LEGALMOMENTUM®

The Women's Legal Defense and Education Fund

October 10, 2023

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

Submitted via regulations.gov

RE: RIN 3046–AB30, Regulations To Implement the Pregnant Workers Fairness Act

Dear Mr. Windmiller:

Legal Momentum welcomes the opportunity to submit these comments in support of the Equal Employment Opportunity Commission's ("EEOC" or "Commission") Notice of Proposed Rulemaking ("NPRM"), RIN 3046–AB30, Regulations To Implement the Pregnant Workers Fairness Act, published in the Federal Register on August 11, 2023.[1]

Legal Momentum, the Women's Legal Defense and Education Fund is the nation's first and longest serving legal advocacy organization dedicated to advancing women's rights and gender equality. For more than 50 years, we have used strategic litigation, innovative public policy, and education and training initiatives to ensure that all women are protected under the law. Gender discrimination in the workplace and issues impacting women's economic equality have been areas of particular focus throughout our five decades of work. Since 2017, our *Women Valued* Initiative has taken an intersectional approach to women's economic empowerment and workplace equality that prioritizes the unmet needs of the most underserved women through targeted legal education and advocacy.

As a strong proponent of the Pregnant Workers Fairness Act ("PWFA"), we are encouraged that it is now in effect and will provide essential protections to pregnant workers. We submit these comments to express overall support for the proposed rule implementing the PWFA and to provide specific recommendations on how to enhance the regulations, which we hope will only further effective implementation and provide important clarity. We hope these rules will further the law's promise of ensuring people with known limitations related to pregnancy, childbirth, or related medical conditions remain healthy and working.

[1] Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714 (proposed Aug. 11, 2023) (to be codified at 29 C.F.R. pt. 1636).

I. Pregnant workers of color and low-wage pregnant workers are particularly vulnerable to pregnancy discrimination, and the proposed rule will provide crucial protections, but could still be improved.

Addressing and eliminating pregnancy discrimination is critical to achieving gender equality and reducing poverty and inequality among women. Despite the anti-discrimination protections in Title VII, the Pregnancy Discrimination Act (PDA), the Americans with Disabilities Act (ADA), and the Family and Medical Leave Act (FMLA), discrimination on the basis of pregnancy is still prevalent in the workplace and has been exacerbated by the absence of reasonable accommodations, which are essential for pregnant workers. This is true despite the fact that three-quarters of women entering the workforce will become pregnant at least once during their employment,[2] and labor force participation of mothers now stands at approximately 70%.[3] Pregnancy still threatens to drastically and negatively alter a woman's economic security or career trajectory, and the consequences of this discrimination can be financially debilitating, particularly when workplaces do not accommodate pregnant workers. These cases of discrimination are often rooted in subtle underlying gender stereotypes that ignore the realities of pregnancy, where employers often view pregnant women as less dedicated, less dependable, and less competent, while requests for reasonable accommodations are viewed as inconvenient. The discrimination faced by pregnant women is intersectional, that is, based on and shaped by not just their pregnancy and gender but also their race, ethnicity, immigration status, or membership in the LGBTQI+ community. Specifically, women of color and women working in low-wage industries disproportionately experience pregnancy discrimination.[4]

Many low-wage jobs are already physically taxing. In New York and across the country, we regularly speak with low-wage pregnant women working in jobs where they must (1) do physically demanding work, including lifting heavy boxes, equipment, or patients; (2) work in environments with hazardous conditions such as high temperatures; (3) stand for long periods during the course of the workday; and (4) work long shifts, exceeding 12 hours. These working conditions, which are inherently challenging, are particularly dangerous for pregnant women.

These conditions are also found in the jobs with the fewest benefits and flexibility; schedules often change week-to-week, workers are expected to be available whenever their employer needs them, and workers are less likely to have flexibility in controlling their own schedules.[5] These workers are also the least likely to have access to paid time off or even unpaid family leave.[6] Despite —or perhaps, because of—these challenging conditions, many women in these positions fear requesting accommodations. Those with the courage to do so are often summarily denied,

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[2] *See* Melissa Alpert & Alexandra Cawthorne, *Labor Pains: Improving Employment and Economic Security for Pregnant Women and New Mothers*, Ctr. for Am. Progress. (Aug. 3, 2009), https://www.americanprogress.org/article/labor-pains/.

[3] *Parenting in America*, Pew Rsch. Ctr. (Dec. 17 2015), https://www.pewresearch.org/social-trends/2015/12/17/1-the-american-family-today/.

[4] Nora Ellman & Jocelyn Frye, *Efforts to Combat Pregnancy Discrimination: Confronting Racial, Ethnic, and Economic Bias*, Ctr. for Am. Progress (No. 2, 2018), https://www.americanprogress.org/article/efforts-combat-pregnancy-discrimination/.

[5] Stephanie Bornstein, Ctr. for WorkLife L., Univ. of Cal., Hastings Coll. Of L., *Poor, Pregnant, and Fired: Caregiver Discrimination Against Low-Wage Workers* 6 (2011), https://worklifelaw.org/publications/PoorPregnantAndFired.pdf.

[6] *Id.* at 6–7.

ignored, or are forced to wait months before receiving a response to their requests.[7] And many who make requests face retaliation.

For instance, one pregnant worker who Legal Momentum assisted was told by her medical provider that she could no longer lift more than 20 pounds during her high-risk pregnancy. She was only in her second trimester. When she informed the hospital where she worked, she was told that they could not accommodate her lifting restriction, but she could go on unpaid leave and return after her pregnancy. When she followed-up with a request for a temporary transfer to another position that did not require heavy lifting, she was eventually told that she had been put on "a list" and was forced to go on unpaid leave while she waited. Months went by before another position was identified, one which would require her to give up her union benefits with no assurance that she could return to her original unionized position. In short, while preparing for a family, she had to stop working, lost pay, and was forced to choose between maintaining a salary and maintaining a better future job with union protection.

As a result of being denied accommodations, we see pregnant workers continuing to work, forced to risk their health and pregnancy to maintain their paycheck. In some of these cases, continued work negatively impacts a woman's health and job performance and she may end up losing everything: the pregnancy and her job. Alternatively, we see pregnant workers forced to go on unpaid leave without health insurance, which can have equally devastating long-term consequences. In such scenarios, women often expend all available leave before their child is born. They then must choose between losing their jobs or returning to work immediately after giving birth. In other cases, women are even fired once their employer learns they are pregnant, which can have a devasting effect on their families' financial stability and access to healthcare.[8]

The PWFA and its implementing regulations therefore serve a critical role in addressing these problematic gaps in protection. We believe that several provisions of the proposed rule, in particular, will benefit low-wage pregnant workers and pregnant workers of color, but there is room to go further.

a. Unnecessary Delay

We applaud the EEOC for making clear that employer delay in responding to accommodation requests may violate the PWFA.[9] This important step addresses how delays can adversely impact the health of workers, health of their pregnancies, or ability of workers to continue with employment at all. We further agree that employers should provide interim accommodations during the interactive process.[10] We recommend that the Commission also:

- Clarify that unnecessary delays at any point in the accommodation process (not just delays in "responding to a reasonable accommodation request")[11] may violate the PWFA;

[7] *Id.* at 14–15.
[8] *Id.* at 11–13.
[9] 88 Fed. Reg. at 54789 ("[A]n unnecessary delay in responding to a request for a reasonable accommodation may result in a violation of the PWFA if the delay results in a failure to provide a reasonable accommodation. This can be true even if the reasonable accommodation is eventually provided, when the delay was unnecessary.").
[10] *See id.* at 54770.
[11] *Id.* (proposed rule 29 C.F.R. § 1636.4(a)(1)).

- Clarify that providing an interim accommodation should not excuse an unnecessary delay by removing the sentence "If an interim reasonable accommodation is offered, delay by the covered entity is more likely to be excused;"[12] and
- Add "the urgency of the requested accommodation" as a factor to consider when evaluating unnecessary delay,[13] given the tragic consequences a delayed accommodation can produce.[14]

b. No-Fault Attendance Policies

The Commission seeks comment on whether there are other situations where ordinary workplace policies operate to penalize employees for using reasonable accommodations.[15] **We highlight here the deeply problematic practice of "no-fault" attendance policies.** These policies penalize employees for missing work, arriving late, or leaving early, such that the employee is disciplined or fired if she accrues a certain number of points under this system, and consider almost all absences unexcused.[16] Such policies lead to employees having worse health status, create delays in obtaining healthcare, and increase the risk of spread of disease.[17] And many employers stick with these policies even in cases when employees should be protected by FMLA or ADA.[18] Therefore, we recommend that the Commission highlight that no-fault attendance or late policies may cause employers to violate the PWFA if applied without consideration of individual circumstances.[19]

c. Supporting Documentation

We are grateful that EEOC recognizes that many workers face barriers obtaining appointments with health care providers in a timely way, or at all, which makes it difficult for them to obtain medical documentation.[20] We are further grateful that the EEOC has made it clear that employers can only demand "reasonable documentation" and must maintain employee privacy.[21]

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[12] *Id.* (proposed rule 29 C.F.R. § 1636.4(a)(1)(vi)). Providing an interim accommodation should not excuse unnecessary delay in cases where the employer delays the provision of the accommodation that the worker requested and needs.
[13] *Id.* (proposed rule 29 C.F.R. § 1636.4(a)(1)).
[14] *See, e.g.*, A Better Balance, *Long Overdue: It is Time for the Pregnant Workers Fairness Act* 8, 11 (2019), https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf (discussing examples of workers who fainted and needed emergency care or experienced pregnancy loss as a result of not being accommodated).
[15] 88 Fed. Reg. at 54781.
[16] Jesse M. Weiss, *Health Effects Show Fault in No-Fault Attendance Policies*, https://ppc.uiowa.edu/sites/default/files/2022-01/Health%20Effects%20Show%20Fault%20in%20No-Fault%20Attendance%20Policies.pdf (last visited Oct. 5, 2023).
[17] *Id.*
[18] *See, e.g.*, A Better Balance, *Misled & Misinformed: How Some U.S. Employers Use "No Fault" Attendance Policies to Trample on Workers' Rights (And Get Away With It)* 16 (2020), https://www.abetterbalance.org/wp-content/uploads/2020/06/Misled_and_Misinformed_A_Better_Balance-1-1.pdf (discussing a pregnant worker who was terminated after leaving work to rush to the hospital due to bleeding and fear she was miscarrying).
[19] *See* 88 Fed. Reg. at 54781 (discussing how covered entities must ensure that their ordinary workplace policies or practices do not operate to penalize employees for utilizing reasonable accommodations).
[20] 88 Fed. Reg. at 54787.
[21] *Id.* at 54769–70 (proposed 29 C.F.R. § 1636.3(l)(1); § 1636.3(l)(4)).

For pregnant workers of color, discrimination in the workplace intersects with discrimination in receiving treatment in a medical system in which they have historically faced systemic discrimination, and which they often distrust.[22] Systemic racism and racialized gender stereotypes lead to pregnant people of color receiving worse treatment that white pregnant workers and facing disproportionate rates of maternal mortality.[23] Through our work with pregnant patients who have been drug tested without their consent—a practice that disproportionately affects women of color[24]—Legal Momentum has seen how such practices destroy the trust between women and their healthcare providers, or in medical professionals in general.[25] Despite this distrust, pregnant workers have to rely on their medical professionals for documentation supporting their request for a reasonable accommodation if their employer requires such documentation.

This distrust also occurs alongside a host of other barriers faced by vulnerable workers, including pregnant people of color, including access to health insurance and access to providers in underserved areas.[26] In our work, we have regularly witnessed the difficulties that low-income women and women of color face in trying to obtain consistent and reliable medical care during pregnancy. As a result, women of color, particularly Black women, may be inhibited or delayed in securing supporting documentation.[27] It is therefore important that the PWFA rules not impose unnecessary, physical, and mental burden on workers, as this would contribute to delays in

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[22] Katrina Armstrong, et al., *Racial/Ethnic Differences in Physician Distrust in the United States*, 97 Am. J. Pub. Health 1283, 1283–1289 (2007), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1913079/; Liz Hamel, et al., *KFF/The Undefeated Survey on Race and Health*, KFF (Oct. 13 2020 https://www.kff.org/report-section/kff-the-undefeated-survey-on-race-and-health-main-findings/.

[23] Molly R. Altman, et al. *Information and Power: Women of Color's Experiences Interacting with Health Care Providers in Pregnancy and Birth*, 238 Soc. Sci. & Med 112491 (2019), https://doi.org/10.1016/j.socscimed.2019.112491; Brittany D. Chambers et al., *Clinicians' Perspectives on Racism and Black Women's Maternal Health*, 3 Women's Health Rep. 476 (2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9148644/ ("Clinicians acknowledged that racism causes and impacts the provision of inequitable care provided to Black women, highlighting Black women are often dismissed and not included as active participants in care decisions and treatment.").

[24] Marian Jarlenski, et al., *Association of Race with Urine Toxicology Testing Among Pregnant Patients During Labor and Delivery*, JAMA Health Forum, https://jamanetwork.com/journals/jama-health-forum/fullarticle/2803729.

[25] *See e.g.*, Khaleda Rahman, *How Hospitals Are Secretly Drug Testing Pregnant Women*, Newsweek (May 10, 2023), https://www.newsweek.com/how-hospitals-secretly-drug-testing-pregnant-women-1799176; Irin Carmon, *'They Really Wanted to See My Baby Get Taken Away' A Woman is Suing a Brookdale Hospital for Secretly Drug Testing Her During Labor*, N.Y. Magazine (Mar. 21, 2023), https://nymag.com/intelligencer/2023/03/brookdale-hospital-lawsuit-brooklyn-pregnancy-drug-testing.html.

[26] Latoya Hill, et al, *Racial Disparities in Maternal and Infant Health: Current Status and Efforts to Address Them*, KFF (Nov. 1, 2022), https://www.kff.org/racial-equity-and-health-policy/issue-brief/racial-disparities-in-maternal-and-infant-health-current-status-and-efforts-to-address-them/#:~:text=However%2C%20women%20of%20color%20are,that%20have%20not%20implemented%20the.

[27] *See, e.g.*, Black Mamas Matter All. & A Better Balance, *Centering the Experiences of Black Mamas in the Workplace* 10 (2022), https://www.abetterbalance.org/centering-black-mamas-pwfa/ (recounting how a participant in a listening session with Black birth workers and organizational leaders on the difficulties Black pregnant people experience obtaining accommodations remarked: "How do I prioritize going to the doctor's office, when it's gonna take me forever when I get there, because I'm at a public clinic, but I need this money, and I'm gonna be in there with a doctor for 10 minutes, but I spent all day trying to get those 10 minutes. Just the entry point, the access, sometimes is an issue.").

receiving reasonable accommodations or deter workers from seeking much-needed accommodations.[28] In revising the rule, Legal Momentum recommends that the Commission:

- Provide further guidance on when the need for an accommodation is "obvious" such that supporting documentation is not needed;[29]
- Provide an expanded list of straightforward accommodation requests for which employers cannot seek supporting documentation,[30] including time to recover from childbirth, time off to attend a reasonable number of healthcare appointments, flexible scheduling or remote work for nausea, modifications to uniforms or dress codes, rest breaks as needed, eating at workstation as needed, minor physical modifications to workstation or moving workstations, personal protective equipment, reprieve from lifting over 20 pounds, and access to closer parking;[31] and
- Modify its language around reasonable documentation[32] to ensure that employers cannot seek unnecessarily invasive information like the exact diagnosis or condition; the following should be sufficient: (1) a description of the limitation that necessitates an accommodation, (2) confirmation that the limitation is related to pregnant, childbirth, or a related medical condition, and (3) a statement that an accommodation is required.

d. Reasonable Accommodations

We appreciate the EEOC's detailed and broad list of possible reasonable accommodations,[33] which reflects the range of accommodations workers impacted by pregnancy, childbirth, and related medical conditions need to remain healthy and working. We also appreciate that the list of reasonable accommodations is non-exclusive, as the appropriate accommodation will vary based on the needs of the pregnant worker. There are many possible accommodations that a pregnant worker may need in order to continue working while maintaining a healthy pregnancy and it is important to ensure that women have broad leeway to make requests that address their particular situation and employers understand the importance of granting these requests, engaging in an interactive dialogue to develop alternatives where the

[28] The legislative record makes clear that the PWFA was not intended to include an onerous supporting documentation framework. For example, while the Minority Views of the House Report stated that "the bill presumably allows employers to require such documentation when the need for an accommodation is not obvious," the Majority did not incorporate that analysis. H.R. Rep. No. 117-27, at 57 (2021), https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf.

[29] 88 Fed. Reg. at 54769 ("The following situations are examples of when requiring supporting documentation is not reasonable under the circumstances: [] When the known limitation and need for reasonable accommodation are obvious . . ."). While it is important to minimize the burdens on workers in securing documentation, it also is important that employers not be allowed to impose restrictions based on paternalistic ideas about what pregnant workers need.

[30] *Id.* (stating that it is not reasonable to require supporting documentation beyond self-attestation when the accommodation is one listed as a predictable assessment or relates to lactation or pumping).

[31] The list of accommodations for which an employer could not seek supporting documentation would then differ from the list of predictable assessments in the "undue hardship" definition. This difference is appropriate because the analysis for determining whether a particular accommodation requires medical certification differs from the undue-hardship analysis.

[32] 88 Fed. Reg. at 54769 (proposed 29 C.F.R. § 1636.3(l)(2)).

[33] 88 Fed. Reg. at 54768 (proposed 29 C.F.R. § 1636.3(i)).

requested accommodation cannot be granted under the law, and ensuring that the employers do not displace the pregnant workers needs with their own assessment.

Too often, requests for reasonable accommodations are seen as an inconvenience. The employer's knee-jerk reaction is to deny a request for reasonable accommodation without sincerely considering the feasibility of the request or practice alternatives. Alternatively, employers provide only unpaid leave as an accommodation, which cuts workers off from income—and in some cases health insurance—when they need it the most.[34] It is important that the PWFA's mandate to "make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee"[35] is achieved and that accommodations are defined broadly to meet the needs of pregnant workers as determined by pregnant workers and their medical providers.

To ensure that pregnant workers are provided with the accommodations they need, we suggest that the EEOC build on its non-exclusive list of examples of reasonable accommodations, specifically:

- Include as a reasonable accommodation[36] "continuation of health insurance benefits during the period of leave;"[37] and
- Expand the list of lactation accommodations[38] to include other modifications that may be necessary to remove barriers to lactation, avoid or alleviate lactation-related health complications, or reduce the risk of contaminating human milk produced by the employee.[39]

e. Retaliation

We commend the EEOC for including robust and broad provisions addressing retaliation consistent with retaliation protections in Title VII and the ADA.[40] We further applaud the Commission's broad interpretation of the statutory prohibition against coercion.[41] At Legal Momentum, we regularly speak with workers who request an accommodation for their pregnancy, are denied the accommodation, and are shortly thereafter retaliatorily terminated.

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[34] Black Mamas Matter All. & A Better Balance, *supra* note 27, at 9.
[35] 42 USC § 2000gg-1(1).
[36] 88 Fed. Reg. at 54768 (proposed 29 C.F.R. § 1636.3(i)(3)).
[37] Uninterrupted access to healthcare is vital during pregnancy and postpartum. Ctrs. for Medicare and Medicaid Servs., *Improving Access to Maternal Health Care in Rural Communities* 6 (2019), https://www.cms.gov/About-CMS/Agency-Information/OMH/equity-initiatives/rural-health/09032019-Maternal-Health-Care-in-Rural-Communities.pdf ("A lack of access to maternal health care can result in a number of negative maternal health outcomes including premature birth, low-birth weight, maternal mortality, severe maternal morbidity, and increased risk of postpartum depression"). The intent of the PWFA was not only for pregnant workers to continue in employment, but also to promote maternal and child health. H.R. Rep. No. 117-27, at 24.
[38] 88 Fed. Reg. at 54768 (proposed 29 C.F.R. § 1636.3(i)(4)).
[39] Lactating employees may require other accommodations unrelated to pumping or not covered by the PUMP Act, and thus beyond the scope of § 1636.3(i)(4) as proposed.
[40] 88 Fed. Reg. at 54792 ("The anti-retaliation provisions of the PWFA should be interpreted broadly, like those of Title VII and the ADA.").
[41] *Id.* at 54792–93 ("Similar to the ADA, the scope of the PWFA coercion provision is broader than the anti-retaliation provision.").

Because retaliation is all too common of a response to a request for an accommodation,[42] it is important that the proposed rule recognizes the broad range of conduct—from termination to requiring unreasonable documentation—amounts to retaliation or coercion.

We further commend the Commission for noting that employers must ensure that their ordinary workplace practices and policies do retaliate against employees for use of a reasonable accommodation.[43] For instance, employees cannot be penalized for failing to work during a break provided as a reasonable accommodation or for not performing an essential function that as a modification has been temporarily suspended.[44] To further strengthen the rule, the Commission could make this requirement clear within the subpart of the proposed rule discussing retaliation.[45]

We also regularly see pregnant workers terminated after being denied a reasonable accommodation based on pretextual factors. The rule should therefore make clear that the timing of adverse employment actions will be a key factor considered when assessing retaliation claims.

II. We applaud the Commission's inclusion of abortion as a related medical condition.

Legal Momentum has long advocated for women's unrestricted access to reproductive healthcare,[46] and abortion is a critical part of the spectrum of reproductive health care[47] needed by hundreds of thousands of people in the U.S. every year.[48] Even before the *Dobbs* decision, state legislators across the country imposed onerous restrictions on the right to abortion, which disproportionately impacted abortion access for people of color, low-income pregnant people, immigrants, young people, people with disabilities, and LGBTQI+ individuals.[49] *Dobbs* has dramatically exacerbated these inequalities, for instance by increasing the costs and difficulty of traveling to seek abortion care, which may require pregnant workers to take more time off work

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[42] Twenty-three percent of pregnancy-discrimination charges filed with the EEOC are accompanied by a retaliation charge. Carly McCann & Donald Tomaskovic-Devey, Ctr. for Emp. Equity, Univ. of Mass. Amherst, *Pregnancy Discrimination at Work: An Analysis of Pregnancy Discrimination Charges Filed with the U.S. Equal Employment Opportunity Commission* 14 (2021), https://www.umass.edu/employmentequity/pregnancy-discrimination-workplace-1.

[43] 88 Fed. Reg. at 54781.

[44] *Id.*

[45] *Id.* at 54771 (proposed 29 C.F.R. § 1636.5(f)).

[46] Legal Momentum has a long history of leading, and joining, amicus briefs protecting the right to reproductive freedom. We have appeared as amici in every leading reproductive rights case, *including Dobbs v. Jackson Women's Health Organization*, *June Medical Services v. Gee*, *Whole Women's Health v. Cole*, *and Webster v. Reproductive Health Service*. Our organization has also brought groundbreaking litigation seeking to protect access to abortion and other reproductive health care, including several cases protecting access to clinics by upholding fixed buffer zones and other reasonable limitations on protestors, seeking justice against those who commit violence at clinics, and state laws imposing burdensome regulations amounting to restricted access.

[47] *Facts Are Important: Abortion Is Healthcare*, Am. Coll. of Obstetricians and Gynecologists, https://www.acog.org/advocacy/facts-are-important/abortion-is-healthcare (last visited Oct. 5, 2023).

[48] Jeff Diamant & Besheer Mohamed, *What the Data Says About Abortion in the U.S.*, Pew Rsch. Ctr. (Jan. 11, 2023), https://www.pewresearch.org/short-reads/2023/01/11/what-the-data-says-about-abortion-in-the-u-s-2/.

[49] Liza Fuentes, *Inequity in Abortion Rights and Access: The End of* Roe *is Deepening Existing Divides*, Guttmacher Inst. (Jan. 17, 2023), https://www.guttmacher.org/2023/01/inequity-us-abortion-rights-and-access-end-roe-deepening-existing-divides.

and lose more income.[50] And being denied an abortion has a serious effect on income and overall well-being.[51]

In the wake of *Dobbs*, it is critical that abortion care is included in the proposed rule. **We strongly support the inclusion of termination of pregnancy, including by abortion, in the enumerated examples of "related medical conditions" that may require accommodation**.[52] By including abortion as a medical condition related to pregnancy, the EEOC addresses a key manner in which pregnancy-related healthcare can create a need for workplace accommodations, and interprets "related medical condition" in a common sense, plain-text way. Abortion's place among the full range of statutorily protected "related medical conditions" is rooted in decades of legislative, administrative, and judicial authority dating back to the 1978 passage of the PDA. Because the phrase "pregnancy, childbirth, or related medical conditions" in the PWFA is the same language used in the PDA,[53] it should be interpreted consistent with the PDA.[54]

Indeed, in enacting the PDA, Congress confirmed its intent that the statute protects workers from discrimination for obtaining abortion care,[55] and the EEOC subsequently reaffirmed abortion as a related medical condition in guidance. [56] Finally, as the Commission notes,[57] subsequent court interpretations have consistently confirmed that the PDA's protections encompass the right to be free from discrimination on the basis of contemplating or obtaining abortion care.[58]

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[50] Samantha Artiga, et al., *What Are the Implications of Overturning* Roe v. Wade *for Racial Disparities?*, KFF (July 15, 2022), https://www.kff.org/racial-equity-and-health-policy/issue-brief/what-are-the-implications-of-the-overturning-of-roe-v-wade-for-racial-disparities/.

[51] *The Turnaway Study*, Advancing New Standards in Reprod. Health, https://www.ansirh.org/research/ongoing/turnaway-study (last visited Oct. 5, 2023).

[52] 88 Fed. Reg. at 54767.

[53] See 42 USC § 2000gg(4); 2000gg-1; 2000e(k).

[54] *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."); *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) ("The rule of in *pari materia* -- like any canon of statutory construction -- is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context.")

[55] *See* H.R. Conf. Rep. No. 95-1786, at 4 (1978) ("Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion."). *See also Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. pt. 1604 app., Introduction (1979) ("A woman is therefore protected against such practices as being fired, or refused a job or promotion, merely because she is pregnant or has had an abortion.").

[56] Equal Emp. Opportunity Comm'n, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (2015), https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#IA4a; *Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. pt. 1604 app., questions 34–35 (1979).

[57] 88 Fed. Reg. at 54774.

[58] *See Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008); *Turic v. Holland Hosp., Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996); *Ducharme v. Crescent City De´ja` Vu, L.L.C.*, 406 F. Supp. 3d 548, 556 (E.D. La. 2019); *cf. Standridge v. Union Pac. R.R. Co.*, 479 F.3d 936, 942 (8th Cir. 2006) (suggesting, but not deciding, that abortion is "related to" pregnancy in interpreting the PDA); *Doe v. First Nat'l Bank of Chi.*, 668 F. Supp. 1110, 1111–12 (N.D. Ill. 1987) (suggesting, but not deciding, that having an abortion is protected under the PDA).

III. We amplify the comments and suggestions made by partner organizations.

In addition, we amplify the comments and suggestions made by our partner organizations, A Better Balance, National Women's Law Center, ACLU, and the National Partnership for Women and Families, including:

1. **Temporary Excusal from Essential Functions:** The EEOC presents a thoughtful framework for whether an employee or applicant is qualified if they cannot perform one or more essential functions. In line with the statutory language indicating that a worker is qualified if they could perform an essential function "in the near future," the EEOC should extend "in the near future" to one year postpartum, and two years postpartum with respect to lactation.
2. **Related Medical Conditions:** The definition of "pregnancy, childbirth, and related medical conditions" in the regulations is expansive and appropriately includes termination of pregnancy, including via miscarriage, stillbirth, and abortion; medical conditions affected by pregnancy and childbirth; and menstrual cycles. Some additional examples may be appropriate, as well as the addition of perimenopause and menopause.
3. **Known Limitations:** The proposed rule appropriately makes clear that a "limitation" can be modest, minor, and/or episodic. We also appreciate that the proposed rule sets out principles that reflect the realities of how employees—who are rarely trained in law—usually communicate their needs regarding their limitations to an employer. Further clarification could be made to the definition of "known limitations" and "communicated to the employer."
4. **Undue Hardship:** Finally, the proposed rule presents a clear interpretation of undue hardship and positively includes "predictable assessments," i.e., examples of accommodations requested by employees due to pregnancy that will, in nearly all instances, not be considered to impose an undue hardship. Additional predictable assessments could be included.

Conclusion

Legal Momentum celebrates the passage of the PWFA and applauds the EEOC for proposing this rule that will provide critical protections to pregnant workers, especially the pregnant workers who most commonly face pregnancy discrimination. We appreciate your consideration of these comments. For any additional questions or guidance, please contact Seher Khawaja, Deputy Legal Director and Senior Attorney, Economic Empowerment (skhawaja@legalmomentum.org).

Respectfully submitted,

Legal Momentum, The Women's Legal Defense and Education Fund