

Guide for Plaintiffs' Attorneys: Responding to Defendant-Employers' Arguments Regarding the Constitutionality of the Pregnant Workers Fairness Act & PUMP Act

On February 27, 2024, a federal court in Texas held that the Pregnant Workers Fairness Act (“PWFA”)¹ was unconstitutionally enacted. While the Texas decision directly affects only the rights of Texas state government employees to sue under the PWFA, private employers across the country are beginning to rely on similar arguments to defend themselves from PWFA claims, as well as claims under the PUMP for Nursing Mother Act (“PUMP Act”).² They contend that Congress passed the PWFA and PUMP Act in violation of the Quorum Clause of the U.S. Constitution.

This guide provides key resources to help plaintiffs’ attorneys respond when defendant-employers challenge the constitutionality of the PWFA and PUMP Act, as well as information about where to go for additional support. It also provides an overview of the Texas decision and its implications for plaintiffs suing under the PWFA and PUMP Act.

Resources for Attorneys Responding to Employer-Raised Defenses Regarding the Constitutionality of the PWFA and PUMP Act

A Better Balance is a national legal organization that launched and led the movement to pass the PWFA, as well as dozens of similar laws at the state and local level. ABB was also a leader in the campaign for passage of the PUMP Act. We litigate pregnancy and lactation claims in federal court, and provide technical assistance to plaintiff-side attorneys across the country. To learn more, visit ABB’s website at <https://www.abetterbalance.org/>.

ABB is available to assist plaintiffs’ attorneys in combating challenges to the constitutionality of the PWFA and PUMP Act. We can provide support of various kinds, including coordinating amicus briefs in support of both statutes. **Please contact Katherine Greenberg, A Better Balance’s Director of Strategic Litigation, at kgreenberg@abetterbalance.org or (212) 430-5989.**

In addition, we have made prior briefing on the Quorum Clause issue available on our website, which may be valuable to you in responding to these arguments:

- DOJ’s principal brief in *Texas v. Garland*, No. 5:23-cv-00034-H (N.D. Tex. May 4, 2023), at 3–6, 36–57 (Dkt. 52), <https://www.abetterbalance.org/resources/texas-v-garland-briefing-re-quorum-clause-and-the-pwfa/>.
- Rep. Pelosi’s principal brief in *McCarthy v. Pelosi*, No. 1:20-cv-01395-RC (D.D.C. June 19, 2020) (Dkt. 16-1), at 4–11, 37–47, <https://www.abetterbalance.org/resources/mccarthy-v-pelosi-briefing-re-quorum-clause/>.

Additional Background

What is the Quorum Clause and what does it have to do with the PWFA and PUMP Act?

The Quorum Clause of the U.S. Constitution states that “a Majority of each [House] shall constitute a Quorum to do Business.”³ It does not specify how or when a majority is determined. During the COVID-19 pandemic, the House of Representatives — acting within its longstanding authority to establish its own House rules and procedures — instituted rules for voting via proxy, a practice known as “proxy voting.”

On December 23, 2022, the House passed the PWFA and PUMP Act with overwhelming bipartisan support as part of the Consolidated Appropriations Act of 2023.⁴ Many House members voted on the Consolidated Appropriations Act via proxy. Accordingly, while a clear majority of House members participated in the vote, a majority of members were not *physically* in the House chamber for the vote.

What did the federal court in Texas decide?

Texas sued the Biden Administration, alleging that the PWFA⁵ was enacted in violation of the Quorum Clause, on the grounds that a majority of House members were not physically present for the vote. On February 27, 2024, Judge Hendrix (N.D. Tex.) agreed, holding that the House’s passage of the entire Consolidated Appropriations Act violated the Quorum Clause.⁶ Judge Hendrix issued an injunction barring the Equal Employment Opportunity Commission (“EEOC”) and Department of Justice (“DOJ”) from enforcing the PWFA against the State of Texas, including accepting any charges or issuing any right-to-sue letters under the PWFA for Texas state government employees. Because the PWFA requires plaintiffs to administratively exhaust their claims with the EEOC, the injunction severely limits the ability of Texas state government employees to sue to enforce their PWFA rights in court.⁷ DOJ is currently appealing the decision.

How does the Texas decision affect plaintiffs suing under the PWFA and PUMP Act?

The injunction applies only to Texas state government employees. The injunction does not apply to private employees or local government employees in Texas. It also does not apply to any employees — whether private employees or government employees — outside Texas.

However, we are increasingly seeing private employers who have been sued under the PWFA or PUMP Act assert defenses attacking the constitutionality of these laws, on the same Quorum Clause grounds at issue in the Texas case.

Who can I contact for more information?

Please contact Katherine Greenberg, A Better Balance’s Director of Strategic Litigation, at kgreenberg@abetterbalance.org or (212) 430-5989.

¹ 42 U.S.C. §§ 2000gg *et seq.*

² 29 U.S.C. § 218d.

³ U.S. Const. art. I., § 5, cl. 1.

⁴ Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4488 (2022), <https://www.congress.gov/bill/117th-congress/house-bill/2617>. The Appropriations Act was a massive three-trillion-dollar appropriations bill that funded the government for the 2023 fiscal year and enacted permanent legislation, including the PWFA and PUMP Act.

⁵ Texas did not specifically challenge the constitutionality of PUMP Act.

⁶ *Texas v. Garland*, No. 5:23-CV-034-H, 2024 WL 814498 (N.D. Tex. Feb. 27, 2024).

⁷ The federal government is still permitted to accept charges alleging pregnancy-related violations of other federal statutes, including the Pregnancy Discrimination Act (“PDA”), Americans with Disabilities Act (“ADA”), and Family and Medical Leave Act (“FMLA”). See Court Decision Limits Pregnant Workers Fairness Act Rights for Texas State Government Employees: FAQ, A Better Balance (March 11, 2024), <https://www.abetterbalance.org/resources/faq-court-decision-limits-pwfa-rights-for-employees-of-the-state-of-texas/>.