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Pregnancy and Labor: An Overview of Federal Laws Protecting Pregnant Workers

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April J. Anderson
Legislative Attorney

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Several different federal laws protect workers from discrimination based on pregnancy. The oldest of these, the Pregnancy Discrimination Act (PDA), generally protects job applicants and employees from adverse action—for example, firing, demotion, refusal to hire, or forced leave—because of pregnancy or related conditions. The PDA also addresses harassment based on pregnancy and bans retaliation against workers for making complaints about pregnancy discrimination. Pregnancy-related conditions can include fertility treatments, medical complications, delivery, postpartum conditions, and lactation. The PDA was enacted as an amendment to Title VII of the Civil Rights Act of 1964, which protects against sex discrimination (as well as certain other forms of discrimination) in employment.

As construed by the Supreme Court, the PDA does not generally require employers to make changes in working conditions to accommodate pregnant workers unless employers provide accommodations to other similarly situated nonpregnant workers. So while employers cannot fire workers for being pregnant, this statute (depending on the facts) may not require them to make workplace changes (e.g., scheduling flexibility, an extra bathroom break) simply because employees' demands are pregnancy-related.

The Pregnant Workers Fairness Act (PWFA), passed in 2022 and effective June 27, 2023, mandates additional protections for pregnant workers. Modeled on the Americans with Disabilities Act (ADA), it requires employers to modify workplace conditions where needed to accommodate pregnancy-related conditions as long as an accommodation is reasonable and does not present an undue hardship to the employer. The PWFA requires a reasonable accommodation, after a case-specific assessment, even if a pregnancy-related condition does not amount to a disability, and even if the accommodation includes reassignment of an essential job function. Relief from an essential job function is only required, however, if it is temporary. In addition, under the PWFA, an employer may not require an employee to take leave if a reasonable accommodation would allow her to keep working.

Some pregnant people face pregnancy-related impairments serious enough to satisfy the ADA's definition of a "disability" and may, along with any PDA or PWFA claims, bring ADA claims for accommodations. Separately, many workers can invoke the Family and Medical Leave Act (FMLA) for unpaid leave for pregnancy-related medical needs. After childbirth, provisions of the Fair Labor Standards Act (FLSA) entitle most nursing mothers to appropriate breaks and accommodations for expressing breast milk.

Preceding the passage of the PWFA, many advocates and legislators proposed expanding legal protections for pregnancy. Proposals included new pregnancy accommodation requirements (modeled on disability law), antidiscrimination measures (expanding current statutes), and leave entitlements (in line with many analogous mandates for reemployment rights or leave entitlements to protect workers engaged in endeavors such as military service). The PWFA focused on this first approach: accommodations. In addition, many states have strengthened rights for pregnant workers in recent years, and the PWFA does not preempt those laws when they offer greater protection.

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Introduction

Federal laws have protected pregnant workers for decades. These laws generally bar employers from taking adverse action against a worker because of pregnancy. Historically, these laws did not typically require employers to make workplace changes to accommodate pregnancy, unless such accommodations were provided to similarly situated, nonpregnant workers, or unless pregnancy impairments amounted to a disability. The Pregnant Workers Fairness Act (PWFA), passed in 2022 and effective June 27, 2023, requires accommodations for most pregnant workers.

The Equal Employment Opportunity Commission (EEOC), the federal entity mainly charged with monitoring compliance and enforcing antidiscrimination laws in employment, reports that it receives thousands of pregnancy discrimination complaints each year.¹ The majority of charges of pregnancy discrimination allege that individuals faced termination based on pregnancy.² Other charges include claims that pregnant workers endured harsher discipline, suspensions pending receipt of medical releases, suggestions that they undergo an abortion, and involuntary leave.³

This report provides an overview of laws protecting pregnant workers, including their substantive provisions, legislative history, practical considerations, judicial interpretation, and limitations. In addition, this report summarizes proposed pregnancy protections and describes other employment laws that may serve as models for potential legislation.

Federal Law Prior to the Pregnancy Discrimination Act

Before the enactment of the Pregnancy Discrimination Act (PDA), federal law did not expressly address the discriminatory treatment of pregnant workers. The primary federal statute addressing discrimination in the workplace, Title VII of the Civil Rights Act of 1964, makes it unlawful to discriminate “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.”⁴ Prohibited actions include discharge, discrimination in pay, denial of promotion, demotion, harsher discipline, suspensions, and forced leave.⁵ Along with adverse actions, Title VII bars harassment because of sex—that is, harsh treatment severe or pervasive enough to alter the employee’s terms and conditions of employment.⁶ Title VII also protects workers from retaliation when they oppose discrimination,

¹ U.S. EQUAL EMP. OPPORTUNITY COMM’N, PREGNANCY DISCRIMINATION CHARGES FY 2010–FY 2021 [hereinafter EEOC], <https://www.eeoc.gov/data/pregnancy-discrimination-charges-FY-2010-FY-2021> (last visited June 7, 2023).

² U.S. EQUAL EMP. OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES, No. 915.003 (June 25, 2015) [hereinafter EEOC Enforcement Guidance], <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues> (last visited June 7, 2023).

³ *Id.*; Joan Williams, *Written Testimony of Joan Williams Professor of Law UC Hastings Foundation Chair Director, Center for Worklife Law – Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (February 15, 2012), <http://www.eeoc.gov/eeoc/meetings/2-15-12/williams.cfm>.

⁴ 42 U.S.C. § 2000e-2(a)(1) (“It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”); EEOC ENFORCEMENT GUIDANCE, *supra* note 2.

⁵ EEOC ENFORCEMENT GUIDANCE, *supra* note 2.

⁶ *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999); *see also Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (continued...)

file a discrimination complaint, or participate in the complaint.⁷ If they prevail on a claim of discrimination or retaliation, employees may seek equitable relief and damages, including back pay and punitive damages.⁸

Because (in its original form) Title VII did not mention pregnancy, courts were left to determine how the prohibition on sex discrimination applied to pregnant workers. In 1976, the Supreme Court took up the issue in *General Electric Co. v. Gilbert*. In that case, General Electric offered a benefits plan to compensate employees unable to work because of illness or injury.⁹ The plan excluded pregnancy and related conditions, but not other medical conditions, from coverage.¹⁰ After a class of women employees presented claims for pregnancy-related medical conditions and challenged the plan as discriminatory, the Court held that the pregnancy exclusion did not violate Title VII because it did not treat men and women differently.¹¹ The benefits plan did not divide employees into groups of men and groups of women for separate treatment, as the Court saw it; instead, the plan separated employees into groups of pregnant and nonpregnant people.¹² The Court said that “[n]ormal pregnancy is an objectively identifiable physical condition with unique characteristics,” and Title VII did not bar employers from excluding pregnancy from benefits coverage “on any reasonable basis.”¹³ The outcome might be different if the employer intended to target women for mistreatment, the Court acknowledged, but it concluded that General Electric’s decision to exclude pregnancy was not pretext for sex discrimination.¹⁴

The Pregnancy Discrimination Act

In response to *Gilbert*, Congress passed the Pregnancy Discrimination Act as an amendment to Title VII. The PDA did not alter Title VII’s provisions on remedies or enforcement. Instead, the PDA added two phrases to Title VII’s definitions section clarifying that pregnancy discrimination is a form of sex discrimination.¹⁵ The first phrase of the PDA adds pregnancy to the list of categories protected from discrimination, declaring that “[t]he terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or

(1993) (noting discrimination “includes requiring people to work in a discriminatorily hostile or abusive environment”); U.S. EQUAL EMP. OPPORTUNITY COMM’N, HARASSMENT, <https://www.eeoc.gov/harassment> (last visited June 7, 2023).

⁷ 42 U.S.C. § 2000e-3(a); EEOC ENFORCEMENT GUIDANCE, *supra* note 2; U.S. EQUAL EMP. OPPORTUNITY COMM’N, QUESTIONS AND ANSWERS: ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES, <https://www.eeoc.gov/laws/guidance/questions-and-answers-enforcement-guidance-retaliation-and-related-issues> (last visited June 7, 2023).

⁸ 42 U.S.C. § 1981; *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 529 (1999); U.S. EQUAL EMP. OPPORTUNITY COMM’N, REMEDIES FOR EMPLOYMENT DISCRIMINATION, <https://www.eeoc.gov/remedies-employment-discrimination> (last visited June 7, 2023).

⁹ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 127 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95–555, 92 Stat. 2076 (1978), *as recognized in* *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 284–85 (1987).

¹⁰ *Id.* at 127.

¹¹ *Id.* at 139.

¹² *Id.* at 135.

¹³ *Id.* at 134.

¹⁴ *Id.* at 134–35.

¹⁵ *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 284–85 (1987) (noting “the PDA reflects Congress’ disapproval of the reasoning in *Gilbert*”); *see also* *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 681 (1983) (observing that “[p]roponents of the legislation stressed throughout the debates that Congress had always intended to protect *all* individuals from sex discrimination in employment—including but not limited to pregnant women workers”).

related medical conditions.”¹⁶ In light of this language, Title VII now expressly protects covered employees and job applicants from discrimination, including demotion, firing, the denial of employment, or harassment, based on pregnancy.¹⁷

In a second phrase, the PDA requires that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.”¹⁸ Legislative history suggests that Congress intended the amendment to clarify that “distinctions based on pregnancy are per se violations of Title VII.”¹⁹ The PDA’s legislative history also suggests that, in enacting the statute, Congress did not mean to single out pregnant women for special protection.²⁰ On the other hand, the PDA’s requirement that pregnant women “be treated the same . . . as other persons not so affected but similar in their ability or inability to work” is unlike safeguards Title VII provides other protected groups; the statute does not use similar language elsewhere.²¹ This unique language has caused some confusion in the courts—most notably in assessing claims alleging disparate impact (claims that a neutral action has an unjustified discriminatory effect).²² The language in the second phrase has also led to confusion about whether being treated “the same” means that pregnant women must receive accommodations given other workers for nonpregnancy reasons,²³ although accommodations claims in the future may be resolved under the PWFA as discussed below.²⁴

Certain pregnant employees additionally fall outside the PDA’s protections. Title VII incorporates some exemptions, and these apply to the PDA. For instance, the statute does not cover employers of fewer than 15 workers.²⁵ Other categories of employers, including military servicemembers

¹⁶ 42 U.S.C. § 2000e(k).

¹⁷ *Id.* §§ 2000e(k), 2000e-2; EEOC ENFORCEMENT GUIDANCE, *supra* note 2.

¹⁸ 42 U.S.C. § 2000e(k).

¹⁹ H.R. REP. NO. 95-948, at 3 (1978) (report from the Committee on Education and Labor to accompany the House version of the PDA, H.R. 6075); *see also* S. REP. NO. 95-331, at 3 (1977) (report from the Committee on Human Resources to accompanying the Senate version of the PDA, S. 995) (stating that the measure was “intended to make plain that, under title VII of the Civil Rights Act of 1964, discrimination based on pregnancy, childbirth, and related medical conditions is discrimination based on sex”); *Newport News*, 462 U.S. at 681 (discussing legislative history of PDA).

²⁰ S. REP. NO. 95-331, at 4 (“Basic to all of these applications is that the bill, because it would operate as part of title VII, prohibits only discriminatory treatment. Therefore, the bill does not require employers to treat pregnant women in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.”); H.R. REP. NO. 95-948, at 3–4 (“We recognize that enactment of [the House version of the PDA] will reflect no new legislative mandate of the congress nor effect changes in practices, costs, or benefits beyond those intended by Title VII of the Civil Rights Act. On the contrary, the narrow approach utilized by the bill is to eradicate confusion by expressly broadening the definition of sex discrimination in Title VII to include pregnancy-based discrimination.”).

²¹ 42 U.S.C. § 2000e(k); *see also* *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 219 (2015) (noting “the meaning of the second clause is less clear” than that of the first clause).

²² For a discussion of this textual difference in the disparate impact context, see *infra* notes 132–139 and accompanying text.

²³ *See infra* notes 78–130 and accompanying text.

²⁴ *See infra* notes 165–192 and accompanying text.

²⁵ 42 U.S.C. § 2000e(b); U.S. EQUAL EMP. OPPORTUNITY COMM’N, PREGNANCY DISCRIMINATION AND PREGNANCY-RELATED DISABILITY DISCRIMINATION, <https://www.eeoc.gov/pregnancy-discrimination> (last visited June 7, 2023).

and most federal judicial employers, fall outside Title VII’s purview.²⁶ Title VII also allows religious institutions more leeway than others to make employment decisions.²⁷

Elements of a PDA Claim: Adverse Action and Motive

Under the PDA, plaintiffs may raise claims like those under Title VII’s other protected bases, including claims based on harassment or adverse action based on pregnancy. They may also raise a PDA-specific claim—that the employer did not accommodate pregnant women as it did others similarly situated. For an adverse action claim, proving a PDA violation generally requires showing two primary elements: an adverse employment action and discriminatory motivation.²⁸ On the first, Title VII, and therefore the PDA, prohibits discrimination in the “compensation, terms, conditions, or privileges of employment.”²⁹ An adverse employment action is one such as termination, discipline, or loss of pay that is significant enough to change the terms, conditions, or privileges of employment.³⁰ Other examples of adverse employment actions that often arise in the PDA context include involuntary reassignment or leave, including mandatory light duty when the employee did not request or require it.³¹

In many cases, the parties agree that the employee has faced an adverse employment action, such as failure to be hired, discharge, threat of discharge, or promotion denial, and the case turns on the second element: whether the employer acted because of the employee’s pregnancy.³² In considering whether an employer mistreated an employee “because of” pregnancy, federal courts generally apply the same legal standards they would in a sex or race discrimination case. In

²⁶ 42 U.S.C. §§ 2000e(f), 2000e-16(a) (“applying protections to “units of the judicial branch of the Federal Government having positions in the competitive service”); *Frost v. United States*, 115 Fed. Cl. 252, 256 (2014) (observing that “the only units in the judicial branch that have ever had positions in the competitive service are the Administrative Office of the United States Courts and the Federal Judicial Center” and, accordingly, federal judiciary employees “do not generally qualify as competitive service employees because they are neither in the executive branch nor included in the competitive service by statute.”); *Jackson v. Modly*, 949 F.3d 763, 772 (D.C. Cir. 2020) (noting every circuit to have considered the issue has concluded, although not always for the same reasons, that Title VII applies only to civilian Department of Defense employees, not uniformed servicemembers); 29 C.F.R. § 1614.103(d)(1) (noting Title VII regulations do not apply to “[u]niformed members of the military departments”).

²⁷ 42 U.S.C. § 2000e-1(a) (indicating religious institutions may employ “individuals of a particular religion to perform work connected with the carrying on . . . of [their] activities”); *see also id.* § 2000e-2(e)(2). The Constitution also constrains some employment laws. As interpreted by the Supreme Court, the Constitution provides a “ministerial exception” forbidding regulation of religious institutions’ selection and management of leaders and others performing religious functions. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188, 196 (2012) (holding ministerial exception limits religious teacher’s entitlement to ADA protections and noting lower courts’ application of the doctrine to Title VII claims); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020) (holding ministerial exception applies to primary school teachers at Catholic schools to bar age and disability discrimination claims). *See also* Cong. Rsch. Serv., *Church Leadership and the Ministerial Exception, Constitution Annotated*, [https://constitution.congress.gov/browse/essay/amdt1-2-3-4/ALDE_00013117/\['ministerial'\]](https://constitution.congress.gov/browse/essay/amdt1-2-3-4/ALDE_00013117/['ministerial']) (last visited June 21, 2023).

²⁸ Claims based on a disparate impact theory or a failure to treat pregnant workers the same as those similarly situated have different intent requirements; these will be discussed separately.

²⁹ 42 U.S.C. § 2000e-2(a)(1).

³⁰ EEOC ENFORCEMENT GUIDANCE, *supra* note 2; *Asmo v. Keane, Inc.*, 471 F.3d 588, 592 (6th Cir. 2006).

³¹ *Richards v. City of Topeka*, 173 F.3d 1247, 1250 (10th Cir. 1999); *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 648 (8th Cir. 1987); *see also* S. REP. NO. 95-331 at 3–4 (1978) (report from the Committee on Human Resources to accompany the Senate version of the PDA, S. 995) (stating that when pregnant employees are “not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working”).

³² *Germain v. Cnty. of Suffolk*, No. 07-CV-2523-ADS ARL, 2009 WL 1514513, at *6 (E.D.N.Y. May 29, 2009); *Poague v. Huntsville Wholesale Furniture*, No. 7:18-CV-00005-LSC, 2020 WL 6363983, at *3 (N.D. Ala. Oct. 29, 2020).

determining motive, courts may consider any unfavorable comments made by supervisors about an employee's pregnancy. Plaintiffs have recounted statements about a worker's appearance, disapproval of her pregnancy, or disparagement of her working ability. Alleged comments noted in PDA cases include "take your fat pregnant ass home,"³³ "[y]ou picked a poor time to get pregnant,"³⁴ or, to a recently married employee, "we feared something like this would happen."³⁵ One manager allegedly told a pregnant worker "if she wanted to keep her job, she should not stay pregnant."³⁶ Such statements may support the employee's claim that an employer acted with a discriminatory motive.

If courts do not find direct evidence of antipregnancy bias, they will turn to the burden-shifting framework announced in *McDonnell Douglas Corp. v. Green*.³⁷ A PDA plaintiff must show that an employer knew of her pregnancy or related condition, prove that she satisfactorily performed her job (or was qualified for hire or promotion), identify an adverse employment action, and point to circumstances suggesting the employer acted because of pregnancy.³⁸

Courts can consider any workplace circumstances that would support an inference of discrimination. Such circumstances may include more favorable treatment of a similarly situated worker who is not pregnant. For example, the U.S. Court of Appeals for the Sixth Circuit held that, for an employee allegedly disciplined and fired one month after disclosing her pregnancy, "the sequence of events . . . is sufficient to raise the inference of discrimination."³⁹ As in other discrimination cases, courts may infer discrimination when employers fail to give credible, consistent reasons for the adverse action.⁴⁰ An employer may lack credibility, for example, when managers' given reasons for firing a pregnant employee change after she files suit.⁴¹ Changing standards after an employee announces a pregnancy can also signal discrimination. One employer at an auto-parts store, for example, allegedly decided on the position's lifting requirement only *after* a worker became pregnant. In setting the lifting requirement, the plaintiff claimed that the manager said: "'what was the weight I told you?' then, after some indecision, decid[ed] that she must lift 50 pounds, and finally conclud[ed] 'oh well, I guess you don't meet it. So you can't come back to work.'"⁴²

Once a worker or applicant has presented facts supporting an inference of discrimination, the burden shifts to the employer to produce evidence that it had a "legitimate, nondiscriminatory

³³ *Hercule v. Wendy's of N.E. Fla., Inc.*, No. 10-80248-CIV, 2010 WL 1882181, at *1 (S.D. Fla. May 11, 2010) (recounting facts in granting partial motion to dismiss against improper parties).

³⁴ *Villanueva v. Christiana Care Health Servs., Inc.*, No. CIV.A. 04-258-JJF, 2007 WL 188111, at *2 (D. Del. Jan. 23, 2007) (denying motion for summary judgment, holding alleged comments provided circumstantial evidence of discriminatory termination).

³⁵ *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1320 (11th Cir. 2012) (holding alleged statements provided circumstantial evidence of discriminatory motive for termination, precluding summary judgment for employer), *overruled in part by* *United States v. Durham*, 795 F.3d 1329, 1330 (11th Cir. 2015).

³⁶ *Townsend v. Town of Brusly*, 421 F. Supp. 3d 352, 360 (M.D. La. 2019).

³⁷ 411 U.S. 792, 802–04 (1973).

³⁸ *See Lewis v. City of Union City*, 918 F.3d 1213, 1221 (11th Cir. 2019).

³⁹ *Lenzi v. Systemax, Inc.*, 944 F.3d 97, 108 (2d Cir. 2019); *see also Asmo v. Keane, Inc.*, 471 F.3d 588, 594 (6th Cir. 2006) (holding two-month window "sufficient to establish a link between [employee's] pregnancy and her termination").

⁴⁰ *Legg v. Ulster Cnty.*, 820 F.3d 67, 70 (2d Cir. 2016).

⁴¹ *Asmo*, 471 F.3d at 596 (pointing to evidence suggesting inconsistent statement and reversing summary judgment).

⁴² *Stansfield v. O'Reilly Auto., Inc.*, No. CIV.A. H-04-4161, 2006 WL 1030010, at *3 (S.D. Tex. Apr. 19, 2006) (denying defendant's summary judgment motion).

reason” for its action.⁴³ If the employer can produce such evidence, the burden shifts back to the employee to prove that the proffered reason is pretextual—i.e., that the real motive was pregnancy.⁴⁴ The employee may prevail even if there were multiple motives—both a discriminatory motive and a legitimate one. It is enough if pregnancy was “a motivating factor” in the adverse decision, even if “other factors also motivated the practice.”⁴⁵

Pregnancy-motivated adverse action is discriminatory even if the employer characterizes its decision as protective or benign.⁴⁶ As the Supreme Court stated, “stereotypical assumptions” about pregnant workers’ abilities “would, of course, be inconsistent with Title VII’s goal of equal employment opportunity.”⁴⁷

Pregnancy Harassment

In addition to barring adverse actions such as reassignment or termination, Title VII and the PDA make it illegal for an employer to subject an employee to a hostile work environment because of pregnancy.⁴⁸ This type of claim requires evidence of “severe or pervasive conduct such that it constitutes a change in the terms and conditions of employment,” although the plaintiff need not identify a discrete adverse employment action.⁴⁹ The Supreme Court has described a workplace that is “permeated with ‘discriminatory intimidation, ridicule, and insult’” as “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”⁵⁰

A single derogatory comment is rarely enough to show a hostile work environment.⁵¹ It is also not enough that a particular employee found the workplace unwelcoming; a harassment claim requires that an “objectively reasonable person would find” the workplace hostile or abusive.⁵² Assessment of the working environment is fact-specific, and courts must examine “the totality of the circumstances.”⁵³ These circumstances may include the frequency of the offensive conduct, its severity, whether it is physically threatening or humiliating, and whether it interferes with job performance.⁵⁴ Consideration of all the circumstances means that a court will assess pregnancy-

⁴³ *McDonnell Douglas Corp. v. Green*, 411 U.S. 411, 802 (1973); *Plotke v. White*, 405 F.3d 1092, 1100 (10th Cir. 2005).

⁴⁴ *McDonnell Douglas*, 411 U.S. at 804; *Lewis v. City of Union City*, 918 F.3d 1213, 1221 (11th Cir. 2019).

⁴⁵ 42 U.S.C. § 2000e-2(m); *see also* *Spees v. James Marine, Inc.*, 617 F.3d 380, 390 (6th Cir. 2010). A plaintiff’s damages may be reduced if an employer can show that, even without the discriminatory motive, it would have taken the same action. 42 U.S.C. § 2000e-5(g)(2)(B); *Gudenkauf v. Stauffer Commc’ns, Inc.*, 158 F.3d 1074, 1076 (10th Cir. 1998).

⁴⁶ *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (holding that barring fertile women from jobs with chemical exposure violates the PDA and stating that “the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect”).

⁴⁷ *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 290 (1987).

⁴⁸ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); U.S. EQUAL EMP. OPPORTUNITY COMM’N, HARASSMENT, <https://www.eeoc.gov/harassment> (last visited June 7, 2023).

⁴⁹ *Gorski v. N.H. Dep’t of Corr.*, 290 F.3d 466, 469 (1st Cir. 2002) (quoting *Gorski v. N.H. Dep’t of Corr.*, CIV. 99-562-JD, 2000 WL 1507428 (D.N.H. July 19, 2000)).

⁵⁰ *Harris*, 510 U.S. at 21 (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65–67 (1986)).

⁵¹ *Cf. Gorski*, 290 F.3d at 474 (holding allegation of seven harassing comments adequate to survive summary judgment).

⁵² *Id.*

⁵³ *Hyde v. K.B. Home, Inc.*, 355 F. App’x 266, 272 (11th Cir. 2009); *see also Gorski*, 290 F.3d at 471.

⁵⁴ *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1276 (11th Cir. 2002).

based epithets and mistreatment together with any abuse that is not overtly pregnancy-related, such as closer supervision or excessive discipline.⁵⁵

Pregnancy-related hostile work environment claims often allege disparaging comments or threats. In one case, for example, the plaintiff claimed that a manager “beg[an] referring to [plaintiff] as ‘prego’” and urged her to quit or go on disability.⁵⁶ A manager pressuring an employee to terminate her pregnancy may support a hostile work environment claim.⁵⁷

“Related Medical Conditions” and the PDA’s Scope

Courts have relied both on the PDA’s plain text, specifically the protection it extends to “childbirth” and “related medical conditions,”⁵⁸ and its legislative history⁵⁹ to establish that the statute covers more than pregnancy per se. As one court put it, discrimination “before, during, and after . . . pregnancy” may violate the PDA.⁶⁰ The EEOC has stated that “the PDA covers all aspects of pregnancy and all aspects of employment, including hiring, firing, promotion, health insurance benefits, and treatment.”⁶¹

Pre-pregnancy discrimination can include adverse action taken on account of a woman’s plans to start a family or seek fertility treatments. For example, the Seventh Circuit concluded that a worker could bring a PDA claim after her employer allegedly fired her for taking time off for fertility treatments, telling her “that the termination was ‘in [her] best interest due to [her] health condition.’”⁶² In another case of pre-pregnancy discrimination, a federal district court in Illinois rejected an employer’s argument that the PDA did not cover discrimination based on inability to become pregnant naturally.⁶³ The court held that the PDA protected an employee who alleged that her supervisor “verbally abused [her]” about her fertility treatments, questioned whether she could manage pregnancy and career, and treated her sick leave applications less favorably than other workers’ requests.⁶⁴

⁵⁵ *Zisumbo v. McCleodUSA Telecomms. Servs., Inc.*, 154 F. App’x 715, 726 (10th Cir. 2005).

⁵⁶ *Id.* (reversing summary judgment granted for employer).

⁵⁷ *Bergstrom-Ek v. Best Oil Co.*, 153 F.3d 851, 854–55 (8th Cir. 1998) (discussing plaintiff’s allegation that employer told her at least six times to get an abortion, calling her at home and offering to pay for it); *Hercule v. Wendy’s of N.E. Fla., Inc.*, No. 10-80248-CIV, 2010 WL 1882181, at *1 (S.D. Fla. May 11, 2010) (describing allegation that manager encouraged plaintiff to have an abortion).

⁵⁸ *Turic v. Holland Hosp., Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996) (holding that the “plain language of the statute” barred discrimination on the basis that a worker had considered an abortion).

⁵⁹ *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1402 (N.D. Ill. 1994) (indicating that PDA coverage for claims from women trying to become pregnant rested on a “common-sense reading of the PDA’s language,” and finding support in statement from Senator that women historically endured discrimination “[b]ecause of their capacity to become pregnant” and “because they might become pregnant” (quoting 123 Cong. Rec. 29385 (1977) (statement of Sen. Harrison Williams))).

⁶⁰ *Id.* at 1402; *see also* *Hall v. Nalco Co.*, 534 F.3d 644, 649 (7th Cir. 2008).

⁶¹ EEOC ENFORCEMENT GUIDANCE, *supra* note 2.

⁶² *Hall*, 534 F.3d at 649 (rejecting district court’s conclusion that because infertility is gender-neutral, plaintiff could not pursue a Title VII claim).

⁶³ *Pacourek*, 858 F. Supp. at 1401; *see also* *Batchelor v. Merck & Co.*, 651 F. Supp. 2d 818, 830 (N.D. Ind. 2008) (holding PDA protects against discrimination based on a woman’s plans to become pregnant); *Erickson v. Bd. of Governors of State Colleges & Universities for Ne. Ill. Univ.*, 911 F. Supp. 316, 319 (N.D. Ill. 1995) (holding PDA covers infertility treatment).

⁶⁴ *Pacourek*, 858 F. Supp. at 1401. *But see* *In re Union Pac. R.R. Emp. Pracs. Litig.*, 479 F.3d 936, 941 (8th Cir. 2007) (holding medical plan’s exclusion of infertility treatment does not violate the PDA because “[i]nfertility is strikingly different from pregnancy” (internal quotation marks omitted)).

In a similar vein, employers may not bar women of childbearing age from certain jobs under “fetal protection” policies designed to prevent exposure to toxins linked to birth defects.⁶⁵ Such policies violate Title VII’s bar on sex-based classifications, the Supreme Court has concluded, and the PDA “bolster[s]” this conclusion.⁶⁶

Courts have also applied the PDA to various postpregnancy conditions. A woman may not be fired because of recent childbirth, for example.⁶⁷ Postpartum medical complications are impermissible grounds for adverse employment action as well.⁶⁸ As one court put it, the PDA encompasses “conditions related to pregnancy that occur after the actual pregnancy.”⁶⁹ A woman with a postpartum condition must be treated as are other workers with nonpregnancy illnesses.⁷⁰ Courts have held that postpartum depression and a disrupted menstrual cycle, for example, fall within this rule.⁷¹

Courts have disagreed about whether lactation is a pregnancy-related condition covered by the PDA. At least at first, the prevailing view among reviewing district courts was that breastfeeding was ineligible for PDA protection, as it was viewed as a medical condition related not to pregnancy or childbirth but instead to subsequent child care.⁷² At least two federal courts of appeals have also opined, either in a holding or in nonbinding dicta, that breastfeeding is not a protected medical condition under the PDA.⁷³ However, more recent court decisions, including one by a federal court of appeals, have concluded otherwise,⁷⁴ leading one district court in 2016

⁶⁵ Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 193 (1991).

⁶⁶ *Id.* at 197–98 (holding battery manufacturer could not preclude women of childbearing age from employment on the grounds that chemical exposure would be dangerous to a fetus should a worker become pregnant); *see also* EEOC ENFORCEMENT GUIDANCE, *supra* note 2.

⁶⁷ Neessen v. Arona Corp., 708 F. Supp. 2d 841, 851 (N.D. Iowa 2010); Shafrir v. Ass’n of Reform Zionists of Am., 998 F. Supp. 355, 363 (S.D.N.Y. 1998).

⁶⁸ Reilly v. Revlon, Inc., 620 F. Supp. 2d 524, 544 (S.D.N.Y. 2009).

⁶⁹ *Id.*

⁷⁰ *Id.* at 545.

⁷¹ *Id.* at 544 (holding PDA covers postpartum depression); Harper v. Thiokol Chem. Corp., 619 F.2d 489, 493 (5th Cir. 1980) (holding employer’s policy of denying postpregnancy employment until worker had returned to a normal menstrual cycle violated PDA); *see also* Infante v. Ambac Fin. Grp., No. 03 CV 8880, 2006 WL 44172, at *4 (S.D.N.Y. Jan. 5, 2006) (noting that plaintiff’s thyroid condition, if exacerbated by recent pregnancy, might fall within the PDA’s purview), *aff’d*, 257 F. App’x 432 (2d Cir. 2007).

⁷² *See, e.g.*, Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1487, 1491 (D. Colo. 1997) (observing that reviewing courts had “uniformly held that needs or conditions of the child which require the mother’s presence are not within the scope of the PDA”); Jacobson v. Regent Assisted Living, Inc., No. CV-98-564-ST, 1999 WL 373790, at *11 (D. Or. Apr. 9, 1999); Wallace v. Pyro Mining Co., 789 F. Supp. 867, 869–70 (W.D. Ky. 1990) (examining the text and legislative history of the PDA and stating that “[w]hile it may be that breast-feeding and weaning are natural concomitants of pregnancy and childbirth, they are not ‘medical conditions’ related thereto. . . . Nothing in the Pregnancy Discrimination Act, or Title VII, obliges employers to accommodate the child-care concerns of breast-feeding female workers by providing additional breast-feeding leave not available to male workers”), *aff’d*, 951 F.2d 351 (6th Cir. 1991).

⁷³ Derungs v. Wal-Mart Stores, Inc., 374 F.3d 428, 438 (6th Cir. 2004) (assessing state law claim and suggesting in dicta that the PDA would not reach breastfeeding); Wallace v. Pyro Min. Co., 951 F.2d 351, (No. 90–6259, 1991 WL 270823, at *1 (6th Cir. Dec. 19, 1991)) (per curiam) (table, text in Westlaw) (stating in dicta that the PDA would not cover breastfeeding); Notter v. N. Hand Prot., a Div. of Siebe, Inc., 89 F.3d 829, 1996 WL 342008, at *5 (4th Cir. June 21, 1996) (table, text in Westlaw) (describing aspects of Fourth Circuit’s prior ruling in *Barrash v. Bowen*, 846 F.2d 927, 931 (4th Cir. 1988) (per curiam), about the scope of the PDA as “dicta without any citation of authority,” but maintaining that the earlier case “stands for the narrow proposition that breastfeeding is not a *medical* condition related to pregnancy or to childbirth”).

⁷⁴ EEOC v. Houston Funding II, Ltd., 717 F.3d 425, 428 (5th Cir. 2013); Hicks v. City of Tuscaloosa, 870 F.3d 1253, 1258–59 (11th Cir. 2017); Allen-Brown v. District of Columbia, 174 F. Supp. 3d 463, 479 (D.D.C. 2016).

to identify a “trend” by reviewing courts to “hold that lactation is a ‘condition related to pregnancy’” under the PDA.⁷⁵ Courts taking this view have emphasized, for example, that a woman unable to breastfeed may experience pain, infection, or other medical complications.⁷⁶ Since 2010, nursing mothers have also enjoyed additional statutory protections: as discussed below, the Fair Labor Standards Act mandates breaks for covered nursing mothers.⁷⁷

Pregnancy Accommodation and *Young v. United Parcel Service*

At its core, the PDA calls for pregnant workers to be treated the same as other similarly situated employees.⁷⁸ After the PDA’s passage, courts struggled to decide which workers were similarly situated under the Act. Pregnant women often face work restrictions, such as lifting constraints, limits on chemical exposure, a need for more bathroom breaks, or other scheduling requirements that need accommodating.⁷⁹

The PDA does not forbid employers from granting accommodations for such constraints, but it does not require accommodations for pregnant workers—at least in circumstances where accommodations are not offered to others.⁸⁰ The difficulty in applying the PDA comes when an employer offers accommodation to some nonpregnant workers and not to pregnant workers. Then PDA plaintiffs may bring claims based on the denial of accommodations and produce evidence of comparators—nonpregnant workers who, they allege, are similarly situated and were treated more favorably. Courts at first varied in their approach to evaluating comparators. Some courts concluded that the reason an employee needed an accommodation mattered, holding that employers must treat pregnant women the same as employees with off-the-job injuries, but that employees injured on the job were not relevant comparators.⁸¹ Other courts concluded that any accommodated employees were relevant.⁸² As the Sixth Circuit reasoned, because the PDA’s text references only employees’ “ability to work,” and not any other basis for comparison, an employer who accommodated on-the-job injuries must accommodate pregnant workers with similar restrictions.⁸³

⁷⁵ *Hicks*, 870 F.3d at 1259 n.5 (quoting *Mayer v. Pro. Ambulance, LLC*, 211 F. Supp. 3d 408, 417 (D.R.I. 2016)).

⁷⁶ *Allen-Brown*, 174 F. Supp. 3d at 479; *see also Mayer*, 211 F. Supp. 3d at 417.

⁷⁷ Fair Labor Standards Act, 29 U.S.C. §§ 207(r), 218c (as amended by the Providing Urgent Maternal Protections for Nursing Mothers Act, Pub. L. No. 117-328, Div. KK, 136 Stat. 4459 (2022) [hereinafter PUMP for Nursing Mothers Act]; *see infra* notes 197–207 and accompanying text.

⁷⁸ 42 U.S.C. § 2000e(k).

⁷⁹ Bradley A. Areheart, *Accommodating Pregnancy*, 67 ALA. L. REV. 1125, 1133 (2016) (“The most commonly requested accommodations include frequent bathroom breaks, limits on heavy lifting, and limitations on overtime work.”); *Jackson v. J.R. Simplot Co.*, 666 F. App’x 739, 740 (10th Cir. 2016) (unpublished, nonprecedential opinion recognizing employee’s doctor restricted her exposure to three chemicals present at her workplace).

⁸⁰ *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 285 (1987) (indicating “Congress intended the PDA to be a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise” (internal quotation marks and citation omitted)).

⁸¹ *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548–49 (7th Cir. 2011) (holding no PDA violation where employer accommodated employees injured on the job and those entitled under the ADA but not pregnant workers), *abrogated by Young v. United Parcel Serv., Inc.*, 575 U.S. 206 (2015); *Spivey v. Beverly Enterprises, Inc.*, 196 F.3d 1309, 1313 (11th Cir. 1999) (holding employees injured on the job are not comparable to pregnant workers for PDA purposes), *abrogated by Young*, 575 U.S. at 206.

⁸² *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996) *abrogated by Young*, 575 U.S. at 206; *see also EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1196 (10th Cir. 2000).

⁸³ *Ensley-Gaines*, 100 F.3d at 1226.

The Supreme Court addressed the issue in its 2015 decision in *Young v. United Parcel Service*,⁸⁴ clarifying that employers must provide accommodations for pregnant women only in limited situations.⁸⁵ In the Court’s view, employers could rely on circumstances beyond employees’ physical needs to justify disparate treatment. Following *Young*, federal courts have wrestled with its application to workers’ claims that, when it comes to pregnancy accommodations, they have been treated less favorably than other employees similar in their ability to work.

The *Young* Decision

In *Young*, the Supreme Court considered a United Parcel Service (UPS) delivery driver’s request for light duty. Young requested light duty after she became pregnant and her doctor restricted her from heavy lifting. UPS denied her request, even though it offered light duty to some other groups of workers, including those who were injured on the job, those who lost Department of Transportation licensure, or those who had disabilities recognized under the Americans with Disabilities Act (ADA). Young claimed pregnancy discrimination, asserting that UPS’s refusal to extend the same privilege to pregnant employees who were similar in their ability to work violated the PDA.⁸⁶

The Supreme Court agreed that the PDA requires a court to compare accommodations given pregnant and nonpregnant workers to implement the statute’s requirement that pregnant workers be treated as favorably as others similar in their ability to work. In the Court’s view, the PDA entails more than “[s]imply including pregnancy among Title VII’s protected traits,” and thereby barring adverse employment actions based on pregnancy, because that approach “would not overturn *Gilbert* in full.”⁸⁷ The PDA’s second phrase—that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work”⁸⁸—would be rendered “superfluous” if the statute did not require employers to accommodate pregnant employees in at least some situations when they accommodated others.⁸⁹

In a six-to-three decision (with Justice Alito concurring), however, the Court ultimately recognized only a narrow accommodation requirement. The Court held that determining when employees are “similar in their ability or inability to work,” and therefore whether employers must make workplace adjustments for pregnant workers, depends not just on *whether* an employer accommodates other workers, but *why* it does so. To allow a pregnant employee to point to *any* accommodation of another worker to entitle her to light duty, the Court held, would be to grant a sort of “most-favored-nation” status to pregnant women that the PDA did not require.⁹⁰ It would be too much, the Court reasoned, if “[a]s long as an employer provides one or two workers with an accommodation—say, those with particularly hazardous jobs, or those whose workplace presence is particularly needed, or those who have worked at the company for many years, or those who are over the age of 55—then it must provide similar accommodations to all pregnant workers.”⁹¹

⁸⁴ 575 U.S. 206 (2015).

⁸⁵ *Id.* at 206.

⁸⁶ *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 211–15 (2015).

⁸⁷ *Id.* at 227.

⁸⁸ 42 U.S.C. § 2000e(k).

⁸⁹ *Young*, 575 U.S. at 226.

⁹⁰ *Id.* at 221.

⁹¹ *Id.*

Turning to the facts of the case before it, the Court determined that although UPS granted various accommodations, the record did not show whether other workers were truly “similar in their ability or inability to work” within the Court’s understanding of the PDA.⁹²

As a result, while Young could rely on other workers’ accommodations as evidence of discrimination, the Court held that those accommodations did not necessarily show that she was entitled to a pregnancy accommodation.⁹³ The employer could still prevail by explaining its sex-neutral reasons for accommodating others. In this case, UPS had unique reasons for offering each type of accommodation.⁹⁴ UPS wanted to implement the ADA, to comply with collective bargaining agreements, and to continue to employ workers who—unlike Young—had lost their licensure but not their ability to lift packages.⁹⁵ Such reasons, the Court surmised, might show on remand that UPS did not single out pregnant women for exclusion from its accommodation procedures.⁹⁶

Along with an assessment of the employer’s reasons for treating pregnant workers less favorably than others, the Court announced one more step in the PDA analysis: a holistic view of an employer’s accommodations. According to the Supreme Court, a court should consider “the combined effects of” an employer’s policies and decide whether they significantly burden pregnant employees in a way that suggests intentional discrimination. “[E]vidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant employees” would suggest such a burden, the Court opined.⁹⁷ A court would then consider “the strength of [the employer’s] justifications for each [accommodation] when combined,”⁹⁸ and the employer’s reasons must be “sufficiently strong” to justify the burden on pregnant workers.⁹⁹ If the reasons are not strong enough, the Court held, the circumstances may “give rise to an inference of intentional discrimination.”¹⁰⁰ Cost alone, the Court added, would not “normally” meet this test to justify different treatment of pregnant workers.¹⁰¹ The Court considered this assessment of accommodations “consistent with our longstanding rule that a plaintiff can use circumstantial proof to rebut an employer’s apparently legitimate, nondiscriminatory reasons for treating individuals within a protected class differently than those outside the protected class.”¹⁰² With these principles in place, the Court remanded Young’s case to the Fourth Circuit.¹⁰³

Justice Alito, concurring in the judgment, agreed that a rule only prohibiting adverse employment actions based on pregnancy would render superfluous the second phrase of the PDA, which “raises several difficult questions of interpretation.”¹⁰⁴ In Justice Alito’s view, the PDA required

⁹² *Id.* at 229–230; *id.* at 237–41 (Alito, J., concurring) (noting various accommodations UPS had granted, and the lack of explanation for some).

⁹³ *Id.* at 229.

⁹⁴ *Id.* at 218–21.

⁹⁵ *Id.* at 215–16, 218.

⁹⁶ *Id.* at 232.

⁹⁷ *Id.* at 229.

⁹⁸ *Id.* at 231.

⁹⁹ *Id.* at 229.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 229.

¹⁰² *Id.* at 230.

¹⁰³ *Id.* at 232.

¹⁰⁴ *Id.* at 233 (Alito, J., concurring).

only a limited assessment of comparators—those doing identical or very similar work.¹⁰⁵ In support of this constrained view of accommodations, Justice Alito pointed out that the PDA does not use the broad language that the ADA and Title VII’s protections for religious practice employ, both of which explicitly *require* some “accommodation” unless it would impose an “undue hardship.”¹⁰⁶

In dissent, Justice Scalia, joined by Justices Kennedy and Thomas, concluded that the PDA did not offer pregnant workers protection exceeding that of other protected classes.¹⁰⁷ In amending Title VII, Congress simply made clear that pregnancy discrimination is sex discrimination, in Justice Scalia’s view.¹⁰⁸ Under this reading, an employer need not offer pregnant workers the accommodations offered for injury, because injury is different from pregnancy. Scalia would not have required any holistic analysis of an employer’s accommodation rules and their burden on pregnant employees. According to Justice Scalia, an employer simply may not “single[] pregnancy out for disfavor” as did the benefits plan in *Gilbert*.¹⁰⁹ The PDA’s second phrase served to add, in Justice Scalia’s judgment, “clarity,” not a new substantive protection.¹¹⁰ In a separate dissent, Justice Kennedy also pointed out that at UPS “[m]any other workers with health-related restrictions were not accommodated either.”¹¹¹

Lower Courts’ Application of *Young*

Under the PDA, plaintiffs may raise both a “traditional” Title VII claim (such as harassment or adverse action against a pregnant person with a discriminatory motive) and a PDA-specific claim (that the employer did not accommodate pregnant women as it did others similarly situated).¹¹² *Young* expounded on a test for the second type of claim, requiring courts to evaluate whether accommodation policies excluding pregnant workers “impose a significant burden on pregnant workers” and whether the “legitimate, nondiscriminatory reasons” for the policies are “sufficiently strong to justify the burden.”¹¹³ This second type of claim has proven difficult to adjudicate.¹¹⁴ What is clear from *Young* is that employers may offer light duty or other work modifications to some workers and exclude pregnant workers from those accommodations, but the exclusion must be justified.¹¹⁵ Otherwise, *Young* does not provide a hard-and-fast rule for assessing pregnancy accommodations. As one Eleventh Circuit judge pointed out, the Supreme Court’s decision left “gaps . . . in our understanding of how trial courts should proceed in PDA cases” once there is a preliminary showing of different treatment.¹¹⁶

¹⁰⁵ *Id.* at 234 (Alito, J., concurring).

¹⁰⁶ *Id.* at 238 (Alito, J., concurring).

¹⁰⁷ *Id.* at 244 (Scalia, J., dissenting, joined by Kennedy and Thomas, JJ.).

¹⁰⁸ *Id.* (Scalia, J., dissenting).

¹⁰⁹ *Id.* at 246 (Scalia, J., dissenting).

¹¹⁰ *Id.* at 245 (Scalia, J., dissenting).

¹¹¹ *Id.* at 251 (Kennedy, J., dissenting).

¹¹² 42 U.S.C. § 2000e(k); *Allen-Brown v. District of Columbia*, 174 F. Supp. 3d 463, 475 (D.D.C. 2016).

¹¹³ *Young*, 575 U.S. at 229 (internal quotation marks omitted); *see also Allen-Brown*, 174 F. Supp. 3d at 475–77 (applying *Young*).

¹¹⁴ One commentator, stating that *Young*’s “holding is complicated and not perfectly clear,” indicated that employers may be inclined to voluntarily extend pregnancy accommodations in order to be “safe rather than sorry.” Areheart, *supra* note 79, at 1128 n.7.

¹¹⁵ *Young*, 575 U.S. at 229.

¹¹⁶ *Durham v. Rural/Metro Corp.*, 955 F.3d 1279, 1288 (11th Cir. 2020) (Boggs, J., concurring). Business leaders, too, (continued...)

Part of the difficulty arises from the complex facts in *Young*. *Young* pointed to many, dissimilar workers whom UPS accommodated, including some accommodated because of non-PDA legal obligations and others (such as those who lost licensure) accommodated for unknown reasons.¹¹⁷ As a result, lower courts applying *Young* have struggled to determine which accommodation circumstances matter in the PDA context.¹¹⁸ The ultimate inquiry, however, remains the question of “whether the employer’s actions g[i]ve rise to [a] valid inference of unlawful discrimination.”¹¹⁹

At the very least, *Young* made it harder for pregnant workers to prevail under the PDA on a claim that they should be accommodated because other workers are accommodated. *Young* overturned the rule, once applied in some courts, that pregnant workers could show discrimination by simply identifying other employees receiving accommodations as comparators.¹²⁰ Instead, as the Second Circuit stated, “[w]hether it is appropriate to infer a discriminatory intent from the pattern of exceptions in a particular workplace will depend on the inferences that can be drawn from that pattern and the credibility of the employer’s purported reasons for adopting them.”¹²¹

Post-*Young*, some pregnant workers have still managed to raise an inference of discrimination based on the denial of accommodations granted to other workers. For example, a D.C. district court held that a police officer had raised an inference of discrimination when her department awarded light duty to 11 other officers but refused her request for light duty after she found it too painful to wear a bulletproof vest while breastfeeding.¹²²

For the most part, applying *Young*, courts require pregnant workers to identify a very similar situation when the employer accommodated a nonpregnant worker before they will infer discrimination against a pregnant worker. One factor courts have considered is whether employees’ accommodation needs derive from on-the-job versus off-the-job sources. For example, the Eleventh Circuit considered the case of an emergency medical technician whose pregnancy imposed lifting restrictions.¹²³ The lower court had concluded that employees accommodated for on-the-job injuries were comparable, but the Eleventh Circuit remanded the case so that the lower court could consider the employer’s claimed reasons for treating on-the-job injury and pregnancy differently.¹²⁴ Similarly, the Seventh Circuit concluded that a retailer who offered light duty only for on-the-job injuries did not violate the PDA in denying light duty for

have noted that employers “face great uncertainty” about pregnancy accommodations. Chamber of Com. of the U.S., U.S. Chamber Key Vote Letter on the Pregnant Workers Fairness Act (Sept. 14, 2020), <https://www.uschamber.com/letters-congress/us-chamber-key-vote-letter-the-pregnant-workers-fairness-act> (last visited June 7, 2023).

¹¹⁷ *Durham*, 955 F.3d at 1288 (Boggs, J., concurring); *Lewis v. City of Union City*, 918 F.3d 1213, 1228 n.14 (11th Cir. 2019) (noting *Young* identified seven types of accommodated workers, including some accommodated because of other laws or collective bargaining agreements).

¹¹⁸ *Durham*, 955 F.3d at 1288 (Boggs, J., concurring). One commenter concluded that, under *Young*, employers who accommodate some employees and exclude pregnant employees face “substantial liability risk.” Sara Alexander, *Labor Pains: The Inadequacies of Current Federal Pregnancy Laws and the Alternative Routes to Accommodation*, 37 *MISS. C. L. REV.* 152, 171 (2019).

¹¹⁹ *Durham*, 955 F.3d at 1289 (Boggs, J., concurring) (internal quotation marks and citation omitted).

¹²⁰ *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 210 (2015); *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996); *see also* *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1196 (10th Cir. 2000).

¹²¹ *Legg v. Ulster Cnty.*, 820 F.3d 67, 78 (2d Cir. 2016).

¹²² *Allen-Brown v. District of Columbia*, 174 F. Supp. 3d 463, 477 (D.D.C. 2016); *see also* *Legg*, 820 F.3d at 70–78.

¹²³ *Durham v. Rural/Metro Corp.*, 955 F.3d 1279, 1282–83 (11th Cir. 2020).

¹²⁴ *Id.* at 1283, 1287.

pregnant workers.¹²⁵ These cases reflect that even after pregnant workers identify comparable employees who were granted accommodations, courts may permit employers to justify treating the pregnant workers differently under the PDA. The Second Circuit surmised, for example, that an employer’s cited reason for accommodating nonpregnant employees—compliance with state-law requirements for workers injured on the job—might (if true) justify a disparity.¹²⁶

Courts have also looked at whether comparators have similar medical restrictions. For instance, in an unpublished, nonprecedential opinion, the Tenth Circuit declined to find that an employer discriminated against a plaintiff when it gave other workers (and, for a time, the plaintiff) light duty because of lifting restrictions but then denied light duty when the plaintiff’s doctor restricted her exposure to chemicals.¹²⁷ A proper comparator would be someone needing an accommodation because of chemical restrictions, the Tenth Circuit held, rather than someone with different medical needs.¹²⁸

In some cases, there may be *no* accommodated employees for comparison. All in all, when an employer never (or hardly ever) grants accommodations for nonpregnant employees, it generally does not have to accommodate a pregnant employee under the PDA.¹²⁹ For example, shortly after *Young*, the Fifth Circuit held in an unpublished, nonprecedential opinion that a nurse fired because of pregnancy-related lifting restrictions could not make out a PDA claim given that the employer accommodated no other nurses with lifting restrictions.¹³⁰

Pregnancy and Disparate Impact Under Title VII

One type of Title VII claim alleges disparate treatment—that an employee suffered adverse action or harassment because of a protected characteristic.¹³¹ Title VII also permits disparate impact claims. In this type of claim, workers challenge a facially neutral employment practice, alleging that it has a disproportionate effect on one group and cannot be justified by business necessity.¹³²

¹²⁵ *Equal Emp. Opportunity Comm’n v. Wal-Mart Stores E., L.P.*, 46 F.4th 587, 597 (7th Cir. 2022). The court found it significant that the retailer consistently denied light duty requests for all other employees, save those injured at work.

¹²⁶ *Legg*, 820 F.3d at 75–78.

¹²⁷ *Jackson v. J.R. Simplot Co.*, 666 F. App’x 739, 743 (10th Cir. 2016).

¹²⁸ *Id.*; *see also Santos v. Wincor Nixdorf, Inc.*, 778 F. App’x 300, 303–04 (5th Cir. 2019) (concluding that employee did not identify a comparator when she could point to no other workers who required telework).

¹²⁹ *See, e.g., Luke v. CPlace Forest Park SNF, L.L.C.*, 747 F. App’x 978, 980 (5th Cir. 2019) (per curiam); *Durham v. Rural/Metro Corp.*, No. 4:16-CV-01604-ACA, 2020 WL 7024892, at *4 (N.D. Ala. Nov. 30, 2020); *Everett v. Grady Mem’l Hosp. Corp.*, 703 F. App’x 938, 948 (11th Cir. 2017); *Lawson v. City of Pleasant Grove*, No. 2:14-CV-0536-JEO, 2016 WL 2338560, at *10 (N.D. Ala. Feb. 16, 2016), *report and recommendation adopted*, No. 2:14-CV-536-KOB, 2016 WL 1719667 (N.D. Ala. Apr. 29, 2016).

¹³⁰ *Luke*, 747 F. App’x at 980.

¹³¹ 42 U.S.C. § 2000e-2(a)(1); EEOC ENFORCEMENT GUIDANCE, *supra* note 2; *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

¹³² *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); 42 U.S.C. § 2000e-2(k)(1). For further discussion of this theory, see CRS Report R46534, *The Civil Rights Act of 1964: An Overview*, by Christine J. Back, at 72 (2020). A disparate impact theory is distinct from the “significant burden” inquiry announced in *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 213 (2015), although, in the dissenters’ view, the *Young* test risks conflating disparate treatment (i.e., intentional discrimination) with disparate impact (i.e., use of policies with discriminatory effects), 575 U.S. at 249 (Scalia, J., dissenting) (noting “Title VII already has a framework that allows judges to home in on a policy’s effects and justifications—disparate impact.”); *id.* at 253 (Kennedy, J., dissenting) (“[T]he Court interprets the PDA in a manner that risks conflation of disparate impact with disparate treatment by permitting a plaintiff to use a policy’s disproportionate burden on pregnant employees as evidence of pretext.” (internal quotation marks omitted)).

A disparate impact claimant does not have to show that an employer intended to single anyone out based on a protected characteristic such as race or sex.

Before the PDA overruled *Gilbert* and set up special provisions for pregnancy, the Supreme Court had stated in nonbinding dicta that pregnant women could bring disparate impact claims under Title VII.¹³³ However, some have argued that the PDA precludes a Title VII disparate impact claim based on pregnancy because it requires that a pregnant worker be treated the same as others.¹³⁴ Thus, the argument goes, similar treatment cannot be a violation even if it has a disparate impact.¹³⁵ Still, several courts have considered disparate impact claims under the PDA.¹³⁶ The Seventh Circuit emphasized that the PDA is “a definitional amendment” providing “no substantive rule to govern pregnancy discrimination.”¹³⁷ As such, the court found that the PDA did not eliminate any claims otherwise available under Title VII for pregnancy discrimination. Others also point out that while the *Young* Court acknowledged the plaintiff had not brought a disparate impact claim, it made no suggestion that such a claim is unavailable for pregnant employees.¹³⁸

EEOC enforcement guidance endorses application of a disparate impact theory to pregnancy discrimination claims. The agency states that while disparate impact claims usually require a statistical showing of the harm of a policy on a protected group, “statistical evidence might not be required if it could be shown that all or substantially all pregnant women would be negatively affected by the challenged policy.”¹³⁹

The ADA, Pregnancy-Related Disabilities, and Accommodations

Separate from Title VII and the PDA’s protections against certain forms of pregnancy discrimination, the ADA may also provide pregnancy-related protections in some circumstances (although its usefulness may be diminished in the future in light of the Pregnant Workers Fairness Act [PWFA], as discussed below). Title I of the ADA requires that employers reasonably accommodate workers with disabilities.¹⁴⁰ While pregnancy per se is not a disability under the ADA,¹⁴¹ some women are eligible for protection under the ADA for pregnancy-related

¹³³ *Nashville Gas Co. v. Satty*, 434 U.S. 136, 144 (1977). The Supreme Court cited precedent establishing a disparate impact theory for claims based on race and stated that “a violation . . . can be established by proof of a discriminatory effect.” *Id.* In considering *Gilbert*, the Court suggested that differences in how employee benefits programs treat pregnancy vis-à-vis other medical conditions, in contrast to policies resulting in lesser “employment opportunities or job status” for pregnant workers, would not support a disparate impact claim. *Id.* at 145. The Court ultimately held that a pregnant worker’s claim based on sick pay policies must fail under *Gilbert*.

¹³⁴ Camille Herbert, *Disparate Impact and Pregnancy: Title VII’s Other Accommodation Requirement*, 24 J. GENDER, SOCIAL POLICY & THE LAW 107, 137 (2015); Alexander, *supra* note 118, at 159; *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 298 n.1 (1987) (White, J., dissenting).

¹³⁵ *Cal. Fed. Sav. & Loan Ass’n*, 479 U.S. at 298 n.1 (White, J., dissenting) (“Whatever remedies Title VII would otherwise provide for victims of disparate impact, Congress expressly ordered pregnancy to be treated in the same manner as other disabilities.”).

¹³⁶ *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 420–22 (1st Cir. 1996); *Scherr v. Woodland Sch. Cmty. Consol. Dist.*, 867 F.2d 974, 983 (7th Cir. 1988); *Germain v. Cnty. of Suffolk*, 672 F. Supp. 2d 319, 321 (E.D.N.Y. 2009).

¹³⁷ *Scherr*, 867 F.2d at 978.

¹³⁸ *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 213 (2015); Herbert, *supra* note 134, at 138.

¹³⁹ EEOC ENFORCEMENT GUIDANCE, *supra* note 2.

¹⁴⁰ 42 U.S.C. § 12112(5).

¹⁴¹ 29 C.F.R. pt. 1630, app. § 1630.2(h); *Young*, 575 U.S. at 253 (Kennedy, J., dissenting).

disabilities, provided they can perform essential job functions. An ADA-qualifying impairment is one that “substantially limits one or more” of a person’s “major life activities.”¹⁴² The Rehabilitation Act creates similar obligations for federally funded programs and most federal employers.¹⁴³ The EEOC enforces these provisions.¹⁴⁴ The Congressional Accountability Act applies ADA and Rehabilitation Act standards to legislative employees.¹⁴⁵

The ADA’s application to pregnancy is a recent development in the law.¹⁴⁶ In recent years, courts have applied the ADA to cover postpartum depression,¹⁴⁷ recovery from a caesarian section,¹⁴⁸ lifting restrictions,¹⁴⁹ and pelvic pain.¹⁵⁰ Other complications of pregnancy can include anemia, sciatica, carpal tunnel syndrome, gestational diabetes, nausea with severe dehydration, abnormal heart rhythms, and swelling.¹⁵¹ These medical conditions can be disabilities under the ADA if they substantially affect major life activities.¹⁵²

Examples of potential ADA accommodations for pregnancy-related disabilities include “allowing a pregnant worker to take more frequent breaks, to keep a water bottle at a work station, or to use a stool; altering how job functions are performed; or providing a temporary assignment to a light duty position.”¹⁵³ Potential ADA accommodations for pregnancy, like other ADA accommodations, are considered case-by-case, reflecting the worker’s impairment and workplace circumstances.

Under the ADA, protected workers first request a workplace change and engage in an “interactive process” with employers to work out a reasonable accommodation.¹⁵⁴ A reasonable accommodation is one that is “feasible,” “plausible,” and reasonable “in the run of cases.”¹⁵⁵ If

¹⁴² *Young*, 575 U.S. at 218; 42 U.S.C. § 12102(1)(A).

¹⁴³ 29 U.S.C. §§ 791, 794; *Khan v. Midwestern Univ.*, 879 F.3d 838, 843 (7th Cir. 2018), *as amended on denial of reh’g* (Feb. 26, 2018) (applying Rehabilitation Act to medical student claiming pregnancy-related disability).

¹⁴⁴ 42 U.S.C. § 12117(a); EEOC ENFORCEMENT GUIDANCE, *supra* note 2. The EEOC’s Office of Federal Operations enforces Rehabilitation Act provisions for federal employees. U.S. EQUAL EMP. OPPORTUNITY COMM’N, APPEALS, <https://www.eeoc.gov/federal-sector/appeals> (last visited June 7, 2023).

¹⁴⁵ 2 U.S.C. 1302(a).

¹⁴⁶ Until it was amended in 2008 to expand the statutory definition of “disability,” the ADA generally did not protect workers with short-term disabilities, such as those most commonly associated with pregnancy. 42 U.S.C. § 12102(4)(A); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 252 (2015) (Kennedy, J., dissenting). The expanded disability coverage from the ADA Amendments Act also applies to Rehabilitation Act claims. *Alexander v. Washington Metro. Area Transit Auth.*, 826 F.3d 544, 547 (D.C. Cir. 2016). Because the plaintiff relied on pre-2008 law, the Supreme Court in the *Young* case did not decide whether the ADA would require the lifting accommodation she requested. *Young*, 575 U.S. at 252 (Kennedy, J., dissenting).

¹⁴⁷ *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 854 (6th Cir. 2018).

¹⁴⁸ *Price v. UTi, U.S., Inc.*, No. 4:11-CV-1428 CAS, 2013 WL 798014, at *2–3 (E.D. Mo. Mar. 5, 2013).

¹⁴⁹ *Heatherly v. Portillo’s Hot Dogs, Inc.*, 958 F. Supp. 2d 913, 921 (N.D. Ill. 2013).

¹⁵⁰ *McKellips v. Franciscan Health Sys.*, No. C13-5096MJP, 2013 WL 1991103, at *4 (W.D. Wash. May 13, 2013).

¹⁵¹ U.S. DEP’T OF HEALTH & HUMAN SERVS., OFF. ON WOMEN’S HEALTH, PREGNANCY COMPLICATIONS, <https://www.womenshealth.gov/pregnancy/youre-pregnant-now-what/pregnancy-complications> (last visited June 7, 2023).

¹⁵² 42 U.S.C. § 12102(1)(A); EEOC ENFORCEMENT GUIDANCE, *supra* note 2; *Hostettler*, 895 F.3d at 854.

¹⁵³ EEOC ENFORCEMENT GUIDANCE, *supra* note 2.

¹⁵⁴ 29 C.F.R. § 1630.2(o)(3).

¹⁵⁵ *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401–02 (2002) (holding appropriate accommodation is one that “seems reasonable on its face, *i.e.*, ordinarily or in the run of cases”); *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001) (discussing precedent and concluding that “a plaintiff needs to show not only that the proposed accommodation would enable her to perform the essential functions of her job, but also that, at least on the face of (continued...)

employers fail to make an accommodation where required, employees may file a complaint with the EEOC and, ultimately, sue in federal court.¹⁵⁶ Employees may seek equitable relief and damages as under Title VII, including, depending on the circumstances, compensatory damages, attorney’s fees, and punitive damages.¹⁵⁷

An employer need not provide an accommodation that imposes an undue hardship on business operations.¹⁵⁸ The ADA requires a case-by-case analysis of the employee’s and the employer’s circumstances, addressing such factors as the nature and cost of the accommodation, the employer’s resources, and the size and function of its workforce.¹⁵⁹ The employer bears the burden of showing an undue hardship, once the employee identifies a reasonable accommodation.¹⁶⁰ Courts have been reluctant to delineate a bright-line rule regarding what is an undue hardship, producing various outcomes.¹⁶¹ For example, one district court declined to grant a defendant summary judgment on a pharmacist’s request for one day of medical leave, suggesting that whether this was an undue hardship depended on such factors as whether the employer had a replacement pharmacist.¹⁶²

The ADA also excludes some employers and employees from coverage. The statute applies to employers of 15 or more employees, and private clubs and religious employers are afforded certain exemptions.¹⁶³ Additionally, going forward, the 2022 PWFA, discussed below, will allow pregnant workers to seek accommodations even without a disability.¹⁶⁴ Because the PWFA allows workers to obtain the same relief they could seek under the ADA, workers may be less likely to invoke the ADA in the future.

The Pregnant Workers Fairness Act

On December 29, 2022, Congress passed the Pregnant Workers Fairness Act as part of the Consolidated Appropriations Act of 2023.¹⁶⁵ The PWFA largely incorporates the accommodation requirements of the ADA, cross-referencing that statute and requiring employers to make

things, it is feasible for the employer under the circumstances”); *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995) (holding “it is enough for the plaintiff to suggest the existence of a plausible accommodation”).

¹⁵⁶ U.S. EQUAL EMP. OPPORTUNITY COMM’N, FILING A LAWSUIT, <https://www.eeoc.gov/filing-lawsuit> (last visited June 7, 2023).

¹⁵⁷ 42 U.S.C. §§ 1981, 12205; *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 529, 534 (1999); *Bruce v. City of Gainesville, Ga.*, 177 F.3d 949, 951 (11th Cir. 1999); U.S. EQUAL EMP. OPPORTUNITY COMM’N, REMEDIES FOR EMPLOYMENT DISCRIMINATION, <https://www.eeoc.gov/remedies-employment-discrimination> (last visited June 7, 2023).

¹⁵⁸ *Terrell v. USAir*, 132 F.3d 621, 624 (11th Cir. 1998).

¹⁵⁹ 42 U.S.C. § 12111(10)(B); *see* CRS In Focus IF12366, *Reasonable Accommodations for Employees with Disabilities*, by Abigail A. Graber (2023).

¹⁶⁰ *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 767 (W.D. Mich. 2001); *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, n.1 480 (7th Cir. 2017) (“The question of undue hardship is a second-tier inquiry under the statute; that is, the hardship exception does not come into play absent a determination that a reasonable accommodation was available.”).

¹⁶¹ *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999); *Cleveland v. Fed. Express Corp.*, 83 F. App’x 74, 78 (6th Cir. 2003); *see also* *Dunn v. City of Malden*, No. CV 14-14743-RWZ, 2016 WL 10988545, at *4 (D. Mass. Mar. 25, 2016) (stating that dispute of fact existed as to whether plaintiff’s request for one additional week of leave unduly burdened employer).

¹⁶² *LaPorta*, 163 F. Supp. 2d at 768; *see also* *Jones v. Children’s Hosp. of Phila.*, No. CV 17-5637, 2019 WL 2640060, at *11 (E.D. Pa. June 27, 2019) (applying a state accommodations law requiring the “same framework” as the ADA).

¹⁶³ 42 U.S.C. § 12111(5); *see also supra* note 27.

¹⁶⁴ Pregnant Workers Fairness Act, Pub. L. No. 117-328, Division II, § 102(4), 136 Stat. 4459 (2022).

¹⁶⁵ Pub. L. No. 117-328, 136 Stat. 4459 (2022).

“reasonable accommodations” for pregnancy-related limitations.¹⁶⁶ The law is effective June 27, 2023.¹⁶⁷ Some lawmakers supporting the PWFA explained that “varying interpretations [of the PDA and ADA] ha[d] created an unworkable legal framework” and “a lack of clarity” for pregnancy-related accommodations.¹⁶⁸

The PWFA mandates “reasonable accommodations” for pregnant workers and gives that term the same construction as in the ADA.¹⁶⁹ In the PWFA’s legislative history, lawmakers suggested that reasonable accommodations might include “seating, water, and light duty.”¹⁷⁰

Under the statute’s terms and in line with the ADA model, an employer need not provide an accommodation that imposes an undue hardship on business operations.¹⁷¹ The employer bears the burden of showing an undue hardship, once the employee identifies a reasonable accommodation.¹⁷² As discussed above, ADA case law has not produced bright-line rules in this “fact-specific, individualized inquiry.”¹⁷³

As the EEOC regulations require in ADA cases,¹⁷⁴ the PWFA obliges employers and employees to negotiate in good faith to determine appropriate accommodations.¹⁷⁵ The law states that an employee need not accept an accommodation other than one “arrived at through the interactive process.”¹⁷⁶ The PWFA also directly addresses mandatory leave, prohibiting employers from forcing employees to take leave if another accommodation would permit them to do their jobs.¹⁷⁷

The PWFA differs from the ADA in notable ways. While the ADA requires that an employee be able to perform the essential functions of her job,¹⁷⁸ the PWFA protects an employee who cannot perform an essential function if that limitation (1) will be eliminated in the “near future,” and (2) can be reasonably accommodated.¹⁷⁹ This provision has come under criticism from some opponents who suggest that it requires employers to retain a worker who cannot perform fundamental job tasks.¹⁸⁰

¹⁶⁶ *Id.* § 103.

¹⁶⁷ *Id.* § 109; U.S. EQUAL EMP. OPPORTUNITY COMM’N, WHAT YOU SHOULD KNOW ABOUT THE PREGNANT WORKERS FAIRNESS ACT, <https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairnessact> (last visited June 8, 2023) [hereinafter PWF Act].

¹⁶⁸ H.R. REP. NO. 117-27, at 11 (2021) (Report from the Committee on Education and Labor).

¹⁶⁹ Pub. L. No. 117-328 § 102(7).

¹⁷⁰ H.R. REP. NO. 117-27, at 11.

¹⁷¹ Pub. L. No. 117-328, § 102(7) (stating “undue hardship” has the same construction as in the ADA); 42 U.S.C. § 12112(b)(5)(A); *Terrell v. USAir*, 132 F.3d 621, 624 (11th Cir. 1998).

¹⁷² *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 767 (W.D. Mich. 2001); *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 480 n.1 (7th Cir. 2017).

¹⁷³ *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999); *Cleveland v. Fed. Express Corp.*, 83 F. App’x 74, 78 (6th Cir. 2003); *see also* *Dunn v. City of Malden*, No. CV 14-14743-RWZ, 2016 WL 10988545, at *4 (D. Mass. Mar. 25, 2016).

¹⁷⁴ 29 C.F.R. § 1630.2(o)(3).

¹⁷⁵ Pub. L. No. 117-328, §§ 102(7), 103(2). An employer who engages in a good faith interactive process gains protection from certain damages. *Id.* § 104(g); *see also* H.R. REP. NO. 117-27, at 34.

¹⁷⁶ Pub. L. No. 117-328, § 103(2); *see* PWF Act, *supra* note 167. Minority views in the House report state that this provision “makes clear reasonable accommodations agreed upon through the interactive process, including an accommodation of leave, are not subject to a unilateral veto by the employee.” H.R. REP. NO. 117-27, at 57.

¹⁷⁷ Pub. L. No. 117-328, § 103(4).

¹⁷⁸ 42 U.S.C. §§ 12111(8); 12112(b)(5)(A); 29 C.F.R. § 1630.2(m).

¹⁷⁹ Pub. L. No. 117-328, § 102(6).

¹⁸⁰ One witness in a committee hearing on a prior version of the bill suggested a worker might “report for work but not do the job.” H.R. REP. NO. 116-494, at 51 (2020); *id.* at 53 (quoting labor lawyer Ellen McLaughlin).

Moreover, under the PWFA, a pregnant worker's impairment need not meet the definition of a "disability" under the ADA before she may claim protection.¹⁸¹ The PWFA requires accommodations for a "known limitation," which is a "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee's representative has communicated to the employer whether or not such condition meets the definition of disability."¹⁸² Aside from significant congressional guidance through the ADA Amendments Act of 2008, there are regulations and judicial decisions interpreting the ADA's standard for disability.¹⁸³ The PWFA standard for a "known limitation" is new, however—how it will play out in practice remains to be seen.¹⁸⁴

Like the ADA and Title VII, the PWFA applies to employers of 15 or more workers.¹⁸⁵ It protects job applicants, federal workers, and state workers.¹⁸⁶ It covers legislative employees, too, through a cross-reference to the Congressional Accountability Act of 1995.¹⁸⁷ Through cross-reference, it also incorporates the limited applicability of Title VII to religious employers.¹⁸⁸

The PWFA additionally parallels Title VII for its remedies and enforcement provisions. Remedies could include compensatory damages, punitive damages, and attorneys' fees.¹⁸⁹ Like Title VII and many other antidiscrimination measures, the PWFA bars retaliation against a worker who has requested an accommodation.¹⁹⁰ The law grants the EEOC and the Attorney General enforcement authority as under Title VII and charges the EEOC with issuing regulations, directing it to include examples of reasonable accommodations.¹⁹¹

All in all, the PWFA significantly expands employers' obligations to provide needed job modifications to pregnant women. Unlike the ADA, it requires provisional job changes to workers' essential duties, at least in some cases, provided those changes are temporary. It also

¹⁸¹ Pub. L. No. 117-328, § 102(4).

¹⁸² *Id.*

¹⁸³ ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; 29 C.F.R. § 1630.2(j)(3); *Sugg v. City of Sunrise*, No. 20-13884, 2022 WL 4296992, at *8 (11th Cir. Sept. 19, 2022) (acknowledging precedent).

¹⁸⁴ *See* H.R. REP. NO. 116-494, at 53 (quoting labor lawyer Ellen McLaughlin indicating departure from established ADA standard).

¹⁸⁵ Pub. L. No. 117-328, § 102(2), (3). The statute cross-references Title VII's coverage provisions. *Id.*; 42 U.S.C. §§ 2000e(b), (f), (n), 2000e-16(a), 2000e-16c(a).

¹⁸⁶ Pub. L. No. 117-328, § 102 (2), (3). The PWFA waives sovereign immunity for state employers. *Id.* § 106. The Supreme Court has limited the ADA's similar waiver of sovereign immunity, holding that a private individual may not sue a state or state agency for damages for employment discrimination. *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001). The Court held that ADA disability protections went beyond Congress's Fourteenth Amendment authority because there was no adequate record showing a pattern of unconstitutional state action discriminating against people with disabilities in employment. *Id.* at 373. Whether similar challenges to the PWFA may arise remains to be seen.

¹⁸⁷ Pub. L. No. 117-328, § 102(3)(B) (citing 2 U.S.C. § 1301); *see* PWF Act, *supra* note 167 ("Covered employers' include private and public sector employers with at least 15 employees, Congress, Federal agencies, employment agencies, and labor organizations.").

¹⁸⁸ Pub. L. No. 117-328, § 107(b). This provision exempts "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1.

¹⁸⁹ Pub. L. No. 117-328, § 104; *see also* H.R. REP. NO. 117-27, at 26 ("[T]he PWFA is written to mirror the enforcement powers, procedures, and remedies established under the Civil Rights Act of 1964."). The law incorporates the damages caps of 42 U.S.C. § 1981a. Pub. L. No. 117-328, § 104 (a)(3).

¹⁹⁰ Pub. L. No. 117-328, § 104(f).

¹⁹¹ *Id.* §§ 104 (a)(1), (e)(1), 105(a). The statute calls for rulemaking within one year of enactment. *Id.* § 105(a). The Board of Directors of the Office of Congressional Workplace Rights must promulgate regulations and administer the act for legislative employees. *Id.* § 105(b).

decouples pregnancy-related accommodation claims from the equal-treatment regime established by the PDA and Title VII. That said, the PWFA applies only to accommodation claims. For claims that an employer discriminated against pregnant workers in other ways, workers must continue to rely on Title VII, state laws, or other applicable laws.¹⁹²

Other Federal Protections for Pregnant Workers

While the PDA, ADA, and PWFA address certain forms of discrimination based on pregnancy and require accommodations in some circumstances, at least three other federal laws also provide pregnancy-related protections. These protections generally involve leave or break time.

The Family and Medical Leave Act and Unpaid, Job-Protected Leave

The Family and Medical Leave Act (FMLA) requires certain employers to grant unpaid leave for illness and some family responsibilities. Eligible workers may invoke the FMLA to, for example, obtain time off work for pregnancy-related issues, including prenatal care.¹⁹³ Most employees may request up to 12 weeks of job-protected leave.

Not all workers are eligible for FMLA leave. Among other requirements, an employee must accrue at least a year of service before taking FMLA leave, and employers of fewer than 50 employees need not offer FMLA leave.¹⁹⁴ Private- and public-sector employees are covered, but members of the armed forces are not.¹⁹⁵ The Department of Labor enforces the FMLA.¹⁹⁶

The Fair Labor Standards Act and Lactation

The Fair Labor Standards Act of 1938 (FLSA) is probably best known for governing worker pay and hours, but it also requires lactation breaks for nursing mothers.¹⁹⁷ The FLSA affords qualifying employees the right to break time and a private place (not a bathroom) to express breast milk for one year after a child's birth.¹⁹⁸ Employers need not pay workers for break time designated for pumping, but employees who pump during other break times are entitled to compensation on the same terms as employees who use that break time for other purposes.¹⁹⁹ Separately, existing federal policy calls for all executive branch employers to provide nursing

¹⁹² See PWF Act, *supra* note 167.

¹⁹³ 29 U.S.C. § 2601; Walter E. Zink II & Jill Gradwohl Schroeder, *Evaluating the Interplay Among FMLA, ADA and Workers' Comp Statutes Isn't Child's Play*, 66 DEF. COUNS. J. 79, 84 (1999). For an overview of the FMLA, see CRS Report R44274, *The Family and Medical Leave Act: An Overview of Title I*, by Sarah A. Donovan (2015).

¹⁹⁴ 29 U.S.C. § 2611(2).

¹⁹⁵ *Id.* §§ 203(e)(2), 2611(4).

¹⁹⁶ *Id.* § 2617(b); see also CRS Report R44274, *The Family and Medical Leave Act: An Overview of Title I*, by Sarah A. Donovan (2015).

¹⁹⁷ Fair Labor Standards Act, 29 U.S.C. §§ 207(r), 218c (as amended by the Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act, Pub. L. No. 117-328, 136 Stat. 4459 (2022)); U.S. DEP'T OF LABOR, WAGES AND THE FAIR LABOR STANDARDS ACT, <https://www.dol.gov/agencies/whd/flsa> (last visited June 8, 2023); CRS Report R42713, *The Fair Labor Standards Act (FLSA): An Overview*, by Sarah A. Donovan (2023).

¹⁹⁸ 29 U.S.C. §§ 207(r), 218c; PUMP for Nursing Mothers Act, Pub. L. No. 117-328, Div. KK, § 102(a), 136 Stat. 4459 (2022).

¹⁹⁹ 29 U.S.C. § 207(r)(2), (3); U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #73: FLSA PROTECTIONS FOR EMPLOYEES TO PUMP BREAST MILK AT WORK (Jan. 2023), <https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers> [hereinafter "FACT SHEET #73"] (last visited June 8, 2023).

accommodations.²⁰⁰ Before December 2022, however, those provisions applied only to employees eligible for overtime under the FLSA’s Section 7.²⁰¹

In December 2022 Congress expanded FLSA protections for nursing mothers, extending them to previously ineligible workers in the Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act.²⁰² Effective immediately, the PUMP for Nursing Mothers Act (passed as part of the Consolidated Appropriations Act of 2023) expands protections to most FLSA-eligible employees.²⁰³ Even as amended, the law does not cover all workers. In particular, employers of fewer than 50 workers need not comply if the requirement would impose an undue hardship.²⁰⁴

The PUMP for Nursing Mothers Act also expands available remedies. Potential legal and equitable remedies include hiring, reinstatement, promotion, lost wages, and other damages, including punitive damages.²⁰⁵ These penalties are available for violations after April 28, 2023.²⁰⁶

The Department of Labor enforces the FLSA.²⁰⁷

Executive Order 13152 and Discrimination Based on Parental Status

In addition to the statutory protections described above, federal executive-branch employees—men and women—enjoy protection from intentional discrimination based on parental status. Executive Order 13152 bars “discrimination in employment because of . . . status as a parent.”²⁰⁸ The Office of Personnel Management (OPM) administers the order, and agencies generally internally investigate and adjudicate complaints.²⁰⁹ The order does not require accommodations for parents or create pathways to enforcement outside of the agency, such as recourse to EEOC

²⁰⁰ JOHN BERRY, OFF. OF PERSONNEL MGMT., MEMORANDUM TO HEADS OF EXEC. DEP’TS & AGENCIES, NURSING MOTHERS IN FEDERAL EMPLOYMENT (Dec. 22, 2010), <https://www.dol.gov/sites/dolgov/files/WHd/legacy/files/NMothersFederalEmplymnt.pdf> (concluding that, while the 2010 FLSA provisions applied only to overtime-eligible employees, federal agencies should provide reasonable break time for civilian, executive employees).

²⁰¹ *Id.*

²⁰² Enacted as Division KK of the Consolidated Appropriations Act of 2023, the PUMP for Nursing Mothers Act, Pub. L. No. 117-328, Div. KK, 136 Stat. 4459 (2022) moved nursing mother protections from Section 7 of the FLSA and reformulated them as a new Section 18D.

²⁰³ By separating nursing protections from FLSA’s Section 7, the new law extended protections to workers not covered under Section 7. These protections now reach FLSA-eligible employees generally, with some enumerated exceptions. Pub. L. No. 117-328, § 102(a); *see also* H.R. REP. NO. 117-102, at 11–12, 21 (2021) (Report from the Committee on Education and Labor) (explaining the effects of moving the provisions in discussing a predecessor bill); U.S. DEP’T OF LABOR, FLSA PROTECTIONS TO PUMP AT WORK, <https://www.dol.gov/agencies/whd/pump-at-work> (last visited June 8, 2023); FACT SHEET #73, *supra* note 199 (noting the PUMP Act reaches “nearly all FLSA-covered employees”).

²⁰⁴ Pub. L. No. 117-328, § 102(a). The PUMP for Nursing Mothers Act borrows from the ADA’s definition of undue hardship, asking courts to consider whether allowing pumping breaks is “causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’s business.” *Id.*

²⁰⁵ *Id.* § 102(b).

²⁰⁶ *Id.* § 103; FACT SHEET #73, *supra* note 199.

²⁰⁷ U.S. DEP’T OF LABOR, FLSA PROTECTIONS TO PUMP AT WORK <https://www.dol.gov/agencies/whd/pump-at-work> (last visited June 8, 2023); U.S. DEP’T OF LABOR, COMPLAINTS CAN BE FILED ONLINE, HOW TO FILE A COMPLAINT, <https://www.dol.gov/agencies/whd/contact/complaints> (last visited June 8, 2023).

²⁰⁸ Exec. Order No. 13,152, *Further Amendment to Executive Order 11,478, Equal Employment Opportunity in Federal Government*, 65 Fed. Reg. 26115 (May 2, 2000). A parent includes a biological parent, adoptive parent, foster parent, step-parent, and others. *Id.*

²⁰⁹ *Id.*; Complainant v. Dep’t of Treasury, EEOC Appeal No. 0120143110, 2015 WL 1635909, at *1 (Mar. 10, 2015) (reflecting agency’s internal process).

adjudication.²¹⁰ While the order does not protect pregnancy per se, it does bar discrimination on account of soon-to-be motherhood.²¹¹ An example of discrimination, OPM has explained, includes stereotypes that parents of young children should not work or lack commitment to work.²¹²

State Pregnancy Protections

Many states have employment discrimination laws that mirror Title VII, including antidiscrimination measures applicable to pregnancy. In recent years, several states have expanded these laws to include accommodations for pregnant workers.²¹³ Unlike the PWFA—a separate law providing for pregnancy accommodations—many state laws take the form of amendments to existing laws barring discrimination in employment based on race, sex, religion, and other factors.²¹⁴ Sometimes state pregnancy accommodation protections build on those states’ disability laws. In Kentucky, for example, pregnancy legislation expanded a requirement of “[r]easonable accommodation[s],” originally intended to benefit workers with disabilities, to include specific job modifications “[f]or an employee’s own limitations related to her pregnancy, childbirth, or related medical conditions.”²¹⁵ Other states have similar measures.²¹⁶ Some provisions expressly address pregnant workers’ needs for breaks, seating, leave, or other contingencies.²¹⁷ Colorado law, for example, states that these may include “more frequent restroom, food, and water breaks; acquisition or modification of equipment or seating; limitations on lifting; temporary transfer to a less strenuous or hazardous position if available, with return to the current position after pregnancy; job restructuring; light duty, if available; assistance with

²¹⁰ JANICE R. LACHANCE, OFF. OF PERSONNEL MNGMT., MEMORANDUM FOR HEADS OF DEP’T’S & INDEPENDENT ESTABLISHMENTS, GUIDANCE ON ADDRESSING DISCRIMINATION BASED ON STATUS AS A PARENT IN FEDERAL CIVILIAN EMPLOYMENT 2 (Jan. 19, 2001), <https://www.nrc.gov/docs/ML0103/ML010310035.pdf>.

²¹¹ The order also protects anyone actively seeking custody or adoption of a child. Exec. Order No. 13,152, *Further Amendment to Executive Order 11,478, Equal Employment Opportunity in Federal Government*, 65 Fed. Reg. 26115 (May 2, 2000).

²¹² Similar sentiments sometimes play a role in pregnancy discrimination. *See, e.g.*, Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am., *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197–98 (1991); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1401 (N.D. Ill. 1994); *Jacobson v. Regent Assisted Living, Inc.*, No. CV-98-564-ST, 1999 WL 373790, at *3 (D. Or. Apr. 9, 1999) (reporting manager asking about employee: “what will her commitment be to the company when she has this baby?”).

²¹³ Brianna L. Eaton, Note, *Pregnancy Discrimination: Pregnant Women Need More Protection in the Workplace*, 64 S.D. L. REV. 244, 262 (2019); Reva B. Siegel, *Pregnancy As A Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination Cutler Lecture*, 59 WM. & MARY L. REV. 969, 974 (2018). *See, e.g.*, HAW. CODE R. § 12-46-107 (1990) (implementing Hawaii’s Title VII-like antidiscrimination statute and requiring pregnancy accommodations). State regulations, too, may require accommodations.

²¹⁴ *See, e.g.*, S.C. CODE ANN. § 1-13-80 (2018); CONN. GEN. STAT. ANN. §§ 46a-60 (2022).

²¹⁵ KY. REV. STAT. ANN. § 344.030(6)(b) (2019).

²¹⁶ W. VA. CODE ANN. § 5-11B-5 (5) (2014) (stating “‘Reasonable accommodation’ and ‘undue hardship’ have the meanings given those terms in section 101 of the Americans with Disabilities Act of 1990”); DEL. CODE ANN. tit. 19, §§ 710-11 (requiring “reasonable accommodations to the known limitations related” to “pregnancy, childbirth, or a related condition, including, but not limited to, lactation”).

²¹⁷ *See, e.g.*, COLO. REV. STAT. ANN. § 24-34-402.3(4)(b) (2016); NEV. REV. STAT. ANN. § 613.4371 (2017); *see also* W. VA. CODE § 5-11b-4 (2014) (authorizing regulations that “identify some reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions”).

manual labor; or modified work schedules.”²¹⁸ State laws also often protect nursing mothers.²¹⁹ For some workers, state laws may be more protective than federal laws.

Pregnancy Protections in Context and Potential Reform

While the PDA has for decades barred employers from singling out pregnant workers for adverse action or harassment, critics long called for enhanced protections. Treating pregnant women the same as other workers, accommodations proponents have argued, does not help pregnant workers retain employment.²²⁰ Proposals have generally fallen into two categories: (1) requiring job modifications akin to the “reasonable accommodations” provided for disability, and (2) pregnancy-specific leave entitlements.²²¹ The PWFA, which parallels the ADA, addressed the first category by focusing on workers’ entitlement to pregnancy accommodations.²²² With respect to the second category, advocates for expanded leave and reemployment rights contend that state and federal measures requiring workplace leave to support socially beneficial activities like voting, jury duty, court appearances, and military service may provide paradigms for protecting employment while enabling pregnancy and child care.²²³ An overview of these measures can help contextualize existing pregnancy protections within employment antidiscrimination law.

Leave entitlements differ from accommodations, as they need not require a showing of disability, known limitation, or reasonableness (as under the ADA or PWFA). As one observer indicated in evaluating FMLA leave entitlements, “treating family and medical leave like leave for jury duty or military service . . . explicitly recognizes the value of caring for others, rather than focusing only on questions of identity and equal treatment.”²²⁴ There are a number of statutes that could serve as models for pregnancy-specific leave entitlements. Perhaps the most comprehensive legal

²¹⁸ COLO. REV. STAT. ANN. § 24-34-402.3(4)(b) (2016); *see also* NEV. REV. STAT. ANN. § 613.4371 (2017); VA. CODE ANN. § 2.2-3909 (2021).

²¹⁹ NATIONAL CONFERENCE OF STATE LEGISLATURES, BREASTFEEDING STATE LAWS (2021), <https://www.ncsl.org/health/breastfeeding-state-laws> (last visited June 8, 2023). These include laws requiring pump breaks for employees, *see, for example*, ARK. CODE ANN. § 11-5-116 (2009); CAL. LAB. CODE § 1030-1033 (2001); D.C. CODE ANN. § 2-1402.82(d)(1) (2007), as well as laws permitting breastfeeding in public. *See, e.g.*, FLA. STAT. ANN. § 383.015 (1993); CAL. CIVIL CODE § 43.3 (1997); 740 ILL. COMP. STAT. ANN. § 137/1 *et. seq.* (2004).

²²⁰ Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2158 (1994); *see also* Siegel, *supra* note 213, at 988.

²²¹ *See* Areheart, *supra* note 79, at 1128–30; Jeannette Cox, *Pregnancy As “Disability” and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 449 (2012); Issacharoff & Rosenblum, *supra* note 220 at 2197.

²²² Scholars and advocates had often pointed to the ADA as a starting point or a model for potential legislation. *See supra* note 221. State-law pregnant workers protections often require accommodations, similar to those used for disability. *See supra* notes 215-218. Another potential accommodation analogue is Title VII’s religious accommodation provision. Under Title VII’s requirements, employers must make changes to workplace rules to accommodate employees’ religious practices, unless this poses an “undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e(j).

²²³ Bryce Covert, *The American Workplace Still Won’t Accommodate Pregnant Workers*, NATION (Aug. 12, 2019), <https://www.thenation.com/article/archive/pregnant-workers-discrimination-workplace-low-wage/> (quoting Gillian Thomas of the American Civil Liberties Union asking employers, “If this were not a pregnancy but if it were jury duty, what would you do?”); Robin R. Runge, *Redefining Leave from Work*, 19 GEO. J. ON POVERTY L. & POL’Y 445, 462 (2012); *see also* CATHERINE R. ALBISTON, INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE 73, 135 (2010) (stating that leave-oriented statutes like the FMLA differ from Title VII and the ADA because they do not focus on workers’ identities and are “more like legislation that creates job-protected leaves for jury duty or military service than anti-discrimination legislation”).

²²⁴ ALBISTON, *supra* note 223, at 135.

regime protecting employment leave is the Uniformed Services Employment and Reemployment Rights Act (USERRA). Through antidiscrimination, antiretaliation, and reemployment provisions, the statute helps military reserve members to complete periodic training and, when needed, extended deployments.²²⁵ One observer characterized USERRA as “possibly the most employee-friendly labor/employment law in effect today.”²²⁶ The law’s stated purpose is to “eliminat[e] or minimiz[e] the disadvantages to civilian careers and employment which can result from [military] service.”²²⁷

Employers cannot fire, refuse to hire, or refuse to promote a servicemember because of his or her past, present, or future service obligations. Courts borrow from Title VII and similar laws when analyzing causation under USERRA; the Supreme Court has assessed the statute as “very similar to Title VII.”²²⁸

USERRA does more than bar adverse employment actions because of service obligations. The statute protects workers’ jobs by requiring that they receive leave without pay during military service. Upon return, a servicemember receives the same status, benefits, and pay at the rate previously earned.²²⁹ The servicemember is also entitled to the same promotion opportunities and pay increases available to those who did not take leave for military duties and accrues seniority during deployment.²³⁰ Employers can escape these obligations, however, if their “circumstances have so changed as to make such reemployment impossible or unreasonable.”²³¹

The FMLA also has protections for military service, allowing a servicemember’s next of kin to take 26 weeks of leave to care for the servicemember.²³² On top of federal law’s substantial protections, many states provide other benefits to accommodate military service. These benefits include leave rights for military spouses in connection with a deployment.²³³

Aside from military service, legislatures have mandated leave for other endeavors. Federal law and many state laws protect employees who need leave for jury service. Federal law bars employers from discharging employees for federal jury service.²³⁴ Federal employees receive pay for jury service, and federal regulations for unemployment benefits exempt those serving as jurors from requirements that they search for work.²³⁵ Almost all states also bar employers from firing employees because of jury service, and many go further, requiring paid leave for time served as a

²²⁵ 38 U.S.C. § 4311(a).

²²⁶ Kenan Torrans, *A Primer on the Uniformed Services Employment and Reemployment Rights Act*, 47 MD. B.J. 13 (March 2014).

²²⁷ 38 U.S.C. § 4301(a)(1).

²²⁸ *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011).

²²⁹ 38 U.S.C. § 4313(a); *see also* Torrans, *supra* note 226, at 15.

²³⁰ 38 U.S.C. § 4313; *see also* Molly Weston Williamson, *The Meaning of Leave: Understanding Workplace Leave Rights*, 22 N.Y.U. J. LEGIS. & PUB. POL’Y 197, 216 (2020) (noting this accrual of seniority during leave is unusual in employment law, “used essentially exclusively in the context of military service”).

²³¹ 38 U.S.C. § 4312(d)(1)(A).

²³² 29 U.S.C. § 2612(3). For covered nonmilitary families, the FMLA affords 12 weeks of leave to care for a family member. *Id.* § 2612(1).

²³³ Williamson, *supra* note 230, at 202.

²³⁴ 28 U.S.C. § 1875.

²³⁵ 20 C.F.R. § 615.8(g)(3)(i)(A); OFF. OF PERSONNEL MGMT., FACT SHEET: COURT LEAVE, <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/court-leave/> (last visited June 8, 2023).

juror.²³⁶ Other state laws restrict the working hours an employer can require during jury service or bar employers from requiring jurors to use sick leave or vacation to cover their service.²³⁷

In addition to protections for jury service, bone-marrow or organ donors often receive time off.²³⁸ Some states provide leave for those who volunteer as emergency or disaster service workers.²³⁹ Voting, too, is commonly supported by leave entitlements, mandated in at least 30 states.²⁴⁰ These types of leave requirements may generally call for shorter leave entitlements than would pregnancy—often a matter of days or even hours rather than weeks or months. They may serve as useful points of comparison, however, because they (unlike many disability accommodations) anticipate a temporary, rather than permanent, alteration of workplace obligations.

Proposed reforms to strengthen protections for pregnant people go beyond workplace leave and accommodation requirements. The Equality Act, passed by the House of Representatives in early 2021, would broaden pregnancy antidiscrimination law beyond employment, applying it in many other areas of public life.²⁴¹ The bill includes provisions defining pregnancy discrimination as sex discrimination and further addresses discrimination against breastfeeding women.²⁴²

Conclusion and Considerations for Congress

A cluster of federal statutes currently protects pregnant workers. As it stands, Title VII, including its PDA provisions, mainly protects pregnant workers from employer bias by barring employers from using pregnancy in employment decisions.²⁴³ The 2022 PWFA mandates pregnancy accommodations at work.²⁴⁴ The law is modeled on the ADA, which requires accommodations for pregnancy conditions that rise to the level of a disability.²⁴⁵ How courts and regulators will apply the PWFA, particularly where it departs from established ADA law, remains to be seen. The FMLA provides affirmative benefits for some pregnant workers, most notably unpaid leave for eligible employees.²⁴⁶ The FLSA, as amended by the PUMP for Nursing Mothers Act, separately requires break time and other benefits for nursing mothers.²⁴⁷

²³⁶ See, e.g., ALA. CODE § 12-16-8 (1975); CAL. LABOR CODE § 230(a); 705 ILL. COMP. STAT. ANN. § 305/4.1(b) (1991); N.Y. JUD. LAW § 519; Williamson, *supra* note 230, at 201 (“Every state except Montana provides some type of specific workplace protection for those serving jury duty.”); Runge, *supra* note 223, at 462; Marianne DelPo Kulow, *Legislating A Family-Friendly Workplace: Should It Be Done in the United States?*, 7 NW. J. L. & SOC. POL’Y 88, 95 (2012). As one analysis concluded, such legislation “reflect[s] the value society places on participating in the justice system.” Runge, *supra* note 223 at 462.

²³⁷ Williamson, *supra* note 230, at 209. Some observers describe paid jury duty as a “civic responsibility” employers should shoulder. Jamie Philpotts, *Los Angeles-Based Latham & Watkins Was Recently Reprimanded by A Local Federal Judge for Not Allowing a Secretary Paid Leave for Jury Duty*, OF COUNSEL, September 21, 1992, at 15 (quoting district judge).

²³⁸ Kulow, *supra* note 236, at 95.

²³⁹ *Id.* at 95–96.

²⁴⁰ *Id.* at 95 n.55.

²⁴¹ H.R. 5, 117th Cong. §§ 3, 4, 6, 9 (2021); see also S. 393, 117th Cong. § 2 (2021).

²⁴² H.R. 5, 117th Cong. §§ 2, 9; see also S. 393 §§ 2, 9.

²⁴³ See *supra* notes 4–27 and accompanying text.

²⁴⁴ Pregnant Workers Fairness Act, Pub. L. No. 117-328, 136 Stat. 4459 (2022).

²⁴⁵ See *supra* notes 141–163 and accompanying text.

²⁴⁶ See *supra* notes 193–195 and accompanying text.

²⁴⁷ See *supra* notes 197–207 and accompanying text.

Over the years, Congress has expanded pregnant workers' protections. Congress clarified Title VII's application to pregnancy with the PDA; broadened the definition of disability within the ADA to include temporary disabilities, enhancing protection for pregnant employees (among others); and passed the PWFA and PUMP for Nursing Mothers Act.²⁴⁸ Several states have also passed pregnancy accommodations laws to supplement existing antidiscrimination measures.²⁴⁹

Courts have helped shape pregnancy protections as well. The Supreme Court's decision in *Gilbert* motivated passage of the PDA.²⁵⁰ More recently, the Court's application of Title VII's PDA provisions in *Young* raised questions as to whether and when pregnancy accommodations are required under that law.²⁵¹ Congress then passed a separate law, the PWFA, mandating pregnancy accommodations. The result is expansive yet piecemeal legislation regarding the treatment of pregnancy in the workplace.

If Congress seeks to enhance, restrict, or consolidate these measures, it may choose to amend Title VII, the PWFA, the ADA, the FLSA, or the FMLA. Congress may wish to take note of what issues emerge in courts' and regulators' application of the PWFA, for instance. With respect to that law, Congress might consider enumerating, as some state laws do, presumptively reasonable pregnancy accommodations.²⁵² It could also exclude specific accommodations.

In considering new measures, federal and state legislation in contexts unrelated to disabilities or discrimination may provide models for enacting pregnancy-specific job protection and leave options. Congress might consider enacting pregnancy-specific leave entitlements beyond those qualifying as reasonable accommodations under the PWFA, making leave available without requiring a pregnancy-related impairment, reasonableness, or lack of undue hardship. For example, Congress could expand FMLA leave for pregnant workers currently ineligible because of employer size or length of employment. Congress could also offer FMLA leave specific to pregnancy and childbearing (the FMLA, for example, offers additional leave for caring for a servicemember).

Author Information

April J. Anderson
Legislative Attorney

²⁴⁸ 42 U.S.C. § 2000e(k); *id.* § 12102(4)(A); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; Pregnant Workers Fairness Act, Pub. L. No. 117-328, 136 Stat. 4459 (2022); PUMP for Nursing Mothers Act, Pub. L. No. 117-328, Div. KK, § 102(a), 136 Stat. 4459 (2022); *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 252 (2015) (Kennedy, J., dissenting); *supra* notes 16–20 and 165–192 and accompanying text.

²⁴⁹ *See supra* notes 213–216 and accompanying text.

²⁵⁰ 42 U.S.C. § 2000e(k); *supra* notes 15–20.

²⁵¹ *See supra* notes 78–130 and accompanying text.

²⁵² *See, e.g.*, COLO. REV. STAT. ANN. § 24-34-402.3(4)(b) (2016); NEV. REV. STAT. ANN. § 613.4371(2017); VA. CODE ANN. § 2.2-3909 (2021).

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