https://advances.massgeneral.org/ortho/journal.aspx?id=1904 (summarizing Physician and Sportsmedicine journal article publishing research finding that 26 percent of pregnant study participants had severe knee dysfunction and that there was a 2.7 times "greater odds of severe dysfunction in pregnant women who had a history of knee problems").

[83] H.R. REP. NO. 117-27, pt. 1, at 11 (2021), https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf ("Although workers in need of pregnancy-related accommodations may be able to seek recourse under … the Americans with Disabilities Act of 1990 (ADA), varying interpretations have created an unworkable legal framework. This has frustrated pregnant workers' ability to secure reasonable accommodations . . . Under the ADA, a pregnancy-related impairment that substantially limits a major life activity is a disability for which an employer may be required to provide reasonable accommodations. However, this standard leaves women with less serious pregnancy-related impairments, and who need accommodations, without legal recourse."); H.R. REP. NO. 117-27, pt. 1, at 26 (2021), https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf; ("Importantly, PWFA does not import the ADA's definition of disability, but rather requires employers to make accommodations to the 'known limitations' related to pregnancy, childbirth, or related medical conditions."); *see also 2021 Bakst Testimony*, *supra* note 5, at 10–11 (explaining the challenges of using an ADA framework to protect pregnant workers, including citing cases where courts found the ADA did not cover pregnancy-related complications).

and hand pain are classic symptoms experienced during pregnancy.[84] As such, it is far more likely that Margaret's wrist pain is caused or exacerbated by her pregnancy than that it is not. Accordingly, **we recommend** the Commission use the Margaret wrist pain as an example of increased pregnancy-related pain that an employer must attempt to alleviate through accommodation.

- The agency should also delete the last sentence of the Lucille hypothetical (example 1636.3 #11), relating to accommodating her opioid use disorder. Again, the agency's overwhelming focus in this section on what an employer does *not* have to accommodate is misleading and confusing, suggesting that an employer must accommodate far fewer needs related to pain and risk than the PWFA in fact requires.
- The agency could use the Jackie hypothetical (example 1636.3 #12) to demonstrate a circumstance in which an employer would need to accommodate a postpartum lactation-related need. For example, the agency could alter the latter half of the hypothetical to state: "After Jackie gives birth, she returns to work where she expresses milk for her baby. Jackie requests the temporary suspension of the essential function of working with chemicals because the chemicals can contaminate human milk.[85] Under the PWFA, her employer must provide her requested accommodation (or another reasonable accommodation), absent undue hardship, in order to accommodate Jackie's lactation-related needs. After Jackie stops lactating and no longer has any known limitations, she can be assigned to work with the chemicals again even if she would rather not do that work, because the PWFA only requires an employer to provide an accommodation needed due to the known limitation related to pregnancy, childbirth, or related medical conditions."
- Finally, **we suggest** the agency add the following examples of reasonable accommodation that may alleviate increased pain and discomfort or to avoid increased risk to health: 1) a farmworker being temporarily transferred to an indoor position to avoid exposure to extreme heat; (2) an administrative assistant experiencing pelvic pain being allowed to

[84] *See, e.g.*, CTR. FOR WORKLIFE LAW, COMMON WORKPLACE LIMITATIONS & REASONABLE ACCOMMODATIONS EXPLAINED, *supra* note 33, at 5 ("Tingling, pain, numbness, and joint stiffness in hands and wrists is common in late pregnancy due to changes in fluid composition and increased amount of pressure on median nerve in wrist. Carpal tunnel syndrome is an impairment that is much more prevalent in pregnant women that the population generally."); Kesikburun et al., *Musculoskeletal Pain and Symptoms in Pregnancy*, *supra* note 81 (noting the prevalence of hand-wrist pain during pregnancy); Rachel Rabkin Peachman, *Pregnancy Pains Got You Down? Read This*, N.Y. TIMES (Mar. 24, 2023), https://www.nytimes.com/article/pregnancy-cramps-pains-guide.html (describing carpal tunnel syndrome as "common" during pregnancy); *Pregnancy: Carpal Tunnel Syndrome*, KAISER PERMANENTE (July 18, 2023), https://healthy.kaiserpermanente.org/health-wellness/health-encyclopedia/he.pregnancy-carpal-tunnel-syndrome.zt1608; Andrzej Zyluk, *Carpal Tunnel Syndrome in Pregnancy: A Review*, 78 POLISH ORTHOPEDICS & TRAUMATOLOGY 223 (2013), https://pubmed.ncbi.nlm.nih.gov/24104526/.

[85] *See, e.g.*, *Learn about Specific Exposures During Pregnancy & Breastfeeding*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 1, 2023), https://www.cdc.gov/niosh/topics/repro/specificexposures.html (describing "common workplace hazards that could be harmful for pregnant or breastfeeding women"); CTR. FOR WORKLIFE LAW, COMMON WORKPLACE LIMITATIONS & REASONABLE ACCOMMODATIONS EXPLAINED, *supra* note 33, at 11.

work remotely to alleviate pain caused by sitting during her commute; and (3) a warehouse worker being afforded additional water breaks to avoid dehydration.[86]

Particular Matters Regarding Leave as a Reasonable Accommodation (§ 1636.3(h)).

We applaud the Commission's discussion of leave as a reasonable accommodation. Leave—especially leave for recovery from childbirth and intermittent time off to recover from pregnancy-related health conditions or to attend prenatal or postnatal medical appointments—is an extremely common accommodation needed for pregnancy, childbirth, and related medical conditions.[87] The EEOC appropriately devotes a full regulatory subsection to the importance of offering leave as a reasonable accommodation. Its explicit, plain-language discussion of leave will be invaluable in educating workers and employers alike about the availability of time off as a reasonable accommodation under the PWFA, making it more likely that employers will provide it and easier for workers to access it.

The legislative history supports the agency's discussion of leave. For example, as the EEOC points out, the House Conference Report states: "[L]eave is one possible accommodation under the PWFA, including time off to recover from delivery." Likewise, the Minority of the House Education and Labor Committee explained that the PWFA's "qualified" language meant that "it is also appropriate to consider . . . leave" as a reasonable accommodation under the PWFA.[88] The business community made clear, too, that it recognize that the PWFA guaranteed leave as a reasonable accommodation.[89]

In our experience supporting workers who contact our helpline, leaves of absence—including intermittent or shorter periods of time off—are vital to ensuring that pregnant and postpartum workers are able to remain attached to the workforce long term, without sacrificing their health or their pregnancies. For example, a Nebraska worker with a high-risk pregnancy contacted us "panicked" because her employer told her she might not qualify for maternity leave under the

[86] For one example of a situation where a reasonable accommodation could have prevented a health problem, *see 2019 Bakst Testimony*, *supra* note 5, at 26 (citing the experience of an ER doctor who had to provide intravenous fluids to a 16-week pregnant patient arriving by ambulance after collapsing at work because she was not allowed to drink water while working on the retail floor).

[87] According to 20062008 Census Bureau data, while pregnant and/or up to 12 weeks postpartum, 51 percent of first-time mothers used paid leave, 42 percent used unpaid leave, and 10 percent used disability leave (participants could select multiple answers). LYNDA LAUGHLIN, U.S. CENSUS BUREAU, MATERNITY LEAVE AND EMPLOYMENT PATTERNS: 2006–2008, at Table 5 (2011)), https://www2.census.gov/library/publications/2011/demo/p70-128.pdf; *see also ACOG Committee Opinion*, *supra* note 78, at e116; for discussion of time off to attend medical appointments.

[88] H.R. REP. NO. 117-27, pt. 1 at 54 (Minority Views, citing to 42 U.S.C. § 12111(9)(B)); *see also* EEOC, *Employer-Provided Leave and the Americans with Disabilities Act* (2016), https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act.

[89] *See, e.g.*, 167 CONG. REC. H2328 (daily ed. May 14, 2021) (letter from U.S. Chamber of Commerce, SHRM, and the National Retail Federation, et al.), https://www.congress.gov/117/crec/2021/05/14/167/84/CREC-2021-05-14-pt1-PgH2321-3.pdf ("This legislation uses an interactive, reasonable accommodation process similar to the Americans with Disabilities Act and specifies a pregnant employee may take leave only after the employer and employee have exhausted the possibility of other reasonable accommodations.").

FMLA in the event that she delivered prematurely. She told us she was "having nightmares about having a baby and having to return to work right away." It took her employer more than two months to finally determine that she did in fact qualify for FMLA leave. While she waited for that determination, she found it tremendously reassuring to have the PWFA "in her back pocket" as a source of job-protected leave to recover from childbirth that she could "fall back on" if needed.

The opposite is also true: Too often we hear from workers whose employers have incorrectly denied them time off (including when it would not have been an undue hardship under the PWFA), forcing them to choose between their job and their health, or otherwise misinformed them about their rights to leave. For example:

- A dental assistant contacted us after learning that she had been fired for pregnancy-related absences during her difficult pregnancy. When she had attempted to provide doctor's notes for each absence, her employer insisted the notes did not "matter" and could not excuse the absences. Afraid to lose her job, she went to work on days when she felt ill.
- Likewise, a retail worker took leave to recover from childbirth, only to learn that her employer had fired her and had no intention of rehiring her.
- A retail worker in Maryland contacted our helpline after her employer informed her, incorrectly, that she did not qualify for any leave to recover from childbirth because she was not eligible for FMLA leave.
- Another worker contacted us to ask whether she could take time off for the significant exhaustion she experienced due to hormone changes associated with in vitro fertilization ("IVF").
- A Nevada customer service worker's employer wrote her up for attending prenatal appointments for her high-risk pregnancy. Her employer claimed that she was too new an employee and thus had not yet accrued sufficient paid time off ("PTO") under the company's policy—without considering whether it could accommodate her occasional need for time off under the PWFA. Her experience reflects a common scenario we have heard on our helpline since the PWFA went into effect: Employers automatically denying new employees' pregnancy-related requests for intermittent leave, on the basis that they are not yet FMLA-eligible or have not yet accrued sufficient paid time off ("PTO"), without engaging in the PWFA interactive process.

We appreciate the Commission's recognition at 88 Fed. Reg. at 54780 that a production standard may need to be prorated or otherwise adjusted for a worker who needs leave as a reasonable accommodation. **We suggest** several changes to strengthen this section further:

- In the sentence, "For example, if a call center employee with a known limitation requests and is granted two hours of leave in the afternoon for rest, the employee's required number of calls may need to be reduced proportionately, as could the employee's pay," **we recommend** the agency delete "as could the employee's pay." For the reasons explained above at the beginning of Section K, a worker should not be punished for their use of a reasonable accommodation under the PWFA, such as temporary excusal from meeting a production standard.
- Adjust the text so that it reflects the following underlined text: "Alternately, the accommodation could allow for the employee to make up the time at a different time

during the day—such as after traditional work hours if the employee prefers—so that the employee's production standards and pay would not be reduced."
- Delete "unpredictable nature" from the list of reasons that a leave could pose an undue hardship.

Ensuring that Workers are Not Penalized for Using Reasonable Accommodations (§ 1636.3(h)).

We applaud the agency for the guidance sub-section on "Ensuring that Workers are not Penalized for Using Reasonable Accommodations."[90] In the three months since the PWFA went into effect (and in the years prior, under state PWFAs) we have routinely heard from workers—particularly low-wage workers—who have been disciplined, or threatened with discipline, under attendance policies and practices, productivity quotas, and other performance metrics (such as "time off task") for exercising their rights to reasonable accommodations under the PWFA. In our experience, such policies and practices have a significant chilling effect on workers. For example:

- We spoke with an FMLA-ineligible desk agent just prior to the federal PWFA's effective date (but in a state with a PWFA analogue), whose large employer gave her verbal and written warnings for her absences due to pregnancy-related nausea, swelling, and pain. As a result of the discipline, she was terrified to call out sick and went to work ill and in pain—even after the federal PWFA went into effect.
- Another worker, also FMLA-ineligible, was put on a probationary period each time she needed time off to address her significant pregnancy-related symptoms and threatened with termination if she called out sick during such periods. She limited her absences as a result, showing up to work on days when she was ill.
- More generally, we hear routinely from workers whose employers tell them—incorrectly—that they cannot exercise their rights to time off as a reasonable accommodation in the first several months of their employment, such as during a 90-day "probationary period."
- We likewise hear from workers who are "pointed" under employer "call-out" policies for needing unforeseen leave as a reasonable accommodation for an urgent pregnancy-related need, where it is not practicable to provide advance notice of the need for leave. For example, we have assisted pregnant workers who have begun bleeding, passed out, and/or miscarried, who must leave work and be rushed to the emergency room, and who are punished or threatened with punishment for doing so.

To further clarify and strengthen this section, **we urge** the agency to state explicitly that the PWFA's protections apply to brand new employees, part-time employees, and temporary or seasonal workers, and that it is unlawful to threaten to penalize, or to actually penalize, such workers for exercising their rights to reasonable accommodations, such as time off, under the PWFA.

We also urge the Commission to clarify that a worker shall not be penalized for needing unforeseeable leave as a reasonable accommodation in a health emergency. As described above,

[90] PWFA Proposed Rule, 88 Fed. Reg. at 54781.

we have assisted pregnant workers who have begun bleeding, passed out, and/or miscarried, who must leave work and be rushed to the emergency room. These are needs for accommodation that the PWFA was intended to protect.[91] The agency should make clear that it is unlawful to punish a worker for needing, requesting, or using such an accommodation, including under a "two-hour call-outs" policy or other points policy, for example.

We recommend adding specific reference to attendance policies and practices, such that the text reads: "Covered entities making reasonable accommodations must ensure that their ordinary workplace policies or practices, <u>including but not limited to attendance policies or procedures, and productivity quotas</u>, do not operate to penalize <u>or threaten potential penalization of</u> employees for utilizing such accommodations. For example, when a reasonable accommodation involves a pause in work—such as a break, a part-time or other reduced work schedule, or leave—an employee cannot be penalized <u>or threatened with a penalty</u> for failing to perform work during such a non-work period<u>, such as through the assessment of "points" for time off, deduction of time from an allotted bank of time off, or discipline for failing to meet production quotas.</u>"

- We hear often from workers on our helpline whose employers apply their attendance "points" policies against workers who use reasonable accommodations for pregnancy-related needs. For example:
    - We spoke with an FMLA-ineligible pregnant worker whose employer maintained a "no-exceptions" attendance policy, repeatedly assigned her disciplinary points for absences needed to attend prenatal appointments, and threatened to terminate her for the points she had received. Her employer's policy on its face, as well as the assignment of points, made her afraid to exercise her rights under the PWFA, forcing her to choose between the medical care she needed and her financial security.
    - A pregnant cashier, also FMLA-ineligible, was written up for two pregnancy-related absences under her employer's attendance policy and threatened that if she had a third pregnancy-related absence her employment would be terminated.
    - Accordingly, **we urge** the agency to specifically state that it is unlawful to *assess points or other penalties* for time off as a reasonable accommodation.
- Likewise, we hear often from workers who are chilled by threatening employer *policies* (such as no fault attendance policies that do not account for time off as a reasonable accommodation under the PWFA) from ever exercising their rights to reasonable accommodation. Accordingly, **we recommend** the guidance state explicitly that maintaining such a policy, regardless of if and when it is applied, can constitute unlawful interference under the PWFA. Likewise, the agency should make clear that threatening to assess points or discipline for taking or attempting to take time off as a reasonable accommodation can constitute interference, regardless of whether the points or discipline are ultimately assessed, because the threats can chill workers from exercising their rights.

[91] *See infra* note 89; *see also* 167 CONG. REC. H2339 (daily ed. May 14, 2021) https://www.congress.gov/117/crec/2021/05/14/167/84/CREC-2021-05-14-pt1-PgH2321-3.pdf (Submission by Rep. Steve Cohen of A Better Balance Legal Analysis of State Actor Pregnancy-Related Gender Discrimination: "As a result of the strain of changing one patient, Jackson had to be rushed to the emergency room and 'nearly [went] into pre-term labor.'").

- For example, the desk agent referenced above told us she was terrified to call out sick and went into work sick and in pain—including *while* she was having contractions—for fear of incurring additional discipline or termination.

All Services and Programs (§ 1636.3(h))

We support the subsection on "All Services and Programs." 88 Fed. Reg. at 54781. To further clarify the accommodation obligation, **we recommend** adding an example of the obligation to provide reasonable accommodations during work travel—a circumstance in which we hear workers struggle to obtain the accommodations they need.

For example, a Virginia worker named Chelsea contacted us seeking clarification on her rights either to be temporarily excused from work travel as an accommodation for lactation or to be provided with accommodations that would ensure she had access to a private pumping space when engaging in air travel for work.

We recommend the agency address this type of scenario by adding an additional sentence: "For instance, an employer must ensure that an employee traveling for work, or to different worksites, has access to appropriate space (private, clean, etc.), time, and other accommodations to allow the employee to express milk."

Interim Reasonable Accommodations (§ 1636.3(h))

We appreciate the Commission's recognition in its subsection on "Interim Reasonable Accommodations" at 88 Fed. Reg. at 54781 that a worker may "have an urgent need for a reasonable accommodation due to the nature or sudden onset of a known limitation under the PWFA." But the guidance in its current form—which states that providing an interim accommodation is a mere "best practice"—does not go far enough. **We urge** the EEOC to clarify that the PWFA *requires* employers to provide interim accommodations for urgent needs. The statutory text, as well as its spirit and legislative intent, requires such a reading.[92]

First, the text of the PWFA is clear that it is unlawful to "not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee."[93] Any failure to so accommodate (absent undue hardship) violates the plain text of the statute. By stating that making prompt interim accommodations in emergent situations is a mere "best practice," rather than a requirement, the Commission has read into the statutory text an exception to the accommodation obligation that does not exist.

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[92] *See, e.g., Long Over Due: Exploring the Pregnant Workers' Fairness Act: Hearing on H.R. 2694 Before the Subcomm. on Civ. Rts. & Hum. Servs. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019) (statement of Rep. Jahana Hayes) (sharing her experience—while working as a teacher—of being pregnant and denied bathroom breaks, and being told she had to wait until her lunch period to use the restroom "which led to further complications with bladder issues, so what started out as an uneventful pregnancy ended up having complications as a result of this minor accommodation not being met"); *2019 Bakst Testimony*, *supra* note 5, at 26 (describing an emergency situation where a pregnant worker was rushed via ambulance to the Emergency Department after fainting due to dehydration.).

[93] 42. U.S.C. § 2000gg-1(1).

Second, our approach finds support in the spirit and legislative intent of the PWFA. The PWFA was enacted specifically to ensure that workers could get the accommodations they need in a timely, and often time-sensitive, manner. The legislative record is replete with statements describing the purpose of the PWFA as ensuring workers no longer must choose between their job and a healthy pregnancy due to not getting accommodations in a timely manner, when needed.[94] As legislators recognized, serious pregnancy-related complications can arise when accommodations are delayed.[95] For example:

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[94] *See, e.g.*, 168 CONG. REC. S10081 (daily ed. Dec. 22, 2022) (statement of Sen. Robert Casey, Jr.), https://www.govinfo.gov/content/pkg/CREC-2022-12-22/pdf/CREC-2022-12-22-senate.pdf (noting that ''pregnant workers need immediate relief to remain healthy and on the job''); 167 CONG. REC. H2328 (daily ed. May 14, 2021) (letter from Black Mamas Matter Alliance et al.), https://www.congress.gov/117/crec/2021/05/14/167/84/CREC-2021-05-14-pt1-PgH2321-3.pdf ("By putting a national pregnancy accommodation standard in place, the Pregnant Workers Fairness Act has the potential to improve some of the most serious health consequences Black pregnant people experience. Furthermore, the Pregnant Workers Fairness Act will help remove one of the many barriers Black pregnant people face at work by ensuring they are afforded immediate relief under the law, and not thrown into financial dire straits for needing pregnancy accommodations."); *id.* at H2332 (statement of Rep. Jan Schakowsky) ("Pregnant women should never have to choose between maintaining a healthy pregnancy and their paycheck. This critical bill will ensure that pregnant women get accommodations *when they need them* without facing discrimination and/or retaliation at work." (emphasis added)); *id.* at H2334 (letter from A Better Balance) ("The Americans with Disabilities Act requires employers to provide reasonable accommodations to workers with disabilities, which can include some pregnancy-related disabilities. However, pregnancy itself is not a disability, leaving a gap wherein many employers are in no way obligated to accommodate pregnant workers in need of *immediate* relief to stay healthy and on the job.") (emphasis added); *id.* at H2338 (statement of Rep. Stephen Ira Cohen) ("The Pregnant Workers Fairness Act will ensure that pregnant workers get accommodations *when they need them* without facing discrimination or retaliation in the workplace by putting in place a clear, explicit pregnancy accommodation framework similar to the accommodation standard that has been in place for decades for workers with disabilities.") (emphasis added); *id.* at H2340 (letter from A Better Balance et al.) ("Evidence from states and cities that have adopted laws similar to the Pregnant Workers Fairness Act suggests that providing this clarity . . . most importantly, helps ensure that women can obtain necessary reasonable accommodations *in a timely manner*, which keeps pregnant women healthy and earning an income when they need it most.") (emphasis added); *id.* at H2341 (statement of Rep. Nancy Pelosi) ("This is what this means: It means that too often when a pregnant worker asks for a temporary job-related accommodation, she will be fired or pushed onto unpaid leave, deprived of her paycheck and health insurance when she needs them most. This is particularly true in many physically taxing jobs, which tend to be low wage and traditionally dominated by women. And that is why we must pass the Pregnant Workers Fairness Act, putting in place a clear, explicit pregnancy accommodation framework, similar to the standard that has been in place for decades for workers with disabilities, which I was proud to be part of."); *Long Over Due: Exploring the Pregnant Workers' Fairness Act: Hearing on H.R. 2694 Before the Subcomm. on Civ. Rts. & Hum. Servs. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019) (statement of Rep. Suzanne Bonamici) (praising the PWFA because it would allow pregnant workers to get accommodations without waiting months or years).

[95] 167 CONG. REC. H2328 (daily ed. May 14, 2021) (statement of Rep. John Katko), https://www.congress.gov/117/crec/2021/05/14/167/84/CREC-2021-05-14-pt1-PgH2321-3.pdf ("Before my home State of New York passed a law prohibiting discrimination against pregnant workers, I heard far too many stories of pregnant women facing discrimination in the workforce and having to choose between a healthy pregnancy and a paycheck . . . . [T]here was Hilda, an employee at a Dollar Tree who

- A pregnant security guard called our helpline after she was forced to wait forty-five minutes to use the bathroom and ended up in the hospital where she was advised that she should not hold her urine so long because it can lead to preterm labor.
- Another pregnant worker, who had asked her supervisor if she could carry a water bottle, became so dehydrated that she collapsed at work and was rushed to the emergency room, at risk of miscarriage.[96]

Finally, the Commission's own interpretation of the statute compels such an approach. Elsewhere in its proposed guidance, the Commission states, "[A]n unnecessary delay in responding to a request for a reasonable accommodation may result in a violation of the PWFA if the delay results in a failure to provide a reasonable accommodation. This can be true even if the reasonable accommodation is eventually provided, when the delay was unnecessary."[97] In light of this appropriate and justified reading of the statute, we find EEOC's unreasonably permissive approach to interim accommodations puzzling. Failure to offer an interim reasonable accommodation for an urgent health need *is* an unnecessary delay and thus constitutes a failure to accommodate, even if the employer eventually provides an accommodation later. The agency should recognize it as such.

Accordingly:

- **We strongly urge** the Commission to make clear that the accommodation to make interim accommodations (while the interactive process is ongoing) is mandatory. To that end, **we urge** the text to be modified so that it reflects the following underlined additions: "An employer must provide an interim reasonable accommodation under the PWFA in certain circumstances . . . In this situation, a covered entity must provide an interim reasonable accommodation that meets the employee's needs while the interactive process is conducted."
    - In the alternative, if the Commission is unwilling to make the above change, **we strongly recommend** the phrase "best practice" be omitted and substituted with language reflecting that covered entities "should" provide interim reasonable accommodations.
- In addition, **we recommend** the agency remind covered entities at the beginning of the interim accommodation section that they may grant accommodations immediately without engaging in a back-and-forth interactive process.
- **We also recommend** the agency reiterate that forcing a worker onto an unwanted leave of absence under any circumstance, including as a purported interim accommodation, constitutes an adverse action and is unlawful.[98] Too often, we see employers immediately send home workers who request an accommodation, when the worker does not want (or need) to go on leave.

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worked there for 3 years when she became pregnant. As her pregnancy progressed, it became painful to stand at the cash register for 8 hours to 10 hours at a time. Denied her request for a stool, she began to experience severe complications, including bleeding and premature labor pains, and was put on bed rest.").

[96] *See 2019 Bakst Testimony*, *supra* note 5, at 26.

[97] PWFA Proposed Rule, 88 Fed. Reg. at 54789.

[98] *See* discussion *supra* Section K (recommending the Commission add a definition of the term "interim reasonable accommodation" in § 1636.3(h)).

- Finally, **we suggest** the EEOC change its illustration of an interim accommodation from "more frequent or longer bathroom breaks" to "temporary transfer" or another accommodation example that is not on the Commission's list of accommodations on the § 1636.3(j)(4) predictable assessments list.[99] Employers should engage in an immediate, interactive process to provide any accommodation that qualifies as a predictable assessment; thus an interim accommodation should not be necessary in those circumstances.

L. 1636.3(i) — Reasonable accommodation — examples.

DIRECTED QUESTION #5 RE: SECTION 1636.3(I): REASONABLE ACCOMMODATION EXAMPLES

> *Throughout the preamble, the Commission provides examples of reasonable accommodations and related analysis. The Commission seeks comment on whether more examples would be helpful and, if so, the types of conditions and accommodations that should be the focus of the additional examples.*

We applaud the Commission for the examples in the proposed interpretive guidance at 88 Fed. Reg. at 54782–84 and detail our recommendations to strengthen these examples below. In addition, **we recommend** modifying or adding several additional examples in order to highlight: (1) the obligation to accommodate lifting restrictions even in the absence of an "established light duty program"; (2) the obligation to accommodate a worker's need to work more slowly, in the assessment of their productivity; (3) the obligation to accommodate time off that exceeds a worker's available FMLA time; and (4) the obligation to accommodate time off for fertility-related appointments.

DIRECTED QUESTION #6 RE: SECTION 1636.3(I): REASONABLE ACCOMMODATION EXAMPLES

> *The Commission seeks comment on whether there are examples or other information that should be included to account for situations in which a worker who already has a reasonable accommodation for an existing disability (1) develops a known limitation and needs new accommodations or modifications to their existing reasonable accommodations or (2) needs to ensure the continuation of their disability-related reasonable accommodations if the worker is moved to another position or given different duties as part of the reasonable accommodation for a known limitation. Further, the Commission seeks comment on ways to ensure that in circumstances described in this question, the respective accommodations can be provided in a timely and coordinated way.*

We direct the Commission to our concerns, described above, regarding "Alleviating Increased Pain or Risk to Health Due to the Known Limitations" (§ 1636.3(h)).

[99] *See* discussion *infra* Section M (suggesting additions to the predictable assessments list in § 1636.3(j)(4)).

PROPOSED REGULATION § 1636.3(i)

We applaud the agency's recognition in 1636.3(i)(3) that leave of varying types is an essential reasonable accommodation under the PWFA, just as it has been under the ADA for decades. We point the agency to our discussion above of how important this accommodation is to pregnant and postpartum workers, particularly those who do not qualify for or have used up their FMLA leave.

In addition, **we specifically support** 1636.3(i)(3)(iv), which designates a "covered entity's concerns about the length, frequency, or unpredictable nature of leave requested as a reasonable accommodation" as a question of undue hardship. These factors should not be considered as part of the "reasonableness" of the proposed accommodation and instead should be weighed (as the Commission correctly recognizes) as part of the employer's affirmative defense of undue hardship.

We strongly urge the Commission to add an additional sentence to subsection 1636.3(i)(3)(iv) to reflect the following underlined text "Extended leave can be a reasonable accommodation. A covered entity's concerns about the length, frequency, or unpredictable nature of leave requested as a reasonable accommodation are questions of undue hardship." Adding this language will reinforce the point that concerns about the length of leave turn exclusively on "undue hardship," which occurs much later in the interactive process.

We strongly urge the Commission to add a new subsection 1636.3(i)(3)(v) stating: "The continuation of health insurance during leave is another potential leave-related accommodation that an employer must provide, absent undue hardship." For many workers, the opportunity to access leave as a reasonable accommodation is hollow without continuation of health benefits; after all, access to uninterrupted healthcare is vital during pregnancy and the postpartum period.[100] A central purpose of the PWFA[101] is promoting maternal and child health.[102] Indeed,

[100] *See, e.g.*, CTRS. FOR MEDICARE & MEDICAID SERVS., IMPROVING ACCESS TO MATERNAL HEALTH CARE IN RURAL COMMUNITIES 6, https://www.cms.gov/About-CMS/Agency-Information/OMH/equity-initiatives/rural-health/09032019-Maternal-Health-Care-in-Rural-Communities.pdf ("A lack of access to maternal health care can result in a number of negative maternal health outcomes including premature birth, low-birth weight, maternal mortality, severe maternal morbidity, and increased risk of postpartum depression.").

[101] H.R. REP. NO. 117-27, pt. 1, at 22–24 (2021), https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf.

[102] The Commission's ADA guidance from 2002 states that employers must continue insurance benefits when an employee is on leave as an ADA accommodation only to the same extent they do so for other employees. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA, at Q21 (2002), https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada. However, the statutory text of the ADA and its implementing regulations support the principle that providing continued health benefits during leave may be a reasonable accommodation, even if other employees do not receive the same benefit, where the continued benefits can be provided without undue hardship. The longstanding ADA principle that gives employees with disabilities an affirmative right to receive the same health insurance benefits as are provided to other employees stems from the ADA's prohibition on "limiting, segregating, or classifying a job applicant or employee in a way that

the House report on the PWFA clearly stated that pregnant people "want, and oftentimes need, to keep working during their pregnancies, both for income and to retain health insurance."[103] The reasonableness of requiring continued health insurance benefits during leave is bolstered by the FMLA requirement that employers do so for up to 12 weeks every year,[104] as well as state laws that require continued health benefits during leave taken for pregnancy or other health reasons.[105]

We urge the EEOC to modify its treatment of leave-related accommodations by deleting comparative reference to other employees.[106] For example, the Commission notes one potential accommodation as "[t]he ability to choose whether to use paid leave . . . or unpaid leave *to the extent that the covered entity allows employees using leave not related to pregnancy* . . . to choose." Under the PWFA (unlike the Pregnancy Discrimination Act ("PDA")), whether these potential accommodations should be provided turns on the question of undue hardship, not on how other employees are treated. As with all accommodations, employers may be obligated to modify standard practices to accommodate people with limitations related to pregnancy, childbirth or related medical conditions, even if a particular benefit is not routinely offered to other employees.[107]

We applaud 1636.3(i)(4) concerning lactation-related accommodations. In particular, we commend the agency for reminding employers that they have lactation-related obligations under both the PUMP Act and the PWFA, including ensuring lactation space has electricity and reasonable proximity to a sink, running water, and a refrigerator for storing milk. These are vital components of a functional lactation space. They are also highly practicable: Some state laws

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adversely affects the opportunities or status of such applicant or employee because of the disability." 42 U.S.C. § 12112(b)(1); *see also* 29 C.F.R. § 1630.5 app. ("[T]his part is intended to require that employees with disabilities be accorded equal access to whatever health insurance coverage the employer provides to other employees."). But this non-discrimination concept should not be conflated with the standard for providing reasonable accommodation, which does not turn on how other employees are treated. Even if the principle from the 2002 guidance were supported by the ADA, it would not be instructive in the PWFA context, given the clear legislative intent of the PWFA to promote healthy pregnancies and reproductive health and to allow employees to take leave following childbirth, all while maintaining their health insurance.

[103] H.R. REP. NO. 117-27, pt. 1, at 24 (2021), https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf.

[104] Family and Medical Leave Act, 29 U.S.C. § 2614(c); 29 C.F.R. § 825.209.

[105] For example, under the California Pregnancy Disability Leave Law and the California Family Rights Act, employees have a right to take up to 7 months of leave *with continued health insurance benefits* during pregnancy and following childbirth. CAL. CODE REGS., tit. 2, § 11044(c) (employer must continue to provide health insurance benefits during 4 months of pregnancy disability leave); CAL. CODE REGS., tit. 2, § 11092(c) (continued health insurance benefits for up to 12 weeks for leave taken to bond with a new child).

[106] Of course, if other employees receive a particular accommodation, that is evidence of the lack of undue hardship.

[107] Similarly, **we suggest** that employers may be required to "provide reserved parking spaces" as a PWFA reasonable accommodation, even when it is not the case that "the employee is otherwise entitled to use employer provided parking." PWFA Proposed Rule, 88 Fed. Reg. at 54714, 54779.

already require, and many employers already provide, these components to lactating employees, decreasing the cost of employer compliance going forward.[108]

We have several recommendations for ways the EEOC can strengthen the final rule and Interpretive Guidance regarding lactation-related accommodations:

We suggest the EEOC use the term "chestfeeding" throughout the Regulations and Interpretive Guidance. "Chestfeeding" is a term used by many masculine-identified trans people to describe the act of feeding their baby from their chest.[109] We appreciate the EEOC's care in using gender neutral language throughout the proposed rule and using the term "chestfeeding" in the regulations and Interpretive Guidance will likewise recognize, in no uncertain terms, the full range of lactation experiences and provide clarity to employers and workers that all lactating employees have a right to receive reasonable accommodations, regardless of gender identity.

We suggest the EEOC update the final rule to remind (1) all employers (including those with fewer than 15 employees) that they must provide lactation break time and space under the PUMP Act for up to one year following birth, and (2) employers with 50 or more employees that they cannot claim an undue hardship defense from providing break time and space under PUMP. On our helpline we have heard from workers whose employers misunderstood their distinct obligations under the two laws, and misinformed employees about their rights—suggesting a need for the EEOC to clarify in the final rule.

- For example, a social worker in North Carolina told us that when she requested lactation breaks from her large employer, HR's immediate response was, "We don't have to accommodate you if this is an undue hardship." HR was incorrect: Because of its large size, the employer did not have a legal right to claim undue hardship under the PUMP Act.

We suggest the EEOC modify language on pumping accommodations to avoid inadvertently suggesting that the PUMP Act does not require certain measures that ensure "functional" lactation space. In its Field Assistance Bulletin No. 2023-02, the U.S. Department of Labor's Wage and Hour Division ("WHD") states that lactation spaces provided by employers pursuant to the PUMP Act "must be functional as a space for pumping." WHD describes that workers must have a place to sit, a flat surface on which to place the pump, and the ability to safely store the milk at work. The WHD also states that the space must be clean and safe for producing milk

[108] *See, e.g.*, CAL. LAB. CODE §§ 1030-31 (also requires access to sink, refrigerator, surface, place to sit, and electricity); MINN. STAT. § 181.939(1)(b) (also requires electrical outlet); N.Y. LAB. LAW § 206-c (also requires, absent undue hardship, access to running water, a chair, a surface, and, if the workplace has it, electricity and a refrigerator); N.Y.C. ADMIN. CODE §§ 8-102, 8-107(22)(b) (also requires, absent undue hardship, access to running water, a surface, a chair, an electrical outlet, and proximity to a refrigerator). The U.S. Department of Labor is clear that the lactation space must be "functional" under the PUMP Act. *See* U.S. Dep't of Lab., Field Assistance Bulletin No. 2023-02 (2023), https://www.dol.gov/sites/dolgov/files/WHD/fab/2023-2.pdf.

[109] Rita Lynne Ferri et al., *ABM Clinical Protocol #33: Lactation Care for Lesbian, Gay, Bisexual, Transgender, Queer, Questioning, Plus Patients*, 15 BREASTFEED MED. 284–293 (May 2020), https://pubmed.ncbi.nlm.nih.gov/32330392/.

(e.g., free of bacteria). This concept of functionality is critical to ensuring lactating workers are able to pump milk for their infants without jeopardizing their economic security.

The EEOC's proposed regulations may inadvertently undermine this concept of functionality by suggesting that the accommodations listed in subsection 1636.3(i)(4)(ii)—including "regularly cleaned," "appropriate seating," and "a surface sufficient to place a breast pump," all of which may be necessary to make a space "functional"—are *not* required by the PUMP Act. While we assume this was not the Commission's intention, **we suggest** the EEOC make clear that the accommodations listed in § 1636.3(i)(4)(ii) may also be required under the PUMP Act. The agency can do so by making two modifications:

1. Delete from 1636.3(i)(4)(ii) the introductory phrase, "Whether the space for lactation is provided under the PUMP Act or paragraph (i)(4)(i)"; and
2. Add the following two examples to the list of pumping accommodations in 1636.3(i)(4)(ii): "space that is shielded from view and free from intrusion" and "breaks, as needed, to express milk." By including two requirements widely recognized as key provisions of the PUMP Act, the regulation will make clear that it is, in part, restating what is already required by the PUMP Act.

We strongly urge the agency to revise the proposed rule to reflect the other kinds of lactation-related accommodations the PWFA requires covered entities to provide (absent undue hardship), as lactating workers may require accommodations beyond break time and space to pump, as well as time/space beyond the one-year time period required by the PUMP Act. Specifically, **we strongly urge** the Commission to:

- Append to the end of subsection (i) the following underlined text: "if not already provided under the PUMP Act, such as after the first year post-childbirth;". The American Association of Pediatrics recommends continued lactation for at least two years,[110] and state laws require employers to provide break time and space beyond one year.[111]
- Add a subsection (iii) that reads: "(iii) Other accommodations including but not limited to time off or remote work for lactation-related needs such as mastitis; modified work duties, personal protective equipment, or a temporary transfer to avoid exposure to toxic chemicals or other hazards that can contaminate human milk; excusal from long-distance travel, or flight schedules and layovers to allow for pumping; accommodations for direct nursing, which may be necessary when a parent is unable to pump milk and/or unable to feed their infant formula or from a bottle, including remote work, permission for a caretaker to bring the employee's infant to the workplace, and a schedule change to permit the employee to go to the child (such as in a daycare setting); assignment to worksites where pumping is feasible or other accommodations to make pumping feasible; remote work; modification of a work uniform to allow for lactation; permission to arrive

[110] Joan Younger Meek et al., *Policy Statement: Breastfeeding and the Use of Human Milk*, 150 PEDIATRICS 1, 11 (2022), https://publications.aap.org/pediatrics/article/150/1/e2022057988/188347/Policy-Statement-Breastfeeding-and-the-Use-of.

[111] *See, e.g.*, COLO. REV. STAT. § 8-13.5-104 (up to 2 years); ME. STAT. tit. 26, § 604 (up to 3 years); N.Y. LAB. LAW § 206-c (up to 3 years); VT. STAT. ANN. tit. 21, § 305 (up to 3 years); WASH. REV. CODE § 43.10.005 (up to 2 years).

late to allow pumping immediately before work; and adjustments to quotas or production standards to reflect pumping breaks." (We have closely adapted this list from the Center for WorkLife Law's instructive resource describing various accommodations that workers may require for lactation-related needs.)[112]

Such clarification is necessary to help workers and employers understand the full breadth of lactation-related accommodations that are covered under the PWFA. Since the PWFA went into effect, we have heard from a number of lactating workers who need the accommodations described above. For example:

- An employee of a sheriff's office contacted our helpline because her doctor advised modified work duties because the restrictiveness of the bullet-proof vest required on full-duty work decreased her milk supply.
- A delivery worker in Nevada called our helpline because her employer refused to provide her an air-conditioned truck in which to pump on her delivery route during the hot summer months.
- Another worker contacted us because she needed to work remotely to accommodate her difficulty supplying enough milk for her baby through pumping alone.
- Another worker, Chelsea, in Virginia, called us because she needed an accommodation to afford her privacy to pump on a work flight, out of view of her male colleagues, such as being seated in a different part of the plane from her coworkers.

PROPOSED GUIDANCE ON § 1636.3(i)

We support the Commission's guidance at 88 Fed. Reg. at 54730 on "Reasonable Accommodations—Examples," including its note that a worker "may need more than one of these accommodations at the same time or as a pregnancy progresses." It is essential that employers understand that a pregnant worker's needs may change throughout, and after, their pregnancy, and that the PWFA requires them to be responsive to those changing needs.

We encourage the Commission to make several changes:

- **We strongly recommend** the agency add a bullet point for reassignment/transfer, to parallel and reflect the inclusion of this accommodation in the proposed rule itself at 1636.3(i)(2). The bullet point could read: "Reassignment and temporary transfer. Because the covered entity has superior access to information about what alternate positions are available, the covered entity must identify potential positions to which the worker could be reassigned."[113] **We also recommend** the agency clarify for employers that they may assess the employee to determine if they are qualified for the vacant

[112] *See* CTR. FOR WORKLIFE LAW, COMMON WORKPLACE LIMITATIONS & REASONABLE ACCOMMODATIONS EXPLAINED, *supra* note 33, at 11.

[113] *See, e.g., Scotch v. Art Inst. of Cal.*, 173 Cal.App.4th 986, 1018 ("An employee cannot necessarily be expected to identify and request all possible accommodations during the interactive process itself because [e]mployees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have.") (internal citations and quotations omitted).

position, but need not require them to fill out an application or compete for the position.[114]

- **We suggest** adding to the telework example at 88 Fed. Reg. at 54730 the following underlined text: "or a mobility impairment, or a need to avoid heightened health risk, such as from a communicable disease."
- **We strongly recommend** changing the light duty bullet point at 88 Fed. Reg. at 54782 to reflect that accommodation in the form of transfer to a light duty position is required even where an employer does *not* have an *existing* "light duty program."[115] (The guidance in its current form reflects only that an employer cannot necessarily deny a pregnant worker assignment/placement in an existing light duty program.) The agency should also change the bullet point to clarify the covered entity's obligations in the PWFA context, not merely (as is currently written) the ADA context. Specifically, **we urge** the agency to alter the bullet point so that it reflects the following new underlined text: "Assignment to light duty or placement in a light duty program has been recognized by the EEOC as a potential reasonable accommodation under the ADA, even if the employer's light duty positions are normally reserved for those injured on-the-job and the person with a disability seeking a light duty position does not have a disability stemming from an on-the-job injury. Thus, under the PWFA, assignment to a light duty position or placement in a light duty program is a reasonable accommodation, regardless of whether the employer's light duty positions are normally reserved for those injured on-the-job. In addition, reassignment/transfer to light duty is a reasonable accommodation regardless of whether an employer has an existing light duty program."
- **We strongly recommend** explicitly specifying at 88 Fed. Reg. at 54782 that mandatory overtime policies and attendance policies/procedures (including points policies and bonus policies) are examples of policies that must be adjusted or modified as a reasonable accommodation under the PWFA. As we explain above, since the PWFA went into effect, we have heard consistently from workers about employers refusing to modify attendance and overtime policies to accommodate pregnant workers' health needs. Accordingly, **we urge** the agency to adopt the following underlined language at 88 Fed. Reg. at 54782: "Adjusting or modifying examinations or policies. Examples of reasonable accommodations include allowing workers with a known limitation to postpone an examination that requires physical exertion or otherwise interferes with a worker's known limitation. Adjustments to policies also could include increasing the time or frequency of breaks to eat or drink or to use the restroom. In addition, an employer must (absent undue hardship) adjust or modify its attendance policies/procedures (such as but not limited to "no fault" attendance policies, points policies, and bonus policies) and mandatory-overtime policies, since penalizing a worker for needing time off for a known limitation could constitute retaliation and/or interference under the PWFA, as well as failure to accommodate."

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[114] U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA, at Q29 (2002), https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada ("Does reassignment mean that the employee is permitted to compete for a vacant position? No. Reassignment means that the employee gets the vacant position if s/he is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended.").

[115] *See* discussion *supra* Section J (discussing "existing light duty programs" in § 1636.3(g)).

Examples of Types of Reasonable Accommodations — 1636.3(i)

We generally support the agency's guidance on "Examples of Types of Reasonable Accommodations" at 88 Fed. Reg. at 54782–84 of the proposed Interpretive Guidance. For instance, **we applaud** the Commission for stating in Example 1636.3 #19 that "[i]n determining if there is an undue hardship, the employer cannot rely on the fact that this type of modification is normally reserved for those with on-the-job injuries."

We support, in particular, examples #20, 21, 26, 28, and 29, which are all excellent examples of circumstances workers have related to us on our helpline; they will provide essential guidance to employers and workers alike about their obligations and rights under the PWFA. **We especially appreciate** Example #29's recognition that employers must accommodate lactation beyond the one-year timeframe required by PUMP; indeed, the American Association of Pediatrics recommends lactation for two years.[116]

Still, we have several significant concerns and recommendations we suggest the Commission adopt in order to better reflect the scope of the PWFA's broad protections. Specifically (in the order they appear in the guidance):

- Example 1636.3 #14 Telework: **We suggest** the agency note that Gabriela is qualified under the first definition of "qualified."
- Examples 1636.3 #15 and 16 Temporary Suspension of an Essential Function: **We recommend** the agency change Nisha's example to contemplate the circumstance in which an employer does *not* have an established light duty program but must still provide reassignment to a light duty position. For example, the beginning of Example #16 could read: "Same facts as above <u>but the employer does not have an established light duty program. The employer must consider all possible reasonable accommodations, including temporarily reassigning Nisha to a light duty position, job restructuring, or</u> temporary suspension of an essential function . . . "
    - As we explained above, the guidance in its current form focuses heavily on circumstances in which an employer has an existing light duty program that they must allow pregnant workers to utilize (as in *Young v. UPS*); the guidance should also explore the (much more common) circumstance in which an employer does *not* have an existing light duty program and must still accommodate a worker in the form of reassignment to a light duty position. Indeed, most healthcare workers (and most non-unionized workers) from whom we hear on our helpline do not have access to an "established" light duty program, and their employers often believe, incorrectly, that they do not have to accommodate their lifting restrictions as a result. We worry that the guidance examples' heavy focus on established light duty programs (four of the 17 examples focus on such programs)—compared to the near-silence regarding employers without such

[116] Joan Younger Meek et al., *Policy Statement: Breastfeeding and the Use of Human Milk*, 150 PEDIATRICS 1, 11 (2022), https://publications.aap.org/pediatrics/article/150/1/e2022057988/188347/Policy-Statement-Breastfeeding-and-the-Use-of.

programs—will cause employers in the latter group to believe they need not accommodate lifting restrictions. Accordingly, to ensure employers in both groups fully understand their obligations, **we recommend** reworking Example #16 to reflect a circumstance in which the employer does not have an "established" light duty program and focus on the other ways an employer must accommodate a worker's lifting restrictions.

- Example 1636.3 #23: **We suggest** tweaking the final sentence slightly to reflect the following underlined text and ensure the example is clear: "The employer must grant the accommodation of 6–8 weeks of unpaid leave (or another reasonable accommodation that meets Sofia's health needs) absent undue hardship).
- Example 1636.3 #30: **We applaud** this example for clearly stating the two distinct types of legal violations at issue. **We suggest** the agency consider removing the final sentence (concerning the worker's potential misconduct) as it is extraneous and unnecessarily vilifies workers seeking accommodations. **We suggest** also, here or in a new example, including a quota/production metrics example where a pregnant worker's need to work more slowly (distinct from a need for more breaks or for time off) must be accommodated and the worker's resulting temporary inability to meet a production standard must be excused.
- Finally, **we recommend** the agency add two additional examples.
    - First, **we recommend** the inclusion of an example addressing the obligation to accommodate time off in excess of a worker's FMLA leave. We hear from low-wage workers on our helpline who have used up their FMLA leave prior to or just after giving birth, who still require additional time to recover from childbirth. Sometimes these workers' employers insist, incorrectly, that the workers must return to work when their FMLA runs out—or lose their job—without considering whether they must offer additional leave as a reasonable accommodation under the PWFA. For example, a recently-postpartum worker called our helpline to learn whether she could take additional job-protected time off to recover from postpartum depression following the exhaustion of her FMLA leave. Because so many employers appear mistaken about their obligations in such a circumstance, **we recommend** the agency create an example directly addressing it.
    - Second, **we recommend** the agency add an example of time off for fertility-related appointments or other related needs. Since the PWFA's effective date, we have consistently heard from workers who need time off related to IVF and other fertility-related needs. For example:
        - One worker, who was not eligible for FMLA, needed time off to recover from pregnancy loss and undergo IVF-related diagnostics and procedures. She contacted us because she was not sure of her rights to time off for such needs under the PWFA.
        - Another worker, who was not FMLA-eligible, requested an accommodation to allow her to attend IVF appointments and manage related side effects. Her employer denied her request without exploring alternatives and told her she had to either work full-time or quit.

- Workers like these (and their employers) would benefit from examples illustrating the obligation to accommodate PWFA-covered needs outside of pregnancy, childbirth, and lactation. **We recommend** the agency add examples to this effect.

M. 1636.3(j) — Undue hardship.

DIRECTED QUESTION #7 RE: SECTION 1636.3(J)(4): PREDICTABLE ASSESSMENTS OF UNDUE HARDSHIP

> *The Commission seeks comment on whether the adoption of the predictable assessment approach facilitates compliance with the PWFA by identifying some of the accommodations most commonly requested by workers due to pregnancy that are simple, inexpensive, and easily available. The Commission further seeks comment on whether different, fewer, or additional types of accommodations should be included in the "predictable assessment" category and whether the category should include predictable assessments for childbirth and/or related medical conditions.*

We commend the Commission's "predictable assessment" approach, which facilitates compliance with the PWFA by identifying some of the accommodations most commonly requested by workers and that are simple, inexpensive, and easily available. **We recommend** the Commission add several other types of accommodations to the predictable assessment category, as detailed below.

PROPOSED REGULATION § 1636.3(j)

We strongly support the Commission's use of a predictable assessment approach, which will ease compliance with the PWFA, increase predictability for worker and employer, and effectuate the promise of the PWFA: ensuring workers can obtain the modest accommodations they need in a timely, effective fashion. Indeed, other jurisdictions have successfully adopted similar approaches to their PWFA-analogue statutes, stating that certain accommodations cannot, or almost always will not, constitute an undue hardship.[117]

To better fulfill the PWFA's purpose, **we recommend** the Commission add the following underlined accommodations to the predictable assessments category at subsection 1636.3(j)(4):

> <u>(v) Allowing an employee breaks as needed to rest;</u>
> <u>(vi) Allowing modifications to an employee's uniform, dress code, or other worn gear;</u>
> <u>(vii) Making minor physical modifications to an employee's workstation, such as the addition of a fan or a seat;</u>
> <u>(viii) Moving an employee's workstation, such as to permit movement, to be closer to restroom or lactation space, or to be away from heat, fumes, or other environmental hazards;</u>

[117] *See, e.g.*, MINN. STAT. ANN. § 181.939(2)(a); *Pregnant Workers & New Parents*, MINN. DEP'T OF LAB. & INDUS., https://dli.mn.gov/newparents; WASH. REV. CODE § 43.10.005(1)(d); WASH. STATE DEP'T OF LAB. & INDUS., https://lni.wa.gov/workers-rights/workplace-policies/pregnancy-accommodations; 47 R.C.N.Y. § 2-09(e)(1).

(ix) Providing an employee personal protective equipment, such as gloves, goggles, earplugs, hard hats, masks, and respirators;
(x) Allowing an employee access to closer parking, if the employer provides parking;
(xi) Allowing an employee to consume food or drink at the employee's workstation or in other places where food/drink is not usually permitted; and
(xii) Time off to attend 16 healthcare appointments related to pregnancy or childbirth.[118]

The above accommodations are similar to the four accommodations the EEOC included in the proposed rule as "predictable assessments" as they, too, are simple and straightforward. These accommodations are modest and pose zero or minimal cost to employers.[119]

The lack of hardship caused by these accommodations is underscored by the fact that multiple states and localities do not allow employers to claim undue hardship for these accommodations. For example:

- Washington does not permit employers to claim undue hardship under its state PWFA for a series of accommodations, including "modifying a no food or drink policy," as in (xi) above, and "providing seating," as in (vii) above.[120]
- Minnesota does not permit employers to claim undue hardship under its state PWFA for several accommodations, including the provision of "seating," as in (vii) above.[121]

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[118] Nearly every paid sick time law in the country only permits employers to request a healthcare provider note if the worker needs time off for three or more consecutive days. *See Know Your Rights: State and Local Paid Sick Time Laws FAQs,* A BETTER BALANCE, https://www.abetterbalance.org/resources/know-your-rights-state-and-local-paid-sick-time-laws/ (last updated July 7, 2022). We suggest a minimum of 16 appointments as it reflects the average number of appointments for prenatal and postnatal care for low-risk pregnancies. *See* Alex Friedman Peahl et al., *A Comparison of International Prenatal Care Guidelines for Low-Risk Women to Inform High-Value Care*, 222 AM. J. OBSTETRICS & GYNECOLOGY 505, 505 (Jan. 2020), https://www.ajog.org/article/S0002-9378(20)30029-6/fulltext (stating that the median number of recommended prenatal care visits for a low-risk pregnancy in the United States is 12-14 visits); *ACOG Committee Opinion No. 736: Optimizing Postpartum Care*, 131 OBSTETRICS & GYNECOLOGY 140, 141 (May 2018), https://journals.lww.com/greenjournal/fulltext/2018/05000/acog_committee_opinion_no__736__optimizing.42.aspx (recommending at least two postpartum care appointments, with ongoing care as needed).

[119] *See, e.g.*, *Costs & Benefits of Accommodation*, JOB ACCOMMODATION NETWORK (May 4, 2023), https://askjan.org/topics/costs.cfm ("Approximately half (49.4%) of the employers participating in this survey who provided cost information reported the accommodations they made cost absolutely nothing to implement ($0). Another 43.3% of the surveyed employers reported the accommodations made involved only a one-time cost, while the remaining 7.2% of accommodations made resulted in ongoing costs to the employer. Of those accommodations that did have a one-time cost, the median one-time expenditure as reported by the employer was $300 (N=289), a decrease compared to previous report findings.").

[120] WASH. REV. CODE § 43.10.005(1)(d) ("An employer may not claim undue hardship for the accommodations under (c)(i), (ii), and (iv) of this subsection, or for limits on lifting over seventeen pounds."); *see also Pregnancy Accommodations*, WASH. STATE DEP'T OF LAB. & INDUS., https://lni.wa.gov/workers-rights/workplace-policies/pregnancy-accommodations.

[121] MINN. STAT. ANN. § 181.939(2)(a) ("[N]or may an employer claim undue hardship for the following accommodations: (1) more frequent restroom, food, and water breaks; (2) seating; and (3) limits on lifting over 20 pounds."); *see also Pregnant Workers & New Parents*, MINN. DEP'T OF LAB. & INDUS., https://dli.mn.gov/newparents ("[U]pon request, your employer is always required to provide more frequent or longer breaks, seating and limits on lifting more than 20 pounds.").

- New York City takes an approach similar to the Commission's "predictable assessment" approach, stating that several types of accommodations are so modest that they "generally will not pose an undue hardship on an employer." These accommodations "include, without limitation: . . . adjustments to uniform requirements or dress codes; additional . . . rest breaks; being allowed to . . . eat at locations where eating or drinking is not typically allowed; moving a workstation to permit movement or stretching of extremities, or to be closer to a bathroom; . . . ; minor physical modifications to a workstation, including the addition of a fan or seat; [and] periodic rest," as in (v), (vi), (vii), (viii), and (xi) above.[122]

We also recommend that the Commission make a minor alteration to the existing predictable assessment language, to change "additional restroom breaks" to "restroom breaks <u>as needed</u>" in subsection 1636.3(j)(4)(ii). Making this change will better parallel (j)(4)(iv) which uses "breaks as needed" language. It will also reflect the PWFA's intent that pregnant workers be afforded accommodations that actually meet their needs, which can be unpredictable and urgent.

We recommend two changes regarding subsection 1636.3(j)(3)(iv):

1. Delete (j)(3)(iv), which inappropriately imports a "comparative" approach into the PWFA. Congress explicitly passed the PWFA to fix the problems with the PDA, under which pregnant workers were entitled to accommodations only if they could produce evidence showing that other nonpregnant workers had received those same accommodations.[123] The PWFA (like the ADA) breaks from this comparative approach, *affirmatively* entitling pregnant workers to accommodations regardless of how other workers are treated. Therefore, **we recommend** eliminating § 1636.3(j)(3)(iv), which imports an inapt comparator framework into the PWFA with the potential to confuse employers, workers, and practitioners as to the correct legal standard.
2. Add the following text after (vi): "<u>In addition, the fact that the employer has provided other employees or applicants in similar positions who are unable to perform the essential function(s) with temporary suspensions of essential function(s) is strong evidence that temporary suspension does not pose an undue hardship.</u>" Our recommended addition reflects the fact that an employer's past/other accommodation practices strongly suggest the absence of undue hardship.

We applaud the Commission for subsection 1636.3(j)(5), which affirms that an employer may not assert undue hardship based on mere "assumption or speculation that other employees might seek a reasonable accommodation, or even the same reasonable accommodation, in the future."

- Such a provision appropriately recognizes that the PWFA requires individualized determinations rooted in individual workers' actual needs, not stereotype or speculation about what workers might need in the future. In our experience, some employers assert undue hardship based on whim or stereotype, without engaging in or offering reasoned decision-making.
- **We suggest**, however, that the EEOC strengthen § 1636.3(j)(5) so as to not suggest that an employer can establish such a defense in situations where it has *more* than a "mere assumption or speculation" that other employees will request an accommodation.

[122] 47 R.C.N.Y. § 2-09(e)(1).
[123] BAKST, GEDMARK & BRAFMAN, LONG OVERDUE, *supra* note 12, at 13–20.

> Regardless of its level of certainty, an employer should never be allowed to deny an accommodation requested by any individual employee based on fears that it will have to provide reasonable accommodations to other employees in the future. Each accommodation decision must be based on the needs of the specific employee requesting the accommodation and the specific circumstances at hand.

We applaud the EEOC for making clear "that a covered entity that receives numerous requests for the same or similar accommodation at the same time . . . cannot deny all of them simply because processing the volume of current or anticipated requests is, or would be, burdensome or because it cannot grant all of them."[124]

We urge the EEOC, however, to remove the assertion, "The covered entity may point to past and cumulative costs or burden of accommodations that have already been granted to other employees when claiming the hardship posed by another request for the same or similar accommodation"[125] and replace it with the following language: "<u>The covered entity may not point to cumulative costs of accommodations that have already been granted to other employees when claiming the hardship. The undue hardship analysis must be conducted on a case-by-case basis.</u>" We have already seen employers reject very modest accommodations on precisely the grounds the EEOC appears to bless. Congress passed the PWFA to ensure that workers enjoy an *affirmative* right to accommodation, regardless of what other workers might want or receive.

We recommend the Commission also state that the following do *not* constitute undue hardship:

- Other employees' fear or prejudice regarding the employee's pregnancy, childbirth, or related condition;[126]
- The possibility that the accommodation would negatively impact other employees' morale. We have repeatedly heard employers rely on this concern to deny reasonable accommodations. For example:
    - One employer told Chelsea, a lactating employee in Virginia, that they no longer wanted to accommodate her pumping needs by temporarily excusing her from work travel—on the grounds that her non-pregnant coworkers wanted to stop traveling too after realizing she had temporarily stopped traveling.
    - Another pregnant worker's employer told her she could not sit on a stool at work because then "everyone will want a stool."

These examples are similar to examples in the guidance interpreting the ADA.[127]

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[124] PWFA Proposed Rule, 88 Fed. Reg. at 54786.
[125] *Id*.
[126] For example, as New York City's Commission on Human Rights has recognized, an employer may not prohibit a lactating worker from pumping milk in public on the grounds that it offends their coworkers or customers. 47 R.C.N.Y. § 2-09(f)(3) ("If an employee wishes to pump at their usual workspace and it does not impose an undue hardship, then the employer shall allow this as an alternative to the lactation room. Discomfort expressed by a coworker, client, or customer generally does not rise to the level of undue hardship.").
[127] U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA, at text accompanying n. 117-18 (2002),

Finally, **we recommend** the EEOC clarify that:

- Assertions of undue hardship based on claims of direct threat are invalid.[128] The PWFA avoided incorporating "direct threat" language from the ADA (intentionally so).
- The fact that an employee has or had previously received an accommodation for pregnancy, disability, or both, is not a valid basis for an undue hardship defense. Allowing such a defense would violate the purpose of both the PWFA and the ADA by penalizing qualified employees for using the accommodations they are entitled to under the law.

PROPOSED GUIDANCE ON § 1636.3(j)

We generally support the proposed guidance. For example, **we applaud** the Commission for recognizing at 88 Fed. Reg. at 54785 that, even if excusing an essential function will become, after a certain period of time, an undue hardship, the employer must still excuse the essential function "for the period of time that it does not impose an undue hardship."

We have several significant concerns and corresponding recommendations to bring the proposed guidance in line with the spirit and intent of the PWFA:

- Example 1636.3 #31: **We recommend** the Commission explain in the hypothetical why the employer, which definitionally has at least 15 employees,[129] could not use the money saved by reducing Patricia's hours to either (i) temporarily assign a different clerk to the hours Patricia is not able to work, or (ii) hire another temporary, part-time employee to cover those hours. As currently written, the example lowers the bar for undue hardship to mere employer preference and **we strongly recommend** the Commission clarify the example.
- **We urge** the EEOC to alter the proposed Interpretive Guidance regarding Title VII's bona fide occupational qualification ("BFOQ") standard. As the Comment Letter from New York Attorney General Letitia James and fellow State Attorneys General explains:

> The Guidance currently states that "claims by employers that workers create a safety risk merely by being pregnant (as opposed to a safety risk that stems from a pregnancy-related limitation) should be addressed under Title VII's [BFOQ] standard and not under the PWFA." The States are concerned that without further explanation, directing employers to BFOQ standards could create unnecessary confusion and potentially undermine the aims of the PWFA. While it is valuable to emphasize that "fetal protection policies" are barred under Title VII, there is a risk that employers will attempt to skirt the requirements of the PWFA by arguing that not being pregnant (or not having a pregnancy-related condition, such as lactation) is a BFOQ. But in the vast majority of such cases, the true, underlying basis for such a position would be a presumed pregnancy-related *limitation* that purportedly prevented the worker from safely performing the essential functions

https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada.

[128] Bakst Questions for the Record, *supra* note 69, at 12.

[129] The PWFA only applies to employers with 15 or more employees. *See* 42 U.S.C. § 2000gg.

> of the job. *The Guidelines should therefore affirmatively state that the individualized undue hardship analysis mandated under the PWFA, and not Title VII's categorical BFOQ, should be the controlling framework for evaluating accommodation requests by workers with pregnancy-related conditions in all or nearly all circumstances, even where safety considerations are at play.*[130]

We agree with the State Attorneys General and urge the Commission to update the Guidance with their suggested language.

- **We strongly recommend** the Commission delete the following example of undue hardship at 88 Fed. Reg. at 54785: "For example, consider a pregnant worker in a busy fulfillment center that has narrow aisles between the shelves of products. The worker asks for the reasonable accommodation of a cart to use while they are walking through the aisles filling orders. The employer's claim that the aisles are too narrow and its concern for the safety of other workers being bumped by the cart would be a defense based on undue hardship . . . " Respectfully, we feel this example is implausible on its face: the potential for being bumped by a cart simply does not present a "safety risk" to coworkers and should not be understood to rise to the level of undue hardship under the PWFA. Moreover, the agency's use of this troubling example would signal to employers that similarly spurious employer claims of "safety risks" to coworkers will be tolerated.
- **We suggest** that the Commission further bolster the justifications for its predictable assessment approach by citing at 88 Fed. Reg. at 54786 in footnote 77 to additional state analogues of the PWFA, such as Minnesota, Washington, and New York City.[131]
- Example 1636.3 #35: **We strongly recommend** the agency either alter or delete this example. Here, the manager has unilaterally and without any apparent justification "decide[d] against allowing Addison to bring water into their workstation." This is precisely the kind of arbitrary, unreasoned denial of accommodation the PWFA was enacted to remediate.

N. 1636.3(k) — Interactive process.

PROPOSED REGULATION 1636.3(k)

We urge the agency to modify the regulation's definition of "interactive process" to reflect the following underlined text: "Interactive process means an informal, <u>good-faith discussion or two-way communication, whether written or verbal</u>, between the covered entity and the employee or

[130] State Attorneys General, Comment Letter on Regulations to Implement the Pregnant Workers Fairness Act NPRM (RIN 3046-AB30) (Oct. 10, 2023) (internal citations omitted).

[131] MINN. STAT. ANN. § 181.939(2)(a) ("[N]or may an employer claim undue hardship for the following accommodations: (1) more frequent restroom, food, and water breaks; (2) seating . . . ."); WASH. REV. CODE § 43.10.005(1)(d) ("An employer may not claim undue hardship for the accommodations under (c)(i), (ii), and (iv) of this subsection, or for limits on lifting over seventeen pounds."); *see also* 47 R.C.N.Y. § 2-09(e)(1); Minn. Dep't of Lab. & Indus., *Pregnant Workers & New Parents*, https://dli.mn.gov/newparents ("[U]pon request, your employer is always required to provide more frequent or longer breaks, seating . . . ."); Wash. State Dep't of Lab. & Indus., *Pregnancy Accommodations*, https://lni.wa.gov/workers-rights/workplace-policies/pregnancy-accommodations.

applicant seeking an accommodation under the PWFA. This process should identify the known limitation and the change or adjustment at work that is needed, if either of these are not clear from the request, and potential reasonable accommodations. There is no prescribed format that must be followed."

- The agency's definition, as currently written, is circular; it defines "interactive process" as "an informal, interactive process." It would be more helpful, for employers and workers, to define the term in a straightforward, clear way as a "good-faith discussion or two-way communication, whether written or verbal."
- Moreover, the current circular definition is not required. The ADA-related text the agency cites is not a formal definition of "interactive process" but rather a casual reference to interactive process as part of the definition of "reasonable accommodation."[132] Thus, because the agency is formally defining "interactive process" for the first time in the PWFA regulations, it need not hew to the passing reference in the ADA regulations.

We urge the EEOC to add a sentence to the definition of "interactive process" as follows: "Unnecessary delay, as defined in § 1636.4(a)(1), in the interactive process may result in a violation of the PWFA." The proposed Interpretive Guidance already recognizes the importance of expediency in carrying out the interactive process, stating that "a covered entity should respond *expeditiously* to a request for reasonable accommodation and act *promptly* to provide the reasonable accommodation."[133] The regulation itself should underscore this directive by making clear that unnecessarily delaying the interactive process may result in a violation of the PWFA.

PROPOSED GUIDANCE ON § 1636.3(k)

- General Definitions and Additions: **We applaud** the Commission for appropriately distinguishing the PWFA from the ADA in explaining that a worker need not identify a "precise" limitation because the PWFA refers only to "limitation[s]" generally. And, as discussed more fully above, **we recommend** the Commission make clear that, in order to trigger the interactive process, a worker need not identify what the specific limitation is but rather solely that they have such a limitation or need an adjustment/change at work.
- Step by Step Process: **We support** the Commission's description of the step-by-step process, including its discussion of the suspension of essential functions.
- Failure to Engage in Interactive Process: We refer the Commission to our discussion of unnecessary delay in the interactive process below in Part IV.
- **We suggest** that the EEOC add an example in the proposed Interpretive Guidance that illustrates how quick and informal the interactive process can be in the PWFA context. For example, the EEOC should include a scenario where an employee makes a simple request of her immediate supervisor, and her immediate supervisor agrees on the spot to make the requested change.

[132] *See* 29 C.F.R. § 1630.2(o)(3) ("To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability and potential reasonable accommodations that could overcome those limitations.").
[133] PWFA Proposed Rule, 88 Fed. Reg. at 54786 (emphasis added0.

O. 1636.3(l) — Supporting documentation.

DIRECTED QUESTION #8A RE: SECTION 1636.3(L): DOCUMENTATION

> *The Commission seeks comment on its proposed approach to supporting documentation, including: (1) whether this approach strikes the correct balance between what an employee or applicant can provide and the interests of the covered entity; (2) whether it is always reasonable under the circumstances for covered entities to require confirmation of a pregnancy beyond self-attestation when the pregnancy is not obvious; (3) if allowed, whether the confirmation of a non-obvious pregnancy should be limited to less invasive methods, such as the confirmation of a pregnancy through a urine test; (4) the ability of employees or applicants to obtain relevant information from a health care provider, particularly early in pregnancy; and (5) whether there are other common limitations that occur early in pregnancy, such as fatigue or morning sickness, for which an employer should not be permitted to require documentation beyond self-attestation.*

We appreciate the EEOC's query as to whether the supporting documentation framework proposed in § 1636.3(l) strikes the right balance between the needs of workers and employers. It does not. Medical documentation requirements impede workers' ability to obtain the accommodations they need and deserve in a timely fashion, or at all. That is contrary to the purpose of the PWFA. Congress specifically enacted the law to eliminate the barriers that the ADA—and courts' obsessive focus[134] on the medical basis of individuals' need for accommodation—imposed on pregnant workers.[135] The PWFA regulations should reflect the

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[134] *See* Katherine A. Macfarlane, *Disability Without Documentation*, 90 FORDHAM L. REV. 59, 68, 81 (2021), https://fordhamlawreview.org/wp-content/uploads/2021/10/Macfarlane_October.pdf (tracing how the ADA—which was intended by its drafters to embrace the social model of disability—came to reflect the medical model of disability, in which "disability only exists if a doctor has recorded its existence in medical records" and "validation requires a physician, who alone can diagnose or categorize the cause of an impairment and also measure and document its functional impact") (internal quotation marks omitted).

[135] *See, e.g.*, 168 CONG. REC. S10082 (daily ed. Dec. 22, 2022) (statement of Sen. Bob Casey), https://www.congress.gov/117/crec/2022/12/22/168/200/CREC-2022-12-22.pdf ("Now, some have claimed that the Americans with Disabilities Act— ADA—already gives pregnant workers who truly need accommodations a right to accommodations. That is simply not true. It is not what we are seeing on the ground or what courts are deciding in their rulings."); 167 CONG. REC. H2321 (daily ed. May 14, 2021) (statement of Rep. John Katko), https://www.congress.gov/117/crec/2021/05/14/167/84/CREC-2021-05-14-pt1-PgH2321-3.pdf ("The Americans with Disabilities Act does require employers to accommodate a pregnant worker if her work limitations rise to the disability impacting one or more major life functions. Women who have limitations that do not rise to this level are not protected under the ADA, which was not designed to address pregnancy-related gender discrimination."); 167 CONG. REC. H2321 (daily ed. May 14, 2021) (statement of Rep. Sheila Jackson Lee) ("While the Pregnancy Discrimination Act (PDA) and the Americans with Disabilities Act (ADA) provide some protections for pregnant workers, there is currently no federal law that explicitly and affirmatively guarantees all pregnant workers the right to a reasonable accommodation so they can continue working without jeopardizing their pregnancy."); *see* Bakst Questions for the Record, *supra* note 69, at 13 ("Often, employers will use the requirement to provide a medical note as a way to prolong having to provide a very simple or reasonable accommodation, knowing that it may be very difficult for a worker to take time to go to the doctor. This delay tactic . . . only stands to further compromise women's health. In addition,

spirit and intent of the PWFA, as well as its text, which nowhere says that employers are permitted to require medical documentation as a condition of receiving reasonable accommodations under the law.[136]

The PWFA was meant to expedite obtaining reasonable accommodations; permitting employers to require medical documentation for ordinary and modest accommodations would frustrate that end, for a variety of reasons:

1. First, as the Commission itself acknowledges in the proposed Interpretive Guidance, many workers face substantial barriers to obtaining appointments with healthcare providers at all, let alone in a timely way, making it challenging to get medical documentation.[137] These challenges are particularly stark for workers in rural areas, veterans, and low-wage workers who may: not have consistent access to healthcare (e.g., due to healthcare "deserts" or health insurance gaps), disproportionately lack control over their work schedules necessary to take time off to attend a doctor's appointment, or not be able to afford the cost to miss work, obtain transportation, and pay for the appointment.[138]
    - For example, one worker early in her pregnancy contacted our helpline because she was struggling to obtain an employer-required doctor's note: She had recently moved to a new state where she did not yet have a primary care provider, and local providers only had appointment openings three months into the future.
    - Another worker, a veteran experiencing severe morning sickness, contacted us because she was struggling to get a doctor's appointment in order to fill out the lengthy documentation her employer insisted she provide before even *beginning* to assess whether to accommodate her. As a veteran, this worker received her health insurance through a program for service members and veterans that is notoriously slow to assign patients to specialty providers, like an ob-gyn. Likewise, due to her insurer, she was unable to get an appointment with her primary care provider for nearly three months. As a result of her employer's burdensome medical documentation requirement and its unwillingness to provide her an interim accommodation, the veteran was forced to go to work while experiencing severe morning sickness.

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as we have seen up close at A Better Balance, vague and poorly written doctors' notes have also been used as a tool to push out a worker rather than engage with them in a good faith interactive process.").

[136] 42 U.S.C. §§ 2000gg *et seq.*

[137] PWFA Proposed Rule, 88 Fed. Reg. at 54787 & n.87.

[138] *See, e.g.*, C. BRIGANCE ET AL., MARCH OF DIMES, NOWHERE TO GO: MATERNITY DESERTS ACROSS THE U.S. 5, 11 (2022), https://www.marchofdimes.org/sites/default/files/2022-10/2022_Maternity_Care_Report.pdf (noting that 4.7 million women live in counties with limited access to maternity care, and that half of women who live in rural communities have to travel over 30 minutes to access an obstetric hospital); *see also* 167 CONG. REC. H2321 (daily ed. May 14, 2021) (statement of Rep. Sheila Jackson Lee), https://www.congress.gov/117/crec/2021/05/14/167/84/CREC-2021-05-14-pt1-PgH2321-3.pdf ("Pregnant workers in low-wage jobs are particularly in need of this legislation granting them the clear legal right to receive accommodations because, in addition to the physically demanding nature of their jobs, they often face inflexible workplace cultures that make it difficult to informally address pregnancy-related needs. For instance, workplace flexibility—such as the ability to alter start and end times or take time off for a doctor's appointment—is extremely limited for workers in low-wage jobs.").

- Another low-wage worker, from a rural state, was told that her doctor must fill out "ADA" paperwork in order for her to receive periodic breaks to eat in order to avoid fainting; getting to her doctor required a 3-hour round trip commute, and her doctor refused to fill out the paperwork without seeing her in person.
- Another low-wage worker contacted our helpline after she could not get her doctor to return her phone calls.
- As one participant in a listening session, which A Better Balance and Black Mamas Matter Alliance held with Black birth workers and organizational leaders, summarized:

> How do I prioritize going to the doctor's office, when it's gonna take me forever when I get there, because I'm at a public clinic, but I need this money, and I'm gonna be in there with a doctor for 10 minutes, but I spent all day trying to get those 10 minutes. Just the entry point, the access, sometimes is an issue.[139]

2. Women of color, particularly Black women, often face medical racism that inhibits or delays their ability to secure supporting documentation.[140] On our helpline, the racial disparities in whose health concerns are acknowledged, named, and supported are striking: Again and again, we have seen Black women subjected to special skepticism and scrutiny by their health providers, slowing or outright blocking them from obtaining doctor's notes for accommodations that white women are readily provided.[141] As one legal scholar put it:

> A system that allows Black women to die from treatable conditions[142] due to the suspicion that accompanies their self-reported symptoms is not one in which each individual has the same access to documentation that would suffice to prove [their

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[139] RENEE SMITH NICKELSON, CLARKE WHEELER, SARAH BRAFMAN & KAMERON DAWSON, BLACK MAMAS MATTER ALLIANCE & A BETTER BALANCE, CENTERING THE EXPERIENCES OF BLACK MAMAS IN THE WORKPLACE 10 (2022), https://www.abetterbalance.org/wp-content/uploads/2022/03/BMMA-ABB-Final-Report-Web-1.pdf. [hereinafter CENTERING BLACK MAMAS REPORT].

[140] *See, e.g.*, Brittany D. Chambers et al, *Clinicians' Perspectives on Racism and Black Women's Maternal Health*, 3 WOMEN'S HEALTH REP. 476, 479 (2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9148644/ ("Clinicians acknowledged that racism causes and impacts the provision of inequitable care provided to Black women, highlighting Black women are often dismissed and not included as active participants in care decisions and treatment."); *see generally* CENTERING BLACK MAMAS REPORT, *supra* note 139.

[141] *See* Macfarlane, *Disability Without Documentation*, *supra* note 134, at 97–98 ("It takes a certain amount of privilege to have the opportunity to discuss disability documentation with a health care provider, let alone actually obtain it. Power dynamics between doctors and patients render that conversation difficult for some but not others, depending on, for example, the patient's race, gender, and class.").

[142] Pregnant Black women in the United States are three times more likely than pregnant white women to die of pregnancy-related causes. *See, e.g.*, Latoya Hill, et al., *Racial Disparities in Maternal and Infant Health: Current Status and Efforts to Address Them*, KAISER FAMILY FOUNDATION (Nov. 1, 2022) https://www.kff.org/racial-equity-and-health-policy/issue-brief/racial-disparities-in-maternal-and-infant-health-current-status-and-efforts-to-address-them/.

> right to accommodation]. To the extent that medical documentation requirements ask doctors to believe that the individual requesting the documentation deserves it, people of color will be disproportionately affected by concerns that [they] are faking [it].[143]

The Commission should not sanction a documentation regime that manufactures unique and special barriers to Black women getting accommodations under the law, particularly in light of President Biden's Executive Order on Advancing Racial Equity and Support for Underserved Communities Throughout the Federal Government.[144]

3. Other practical barriers abound. Often, for example, pregnant people cannot even obtain a medical appointment until they are at least 8–12-weeks pregnant,[145] making it impossible for workers suffering nausea and other symptoms of early pregnancy to obtain the notes they need to get accommodated. Increasingly, some medical providers impose fees to fill out accommodation forms—which can become significant expenses over the course of a pregnancy or multiple pregnancies, as needs change and as employers insist upon new or different documentation—posing additional barriers, especially for low-wage workers.[146] The imposition of these fees reflects another cost the agency should factor into its cost-benefit analysis: Writing notes takes time.[147] At a moment of shortage of ob-gyn doctors[148] and other health providers, the Commission should avoid manufacturing unnecessary impositions on providers' time, stretching an already-

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[143] *Id.* at 98.

[144] Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021) ("Each agency must assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups.").

[145] *See, e.g.*, *Newly Pregnant?*, BOSTON MEDICAL CENTER, https://www.bmc.org/newly-pregnant ("When your pregnancy test reveals that you are pregnant [sic] you should call your OBGYN provider right away to schedule your first prenatal appointment. This appointment will be scheduled sometime between weeks 8 and 12.") (last visited Oct. 5, 2023).

[146] Kimberly Danebrock, *Charging Patients for Completing Forms*, COOPERATIVE OF AM. PHYSICIANS (Apr. 15, 2014), https://www.capphysicians.com/articles/charging-patients-completing-forms; *Can Doctors Charge Employees a Fee for Completing FMLA Certifications?,* SOC'Y HUM. RESOURCE MGMT., https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/octorschargeeforfmlacertifications.aspx (last visited Sept. 18, 2023); *see also* Meredith Cohn & Jessica Calefati, *Johns Hopkins Medicine Joins National Move to Charge Patients for Messaging Their Doctor*, BALT. BANNER (July 3, 2023), https://www.thebaltimorebanner.com/community/public-health/johns-hopkins-mychart-messaging-fees-7HJ6GX7NGNE7NPYQQ7E7C5EHXE/ (discussing healthcare systems charging for MyChart messages).

[147] *See* Wendy Chavkin, Comment Letter on Regulations to Implement the Pregnant Workers Fairness Act NPRM 5–6 (RIN 3046-AB30) (Oct. 5, 2023) (explaining, from her perspective as a trained ob-gyn, that "A requirement for documentation is onerous for physicians as well, who face dramatically increased requirements that interfere with patient care.").

[148] Janet Shamlian, *OB-GYN Shortage Expected to Get Worse as Medical Students Fear Prosecution in States with Abortion Restrictions*, CBS NEWS (June 19, 2023, 7:40 PM) https://www.cbsnews.com/news/ob-gyn-shortage-roe-v-wade-abortion-bans/.

overburdened healthcare system and imposing additional, unnecessary healthcare costs.[149]

4. Doctor's notes sometimes reflect paternalism (e.g., *over*-protective notes that result in workers being pushed onto leave when they want and are able to continue working) or their (understandable) misunderstanding of the law. In the three months since the PWFA went into effect, we have heard again and again on our helpline from workers whose health providers declined to write them accommodation notes on grounds that reflect a misunderstanding of the PWFA. For example:
    - A pregnant cashier experiencing pelvic pain and fatigue was unable to obtain reasonable accommodations due to her doctor believing he could not fill out her accommodation form because she did not have a "disability." Unable to get the accommodations she needed, she was forced to quit her job.
    - A pregnant administrative assistant experiencing round-the-clock vomiting and dizziness struggled to get the accommodations she needed because her doctor told her he could not write her a note without a diagnosable medical condition to justify it.
    - A pregnant psychiatrist sought a closer parking spot because walking 15 minutes in the summer heat during her third trimester was becoming increasingly difficult. Her doctor informed her that he had a policy against writing such letters unless severely medically necessary—suggesting a profound misconception about the law and his role within it.

5. Finally, in our experience, employers routinely reject doctor's notes over technicalities and force workers to return again and again to their providers to obtain minor tweaks to earlier notes, causing significant expense and delay and frustrating the worker's ability to obtain the accommodations they need. For example, in the three months since the PWFA went into effect, we have tracked employers' rejection of supporting medical documentation. A small sampling of what we have heard:
    - An employer rejected a doctor's note, which had advised accommodation until the worker's delivery date, on the (bizarre) grounds that the note should have stated a later date—in the *hypothetical* event that she delivered past her due date. When the worker approached her health provider about rewriting the note per her employer's specifications, the health provider stated that they could not do so because the worker would no longer be in the provider's care after her due date.
    - Another worker was forced to provide a new note for *each* absence for morning sickness—an impossible requirement, given that she could not see her doctor every time she was too nauseous to go to work. (Indeed, we are not aware of any doctor who would be willing to meet with a patient *each* day she experienced morning sickness.)
    - A pregnant retail worker contacted our helpline after her employer wrote her up for an absence due to pregnancy-related illness and threatened to terminate her if she had to miss work for pregnancy-related sickness again. Her employer

[149] Frank Diamond, *U.S. Employers Brace for Healthcare Costs to Rise Next 3 Years*, FIERCE HEALTHCARE (Sept. 16, 2022, 8:05 AM), https://www.fiercehealthcare.com/payers/employers-expect-healthcare-costs-rise-next-3-years.

maintained an attendance policy that any absence, no matter the reason, would result in a write-up unless the employee could provide a doctor's note that very same day; retroactive notes, in other words, would not be excused. Typically, a pregnant worker (like any other worker) cannot get a same-day appointment with their provider except for urgent situations, making it impossible to provide a same-day note.

- An employer delayed, for nearly two months, the process of providing a pregnant convenience store worker bathroom breaks and temporary transfer by (1) requiring her to provide a doctor's note, then (2) requiring her to fill out "ADA" forms, then (3) neglecting to review the completed ADA forms for 3–4 weeks, and finally (4) requiring her to go back to her doctor to get a revised doctor's note. In our experience talking to hundreds of pregnant workers a year, this sequence of events is not an anomaly.
- A pregnant machine operator—who needed a simple accommodation to reduce her exposure to gas and fumes on the job, such as a respirator—instead received a generic note from her health provider advising lifting restrictions. Her employer rejected the note for failing to explain why a pregnant worker should not be exposed to toxic fumes, prompting her to go to a different health provider to obtain a note specifically mentioning exposure to fumes. Her employer rejected the second note on the grounds that it "contradicted" the former, and pushed her onto leave without pay.

Allowing employers to require supporting medical documentation frustrates workers' ability to get accommodations, contravening the spirit and purpose of the PWFA. Such a requirement is also unsupported by the text of the statute. Accordingly, **we urge** the Commission to prohibit employers from requiring any medical documentation. In the alternative, if the Commission is unwilling to do, so we offer specific recommendations to modify the Commission's approach below.

PROPOSED REGULATION § 1636.3(l)

While the PWFA was passed to help pregnant workers obtain accommodations in a timely fashion to protect their health, the proposed regulation would do the opposite, imposing unnecessary financial, physical, and mental burden on workers, contributing to substantial delay in receiving reasonable accommodations, and deterring workers from seeking the accommodations they need for their health and wellbeing.[150] Accordingly, **we urge** the EEOC to modify the supporting documentation framework as follows.

[150] The legislative record is clear that the PWFA did not intend to include a supporting documentation framework that would be onerous for workers. For example, while the Minority Views of the House Report stated that "the bill presumably allows employers to require such documentation when the need for an accommodation is not obvious," the Majority did not incorporate that analysis. H.R. REP. NO. 117-27, at 57 (2021), https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf; *see also* Bakst Questions for the Record, *supra* note 69, at 13 (arguing against the inclusion of a medical documentation requirement because employers often seek medical notes as a "way to prolong having to provide a very simple or reasonable accommodation").

First, as to 1636.3(l)(1)(i), **we suggest** the Commission clarify "obvious" needs. We agree with the Commission that employers should not be permitted to seek medical documentation when the need for accommodation is "obvious." We are concerned, however, that employers could unilaterally impose restrictions based on paternalistic stereotypes[151] about what pregnant or postpartum people "obviously" need, or that the proposed rule could have the unintended consequence of making the employee's body the subject of invasive scrutiny as employers consider whether their pregnancy is "obvious."

For these reasons, **we encourage** the Commission to maintain this important concept in the final regulations but to clarify how it is to be applied, specifically:

- **We recommend** replacing the current text of § 1636.3(l)(1)(i) with the following: "(i) When the employee has confirmed, through self-attestation, that they have a limitation related to pregnancy, childbirth, or a related medical condition, and the need for accommodation is obvious."
- **We suggest** providing guidance on how an employer may determine whether the need for accommodation is obvious: "A need for accommodation is obvious if, in light of the pregnant employee's known limitation, the employer either knew or should have known that the employee would need or did need the accommodation." For example, if a pregnant employee self-attests to regular vomiting and requests temporary relocation of their workstation closer to the bathroom, the need for accommodation is "obvious" because the employer knows, or should have known, that the employee needs easy bathroom access. Similarly "obvious" would be a police officer who self-attests to pregnancy, whose uniform and bulletproof vest no longer fit due to her physical changes, and who asks for a larger size.
- **We encourage** the Commission to warn employers in the proposed Interpretive Guidance against imposing accommodations not requested by the employee.

Second, as to § 1636.3(l)(1)(iii), **we applaud** the agency for making clear that employers cannot seek supporting documentation for certain straightforward accommodation requests. **We urge** the agency to expand the list to also include:[152]

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[151] *See* PWFA Proposed Rule, 88 Fed. Reg. at 54790 n. 106 (citing U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES II.A.3 (2007), https://www.eeoc.gov/laws/guidance/enforcementguidance-unlawful-disparate-treatment-workerscaregiving-responsibilities (describing situations in which employers incorrectly assume based on stereotypes that workers with caregiving responsibilities need a change to their workload or work environment); *see also UAW v. Johnson Controls*, 499 U.S. 187 (1991) (striking down employer's fetal protection policy that limited the opportunities of women); Bakst Questions for the Record, *supra* note 69, at 2 (explaining that employers have been known to unilaterally cut a worker's hours or stop a worker from working late in an attempt to ''help'' the employee or because the employer felt sorry for the worker, even though an employee did not ask for such accommodation and did not need it).

[152] In New York City, employers with 4 or more employees are not permitted to ask for medical documentation for many of the accommodations on this list. Any accommodations listed here that are not on New York City's list are similarly minor in nature. *See* N.Y.C. COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF PREGNANCY, CHILDBIRTH, RELATED MEDICAL CONDITIONS, LACTATION ACCOMMODATIONS, AND SEXUAL OR REPRODUCTIVE HEALTH

- Time off, up to 8 weeks, to recover from childbirth;[153]
- Time off to attend healthcare appointments related to pregnancy, childbirth, or related medical conditions, including, at minimum, at least 16 healthcare appointments;[154]
- Reprieve from lifting over 20 pounds;[155]
- Flexible scheduling or remote work for nausea;[156]
- Allowing an employee breaks as needed to rest;
- Allowing modifications to an employee's uniform, dress code, or other worn gear;
- Making minor physical modifications to an employee's workstation, such as the addition of a fan or a seat;
- Moving an employee's workstation, such as to permit movement, to be closer to restroom or lactation space, or to be away from heat, fumes, or other environmental hazards;
- Providing an employee personal protective equipment, such as gloves, goggles, earplugs, hard hats, masks, and respirators;
- Allowing an employee access to closer parking, if the employer provides parking; and
- Allowing an employee to consume food or drink at the employee's workstation or in other places where food/drink is not usually permitted.

DECISIONS 10 (2021), https://www.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_2021.pdf.

[153] *See, e.g.*, N.Y.C. COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF PREGNANCY, CHILDBIRTH, RELATED MEDICAL CONDITIONS, LACTATION ACCOMMODATIONS, AND SEXUAL OR REPRODUCTIVE HEALTH DECISIONS 10 (2021), https://www.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_2021.pdf.

[154] Nearly every paid sick time law only permits employers to request a healthcare provider note if the person needs time off for three or more consecutive days. *See Know Your Rights: State and Local Paid Sick Time Laws FAQs*, A BETTER BALANCE, https://www.abetterbalance.org/resources/know-your-rights-state-and-local-paid-sick-time-laws/ (last updated July 7, 2022). We suggest a minimum of 16 appointments as it reflects the average number of appointments for prenatal and postnatal care for low-risk pregnancies. *See* Alex Friedman Peahl et. al, *A Comparison of International Prenatal Care Guidelines for Low-Risk Women to Inform High-Value Care*, 222 American Journal of Obstetrics & Gynecology 505, 505 (2020), https://www.ajog.org/article/S0002-9378(20)30029-6/fulltext (stating that the median number of recommended prenatal care visits for a low-risk pregnancy in the United States is 12-14 visits); *ACOG Committee Opinion No. 736: Optimizing Postpartum Care*, 131 Obstetrics & Gynecology 140, 141 (2018), https://journals.lww.com/greenjournal/fulltext/2018/05000/acog_committee_opinion_no__736__optimizing.42.aspx (recommending at least two postpartum care appointments, with ongoing care as needed).

[155] *See* MASS. GEN. LAWS ch. 151B, § 4(1E) (2017) (" . . . an employer shall not require documentation from an appropriate health care or rehabilitation professional for . . . limits on lifting more than 20 pounds . . . ") For a discussion of the risks of repetitive lifting for pregnant workers, see *ACOG Committee Opinion*, *supra* note 78, at e119–e120 (discussing association between preterm delivery and lifting/carrying more than 11 pounds, and recommending repetitive, long-duration-pattern lifting of no more than 13–18 pounds).

[156] *See* 29 C.F.R. § 825.115(f) ("Absences attributable to incapacity [due to pregnancy] qualify for FMLA leave even though the employee . . . does not receive treatment from a health care provider during the absence. . . . An employee who is pregnant may be unable to report to work because of severe morning sickness.").

We note that this new list will diverge from the list of predictable assessments included in the "undue hardship" definition, as the principles underlying whether a particular accommodation warrants medical certification differ from the principles underlying the undue hardship defense. A summary of our suggestions for both categories is provided in Table 1 below.

TABLE 1[157]

EMPLOYER MAY NOT REQUEST SUPPORTING DOCUMENTATION UNDER ANY CIRCUMSTANCES	***PREDICTABLE ASSESSMENTS WHERE UNDUE HARDSHIP WILL RARELY OCCUR***
Allowing an employee to carry water and drink, as needed, in the employee's work area;	Allowing an employee to carry water and drink, as needed, in the employee's work area;
Allowing an employee additional restroom breaks;	Allowing an employee additional restroom breaks;
Allowing an employee whose work requires standing to sit and whose work requires sitting to stand	Allowing an employee whose work requires standing to sit and whose work requires sitting to stand
Allowing an employee breaks, as needed, to eat and drink	Allowing an employee breaks, as needed, to eat and drink
Lactation or pumping	**N/A - This is not a predictable assessment**[158]
Time off, up to 8 weeks, to recover from childbirth.	**N/A - This is not a predictable assessment**
Reprieve from lifting over 20 pounds	**N/A - This is not a predictable assessment**
Flexible scheduling or remote work for nausea	**N/A - This is not a predictable assessment**
Time off to attend healthcare appointments related to pregnancy, childbirth, or related medical conditions, including, at minimum, at least 16 healthcare appointments[159]	**Time off to attend 16 healthcare appointments related to pregnancy or childbirth**

[157] Note: Accommodations in plain font are already included in these categories in the proposed rule. Accommodations in **bold** are suggested additions to each category.

[158] We suggest the Commission update the final rule to remind employers with 50 or more employees that they must provide lactation break time and space under the PUMP Act for up to 1 year following birth, and, under that law, employers cannot claim an undue hardship defense. *See* PUMP for Nursing Mothers Act, 29 U.S.C. § 218d.

[159] Nearly every state paid sick time law in the United States only permits employers to request a healthcare provider note if the person needs time off for 3 or more consecutive days. *Know Your Rights: State and Local Paid Sick Time Laws FAQs*, A BETTER BALANCE, https://www.abetterbalance.org/resources/know-your-rights-state-and-local-paid-sick-time-laws/ (last updated July 7, 2022). We suggest a minimum of 16 appointments as it reflects the average number of appointments for prenatal and postnatal care for low-risk pregnancies. *See* Alex Friedman Peahl et. al, *A Comparison of International Prenatal Care Guidelines for Low-Risk Women to Inform High-Value Care*, 222 AM. J. OBSTETRICS & GYNECOLOGY 505, 505 (2020), https://www.ajog.org/article/S0002-9378(20)30029-6/fulltext (stating that the median number of recommended prenatal care visits for a low-risk pregnancy in the United States is 12-14 visits); *see also ACOG Committee Opinion*, *supra* note 78, at 140–141.

Allowing an employee breaks as needed to rest	**Allowing an employee breaks as needed to rest**
Allowing modifications to an employee's uniform, dress code, or other worn gear	**Allowing modifications to an employee's uniform, dress code, or other worn gear**
Making minor physical modifications to an employee's workstation, such as the addition of a fan or a seat	**Making minor physical modifications to an employee's workstation, such as the addition of a fan or a seat**
Moving an employee's workstation, such as to permit movement, to be closer to restroom or lactation space, or to be away from heat, fumes, or other environmental hazards	**Moving an employee's workstation, such as to permit movement, to be closer to restroom or lactation space, or to be away from heat, fumes, or other environmental hazards**
Providing an employee personal protective equipment, such as gloves, goggles, earplugs, hard hats, masks, and respirators	**Providing an employee personal protective equipment, such as gloves, goggles, earplugs, hard hats, masks, and respirators**
Allowing an employee access to closer parking, if the employer provides parking	**Allowing an employee access to closer parking, if the employer provides parking**
Allowing an employee to consume food or drink at the employee's workstation or in other places where food/drink is not usually permitted	**Allowing an employee to consume food or drink at the employee's workstation or in other places where food/drink is not usually permitted**

Third, as to 1636.3(l)(2), **we commend** the EEOC for making clear that employers may only require "reasonable" documentation. In the early months of PWFA implementation, employers have imposed extremely onerous documentation requirements, similar to those under the FMLA and ADA, that far exceed "reasonable." We have had several dozen helpline callers tell us they were asked to complete ADA or FMLA paperwork in order to obtain pregnancy accommodations under the PWFA. For example:

- A healthcare worker who needed a closer parking spot to accommodate her advanced pregnancy was told to complete an ADA form (in addition to a letter from her doctor), despite the fact that she did not have a disability.
- A customer services representative who requested periodic breaks to avoid fainting due to pregnancy was required to have her doctor complete ADA paperwork—which required her to travel three hours to see her doctor—even though she did not claim to have a disability.
- A federal employee who needed (and, after significant self-advocacy, obtained) a temporary transfer or remote-work accommodation due to pregnancy was required to complete a five-page "ADA" packet, even though she did not claim to have a disability.
- A convenience store worker needed an accommodation for morning sickness. At her employer's direction, she provided a doctor's note. Her employer then insisted that she complete "disability" forms, even though she did not claim to have a disability.

As a result, far too many workers have not received the accommodations they need in a timely manner. Accordingly, **we urge** the agency do the following to ensure employers request only "reasonable" documentation:

- Modify the definition of reasonable documentation found in § 1636.3(l)(2). It is unnecessarily invasive for an employer to demand to know their employee's precise condition or a description of it; rather it should be sufficient for a healthcare provider to (1) describe the employee's limitation that necessitates accommodation, (2) confirm that

the limitation is related to pregnancy, childbirth, or a related medical condition, and (3) state that they require an accommodation.[160] For example, medical documentation need not state that a worker needs to attend a medical appointment related to a miscarriage, but can simply state that the employee needs to attend a medical appointment during the workday (the limitation), due to pregnancy, childbirth, or a related medical condition, and thus a modified start time (the accommodation) is recommended.

- Further clarify § 1636.3(l)(1)(ii), and the accompanying guidance at 88 Fed. Reg. at 54788, prohibiting an employer from requiring additional documentation when the worker "has already provided the employer with sufficient information." We appreciate the guidance's lifting restrictions example. An additional example regarding time off for pregnancy-related sickness would be valuable. We heard from a worker whose employer forced her to provide a new doctor's note *each time* she was absent due to morning sickness, even though her doctor had already written a note describing her known limitation (morning sickness) and needed change (time off when she was ill).
- Make clear in the proposed rule or proposed Interpretive Guidance that employers cannot require workers to submit any particular medical certification form, so long as the healthcare provider documents the requisite three pieces of information, as explained above. Additionally, clarify that employers cannot require employees to complete ADA or FMLA certification forms in order to receive a PWFA accommodation, because such forms seek substantially more information than is "reasonable" under the PWFA.
- Clarify that under no circumstances may an employer require a worker to take any sort of test to confirm their pregnancy or to provide documentation or other proof of pregnancy. The Commission should clarify that self-attestations of pregnancy are sufficient in all circumstances.
- Make clear that an employer cannot take adverse action during a worker's good faith attempt to obtain medical documentation. For example, it would be unlawful for an employer to force a worker on unpaid leave when the employee is waiting to attend a doctor's appointment where they will receive appropriate documentation. It would also be unlawful for an employer to write up a worker who needs to rush to the ER for a pregnancy-related health need, on the ground that they have not yet provided supporting documentation for their absence. State agencies have established similar safeguards under state PWFAs.[161]
- Remind employers that if they do not request medical documentation from other non-pregnant workers, they cannot do so for pregnant workers.[162]

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[160] This approach is similar to the approach taken by California wherein the accommodation simply needs to be on the advice of a healthcare provider for a health condition related to pregnancy. *See* 2 Cal. Reg. § 11050(b)(6).

[161] *See, e.g.*, Tennessee Pregnant Workers Fairness Act, TENN. CODE. ANN § 50-10-103 (2020) ("An employer shall not take adverse action against an employee related to the employee's need for accommodation while the employee is engaging in good faith efforts to obtain medical certification."); 47 R.C.N.Y. § 2-09(g)(2) ("An employer also must not take adverse action against an employee related to their need for accommodation while the employee is engaging in good faith efforts to obtain documentation.").

[162] For instance, it could be a violation of Title VII. *See* 42 U.S.C. § 2000e(k).

Fourth, as to 1636.3(l)(3), we applaud the EEOC for its comprehensive, non-exhaustive, list of healthcare providers from whom employees can seek documentation.

- **We urge** the Commission to remove the terms "appropriate" and "in a particular situation" from the sentence "The covered entity may request documentation from the *appropriate* health care provider *in a particular situation*" (emphasis added). Employers should not have the discretion to second guess the judgment of licensed healthcare providers due to an assumption that they are not "appropriate" for the situation.
- **We also urge** the EEOC to make clear in the proposed rule or proposed Interpretive Guidance that employers must accept documentation from telehealth providers.

DIRECTED QUESTION #8B RE: SECTION 1636.3(L)(3): NON-EXHAUSTIVE LIST OF HEALTH CARE PROVIDERS

> *The Commission seeks comment on whether other types of health care providers should be included in the non-exhaustive list in the regulation.*

We address this question above.

DIRECTED QUESTION #8C RE: SECTION 1636.3(L)(3): APPROPRIATE HEALTH CARE PROVIDER TO PROVIDE DOCUMENTATION

> *The Commission seeks comment on whether there are situations in which an employer should be permitted to require an employee seeking a reasonable accommodation to be examined by a health care provider chosen by the employer; what limits that should be placed on the employer or the health care provider; and what effect allowing such an examination may have on the willingness of workers to request accommodations under the PWFA.*

There are no such situations, and **we applaud** the Commission for making clear that employers cannot require employees to be examined by the employer's healthcare provider, as such a practice would invade privacy, lead to differential evaluations based on race, impose unnecessary delay, and deter workers from seeking accommodation under the PWFA.

PROPOSED REGULATION § 1636.3(l)(4)

Finally, as to § 1636.3(l)(4), **we applaud** the EEOC's emphasis on ensuring employers maintain worker privacy when seeking documentation. **We suggest** the agency specifically state that employers must keep a worker's medical information separate from the rest of their personnel file, and may not share information about the worker's needs with anyone other than the supervisor(s) implementing the accommodation. Shockingly, one helpline caller told us that a supervisor insisted on publicly displaying her doctor's note in the workplace so that all her coworkers would be on notice of her restrictions.

PROPOSED GUIDANCE ON § 1636.3(l)

We commend the Commission for stating clearly at 88 Fed. Reg. at 54788–89 that documentation requests that violate the rule may constitute unlawful retaliation or interference. **We likewise applaud** the Commission's clear statement at 88 Fed. Reg. at 54789 that intentional

disclosure of medical information may violate the retaliation and coercion provisions of the PWFA.

Our same recommendations (above) to the proposed regulation's supporting documentation section apply to the Interpretive Guidance; we do not rehash them here. In addition:

- **We urge** the Commission to state at 88 Fed. Reg. at 54787 that an employer *must* provide interim accommodations if and while an employee is delayed in obtaining supporting documentation,[163] for the reasons described more fully in our discussion of interim accommodations above.[164]
- Example 1636.3 #37/Documentation: **We suggest** the Commission state which parts of the law the employer violated in this hypothetical, as the Commission helpfully did in Example #36/Documentation.

IV. 1636.4 — Prohibited practices.

DIRECTED QUESTION #9 RE: SECTION 1636.4(1): CHOOSING BETWEEN ACCOMMODATIONS

> *The Commission seeks comment on whether it should include language in the rule explaining that an employer may not unreasonably select an accommodation that negatively effects an employee's or applicant's employment opportunities or terms and conditions of employment when another available accommodation would not do so or whether the protections in 42 U.S.C. 2000gg–1(1) and (5) and 2000gg–2(f) alone are sufficiently clear in this regard.*

We strongly support the Commission including such language.

PROPOSED REGULATION § 1636.4

We applaud the EEOC for making clear that employer delay in responding to accommodation requests "may result in a violation of the PWFA."[165] Too often, employers delay providing accommodations for weeks or even months. Delays adversely impact the health of workers and/or the health of their pregnancies, and also cause economic harm, such as when workers are sent home without pay pending their employer's accommodation decision. For example, on our helpline:

- A security guard contacted us after her employer denied her repeated requests for breaks to use the restroom, stating, "That sounds like a 'you' problem." She was hospitalized for pre-term contractions, which her doctor attributed to her being forced to hold her urine for too long.

[163] PWFA Proposed Rule, 88 Fed. Reg. at 54787 ("[T]he Commission encourages employers who choose to require documentation, when that is permitted under this regulation, to grant interim accommodations as a best practice if an employee indicates that they have tried to obtain documentation but there is a delay in obtaining it…").
[164] See discussion *supra* Section K and *infra* Part IV.
[165] PWFA Proposed Rule, 88 Fed. Reg. at 54789 & n. 98.

- A worker at a large convenience store chain requested a temporary reassignment to a different position due to morning sickness. Despite promptly providing her employer with a doctor's note and completing her employer's required forms, she has been waiting *over three months* for a determination from her employer's third-party administrator on her accommodation request, causing her significant stress and frustration. When she complained about the unnecessary delay, her manager told her, incorrectly, "the onus should be on you to hound [our third-party administrator] for your accommodations." This worker's experience is not unique: We have routinely seen employers' use of third-party administrators result in significant and devastating delays to workers getting accommodations under the PWFA. Often, employers refuse even to accept workers' doctor's notes, telling them instead to contact the third-party administrator.
- Another worker, Raquel, requested temporary remote work for postpartum mental health needs. Her employer delayed responding to her request, which took a significant psychological toll, delaying her recovery. It also affected her financially, forcing her to remain on leave without pay and fall behind on household bills.
- A hospital technologist requested light duty on her doctor's advice. Her employer immediately forced her out onto an unwanted leave, without pay, despite the availability of a range of alternate accommodations, and forced her to endure nearly two months of silence as she waited to learn when and how she could return to her job. The unnecessary delay put pressure on the family finances, forcing her husband to pick up overtime shifts, and strained the marriage and her mental health. After we intervened to help her, she was able to get her requested accommodation and return to work.
- Another worker, Lily, who works for a state agency in Washington and is a veteran, needed an urgent accommodation for severe morning sickness. Her employer refused to provide her an interim reasonable accommodation, stating that it would not consider her accommodation request until she found a health provider to fill out its lengthy documentation forms—a challenge for her as a veteran relying on a notoriously slow healthcare system for veterans. Her employer's delay in accommodating her has caused significant psychological and emotional distress. She told us, "It has made me lose faith in humanity. My job no longer feels safe."

The PWFA was passed to eliminate precisely the health and economic harms our callers have been experiencing thanks to their employers' needless delay. To ensure workers are able to get the accommodations they need without unnecessary delay, **we recommend** the EEOC make several changes to the propose rule.

First, as to 1636.4(a)(1), **we applaud** the EEOC for recognizing that unnecessary delay may result in a failure-to-accommodate violation. **We urge** the EEOC to clarify, however, that unnecessary delays *at any point* during the accommodation process may result in violation, not just delays in "responding to a reasonable accommodation request." To that end, **we recommend** the EEOC amend § 1636.4(a)(1) by striking "An unnecessary delay in responding to a reasonable accommodation request may result in a violation of the PWFA" and replacing it with "An unnecessary delay in responding to a reasonable accommodation request<u>, engaging in the interactive process, or providing a reasonable accommodation</u> may result in a violation of the PWFA." This will clarify that employers cannot avoid a violation simply by providing an initial

response to the employee's request, but must instead avoid delay during the entirety of the accommodation process.

Second, as to § 1636.4(a)(1)(vi), **we agree** that covered entities should (or, in our view, must) provide interim accommodations during the interactive process if the employer cannot immediately grant the worker's original accommodation request. Providing an interim accommodation, however, should not excuse "unnecessary delay" if employers proceed to delay the provision of the ultimate accommodation the worker requests and needs. Accordingly, **we recommend** the EEOC remove the sentence "If an interim reasonable accommodation is offered, delay by the covered entity is more likely to be excused" and replace it with "Failure to offer an interim accommodation may constitute unnecessary delay and result in a violation of the PWFA."

Third, as to § 1636.4(a), **we appreciate** the EEOC's inclusion of a variety of factors to be considered when evaluating unnecessary delay. **We recommend** the EEOC add one additional factor to the list: "The urgency of the requested accommodation." In some cases, pregnant people who do not receive immediate relief can experience tragic and irreparable consequences, such as employees who are denied permission to seek emergency medical care, and as a result, experience complications or pregnancy loss.[166] This additional factor values the importance of immediacy when it comes to providing accommodations under the PWFA and will better assist the EEOC and courts in evaluating when an unnecessary delay has occurred."[167]

Next, as to § 1636.4(a)(4), **we strongly recommend** the EEOC include a second factor that employers must consider in choosing between different accommodations that would not impose undue hardship. In addition to advancing equal employment opportunity, the PWFA's statutory purpose also includes promoting the health of workers who are pregnant, recently postpartum, or have related medical conditions.[168] As such, in selecting between accommodations, employers must take into account which accommodation would most effectively meet the pregnancy-related health needs identified by the worker or their representative. **We strongly recommend** the EEOC add this additional factor to the regulation as follows: "When choosing between accommodations that do not cause an undue hardship, the covered entity must choose an option that most effectively meets the employee's or applicant's needs related to pregnancy, childbirth, or a related medical condition (as communicated to the covered entity by the employee,

[166] *See, e.g.*, BAKST, GEDMARK & BRAFMAN, LONG OVERDUE, *supra* note 12, at 8, 11 (citing examples of workers who fainted and needed emergency care or experienced pregnancy loss as a result of not being accommodated); Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying At Work: The Physical Toll of Pregnancy Discrimination*, N.Y. TIMES (Oct. 21, 2018), https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html.
[167] *See* PWFA Proposed Rule, 88 Fed. Reg. at 54789 & n.97.
[168] *See* H.R. REP. NO. 117-27, pt. 1, at 22 ("According to the American College of Obstetrics and Gynecologists (ACOG), providing reasonable accommodations to pregnant workers is critical for the health of women and their children"); H.R. REP. NO. 117-27, pt. 1, at 23 ("When simple accommodations like those suggested by ACOG are not provided, the impacts on a workers health and pregnancy can be deadly."); H.R. REP. NO. 117-27, pt. 1, at 24 ("Guaranteed reasonable accommodations could be pivotal in pregnant workers maintaining healthy pregnancies both during COVID-19 and beyond.").

applicant, or their representative) and provides the employee or applicant equal employment opportunity."

We support the agency making clear in the proposed rule that the accommodation must provide the employee with equal employment opportunity. We have concerns, however, with the agency's proposed comparator standard. The standard in the proposed regulations states: "The accommodation should provide the employee or applicant with equal employment opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges *as are available to the average similarly situated employee* without a known limitation."[169] We are concerned about the EEOC using a comparator standard to make this determination, given that courts have historically imposed stringent requirements as to who constitutes a sufficient comparator.[170] **We urge** the EEOC to add the following language to address this issue:

> The question of whether an employer has provided an accommodation that provides the employee or applicant with equal employment opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges as are available to the average similarly situated employee without a known limitation, can be made based on evidence of the opportunities that would have been available to the employee seeking accommodation had they not identified a known limitation or sought accommodation or any other evidence that tends to demonstrate that the accommodation provided to the employee or applicant provided or did not provide an equal employment opportunity. Evidence of opportunities available to other specific individual employees is not required. "Similarly situated" does not mean similar in all respects, but only in material respects.

PROPOSED GUIDANCE ON § 1636.4

To further clarify the Interpretive Guidance for workers and employers:

- **We recommend** adding examples of circumstances that would constitute an unnecessary delay. For example, one hypothetical could address when even a seven-day delay constitutes an unnecessary delay. Another hypothetical could address the circumstance in which an employer repeatedly and unreasonably requests ever more documentation, causing an unnecessary delay.
- **We urge** the EEOC to state that any unlawful conduct, such as unnecessary delay, by a third-party administrator is directly attributable to the employer. As discussed above, we consistently hear from workers whose employers refuse to accept doctor's notes or otherwise engage with an accommodation request, and instead force workers to direct PWFA requests to their third-party administrator. The agency should make clear that an employer cannot avoid liability for a delay in responding to an accommodation request, engaging in the interactive process, or providing a reasonable accommodation merely by hiring an administrator to respond to such requests.
- **We recommend** the EEOC add an example of unnecessary delay in which the delay is caused by the employer's third-party administrator, for the reasons described above.

[169] PWFA Proposed Rule, 88 Fed. Reg. at 54770 (emphasis added).
[170] *See* Suzanne Goldberg, *Discrimination by Comparison,* 120 YALE L.J. 728 (2011) (documenting how courts have applied overly-strict comparator requirements to undermine discrimination claims).

- **We suggest** adding an example of unnecessary delay in which an employer tries to blame its delay on the fact that the worker is unionized, even though the union has already engaged and signed off on the worker's requested accommodation. Since the PWFA went into effect (and before, in the context of state PWFAs), we have seen employers routinely try to weaponize the existence of a union and a collective bargaining agreement as a way to delay—sometimes for months—consideration and grant of an accommodation, even when the union is eager for the worker to receive such accommodation.
    - For example, a telecommunications worker contacted our helpline after she was denied an accommodation to work from home as an accommodation for her postpartum depression, despite being able to complete all of her essential functions remotely. Her employer claimed that it was unable to provide this accommodation unless the worker's union agreed to a remote work protocol for all members; the union had repeatedly advised the employer, however, that it did not object to remote work accommodations being provided to its members. As a result, the worker was forced to remain on leave and lost vital income for her growing family.
- **We recommend** reminding employers at 88 Fed. Reg. at 54790 that although it is true the employer "has the ultimate discretion to choose between potential reasonable accommodations," an accommodation is not reasonable if it does not meet the worker's needs/limitations.
    - For example, after Jessica, a New Jersey worker, requested to work from home temporarily for the remaining months of her pregnancy because her commute was exacerbating pregnancy-related symptoms such as nausea and pelvic pain, her employer offered her two alternate accommodations. But Jessica was already receiving these accommodations informally from her supervisor, and they had proven insufficient to alleviate her symptoms. When Jessica asked for the reason that her work-from-home request was denied, her employer refused to provide one. (Jessica was ultimately able to secure accommodations sufficient to address her health needs, with significant self-advocacy and thanks to learning about the PWFA.)
- **We recommend** the Commission also add an example at 88 Fed. Reg. at 54790 that speaks to the need for employers, when choosing among accommodations, to select the accommodation that most effectively meets the employee's pregnancy-related health needs. One example could be a pregnant employee whose healthcare provider writes a note requesting that she be excused from working with a particular toxic chemical that she routinely uses in the course of performing one of her job duties. Her employer identifies two potential accommodations, neither of which imposes an undue hardship: 1) completely excusing the pregnant employee from the task by reassigning it to two other employees, one of whom is happy to help, and one of whom says she does not want to perform the task; and 2) significantly reducing the number of times the employee must engage in the task by reassigning a large portion of it to the other employee who says they are happy to help. The employer must select the first accommodation. While the second accommodation would address the employee's health needs in large part, by significantly reducing exposure to the toxic chemical, it would not address the pregnancy-related health needs *as effectively* as the first accommodation, which

eliminates toxic exposure. While the employer may prefer to provide the accommodation that does not frustrate the second coworker's preference, it must provide the accommodation that most effectively meets the pregnant worker's health needs, since it can do so without undue hardship.

- Example 1636.4 #39: **We strongly urge** the Commission to delete the following text from the example: "The Commission recognizes that the relief in this situation may be limited to requiring the employer to engage in the interactive process with the employee." That is far from the only relief that would be available. Such a worker could obtain emotional distress damages and attorneys' fees (if applicable), and the Commission would retain authority to order other remedial relief, such as requiring training and postings. The agency's statement could be read to block workers from obtaining relief not expressly listed here, and **we strongly urge** its deletion.
- **We suggest** that the EEOC note, perhaps in a footnote, that the following conduct, described at 88 Fed. Reg. at 54791, would also violate the PDA: "Finally, this provision also could be violated if a covered entity has a rule that requires all pregnant workers to stop a certain function—such as traveling—automatically, without any evidence that the particular worker is unable to perform that function."
- Example 1636.4 #40: **We suggest** the agency change "could be" to "would be" in the final sentence, because, under the circumstances described in the hypothetical ("as a result [of the accommodation], failed to meet the sales quota"), the negative appraisal "would" violate the PWFA.

DIRECTED QUESTION #10 RE: SECTION 1636.4(B): REQUIRING EMPLOYEE TO ACCEPT AN ACCOMMODATION

> *The Commission seeks comment on whether there are other factual scenarios that would violate this provision and whether additional examples would be helpful.*

Since the PWFA went into effect, we have heard from dozens of workers who requested an on-the-job accommodation and were instead forced immediately onto unpaid leave for days, weeks, or months at a time, causing significant stress and financial hardship for workers already living paycheck to paycheck. Because employers are routinely pushing workers onto unpaid leave, **we strongly urge** the Commission to reiterate that forcing a worker on *unwanted* leave, even as a so-called "interim" accommodation, is unlawful. Additional guidance, including in the agency's public outreach and education materials, is critical.

DIRECTED QUESTION #11 RE: SECTION 1636.4(E): ADVERSE ACTION ON ACCOUNT OF REQUESTING OR USING A REASONABLE ACCOMMODATION

> *The Commission seeks comment on whether there are other factual scenarios that would violate this provision and whether additional examples would be helpful.*

We direct the Commission to our discussion above of "Ensuring that Workers are not Penalized for Using Reasonable Accommodations."

V. 1636.5 — Remedies and enforcement.

PROPOSED REGULATION § 1636.5

We applaud the Commission for appropriately clarifying that "an individual does not actually have to be deterred from exercising or enjoying rights under the PWFA for the coercion, intimidation, threats, harassment, or interference to be actionable." In our experience, we have watched workers persevere in exercising their rights in the face of significant threats, harassment, and intimidation from their employer. The perseverance of such workers does not render their employers' misconduct harmless and, as the agency rightly recognizes, should not make it lawful; such wrongdoing should not be excused simply "because its victims are resilient enough to persist in the face of such unequal treatment."[171]

To further strengthen the regulation:

- **We recommend** adding a subsection on policies that, on their face, have the effect of intimidating workers from exercising their rights under the PWFA, such as 100% attendance policies and probationary policies that purport to prohibit workers from having an absence during the first 90-days of a new job. **We recommend** the agency elevate the following text from the Interpretive Guidance to the regulation, with some additions as underlined: "Some other examples of coercion include . . . issuing a policy or requirement that purports to limit an employee's or applicant's rights to invoke PWFA protections (e.g., a fixed leave policy that states 'no exceptions will be made for any reason' <u>or fails to specify that 'absences protected by the ADA and PWFA are lawful absences'</u>)." We routinely see employer attendance policies that state that "no exceptions will be made," without informing workers that absences protected by laws such as the PWFA, ADA, and FMLA will be excused and not result in penalty.[172] As we have documented, such policies are highly misleading and chill workers from exercising their rights to legally-protected time off.[173]
- **We urge** the EEOC to clarify that, as under the ADA,[174] the good faith effort defense to monetary damages is limited to damages for a covered entity's failure to make reasonable accommodations under § 1636.4(a). The EEOC should clarify that the good faith defense to monetary damages is *not* available for other violations of PWFA, including requiring an employee or applicant to accept an accommodation other than one arrived at through

[171] *Peltier v. Charter Day Sch.*, 37 F.4th 104, 135 (4th Cir. 2022) (Keenan, J., concurring) (describing the impact of a discriminatory dress code on female students in a Title IX case).
[172] *See, e.g.*, Letter from Dina Bakst, Elizabeth Chen & Dana Bolger to Andy Jassy & David Zapolsky (Jan. 10, 2022), https://www.abetterbalance.org/resources/letter-urging-amazon-to-correct-deficiencies-in-abusive-points-based-attendance-policy/; Press Release, Sen. Elizabeth Warren, Senators Warren, Sanders, Booker, Blumenthal, Reps. Ocasio-Cortez, Bush Call Out Amazon's Attendance Policy Punishing Workers for Taking Legally-Protected Leave (Mar. 3, 2022), https://www.warren.senate.gov/newsroom/press-releases/senators-warren-sanders-booker-blumenthal-reps-ocasio-cortez-bush-call-out-amazons-attendance-policy-punishing-workers-for-taking-legally-protected-leave.
[173] DINA BAKST, ELIZABETH GEDMARK & CHRISTINE DINAN, MISLED & MISINFORMED: HOW SOME U.S. EMPLOYERS USE "NO FAULT" ATTENDANCE POLICIES TO TRAMPLE ON WORKERS' RIGHTS (AND GET AWAY WITH IT), A BETTER BALANCE (2020), https://www.abetterbalance.org/wp-content/uploads/2020/06/Misled_and_Misinformed_A_Better_Balance-1-1.pdf.
[174] *Foster v. Time Warner Entertainment Co., L.P.*, 250 F.3d 1189, 1198 (8th Cir. 2001) (good faith defense to damages not applicable to ADA retaliation claim).

the interactive process (§ 1636.4(b)); denying employment opportunities based on the need or potential need to make a reasonable accommodation (§ 1636.4(c)); requiring an employee to take leave if another reasonable accommodation can be provided (§ 1636.4(d)); taking adverse actions on account of an employee, applicant, or former employee requesting or using a reasonable accommodation (§ 1634.4(e)). Likewise, the EEOC should clarify that the good faith defense to damages is not available for claims brought under the prohibition against retaliation (§ 1636.5(f)).

- **We strongly recommend** the EEOC also make clear that a good faith effort defense to monetary damages will rarely be available in cases where an employer has failed to provide an accommodation under the PWFA, given the predictable and time-limited nature of most accommodations needed for pregnancy, childbirth, and related medical conditions, and the health implications of unnecessarily delaying and/or failing to provide an accommodation.[175]

PROPOSED GUIDANCE ON § 1636.5

- **We suggest** deleting "unwarranted" from the phrase "subjecting an employee to unwarranted discipline . . . because they assisted a coworker in requesting a reasonable accommodation" at 88 Fed. Reg. at 54793. If the employee was disciplined "because" they helped a coworker exercise their rights, the discipline is necessarily uncalled-for and the use of "unwarranted" is superfluous.
- Example 1636.5 #48: **We support** inclusion of this example, as it illustrates a helpful example of retaliation against a worker other than the worker requesting the accommodation.
- Example 1636.5 #50: **We recommend** striking "obviously pregnant" from the example, for the reasons discussed above.
- **We recommend** adding an example that illustrates a policy-based violation, such as a worker who is chilled from requesting time off for prenatal appointments as an accommodation because they are subject to an attendance "points" policy that states they will receive points for any absence, without explaining that PWFA-protected absences will not result in points.
- **We recommend** adding an example of a violation where an employer policy or practice precludes workers from meaningfully requesting a reasonable accommodation, such as a policy of "not accepting" doctor's notes or use of a technological system that does not allow workers to report that an absence is for a PWFA-protected reason.[176]
- **We recommend** adding an example of a violation where an employer conveys false or misleading information about a worker's right to accommodation that chills a worker from exercising their rights, such as an employer stating incorrectly that a worker is "too new" to exercise their right to time off as a reasonable accommodation under the PWFA.
- **We suggest** adding an example where an employer only allows workers to access their accommodations policy when they are on the clock, physically at the worksite, or have legal counsel—employer practices we regularly hear about on our helpline. Such practices impede workers' ability to exercise their rights under the PWFA and other laws.

[175] *See supra* note 48. We were deeply involved in the negotiations around the good faith effort provision; it was intended to be extremely narrow.
[176] *See generally* BAKST, GEDMARK & DINAN, MISLED & MISINFORMED, *supra* note 173.

VI. 1636.7 — Relationship to other laws.

PROPOSED GUIDANCE ON § 1636.7

At 88 Fed. Reg. at 54794, **we recommend** the agency change "will be able to seek" to "are entitled (absent undue hardship)" so that the sentence reads, "Under the PWFA, employees affected by pregnancy, childbirth, or related medical conditions are entitled (absent undue hardship) to reasonable accommodations whether or not other employees have those accommodations . . . " The PWFA gives workers a right to receive reasonable accommodations, not merely a right to "seek" or request them.

DIRECTED QUESTION #12 RE: SECTION 1636.7(B): RULE OF CONSTRUCTION

> *The Commission invites the public to provide examples of:*
>
> *A. What accommodations provided under PWFA, 42 U.S.C. 2000gg–1 may impact a religious organization's employment of individuals of a particular religion, and what accommodations may not impact a religious organization's employment of such individuals;*
>
> *B. How accommodations provided under PWFA, 42 U.S.C. 2000gg–1 may affect those individuals' performance of work connected with the religious organization's activities, and when they may not affect those individuals' performance of such work;*
>
> *C. When the prohibition on retaliatory or coercive actions in PWFA, 42 U.S.C. 2000gg–2(f) may impact a religious organization's employment of individuals of a particular religion, and when it may not impact a religious organization's employment of such individuals;*
>
> *D. When prohibiting retaliatory or coercive actions as described in PWFA, 42 U.S.C. 2000gg–2(f) may affect those individuals' performance of work connected with the religious organization's activities, and when it may not affect those individuals' performance of such work.*
>
> *E. The Commission also seeks comment regarding whether any of the above factual scenarios are expected to arise with such regularity that, to facilitate compliance with this provision, the public would benefit from a more detailed rule by the Commission than the case-by-case approach proposed and whether there are alternative interpretations of 42 U.S.C. 2000gg–5(b) of the PWFA that commenters believe, given their answers to questions A–D, that the Commission should consider.*

The EEOC correctly recognizes that, since its enactment nearly 60 years ago, Section 702 of Title VII of the Civil Rights Act allows religious employers to preference workers who share the employer's religious beliefs without facing liability for religious discrimination, but does not insulate those employers from claims of discrimination based on other protected characteristics. Consistent with this textual scope, the inclusion of Section 702 in PWFA likewise permits a

religious employer, when faced, for instance, with the circumstance of a coreligionist and a worker of another faith seeking the same accommodation, to preference the coreligionist. It does not excuse the employer from the statutory obligation to reasonably accommodate the other worker, unless doing so would impose an undue hardship, as is true for nonreligious employers. It also does not permit the employer to deny the other worker a reasonable accommodation based on religious belief or any other characteristic protected by Title VII.[177]

Amendments that would have broadly exempted religious employers from the requirements of the PWFA were rejected in both the House and the Senate, demonstrating that Congress' intent was not to exempt religious entities from the PWFA.[178] The EEOC correctly recognizes that nothing in this provision categorically exempts religious employers from the requirements of 42 USC 2000gg-1.

VII. Economic Analysis

DIRECTED QUESTION #13 RE: ECONOMIC ANALYSIS

> *A. The Commission has identified five primary benefits of the proposed rule and underlying statute. The Commission seeks comment regarding these and any other benefits to individuals who may be affected by the accommodations and protections set forth in the proposed rule and the PWFA, or who may have been affected by a lack of such accommodations and protections in the past, including qualitative or quantitative research and anecdotal evidence.*

In the three months since the PWFA went into effect, we have fielded hundreds of calls about the new law from workers across the country. Our helpline staff have been moved to hear from dozens and dozens of low-wage workers who called to thank us for passing the law, and to tell us just how transformative it has been in their lives and in the lives of their growing families. Indeed, the PWFA's impact has been immediate and striking: In some cases, workers have told us that before June 27, 2023—the PWFA's effective date—their employers automatically denied or outright ignored their requests for accommodation; after June 27, they suddenly approved them.

Getting the accommodations they need and deserve has allowed workers to protect their health and their pregnancies, and has shielded many from the economic precarity that used to accompany pregnancy, when employers would automatically push workers out of their jobs rather than accommodate their health needs. We have also seen the new legal right to

[177] *See* 168 CONG. REC. H10528 (daily ed. Dec. 23, 2022) (statement of Rep. Jerrold Nadler) (referring to the Rule of Construction as "narrow" and stating, "Properly read, the rule of construction thus means that religious institutions can continue to prefer coreligionists in making pregnancy accommodations.").
[178] *See Markup of H.R. 1065, Pregnant Workers Fairness Act, Before the H. Comm. on Educ. & Lab.*, 117th Cong. (Mar. 24, 2021) (substitute amendment offered by Rep. Russ Fulcher (R–ID)), https://docs.house.gov/meetings/ED/ED00/20210324/111413/BILLS-117-HR1065-A000370-Amdt-2.pdf; S. Amdt. 6577, 117th Cong. § 2, Roll Call Vote (2022), https://www.congress.gov/amendment/117th-congress/senate-amendment/6577/text.

accommodation give pregnant workers a strong sense of dignity and belonging in the workforce, making clear that pregnancy and work need not be incompatible, reducing stigma and stereotyping, and reinscribing pregnancy as an ordinary part of employment.[179]

Even as we have seen the PWFA's groundbreaking benefits for many workers, we do not wish to tell an overly-cheerful story about the law's early successes. As described throughout our comment, we also hear regularly from workers—particularly low-wage women of color—whose employers have violated their rights under the law, providing ineffective accommodations, delayed accommodations, or no accommodations at all; subjecting workers to arduous documentation requirements that delay or outright frustrate their ability to obtain the accommodations they need; misleading workers about their rights; forcing workers on unpaid leaves they do not seek and on which they cannot survive; and outright firing workers for exercising their right to legally-protected time off under the PWFA.

Thus, in order to fully effectuate the intent of the law, EEOC must issue regulations that are robust, clear, and comprehensive. Only then will the PWFA's promise—of restructuring work and workplaces to support the flourishing of workers with needs related to pregnancy, childbirth, or related medical conditions—become a lived reality in warehouses, storefronts, schools, and hospitals across the country.

Below are small sampling of the stories we have heard on our helpline:

- Beca Macri, a certified nurse assistant in Massachusetts, read about the PWFA on our website and used it to successfully secure pregnancy accommodations from her employer of ten years. Beca had previously experienced a pregnancy loss and, after becoming pregnant again, was determined to use the PWFA to safeguard her health. She told us:

> I feel like a lot of pregnant women across the world don't realize what their rights are. It took me having a miscarriage for me to advocate for myself because I realized my job didn't care about me. I found the new law that took effect June 27th and did my research. I dug deep, not just to get myself help, but to spread the word to every pregnant person I meet.
>
> I don't think until [anyone is] in your shoes they realize how hard it is to lift someone over and over again or to think you can't take a break to sit down.

[179] For a discussion of the equality-enhancing benefits of the PWFA, *see, e.g.*, Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, YALE L.J. FORUM 450, 489 (Jan. 20, 2020), https://www.yalelawjournal.org/pdf/Siegel_TheNineteenthAmendmentandtheDemocratizationoftheFamily_kwjdphtp.pdf (describing the PWFA as a law that "seeks to structure the family in ways that allow all adult members of the household to be recognized and participate in democratic life as equals"); Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEORGETOWN L.J. 167, 220–226 (2020), https://law.yale.edu/sites/default/files/documents/faculty/papers/the_pregnant_citizen_siegel_final_pdf.pdf (explaining how the PWFA fosters equal citizenship and attacks gender-based stereotypes and gendered workforce exclusions); Reva B. Siegel, *Pregnancy as a Normal Condition of Employment*, 59 WILLIAM & MARY L. REV. 969, 1006 (2018), https://scholarship.law.wm.edu/wmlr/vol59/iss3/5/ (documenting how passage of state PWFAs "signal the growing belief that working women have a right to hang onto their jobs when they become mothers, and that their income is crucial to a family's survival").

> Maybe you have gestational diabetes and your sugar is low. Having these laws in place means pregnant women can have a happy and healthy pregnancy and keep their job.
>
> When I found out about the law, I felt strongly that I was going to use this to my advantage and have that beside me. When I went into work, I wasn't afraid to request reasonable accommodations because I wasn't alone. I didn't have a person with me, but I had a federal law with me to help me. Suddenly they agreed to accommodate me after being completely resistant before.[180]

- Another worker, a hospital technologist, requested light duty on her doctor's advice. Her employer immediately forced her onto an unwanted leave, without pay, despite the availability of alternate accommodations, and then forced her to endure months of silence as she waited to learn when and how she could return to her job. She told us:

> Getting sent home early from work in front of all my colleagues felt so demeaning. It made me feel inadequate to do a job that I had worked hard to master all those years. Since I was no longer able to contribute to my financial household responsibilities, my husband had to take the burden on all by himself. He had to pick up overtime shifts at work, which meant less time with our family. This placed a strain on my marriage and mental health. I was in a constant state of anguish. After getting silence from my employer, I started to regret my pregnancy, one that I had wholeheartedly prayed for. I felt this wasn't fair to myself or my baby.

After we intervened to help her, she successfully obtained her requested accommodation and was able, after months of unpaid leave, to return to work. She told us:

> When I received the call that my accommodation was approved I burst into tears. It felt like a load of bricks had been lifted off my chest. When I returned to work, I walked around with such pride and a high sense of dignity. I was finally able to enjoy my pregnancy and relax. I am able to contribute financially again, giving me my sense of self-worth back. I no longer felt ostracized or incapable because I was pregnant.

- Another worker, a federal contractor in Virginia, needed a lactation accommodation to allow her to maintain her milk supply. After she learned about the PWFA and advocated for herself, her employer granted her request. She told us:

> I cannot begin to describe the relief that the PWFA provided me. As a first-time mom, I know that I could have survived without it, as generations have before me, but the protections I have been afforded have greatly supported my physical and mental health, which helps me to be a better mom, wife, and community member.

[180] Beca's story was featured in an article in *The Nation* about the PWFA. *See* Bryce Covert, *The New Law to Protect Pregnant Workers Is Already Changing Lives*, THE NATION (Aug. 14, 2023), https://www.thenation.com/article/society/pregnant-workers-fairness-act-3/.

> This law makes me proud to be an American because taking this step to protect the dignity of all mothers in our society will have huge positive ripple effects.

- Cristel, an electrician's assistant in New York City, was 29 weeks pregnant and needed accommodations to allow her to continue working while pregnant. Initially, Cristel presented her employer with a doctor's note outlining several pregnancy-related restrictions, such as limitations on lifting and climbing stairs, common for expecting mothers. Rather than grant her accommodations or work with her to identify alternate accommodations that could meet her needs, Cristel's employer tried to push her onto leave. Cristel told us (translated from Spanish):[181]

  > When I became pregnant, I was afraid I would face discrimination, and I did. Because I work in construction and there were only men, they looked at women as if they shouldn't be working, just because I was pregnant.
  >
  > There are definitely areas where one could work that are easier, but they just move you around and move you around to hard areas, in the hopes that you quit.

  After Cristel learned her PWFA rights and advocated for herself under the law, her employer suddenly exhibited increased flexibility and willingness to accommodate her needs. "They did listen to my doctor and accommodated the restrictions outlined by my doctor, which was good and helpful," Cristel told us. She feels relieved that she knew her rights and could ensure that she was treated fairly by her employer. "I'm feeling hopeful."

- Louseda, a registered nurse in Florida, was pregnant and experiencing lower abdominal pressure and pain, which impacted her ability to work. When she requested accommodations that would ameliorate those issues, her employer initially denied them. After doing her own research on the PWFA and seeing A Better Balance's online resources, Louseda asked her employer to reexamine her request under the law. Upon understanding its legal obligations, her employer granted her several accommodations, including a temporary transfer to a position that allows Louseda greater access to a chair and less walking, as well as a modified schedule. As a result, she has been able to continue working at her job and earning a paycheck, without risking her or her baby's health.

- Raquel, who works for a telecommunications company in Ohio, experienced postpartum mental health complications after giving birth to her daughter, and requested an accommodation on the advice of her doctor. Her employer needlessly took months to respond to her request. Raquel told us:

[181] "Cuando me quedé embarazada, tenía miedo de sufrir discriminación, y así fue. Como trabajaba en la construcción y sólo había hombres, miraban a las mujeres como si no debieran trabajar sólo porque yo estaba embarazada. Definitivamente hay áreas en las que una podría trabajar que son más fáciles, pero simplemente te mueven y te colocan en áreas difíciles con la esperanza de que renuncies."

> My employer's delay in responding to my request took a huge toll on me psychologically. It further delayed my recovery, as I was depressed and on pins and needles waiting for an answer. Economically it affected me, as well, because they took so long to make a decision that I used up all of my vacation time and went into non-paid time, which meant my paycheck was short and I got behind on many of my household bills.

Raquel learned about the PWFA and, using A Better Balance's resources, informed her employer that she had a legal right to accommodations for medical conditions related to childbirth. That changed everything: Raquel's employer finally approved her request and gave her the accommodation she needed to return to work. She told us:

> The new Pregnant Workers Fairness Act has meant so much to me. I am more than thankful for this law because I can now focus on caring for my baby and myself, and truly recover from my post-pregnancy complications. I also feel very empowered because, had this law not been in place, I know my job would not have accommodated me in any kind of way.

- Angela, a telecommunication specialist employed by a federal agency in New York, worked remotely during the pandemic. After her office returned to in-person work, she had to spend five hours traveling to and from work each day, a commute that became increasingly difficult as she progressed in her pregnancy. Upon the advice of her doctor, she requested remote work or temporary transfer to a different location closer to her home. Management took two weeks to respond, then indicated they did not intend to accommodate her.

  Frustrated, Angela started reading up on her rights under the PWFA, which had recently gone into effect. Learning the law "helped kickstart things," and Angela's employer finally began moving forward with her request. Not long after that, her agency's legal counsel advised that the agency must comply with her accommodation request as soon as possible, and the agency provided her with equipment to begin working remotely. Angela felt relieved. "This news came at an especially reassuring time," she told us, "as my bloodwork results from my last doctor's appointment returned 'flagged' the same afternoon. Now I will be better able to manage my and my baby's needs for the remainder of the pregnancy."

- Katie, a tax specialist in Ohio, had been working remotely until her employer recently began requiring some employees to return to the office. Katie was pregnant and had gestational hypertension (high blood pressure). On her doctor's advice, she requested continued remote work as a pregnancy accommodation. Her employer denied her request without explaining why. After Katie learned about the PWFA and educated her employer about the law's requirements, her employer granted her accommodation request. She was relieved and told us, "This law is a huge win for women."

- Emily, an independent living worker in South Carolina, was in her first trimester of pregnancy and experiencing severe "24/7" morning sickness and vomiting, as well as

dizziness and fatigue, due to her pregnancy. She wanted to request remote work to help ease the impact of her symptoms, but did not know her rights. She told us:

> I originally found out about PWFA through a friend sharing a TikTok video about it. I emailed my employer to share the good news about my pregnancy and request a temporary work-from-home accommodation under the PWFA. My request was approved about one week later with no further information requested by my employer. Having [information] about the law allowed me to feel confident asking for my accommodation.

Despite the new law, many workers continue to experience discrimination and accommodation denials, risking their health and forcing them to lose both pay and a sense of belonging in their workplaces, in violation of the letter or the spirit of the PWFA. These violations underscore the vital need for the EEOC to promulgate strong regulation and guidance, as well as conduct robust public education campaigns. For example:

- Victoria, a custodial worker in South Carolina, had worked for her employer for ten years. She had made significant personal sacrifices for her employer, including delaying starting her family. When she eventually became pregnant, she submitted a doctor's note advising standard pregnancy-related restrictions she believed her employer could easily accommodate. Instead of accommodating her, Victoria's employer sent her home for two months—forcing her to exhaust her PTO and, then, to struggle to survive without pay—and told her not to return until she had "no restrictions." Victoria was devastated. Without a steady paycheck coming in, she struggled to pay her medical bills, at the very moment she needed medical care the most. Her employer's actions took a psychological toll, too: "Going through everything, it's frustrating. It can damage your mental health." She resented that she was being excluded from the workplace based on nothing more than stereotypes about the capability of pregnant women:

  > I'm a woman in a job where usually men are in that job. My brain is still working the same. I'm still capable of doing things. Having a baby inside your belly is not a sickness. It shouldn't change a lot for your work.
  >
  > When, for a company, is the right time for a woman to have a baby?

- A customer service representative with a high-risk pregnancy was devastated when her employer immediately denied her request for occasional time off to attend her prenatal appointments, claiming that she was "too new" to take time off. She told us, "To come back to work and get talked to by a supervisor like I was wrong for going to an appointment when I was high-risk and gave them notice—I felt embarrassed. I was so upset."

- A convenience store worker who had submitted form after form in support of her request for modest accommodations for morning sickness felt exasperated by her employer's three-month delay in responding to her request. When she complained, her manager told her the "onus" should be on her to "hound" them for the accommodations she needed. She told us, "I would like to say the PWFA sounds great on paper but, with how my

employer handles accommodations, it doesn't feel like it is helping me at all." Her experience drives home the need for robust regulations and guidance from the EEOC.

Finally, we encourage the Commission to review our webpage[182] profiling women who—after being denied accommodations for pregnancy, often without any legal recourse—became advocates for change, working tirelessly to fight for passage of the PWFA. Their pre-PWFA experiences underscore just how groundbreaking and vital the law—and robust enforcement of it—is. For instance:

- Armanda Legros, New York: As a worker for an armored truck company in New York and the sole breadwinner of her family, Armanda asked to avoid heavy lifting during her pregnancy after she pulled a muscle on the job. Her employer responded by pushing her out, despite having previously accommodated a coworker who had injured his back on the job. Armanda lost her health insurance and had to apply for food stamps, struggling to make ends meet. Armanda testified before the U.S. Senate Committee on Health, Education, Labor & Pensions in support of the PWFA in 2014. "Once my baby arrived, just putting food on the table for him and my four-year-old was a challenge. I was forced to use water in his cereal at times because I could not afford milk. I was scared every time I looked in my empty fridge," she said.

- Lyndi Trischler, Kentucky: Lyndi, a police officer in Kentucky, was pushed off the job when she requested light duty, robbing her of critical income when she needed it most. Because of the heavy equipment and physical demands of patrolling, when Lyndi became pregnant she consulted her healthcare provider who recommended she seek light duty. The City told her that its policy was to only give accommodations to employees injured on the job. At five and a half months pregnant, being forced out of work took a deep emotional and economic toll on her and her family. To make matters worse, she also learned that her son had a rare genetic disorder that meant he would not survive long after birth. "I returned to work a mere eight weeks after giving birth and after my son passed away. As heartbreaking as this experience was, it was made all the worse by having to face workplace discrimination too. If there had been a clear law on the books, then this likely never would have happened."

- Natasha Jackson, South Carolina: Natasha's dream of owning a home disappeared after she was denied accommodations while pregnant. She was the highest-ranking account executive and the only female employee at a Rent-A-Center store in South Carolina. When she needed to avoid occasional heavy lifting required at her job, she was forced to go on leave. "The timing could not have been worse. My husband and I had just made a down payment on a house . . . Without my income, we were forced to back out of the contract." Natasha ultimately lost her job and needed emergency public housing. "I am asking you to stand up for women like me so we can have an equal opportunity to support our families while protecting her health," she urged Congress at a 2019 briefing on the Pregnant Workers Fairness Act.

[182] *See, e.g., The Women Who Inspired the Movement for the Pregnant Workers Fairness Act*, A BETTER BALANCE, https://www.abetterbalance.org/pregnant-worker-stories (last updated June 27, 2023).

- Tasha Murrell, Tennessee: Tasha worked at a national logistics company's warehouse in Memphis, Tennessee. Despite receiving a doctor's note saying she needed a lifting restriction and complaining of extreme stomach pain, she was forced to continue lifting on the job. One day, she told a supervisor she was in pain and asked to leave early; the manager said no. Tragically, she had a miscarriage the next day. "It's not right for companies to treat us like this," she said. "It's hurtful, for me and the other women, to even speak out on losing our babies. But I feel empowered. You never know who you might help by speaking out."

- Tesia Buckles, Missouri: Tesia, a retail store employee in Missouri, called us when she needed to carry a water bottle as an accommodation due to her pregnancy: "I started to become really dizzy and nauseous, and I had asked [my employer] if I could have a water bottle to kind of help with that, just near my workspace, and they refused me that . . . We were in one of the hottest parts of the store, and I was nearly fainting every day, and they denied me that right as well. I never expected to be treated that badly, so 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 accommodated. But I wasn't. They told me that I would have to take unpaid leave, or I would have to quit. 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."

- Hilda Guzzman, New York: Hilda had worked at a retail store in Long Island, New York for three years when she became pregnant. As her pregnancy progressed, it became very uncomfortable to stand at the cash register for eight to ten hours at a time. Denied her request for a stool, she began to experience complications, including bleeding and premature labor pains, and was put on bed rest. With no paid leave, she and her family struggled to make ends meet. "These physical problems landed me in the emergency room every few days. Although I could have kept working if I had been allowed to sit on a stool, because my employer wouldn't let me, my doctor finally put me on bed rest to get me off my feet."

B. The Commission seeks comment regarding whether the health benefits that are expected to result from the PWFA and its implementing regulations are quantifiable; in particular, the Commission seeks comments regarding any existing data specifying how often pregnancy-related health problems may be attributed to the unavailability of work accommodations and the resulting cost of such problems.

We direct the Commission to the Louisville, Kentucky Department of Public Health's Pregnant Workers Health Impact Assessment,[183] which compiled research concerning the benefits of pregnancy accommodations on the health outcomes of pregnant workers. For example, the Health Impact Assessment documented data showing that:

[183] LOUISVILLE DEP'T OF PUB. HEALTH & WELLNESS, PREGNANT WORKERS HEALTH IMPACT ASSESSMENT (2019), https://louisvilleky.gov/center-health-equity/document/pregnant-workers-hia-final-02182019pdf.

- "Women that stood for more than five hours per work day had a 20% greater risk of preterm delivery compared to women standing two hours or less. For women walking for more than five hours per day, the risk increased to 40%. Women who reported more than five hours of both standing and walking had a three times greater risk of preterm delivery compared with women who reported two hours or less on either of the exposures."[184]
- "Women exposed to high noise levels during pregnancy are also at a significantly higher risk for having a SGA [Small for Gestational Age] newborn and high blood pressure during pregnancy."[185]
- Children with hearing loss "were more likely to be born to mothers who had reported an occupational exposure to noise range from 85 to 95 dB during pregnancy."[186]
- As a result of "expos[ure] to chemicals, poor posture, and psychological stress," work as a hairdresser is associated with "a 44% increase in risk to have a LBW [low-birth weight] baby, a 21% increase risk in preterm delivery, and a 62% higher risk of perinatal death," and work as a cosmetologist is associated with a 53% increase in risk of a small for gestational age infant and 36% higher risk of perinatal death.[187]

C. The Commission seeks comment regarding the ways in which the proposed rule and the PWFA enhance human dignity, including qualitative or quantitative research and anecdotal evidence addressing this benefit.

The PWFA has already fostered—and the proposed rule will no doubt enhance—women's and other workers' dignity, equity, and sense of belonging in the workplace and workforce. As one hospital worker told us:

> When I received the call that my accommodation was approved I burst into tears. It felt like a load of bricks had been lifted off my chest. When I returned to work, I walked around with such pride and a high sense of dignity. I was finally able to enjoy my pregnancy and relax. I am able to contribute financially again, giving me my sense of self-worth back. I no longer felt ostracized or incapable because I was pregnant.

For other examples of how the PWFA has enhanced human dignity and equality, we direct the Commission to our response to (A) above.

F. The Commission seeks comment regarding any existing data quantifying the average cost of pregnancy-related accommodations.

We direct the Commission to the Job Accommodation Network's ("JAN") findings that most accommodations are low- or no-cost.[188] Specifically, JAN found that nearly half of employers said the accommodations their employees needed "cost nothing."[189]

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[184] *Id.* at 17.
[185] *Id.* at 18.
[186] *Id.* at 18.
[187] *Id.* at 19.
[188] *See Costs & Benefits of Accommodation*, *supra* note 119.
[189] *Id.*

H. The Commission invites members of the public to comment on any aspect of this IRIA, and to submit to the Commission any data that would further inform the Commission's analysis.

We direct the Commission to the dozens of worker stories we have shared throughout our comment. These stories reflect what we have heard on our helpline in the first few months of PWFA implementation, and we hope they will guide the agency in finalizing its regulation and guidance.

We likewise direct the Commission to our reports on the PWFA, which document the health, economic, and business cases for the law.[190]

I. The Commission seeks comment regarding its analysis and conclusion that the regulation will not have a significant economic impact on small entities; in particular, the Commission seeks comment regarding any existing data quantifying impacts on small entities.

The regulation will not burden small entities. First, the federal PWFA does not apply to employers with fewer than 15 employees. Small employers in dozens of states across the country have been complying with state PWFAs and regulations similar to the EEOC's proposed rule for years, without difficulty.[191] Indeed, many state and local PWFAs apply to employers with as few as one employee.[192] The fact that those employers have been able to successfully comply with similar laws at the state level is a strong indication that larger employers with 15 or more employees will likewise be able to comply.

Second, the regulation and accompanying guidance will ease compliance for small employers by making the statutory text clear, concrete, and practicable for employers. For example, the agency's provision of extensive examples throughout the guidance, as well its use of plain

[190] *See* BAKST, GEDMARK & BRAFMAN, WINNING THE PREGNANT WORKERS FAIRNESS ACT, *supra* note 3 (providing a full list of the PWFA-related reports A Better Balance published over the course of the 10-year PWFA advocacy campaign); *see also* DINA BAKST, ELIZABETH GEDMARK, SARAH BRAFMAN & MEGHAN RACKLIN, A BETTER BALANCE, LONG OVERDUE: THE PREGNANT WORKERS FAIRNESS ACT IS A CRITICAL MEASURE TO ENSURE WOMEN'S WORKFORCE PARTICIPATION AND PROMOTE HEALTHY PREGNANCIES (2021), https://www.abetterbalance.org/long-overdue-2021-update/; BAKST, GEDMARK & BRAFMAN, LONG OVERDUE, *supra* note 12.

[191] *See* State Attorneys General, Comment Letter on Regulations to Implement the Pregnant Workers Fairness Act NPRM 5–6 (RIN 3046-AB30) (Oct. 10, 2023) (documenting how "states' experiences with their own PWFA-type laws affirms the ease of implementation" including no marked increase in litigation following passage of the analogue state PWFAs).

[192] *See, e.g.*, CAL. GOV'T CODE § 12926(d) (covering employers with as few as five employees); Conn. Gen. Stat. § 46a-60 (covering employers with one or more employees); N.M. STAT. ANN. § 28-1-2 (covering employers with four or more employees); N.Y. EXEC. L. § 292(5) (covering employers with one or more employees); VA. CODE ANN. § 2.2-3909(A) (covering employers with five or more employees).

language, helpfully clarifies the meaning of the statute, particularly for employers who do not have internal legal counsel.[193]

Third, worker-supportive policies and practices like those required by the PWFA and its implementing regulations and guidance boost productivity, retention, and morale. As JAN found in its survey of a wide range of employer sizes—including small businesses—"employers report[ed] that the benefits from making workplace accommodations far outweigh their associated costs" and include "retaining valuable employees, improving productivity and morale, reducing workers' compensation and training costs, and improving company diversity."[194] Nearly half of surveyed employers stated that "the accommodations needed by their employee cost nothing" and another 43% said they experienced a "one-time cost."[195]

Business owners' personal testimony bolsters JAN's survey findings. For example, Kent Oyler, CEO of Greater Louisville Inc., wrote in support of his state's PWFA that "these sorts of policies have led to increased talent attraction and retention, improved productivity, and reduced absenteeism . . . and are pro-business, pro-workforce legislation that will be good for our state's economy."[196]

Finally, the PWFA's undue hardship defense ensures that employers' accommodation obligations under the PWFA, as implemented by EEOC's regulations, are tailored to each individual employer's abilities, such that small business will not be economically impacted more than any other employer.

> *J. The Commission has attempted to draft this NPRM in plain language. The Commission invites comment on any aspect of this NPRM that does not meet this standard.*

We applaud the Commission for drafting the NPRM in plain language, and for providing extensive hypothetical examples to demonstrate employers' legal obligations in a manner that is clear and accessible to non-lawyers. We direct the Commission to our discussion throughout our comment as to how the Commission can clarify and sharpen the language.

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[193] *2019 Wilbur Testimony*, *supra* note 48 ("[M]any small-to-midsize Kentucky businesses were forced to navigate complex circumstances like pregnancy, childbirth, and related medical conditions without the aid of a robust HR department or in-house counsel. On behalf of our region's business community, we saw an opportunity to search for a solution to address this uncertainty and help prevent problems before they start.").
[194] *See Costs & Benefits of Accommodation*, *supra* note 119.
[195] *Id.*
[196] Kent Oyler, *Guest Comment: Legislation Would Help Kentucky Women in the Workforce*, LOUISVILLE BUS. FIRST (Jan. 4, 2019), https://www.bizjournals.com/louisville/news/2019/01/04/guest-comment-legislation-would-help-kentucky.html; *see also* Kelly Ann Bird & Marisa N. Hourdajian, *N.J.'s Pregnant Worker's Fairness Act: The Impetus, Impact and Hidden Benefits for Employers*, N.J.L.J. (Mar. 17, 2014), https://www.law.com/njlawjournal/almID/1202646730417 ("[W]orkers who are able to be accommodated will have fewer reasons to be absent.").

We thank you for your consideration. Please do not hesitate to contact us with questions.

Sincerely,

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