

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

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April J. Anderson
Legislative Attorney

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

The Pregnancy Discrimination Act (PDA) generally protects job applicants and employees from adverse action—firing, demotion, refusal to hire, or forced leave—because of pregnancy or related conditions. It also bars harassment based on pregnancy and bans retaliation against workers for making a complaint 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 accommodations are provided to other similarly situated nonpregnant workers. Thus, if an employer never (or hardly ever) allows work adjustments for nonpregnant employees, it generally is not legally required under the PDA to accommodate a pregnant employee. Therefore, while employers cannot fire workers for being pregnant, the law does not require them to make workplace changes (e.g., scheduling flexibility, an extra bathroom break) simply because the employee’s demands are pregnancy-related.

In some circumstances, pregnant workers may invoke federal statutes in addition to the PDA when they seek workplace alterations or leave. The Americans with Disabilities Act (ADA) mandates modifications for those women who face pregnancy-related impairments significant enough to satisfy the ADA’s definition of a “disability.” Some workers can invoke the Family and Medical Leave Act (FMLA) for unpaid leave related to childbearing, but not all pregnant workers qualify as having a disability under the ADA. Some workers and some employers fall outside the FMLA’s purview.

Some advocates and legislators have proposed expanding legal protections afforded to pregnant workers. These proposals may take the form of amendments to existing laws, stand-alone measures, new pregnancy accommodation requirements, or leave entitlements. Many states have enacted additional pregnancy accommodations in recent years. A federal pregnancy accommodation proposal, the Pregnant Workers Fairness Act, passed the House of Representatives in 2021, after an earlier version of the legislation passed by that body in 2020. This scheme largely mirrors the structure of the ADA, requiring case-by-case assessment of reasonable accommodations for pregnant workers. The House also passed the Equality Act in 2021. That bill would provide that prohibitions on sex discrimination in several federal statutes include pregnancy, childbirth, and related conditions.

In addition to the disability regime like that of the ADA, some have proposed leave-based models for potential legislation, under which pregnant workers must be allowed job-protected leave. Numerous similar statutes exist outside of the pregnancy context, using accommodations, reemployment rights, or leave entitlements to protect workers’ engagement in such endeavors as voting, military service, religious exercise, or participation in the legal system.

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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. They do not generally require employers to make workplace changes to accommodate pregnancy, unless such accommodations are provided to similarly situated nonpregnant workers. While pregnancy is not a disability per se, protections for workers with disabilities may apply to women who face certain pregnancy-related medical conditions.¹

The Equal Opportunity Employment Commission (EEOC), the federal entity primarily charged with monitoring compliance and enforcing antidiscrimination laws, reports that it receives thousands of pregnancy discrimination complaints each year.² Most charges of pregnancy discrimination include allegations that individuals faced termination based on pregnancy.³ 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.⁴

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 changes for pregnancy protections and describes other employment laws that may serve as models for potential legislation.

Federal Law Prior to the Pregnancy Discrimination Act

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

¹ See *infra* notes 160-178.

² Pregnancy Discrimination Charges FY 2010 - FY 2019, U.S. Equal Employment Opportunity Commission [hereinafter EEOC], <https://www.eeoc.gov/statistics/pregnancy-discrimination-charges-fy-2010-fy-2019> (last visited June 4, 2021).

³ EEOC, 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 4, 2021).

⁴ *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*, Meeting of February 15, 2012, EEOC, <http://www.eeoc.gov/eeoc/meetings/2-15-12/williams.cfm> (last visited June 4, 2021).

⁵ 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 3.

⁶ EEOC Enforcement Guidance, *supra* note 3.

employee's terms and conditions of employment.⁷ Workers who oppose discrimination, file a discrimination complaint, or participate in the complaint process are protected from retaliation.⁸ If they prevail on a claim of discrimination or retaliation, employees may seek equitable relief and damages including back pay and punitive damages.⁹

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 *Gilbert v. General Electric*. In that case, General Electric offered a benefits plan to compensate employees unable to work because of illness or injury.¹⁰ The plan excluded pregnancy and related conditions, but not other medical conditions, from coverage.¹¹ 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.¹² 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.¹³ 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.”¹⁴ It 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.¹⁵

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 substantive provisions on remedies or enforcement.¹⁶ Instead, the PDA added two phrases to Title VII’s definitions section clarifying that pregnancy is a form of sex discrimination. The first phrase of the PDA adds pregnancy into 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

⁷ *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999). *See also* *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (noting discrimination “includes requiring people to work in a discriminatorily hostile or abusive environment”); *Harassment*, EEOC, <https://www.eeoc.gov/harassment> (last visited June 4, 2021).

⁸ 42 U.S.C. § 2000e-3; EEOC Enforcement Guidance, *supra* note 3; *Questions and Answers: Enforcement Guidance on Retaliation and Related Issues*, EEOC, <https://www.eeoc.gov/laws/guidance/questions-and-answers-enforcement-guidance-retaliation-and-related-issues> (last visited June 4, 2021).

⁹ *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 529 (1999); 42 U.S.C. § 1981; *Remedies for Employment Discrimination*, EEOC, <https://www.eeoc.gov/remedies-employment-discrimination> (last visited June 4, 2021).

¹⁰ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 127 (1976).

¹¹ *Id.* at 127.

¹² *Id.* at 139.

¹³ *Id.* at 135.

¹⁴ *Id.*

¹⁵ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 127 (1976) at 134.

¹⁶ *California 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.”¹⁷ Thus, Title VII now expressly protects covered employees and job applicants from discrimination, including demotion, firing, or denial of employment based on pregnancy.¹⁸

In the 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.”¹⁹ Legislative history suggests that Congress intended the amendment to clarify that “distinctions based on pregnancy are per se violations of Title VII.”²⁰ It also suggests that, in enacting the PDA, Congress did not mean to single out pregnant women for special protection.²¹ Nevertheless, 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.²² This different language has caused some confusion in the courts—most notably in assessing disparate impact claims.²³

Certain pregnant employees fall outside the PDA’s protections. Title VII incorporates a number of exemptions, and these apply to the PDA. The statute does not cover employers of fewer than 15 workers.²⁴ Other categories of employers, including the military, many judicial employers, and elected officials (for the employment of personal staff) lay outside the statute’s purview.²⁵ Title VII also allows religious institutions more leeway in employment decisions related to their religious mission.²⁶

¹⁷ 42 U.S.C. § 2000e(k).

¹⁸ 42 U.S.C. §§ 2000e(k), 2000e-2; EEOC Enforcement Guidance, *supra* note 3. Title VII also bars harassment because of pregnancy.

¹⁹ 42 U.S.C. § 2000e(k).

²⁰ 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, and 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 Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 681 (1983) (discussing legislative history of PDA).

²¹ S. REP. NO. 95-331, at 4 (1977) (“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, 3-4 (“We recognize that enactment of H.R. 6075 [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.”).

²² 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).

²³ For a discussion of this textual difference in the disparate impact context, *see infra* notes 147-155 and accompanying text.

²⁴ 42 U.S.C. § 2000e(b); *Pregnancy Discrimination*, EEOC, <https://www.eeoc.gov/pregnancy-discrimination> (last visited June 8, 2021).

²⁵ 42 U.S.C. § 2000e(f); 42 U.S.C. § 2000e-16(a); *Jackson v. Modly*, 949 F.3d 763, 772 (D.C. Cir. 2020).

²⁶ 42 U.S.C. § 2000e-1 (noting religious institutions may to employ “individuals of a particular religion to perform work connected with the carrying . . . of their activities”); *see also id.* § 2000e-2(e)(2). The Constitution may also constrain 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

Elements of a PDA Claim: Adverse Action and Motive

Title VII bars employers from taking adverse employment actions, including “fail[ure] or refus[al] to hire or . . . discharge [of] any individual” and discrimination in “compensation, terms, conditions, or privileges of employment.”²⁷ Accordingly, to make out a Title VII claim (including a PDA claim) an employee must generally show that she suffered an adverse employment action, such as termination, discipline, loss of pay, or other mistreatment.²⁸ Involuntary reassignment or leave may also violate the PDA, including mandatory light duty when the employee did not request or require it.²⁹ The Supreme Court noted that “stereotypical assumptions” about pregnant workers’ abilities “would, of course, be inconsistent with Title VII’s goal of equal employment opportunity.”³⁰

Under the PDA, courts commonly consider claims that bias against pregnancy motivated an employee’s discharge, threat of discharge, or promotion denial.³¹ In these cases, the parties do not generally dispute that an employer has taken an adverse action. Resolution here turns on establishing an impermissible motive: acting because of pregnancy.³²

To establish motive, courts generally use a burden-shifting standard. After the employee identifies an adverse action, the burden then shifts to the employer to prove it had a “legitimate, nondiscriminatory reason” for its decision.³³ The question of motive is a factual one, and an employee may prevail if she shows that the proffered motive is pretextual.³⁴ She 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.”³⁵ Pregnancy-motivated adverse action is discriminatory even if the employer characterizes its decision as protective or benign.³⁶

religious functions. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188, 196 (2012) (holding ministerial exceptions limited application of ADA to religious teacher and noting lower courts’ application of the doctrine to Title VII claims).

²⁷ 42 U.S.C. § 2000e-2(a)(1).

²⁸ EEOC Enforcement Guidance, *supra* note 3; *Asmo v. Keane, Inc.*, 471 F.3d 588, 592 (6th Cir. 2006).

²⁹ *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”).

³⁰ *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 290 (1987).

³¹ *Hercule v. Wendy’s of N.E. Fla., Inc.*, No. 10-80248-CIV, 2010 WL 1882181, at *5 (S.D. Fla. May 11, 2010); *Germain v. Cty. of Suffolk*, No. 07-CV-2523ADSARL, 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).

³² *Germain*, 2009 WL 1514513, at *5.

³³ *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1220 (10th Cir. 2007).

³⁴ 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. If they find no direct evidence of anti-pregnancy bias, courts turn to the burden-shifting framework announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). A PDA plaintiff must show that an employer knew of her pregnancy or related condition, prove that she satisfactorily performed her job, identify an adverse employment action, and point to circumstances suggesting the employer acted because of pregnancy. *See Lewis v. City of Union City, Georgia*, 918 F.3d 1213, 1221 (11th Cir. 2019).

³⁵ 42 U.S.C. § 2000e-2(m). *See also* *Spees v. James Marine, Inc.*, 617 F.3d 380, 390 (6th Cir. 2010).

³⁶ *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

Without a clear connection between pregnancy and the adverse action, a court will consider facts that tend to support a finding of intentional discrimination, such as the timing of an adverse action. 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.”³⁷

As in other discrimination cases, courts will recognize an inference of discrimination when employers fail to give credible, consistent reasons for the adverse action.³⁸ An employer may lack credibility, for example, when managers’ given reasons for firing a pregnant employee change after she files suit.³⁹ Inconsistencies may also help show that an employer’s claim that a pregnant worker could not do her job are pretextual. 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.’”⁴⁰

Also relevant in determining motive are 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,”⁴¹ “[y]ou picked a poor time to get pregnant,”⁴² or, to a recently married employee, “we feared something like this would happen.”⁴³ One manager allegedly told a pregnant worker “if she wanted to keep her job, she should not stay pregnant.”⁴⁴ Such statements may support the employee’s claim that an employer acted with a discriminatory motive.

Pregnancy Harassment

In addition to barring adverse actions such as reassignment or termination, Title VII makes it illegal for an employer to subject an employee to a hostile work environment because of pregnancy.⁴⁵ This 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

that “the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect”).

³⁷ *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) 594 (holding two-month window “sufficient to establish a link between [employee’s] pregnancy and her termination”).

³⁸ *Legg v. Ulster Cty.*, 820 F.3d 67, 70 (2d Cir. 2016).

³⁹ *Asmo*, 471 F.3d at 596 (pointing to evidence suggesting inconsistent statement and reversing summary judgment).

⁴⁰ *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).

⁴¹ *Hercule v. Wendy’s of N.E. Fla., Inc.*, No. 10-80248-CIV, 2010 WL 1882181, at *1, (S.D. Fla. May 11, 2010) (denying motion to dismiss).

⁴² *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).

⁴³ *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1320 (11th Cir. 2012) (holding alleged statements provide circumstantial evidence of discriminatory motive for termination, precluding summary judgment for employer).

⁴⁴ *Townsend v. Town of Brusly*, 421 F. Supp. 3d 352, 360 (M.D. La. 2019).

⁴⁵ *Harris*, 510 U.S. at 21; *Harassment*, EEOC, <https://www.eeoc.gov/harassment> (last visited June 8, 2021).

discrete adverse employment action.⁴⁶ The Supreme Court has described such a workplace as “permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”⁴⁷

A single derogatory comment is rarely enough to show harassment.⁴⁸ Furthermore, it is 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.⁴⁹ Assessment of the working environment is fact-specific, and courts must examine “the totality of the circumstances.”⁵⁰ 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.⁵¹ Taking into account all of the circumstances means that a court will assess pregnancy-based epithets and mistreatment together with any abuse that is not overtly pregnancy-related, such as closer supervision or excessive discipline.⁵²

In the context of pregnancy, hostile treatment claims often include allegations of disparaging comments or threats. In one case, for example, plaintiff claimed that a manager “beg[a]n referring to [plaintiff] as ‘prego,’” and urged her to quit or go on disability.⁵³ A manager pressuring an employee to terminate her pregnancy may also support a harassment claim.⁵⁴

Light Duty and Light Duty Requests

One particular form of discrimination, discriminatory denials of light duty, commonly arises in the pregnancy context. While other claims focus on employers’ imposing involuntary restrictions on pregnant workers (such as changed job duties or forced leave), these claims, conversely, allege that employers *denied* a request for light duty or other job modifications. Under the PDA, pregnant women who “are not able to work for medical reasons . . . must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working.”⁵⁵ The PDA does not require accommodations, but courts must evaluate whether, in these cases, managers contravened the PDA’s requirement that pregnant workers be treated the same as other employees similar in their ability to work. Workers may sometimes show this comparison by identifying other employees given the accommodation they seek. In a mail handling facility, for example, a pregnant worker alleged that supervisors declined to let her perform some of her tasks while seated, even though injured employees were allowed this accommodation.⁵⁶

⁴⁶ *Gorski v. New Hampshire Dep’t of Corr.*, 290 F.3d 466, 469 (1st Cir. 2002).

⁴⁷ *Harris*, 510 U.S. at 21.

⁴⁸ *Cf. Gorski*, 290 F.3d at 471 (holding allegation of seven harassing comments adequate to survive summary judgment).

⁴⁹ *Gorski*, 290 F.3d at 474.

⁵⁰ *Hyde v. K.B. Home, Inc.*, 355 F. App’x 266, 272 (11th Cir. 2009). *See also Gorski*, 290 F.3d at 471.

⁵¹ *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1276 (11th Cir. 2002).

⁵² *Zisumbo v. McCleodUSA Telecomms. Servs., Inc.*, 154 F. App’x 715, 726 (10th Cir. 2005).

⁵³ *Id.* (reversing summary judgment granted for employer).

⁵⁴ *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).

⁵⁵ S. REP. NO. 95-331 at 3 (1978).

⁵⁶ *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1223 (6th Cir. 1996) (reversing summary judgment).

Courts will also consider whether an employer has changed work requirements, making them more strenuous than before a worker's pregnancy. One manager, for example, allegedly forbade an employee to seek help in lifting, even though she did so before she became pregnant, and even though managers allowed others to seek assistance.⁵⁷

"Related Medical Conditions" and the PDA's Scope

In protecting "pregnancy, childbirth, or related medical conditions,"⁵⁸ the PDA reaches circumstances beyond pregnancy per se. As one court put it, discrimination "before, during, and after . . . pregnancy" may violate the PDA.⁵⁹ 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."⁶⁰

Pre-pregnancy considerations include adverse actions 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.'"⁶¹

In another case of pre-pregnancy discrimination, a federal district court in Illinois rejected the employer's argument that the PDA did not cover discrimination based on inability to become pregnant.⁶² It 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.⁶³ While the court acknowledged that allowing claims only for pregnant women and excluding those seeking pregnancy might be a "common-sense reading of the PDA's language," it also pointed to the Act's legislative history.⁶⁴ One of the measure's sponsors explained that women historically endured discrimination "[b]ecause of their capacity to become pregnant," and "because they might become pregnant."⁶⁵

In a similar vein, employers may not bar women of childbearing age under "fetal protection" policies designed to prevent exposure to toxins linked to birth defects.⁶⁶ Such a policy violates

⁵⁷ *Stansfield v. O'Reilly Auto., Inc.*, No. CIV.A. H-04-4161, 2006 WL 1030010, at *5-6 (S.D. Tex. Apr. 19, 2006).

⁵⁸ 42 U.S.C. § 2000e(k).

⁵⁹ *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1402 (N.D. Ill. 1994) (quoting legislative history and holding PDA protected employee seeking fertility treatments); *see also* *Hall v. Nalco Co.*, 534 F.3d 644, 649 (7th Cir. 2008).

⁶⁰ EEOC Enforcement Guidance, *supra* note 3.

⁶¹ *Hall*, F.3d at 649 (rejecting district court's conclusion that because infertility is gender-neutral, plaintiff could not pursue a Title VII claim).

⁶² *Id.*; *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).

⁶³ *Pacourek*, 858 F. Supp. at 1401.

⁶⁴ *Id.* at 1402.

⁶⁵ *Id.* (quoting 124 Cong. Rec. 38574 (daily ed., Oct. 14, 1978) (statement of Rep. Ronald Sarasin, House manager of PDA legislation). *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).

⁶⁶ *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 193 (1991).

Title VII's bar on sex-based classifications, the Supreme Court has observed, and the PDA "bolster[s]" this conclusion.⁶⁷

Courts have sometimes cited the PDA's reference to "related medical conditions" as showing its coverage exceeds pregnancy per se. The Sixth Circuit did so, holding that the "plain language of the statute" barred discrimination because a worker had considered an abortion.⁶⁸ Courts have applied the PDA to various postpregnancy conditions. A woman may not be fired because of recent childbirth, for example.⁶⁹ Postpartum medical complications, similarly, are impermissible grounds for employment action.⁷⁰ As one court put it, the PDA encompasses "conditions related to pregnancy that occur after the actual pregnancy."⁷¹ A woman with a postpartum condition must be treated as are other workers with nonpregnancy illnesses.⁷² Courts have held that postpartum depression and a disrupted menstrual cycle, for example, fall within this rule.⁷³

There has been disagreement among courts on whether lactation is a pregnancy-related condition covered by the PDA. At least initially, the prevailing view among reviewing district courts was that breastfeeding was ineligible for PDA protection, as it was not viewed as a medical condition related to pregnancy or childbirth, but instead related to subsequent child care.⁷⁴ At least two federal courts of appeals have also opined, either when resolving a dispositive issue of the case or in nonbinding dicta, that breastfeeding is not a protected medical condition under the PDA.⁷⁵ More recent court decisions, including one by a federal court of appeals, have concluded otherwise,⁷⁶ leading one district court to observe in 2016 that there was a "trend" by reviewing

⁶⁷ *Id.* at 197-98 (holding battery manufacturer may not preclude women of childbearing age from employment on the grounds that chemical exposure would be dangerous to an unborn child should a worker become pregnant); *see also* EEOC Enforcement Guidance, *supra* note 3.

⁶⁸ *Turic v. Holland Hosp., Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996).

⁶⁹ *Neessen v. Arona Corp.*, 2010 WL 1731652, at *7 (N.D. Iowa Apr. 30, 2010); *Shafir v. Ass'n of Reform Zionists of Am.*, 998 F. Supp. 355, 363 (S.D.N.Y. 1998).

⁷⁰ *Reilly v. Revlon, Inc.*, 620 F. Supp. 2d 524, 544 (S.D.N.Y. 2009).

⁷¹ *Id.*

⁷² *Id.* at 545.

⁷³ *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 post-pregnancy employment until worker had returned to a normal menstrual cycle violated PDA). *See also* *Infante v. Ambac Fin. Grp.*, No. 03 CV 8880 (KMW), 2006 WL 44172, at *4 (S.D.N.Y. Jan. 5, 2006), *aff'd*, 257 F. App'x 432 (2d Cir. 2007) (noting that plaintiff's thyroid condition, if exacerbated by recent pregnancy, might fall within the PDA's purview).

⁷⁴ *See, e.g.,* *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1492 (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* without opinion, 951 F.2d 351 (6th Cir.1991).

⁷⁵ *Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 438 (6th Cir. 2004) (assessing state law claim and stating in dicta that the PDA would not reach breastfeeding); *Wallace v. Pyro Min. Co.*, 951 F.2d 351, 1991 WL 270823, at *1 (6th Cir. 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 (4th Cir. 1996) (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").

⁷⁶ *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 428 (5th Cir. 2013); *Hicks v. City of Tuscaloosa, Alabama*, 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);

courts to “hold that lactation is a ‘condition related to pregnancy’” under the PDA. Courts taking this view have emphasized, for example, that a woman unable to breastfeed may experience pain, infection, or other medical complications.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 Yet after the PDA’s passage, courts struggled to decide whether and when the Act requires accommodations for pregnant workers in order for them to be treated the same as other workers similar in their ability to work. Pregnant women often face work restrictions, such as lifting constraints, limits on chemical exposure, a need for more bathroom breaks, or other scheduling requirements.⁷⁹ The PDA does not forbid employers from granting a pregnant worker’s request for an accommodation of these constraints.⁸⁰ It also does not explicitly require the employer to make any changes to workplace conditions or rules to suit a pregnant worker. Whether the PDA requires employers to offer pregnant women the same accommodations that they extend to other workers for other reasons is a question that the Supreme Court took up in its 2015 decision in *Young v. United Parcel Service*, holding that employers may refuse pregnant women certain accommodations given to other workers. The workers’ differing circumstances, the Court held, mattered in the analysis.⁸¹

At least prior to *Young*, courts varied in defining which employees (among those who had received accommodations for reasons other than pregnancy) pregnant workers could cite as comparators. Some courts concluded that employers must treat pregnant women the same as others who request light duty for off-the-job injury, but held that employees injured on the job were not applicable comparators.⁸² Other courts concluded that any accommodated employees were relevant.⁸³ As the Sixth Circuit put it, “instead of merely recognizing that discrimination on the basis of pregnancy constitutes unlawful sex discrimination under Title VII,” the PDA provided additional protection “by expressly requiring that employers provide the same treatment [for pregnancy] as provided to ‘other persons not so affected but similar in their ability or inability to work.’”⁸⁴ Because ability to work is the only stated grounds for comparison, the Sixth

Barnes v. Hewlett Packard Co., 846 F. Supp. 442, 445 (D.Md.1994).

⁷⁷ *Allen-Brown*, 174 F. Supp. 3d at 479. See also *Mayer v. Prof'l Ambulance, LLC*, 211 F. Supp. 3d 408, 417 (D.R.I. 2016).

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 noting employee’s doctor restricted her exposure to three chemicals present at her workplace).

⁸⁰ *California Fed. Sav. & Loan Ass’n*, 479 U.S. at 285 (noting “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 *Young v. United Parcel Serv., Inc.*, 575 U.S. 206 (2015).

⁸² *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548-549 (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*, 575 U.S. 206; *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. 206.

⁸³ *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).

⁸⁴ *Ensley-Gaines*, 100 F.3d at 1226.

Circuit held that if an employer allowed light duty after on-the-job injuries, it must similarly accommodate pregnant workers.⁸⁵

In *Young*, the Supreme Court addressed the issue of light duty and pregnant workers, clarifying that employers must provide accommodations for pregnant women only in limited circumstances.⁸⁶ As discussed in further detail below, the Court rejected the view that the PDA required employers to extend to pregnant workers *every* accommodation given to others with similar needs. Instead, employers could rely on workers' differing circumstances to justify disparate treatment. Federal courts have wrestled with the application of *Young* 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* Court's 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.

The Court agreed that the PDA requires a court to compare accommodations given pregnant and nonpregnant workers in order 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," 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 it were inappropriate to compare pregnant employees and other accommodated workers.⁸⁹

The Court recognized that UPS's accommodation of other workers who needed light duty raised the possibility that it might be obligated to accommodate the plaintiff. Ultimately, in its six-to-three decision, with Justice Alito concurring, the Court recognized a very narrow accommodation requirement. The Court held that any workplace adjustments required for pregnancy will depend not just on *whether* an employer accommodates other workers, but *why* it does so. 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.⁹⁰ In the Court's view, "similar in . . . inability to work" included inquiry into the *reasons* for that inability.⁹¹

⁸⁵ *Id.*

⁸⁶ *Young*, 575 U.S. at 206.

⁸⁷ *Id.* at 227.

⁸⁸ 42 U.S.C. § 2000e(k).

⁸⁹ *Young*, 575 U.S. at 226.

⁹⁰ *Id.* at 237-241.

⁹¹ *Id.*

To allow a pregnant employee to point to *any* accommodation of another worker as entitling her to light duty, the Court held, would be to grant a sort of “most-favored-nation” status to pregnant women.⁹² 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.”⁹³

Accordingly, while Young could rely on other workers’ accommodations to help establish a prima facie case of discrimination, the Court held that those accommodations did not necessarily show that she was entitled to a pregnancy accommodation.⁹⁴ 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.⁹⁵ 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.⁹⁶ Such reasons, the Court surmised, might show on remand that UPS did not single out pregnant women for exclusion from its accommodation procedures.⁹⁷

In addition to 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. A court should consider “the combined effects of” an employer’s policies and decide if they significantly burdened 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.⁹⁸ A court would then consider “the strength of [the employer’s] justifications for each [accommodation] when combined,”⁹⁹ and the employer’s reasons must be “sufficiently strong” to justify the burden.¹⁰⁰ If the reasons are not sufficiently strong, the Court held, the circumstances may suggest pretext and “give rise to an inference of intentional discrimination.”¹⁰¹ Cost alone, the Court added, would not “normally” meet this test.¹⁰²

The Court remanded Young’s case to the Fourth Circuit to consider the issue.¹⁰³ The Court acknowledged that its assessment of accommodations was “limited to the Pregnancy Discrimination Act context,” but considered it “consistent with our longstanding rule that a plaintiff can use circumstantial proof to rebut an employer’s apparently legitimate,

⁹² *Id.* at 225.

⁹³ *Id.* at 221.

⁹⁴ *Young*, 575 U.S. at 229.

⁹⁵ *Id.* at 218-221.

⁹⁶ *Id.* at 215-216, 218.

⁹⁷ *Id.* at 232.

⁹⁸ *Id.* at 229-230.

⁹⁹ *Id.* at 231.

¹⁰⁰ *Young*, 575 U.S. at 230.

¹⁰¹ *Id.*

¹⁰² *Id.* at 229.

¹⁰³ *Id.* at 232.

nondiscriminatory reasons for treating individuals within a protected class differently than those outside the protected class.”¹⁰⁴

Justice Alito, concurring in the judgment, agreed that a mere antidiscrimination rule would render the second phrase of the PDA, which “raises several difficult questions of interpretation,” superfluous.¹⁰⁵ In Justice Alito’s view, the PDA required courts to compare pregnant workers seeking an accommodation to workers doing identical or similar work.¹⁰⁶ In addition, courts should look to workers “similar *in relation* to the ability to work”—that is, courts must consider the reason for that inability.¹⁰⁷ 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.”¹⁰⁸

In dissent, Justice Scalia concluded that the PDA did not offer pregnant workers protection exceeding that of other protected classes.¹⁰⁹ In amending Title VII, Congress made clear that pregnancy discrimination is sex discrimination, but it did not create, in Justice Scalia’s view, any “freestanding ban on pregnancy discrimination.”¹¹⁰ Accordingly, he concluded, “pregnant women are entitled to accommodations *on the same terms* as other workers with disabling conditions.”¹¹¹ This means that a court must consider the reasons for the employees’ inability to work when comparing pregnant and nonpregnant workers. An employer need not offer pregnant workers the adjustments offered for disability or injury, although it may not “single[] pregnancy out for disfavor” as did the benefits plan in *Gilbert*.¹¹² The PDA’s second phrase serves to add, in Justice Scalia’s judgment, “clarity,” not a new substantive protection.¹¹³ Justice Kennedy joined this dissent and, in a separate dissent, pointed out that at UPS “[m]any other workers with health-related restrictions were not accommodated either.”¹¹⁴

Lower Courts’ Application of *Young*

Under the PDA, plaintiffs may raise both a “traditional” Title VII claim (that an employer imposed some adverse action with a discriminatory motive or harassed an employee) and a PDA-specific claim (that the employer did not accommodate pregnant women as it did others of similar working ability).¹¹⁵ *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 the “legitimate, nondiscriminatory reasons” for the policies are not “sufficiently strong to justify the burden.”¹¹⁶ This second type of claim has proven difficult to

¹⁰⁴ *Id.* at 230.

¹⁰⁵ *Id.* at 233 (Alito, J., concurring).

¹⁰⁶ *Young*, 575 U.S. at 234. (Alito, J., concurring).

¹⁰⁷ *Id.* at 233 (Alito, J., concurring).

¹⁰⁸ *Id.* (Alito, J., concurring).

¹⁰⁹ *Id.* at 244 (Scalia, J., dissenting, joined by Kennedy and Thomas, JJ.).

¹¹⁰ *Id.* (Scalia, J., dissenting).

¹¹¹ *Id.* at 242 (Scalia, J., dissenting).

¹¹² *Young*, 575 U.S. at 246 (Scalia, J., dissenting).

¹¹³ *Id.* at 245 (Scalia, J., dissenting).

¹¹⁴ *Id.* at 251 (Kennedy, J., dissenting).

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

¹¹⁶ *Young*, 575 U.S. at 229 (internal quotation mark omitted); *see also Allen-Brown*, 174 F. Supp. 3d at 475 (applying *Young*).

adjudicate.¹¹⁷ *Young* does not provide a hard-and-fast rule for assessing pregnancy accommodations, given its focus on case-by-case analysis of an employer's accommodations for nonpregnant workers in comparison with pregnant ones. What is clear from *Young* is that employers may sometimes offer light duty or other work modifications to some workers and exclude pregnant workers from those accommodations, at least if pregnant women are not singled out without justification.¹¹⁸

Courts have struggled with application of the *Young* test; as one Eleventh Circuit judge has pointed out, the Supreme Court's decision left "gaps . . . in our understanding of how trial courts should proceed in PDA cases once a prima facie case is made."¹¹⁹ Business leaders, too, note that employers "face great uncertainty" about pregnancy accommodations.¹²⁰

Part of the difficulty arises from the complex facts in *Young*. *Young* pointed to numerous, dissimilar workers whom UPS accommodated, including some accommodated because of the ADA and others (such as those who lost licensure) accommodated for unknown reasons.¹²¹ As a result, lower courts applying *Young* have struggled to determine *which* types of accommodations *matter* in the PDA context.¹²² The ultimate inquiry, however, remains the question of "whether the employer's actions gave rise to valid inference of unlawful discrimination."¹²³

At the very least, *Young* made it harder for pregnant workers to prevail in a claim that they should be accommodated because other workers are accommodated. *Young* overturned the rule, previously applied in some courts, that pregnant workers could show discrimination by identifying other employees, even those injured on the job, as examples of how pregnant workers must be accommodated.¹²⁴ Instead, as the Second Circuit noted, "[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."¹²⁵ In considering the case of a pregnant corrections officer, the Second Circuit went on to hold that she had shown potential discrimination where her employer accommodated some injured employees, but no pregnant workers, with light duty.¹²⁶

¹¹⁷ One commentator, stating that *Young*'s "holding is complicated and not perfectly clear," concluded that employers may be inclined to voluntarily extend pregnancy accommodations, "being safe rather than sorry." Areheart, *supra* note 79 at 1128 n.7.

¹¹⁸ *Young*, 575 U.S. at 229.

¹¹⁹ *Durham v. Rural/Metro Corp.*, 955 F.3d 1279, 1288 (11th Cir. 2020) (Boggs, J., concurring).

¹²⁰ U.S. Chamber of Commerce, 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 14, 2021).

¹²¹ *Durham*, 955 F.3d at 1288 (Boggs, J., concurring); *Lewis v. City of Union City, Georgia*, 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).

¹²² *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).

¹²³ *Durham*, 955 F.3d at 1288 (Boggs, J., concurring) (internal quotation marks and citation omitted).

¹²⁴ *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 218 (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).

¹²⁵ *Legg v. Ulster Cty.*, 820 F.3d 67, 78 (2d Cir. 2016).

¹²⁶ *Id.* at 70-71, 78.

More facts were needed, the court concluded, to decide if the circumstances proved intentional discrimination.¹²⁷

In a similar case, a D.C. district court concluded that a police officer had raised an inference of discrimination because her department awarded light duty to 11 other officers. The department refused her request for light duty after she found it too painful to wear a bulletproof vest while breastfeeding.¹²⁸

For the most part, courts require pregnant workers to identify a very similar situation where the employer accommodated a nonpregnant worker before they will infer discrimination against a pregnant worker. For example, the Eleventh Circuit considered the case of an emergency medical technician whose pregnancy imposed lifting restrictions.¹²⁹ The employer had assigned others with lifting restrictions to light duty, provided they were injured on the job.¹³⁰ The court concluded that although these employees were similar in their ability to work, the lower court should have also considered the employer's *reasons* for accommodating on-the-job injuries.¹³¹ It remanded the case.¹³²

Similarly, in an unpublished, nonprecedential opinion, the Tenth Circuit declined to find 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 plaintiff's doctor put limits on her exposure to chemicals.¹³³ The court did not see a worker with a chemical exposure restriction and one with a lifting restriction as "similar . . . in their ability to work."¹³⁴ A proper comparator would be someone who received the type of accommodation the pregnant employee requested, the Tenth Circuit held, rather than *anyone* who received an accommodation.¹³⁵

In *Santos v. Wincor Nixdorf, Inc.*, the Fifth Circuit considered a project analyst's claim of discrimination after she moved to full-time telework during her pregnancy and faced termination shortly afterward. She claimed that her performance matched that of other employees, proving her pregnancy and accommodation request motivated the termination.¹³⁶ In an unpublished, nonprecedential opinion rejecting her claim, the Fifth Circuit stated that "it is not enough for Santos to compare herself to other employees who did not ask for or receive work-from-home accommodations of any sort."¹³⁷ The PDA required she identify another "employee was similarly unable to work in the office for the same duration and at the same stage of his or her employment."¹³⁸

¹²⁷ *Id.* at 77-78.

¹²⁸ *Allen-Brown*, 174 F. Supp. 3d at 477.

¹²⁹ *Durham*, 955 F.3d at 1282.

¹³⁰ *Id.* at 1283.

¹³¹ *Id.* at 1287.

¹³² *Id.*

¹³³ *Jackson v. J.R. Simplot Co.*, 666 F. App'x 739, 743 (10th Cir. 2016).

¹³⁴ *Id.*

¹³⁵ *Id.* (holding comparators relieved of heavy lifting did not compare well with plaintiff, who needed to avoid chemical exposure).

¹³⁶ *Santos v. Wincor Nixdorf, Inc.*, 778 F. App'x 300, 303-304 (5th Cir. 2019).

¹³⁷ *Id.* at 304.

¹³⁸ *Id.* at 304.

Furthermore, even after workers identify comparable employees, courts will permit employers to justify treating them differently. 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.¹³⁹

What about cases where there are *no* accommodated employees for comparison? All in all, when an employer never (or hardly ever) grants work restrictions for nonpregnant employees, it generally has no obligation to accommodate a pregnant employee.¹⁴⁰ In those circumstances, employers need not change job requirements on account of pregnancy. For example, shortly after *Young*, the Fifth Circuit held in an unpublished, nonprecedential opinion that a nurse fired because of pregnancy-related lifting conditions could not make out a PDA claim, given that the employer did not accommodate any other nurses with lifting restrictions.¹⁴¹ As the Fifth Circuit saw it, *Young* required an employee to show "that the employer did accommodate others 'similar in their ability or inability to work.'"¹⁴² Because the employee could not identify others who received the modification she requested, she could not raise an inference of discrimination against pregnant workers.

The Eleventh Circuit similarly decided in an unpublished, nonprecedential opinion that a hospital did not discriminate in denying a pregnant program director work-from-home privileges when she faced a high-risk pregnancy.¹⁴³ The employee could not identify anyone else who had been granted full-time telework. *Young*, the court held, required that the plaintiff show her employer "did accommodate others similar in their ability or inability to work."¹⁴⁴ Without that, and without any other evidence of "implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action," the worker could not show discriminatory intent.¹⁴⁵

Pregnancy and Disparate Impact Under Title VII

An archetypal Title VII claim alleges disparate treatment—that an employee suffered adverse action or harassment because of a protected characteristic.¹⁴⁶ 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.¹⁴⁷ A disparate impact claimant does not have to show that an employer intended to

¹³⁹ *Legg v. Ulster Cty.*, 820 F.3d 67, 75-78 (2d Cir. 2016).

¹⁴⁰ *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).

¹⁴¹ *Luke*, 747 F. App'x at 980.

¹⁴² *Id.* (quoting *Young*).

¹⁴³ *Everett v. Grady Mem'l Hosp. Corp.*, 703 F. App'x 938, 948 (11th Cir. 2017).

¹⁴⁴ *Id.* (quoting *Young*).

¹⁴⁵ *Id.* (internal quotation marks and citation omitted). As before *Young*, a plaintiff need not draw comparisons with other, nonpregnant employees if there is other circumstantial evidence of discrimination. *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1320 (11th Cir. 2012).

¹⁴⁶ 42 U.S.C. § 2000e-2(a)(1); EEOC Enforcement Guidance, *supra* note 3; *Harris*, 510 U.S. at 21.

¹⁴⁷ *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. A disparate impact theory is distinct from the "significant burden" inquiry announced in *Young*, although, in the dissenters' view,

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.¹⁴⁸ The Court cited precedent establishing disparate impact theory for claims based on race and noted that “a violation. . . can be established by proof of a discriminatory effect.”¹⁴⁹

After the PDA amended Title VII, however, some have argued that the PDA precludes a typical Title VII disparate impact claim because it requires that a pregnant worker be treated the same as others.¹⁵⁰ Thus, the argument goes, similar treatment cannot be a violation even if it has a disparate impact.¹⁵¹ Nevertheless, several courts have considered these claims under the PDA.¹⁵² The Seventh Circuit emphasized that the PDA is “a definitional amendment” providing “no substantive rule to govern pregnancy discrimination.”¹⁵³ Accordingly, it did not undermine any claims that Title VII generally provides. Others point out, in addition, that while the *Young* Court noted the plaintiff had not brought a disparate impact claim (i.e., she alleged that UPS intentionally denied accommodations for pregnant women, not that a neutral policy had a disproportionate effect), it made no suggestion that such a claim is unavailable for pregnant employees.¹⁵⁴

Furthermore, EEOC enforcement guidance endorses application of a disparate impact theory to pregnancy claims. Indeed, the agency states that while disparate impact claims usually require a statistical showing of the harmful effect, “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.”¹⁵⁵

Other Federal Protections for Pregnant Workers

While Title VII and the PDA address certain forms of discrimination based on pregnancy, at least two other federal laws also provide pregnancy-related protections. These protections generally

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. 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.”), 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).

¹⁴⁸ *Nashville Gas Co. v. Satty*, 434 U.S. 136, 144 (1977). In considering *Gilbert*, the Court suggested that any disparate impact based on a benefits program, rather than “employment opportunities or job status” would not support a disparate impact claim.

¹⁴⁹ *Id.* (the court held, however, that a pregnant worker’s claim about sick pay policies must fail under *Gilbert*).

¹⁵⁰ 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 122 at 159; *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 298 n.1 (1987) (White, J., dissenting).

¹⁵¹ *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.”).

¹⁵² *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 420 (1st Cir. 1996); *Scherr v. Woodland Sch. Cmty. Consol. Dist.*, 867 F.2d 974 (7th Cir. 1988); *Germain v. Cty. of Suffolk*, 672 F. Supp. 2d 319, 321 (E.D.N.Y. 2009).

¹⁵³ *Scherr*, 867 F.2d at 978.

¹⁵⁴ *Young*, 575 U.S. at 213; Herbert, *supra* note 150 at 138 (noting the Court’s conclusion that *Young* did not assert a disparate impact claim and that the “Court did not suggest that she could not have brought such a claim.”).

¹⁵⁵ EEOC Enforcement Guidance, *supra* note 3.

involve accommodations for pregnant workers with disabilities—including pregnancy-related medical conditions—and unpaid leave for illness and family care. In general, however, federal law does not require paid leave for pregnant workers or accommodation for pregnant, nondisabled workers. Eligible federal employees are entitled to paid parental leave.¹⁵⁶

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.¹⁵⁷ Most employees may request up to 12 weeks of job-protected leave. The law does not require accommodations for pregnant women in the workplace, however.

Not all workers are eligible for FMLA leave. Among other requirements, an employee must accrue at least a year of service before taking leave, and employers of fewer than 50 employees need not offer FMLA leave.¹⁵⁸ Private- and public-sector employees are covered, but members of the armed forces are not.¹⁵⁹

The ADA, Pregnancy-Related Disabilities, and Accommodations

Title I of the ADA requires that employers reasonably accommodate workers with disabilities.¹⁶⁰ The Rehabilitation Act creates similar obligations for federal employers and federally funded programs.¹⁶¹ The EEOC enforces these provisions.¹⁶² Workers first request a workplace change and engage in an “interactive process” with employers to work out a reasonable accommodation.¹⁶³ If employers fail to make an accommodation where required, employees may file a complaint with the EEOC and, ultimately, sue in federal court.¹⁶⁴ If they prevail on a claim of discrimination or retaliation, employees may seek equitable relief and damages including back pay, attorney’s fees, and punitive damages.¹⁶⁵

¹⁵⁶ 5 U.S.C. § 6382; 5 C.F.R. § 630.1703.

¹⁵⁷ 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.

¹⁵⁸ 29 U.S.C. § 2611(2); nearly a decade ago, it was estimated that some 40 percent of workers are not covered. ABT ASSOCIATES, *FAMILY MEDICAL LEAVE IN 2012: TECHNICAL REPORT* at i, https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/TECHNICAL_REPORT_family_medical_leave_act_survey.pdf. In 2012, 21% of FMLA leave was taken because of a pregnancy or a new child. *Id.* at ii.

¹⁵⁹ 29 U.S.C. §§ 2611(4); 203(e)(2).

¹⁶⁰ 42 U.S.C. § 12112(5).

¹⁶¹ 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).

¹⁶² 42 U.S.C. § 12117(a); EEOC Enforcement Guidance, *supra* note 3. The EEOC’s Office of Federal Operations enforces Rehabilitation Act provisions for federal employees. *Appeals*, EEOC, <https://www.eeoc.gov/federal-sector/appeals> (last visited June 14, 2021).

¹⁶³ 29 C.F.R. § 1630.2(o)(3).

¹⁶⁴ *Filing a Lawsuit*, EEOC, <https://www.eeoc.gov/filing-lawsuit> (last visited June 14, 2021).

¹⁶⁵ *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); 42 U.S.C. § 1981; 42 U.S.C. § 12205; *Remedies for Employment Discrimination*, EEOC, <https://www.eeoc.gov/remedies-employment-discrimination> (last visited June 14, 2021).

While pregnancy is not a disability within the meaning of the ADA,¹⁶⁶ some women are eligible for protection under the ADA for pregnancy-related conditions. A qualifying impairment is one that “substantially limits one or more” of her “major life activities.”¹⁶⁷ The ADA’s application to pregnancy is a relatively recent development in the law. 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.¹⁶⁸ 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 restriction that she requested.¹⁶⁹

In recent years, courts have applied the ADA to cover postpartum depression,¹⁷⁰ recovery from a caesarian section,¹⁷¹ lifting restrictions,¹⁷² and pelvic pain.¹⁷³ Other complications of pregnancy include anemia, sciatica, carpal tunnel syndrome, gestational diabetes, nausea with severe dehydration, abnormal heart rhythms, and swelling.¹⁷⁴ These medical conditions can be disabilities if they substantially affect major life activities.¹⁷⁵ Once a woman shows she is a person with a disability under the ADA, the law requires the employer to engage in an interactive process, if needed, to identify a reasonable accommodation that will allow her to fulfill her essential job duties.¹⁷⁶

The EEOC reports, as examples of potential workplace accommodations for pregnancy disabilities under the ADA and Rehabilitation Act, “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.”¹⁷⁷ Potential ADA accommodations for pregnancy, like other ADA accommodations, are considered on a case-by-case basis, taking into account the worker’s impairment and workplace circumstances.

An employer need not provide an accommodation that imposes an undue hardship on business operations.¹⁷⁸ Undue hardship, too, requires a case-by-case analysis taking into account such factors as the nature and cost of the accommodation, the employer’s resources, and the size and function of its workforce.¹⁷⁹ The employer bears the burden of showing an undue hardship, once the employee identifies a reasonable accommodation.¹⁸⁰ Courts have been reluctant to delineate a

¹⁶⁶ 29 C.F.R. pt. 1630, app. § 1630.2(h).

¹⁶⁷ *Young*, 575 U.S. at 253 (Kennedy, J., dissenting); 42 U.S.C. § 12102(1)(A).

¹⁶⁸ 42 U.S.C. § 12102(4)(A); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008); *Young*, 575 U.S. at 252 (Kennedy, J., dissenting). The expanded disability coverage also applies under the Rehabilitation Act; *Alexander v. Washington Metropolitan Area Transit Authority*, 826 F.3d 544, 547, 423 (D.C. Cir. 2016).

¹⁶⁹ *Young*, 575 U.S. at 252 (Kennedy, J., dissenting).

¹⁷⁰ *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 854 (6th Cir. 2018).

¹⁷¹ *Price v. UTi, U.S., Inc.*, No. 4:11-CV-1428 CAS, 2013 WL 798014, at *2-3 (E.D. Mo. Mar. 5, 2013).

¹⁷² *Heatherly v. Portillo’s Hot Dogs, Inc.*, 958 F. Supp. 2d 913, 921 (N.D. Ill. 2013).

¹⁷³ *McKellips v. Franciscan Health Sys.*, No. C13-5096MJP, 2013 WL 1991103, at *4 (W.D. Wash. May 13, 2013).

¹⁷⁴ EEOC Enforcement Guidance, *supra* note 3; *Pregnancy*, U.S. Dep’t of Health & Human Servs., <https://www.womenshealth.gov/pregnancy/youre-pregnant-now-what/pregnancy-complications> (last visited June 14, 2021).

¹⁷⁵ 42 U.S.C. § 12102(1)(A); EEOC Enforcement Guidance, *supra* note 3; *Hostettler*, 895 F.3d at 854.

¹⁷⁶ *Frazier-White v. Gee*, 818 F.3d 1249, 1257 (11th Cir. 2016); 29 C.F.R. § 1630.2(o)(3).

¹⁷⁷ EEOC Enforcement Guidance, *supra* note 3.

¹⁷⁸ *Terrell v. USAir*, 132 F.3d 621, 624 (11th Cir. 1998).

¹⁷⁹ 42 U.S.C. § 12111(10)(B).

¹⁸⁰ *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 767 (W.D. Mich. 2001); *Severson v. Heartland Woodcraft*,

bright-line rule, holding it “a fact-specific, individualized inquiry.”¹⁸¹ For example, one district court declined to grant defendant summary judgment on a pharmacist’s request for one day of medical leave, suggesting that whether this was an undue burden depended on such factors as whether the employer had a replacement pharmacist.¹⁸² In another case of a schedule change request, in which an orthopedic technician asked for an earlier lunch break to mitigate nausea, a district court in Pennsylvania concluded that a jury could reasonably reject defendant’s claim of undue hardship.¹⁸³

The ADA excludes some employers and employees from coverage. The statute applies to employers of more than 15 employees, and private clubs and religious employers are afforded certain exemptions.¹⁸⁴

Executive Order 13152 and Discrimination Based on Parental Status

In addition to the protections of the PDA, federal executive 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.”¹⁸⁵ The Office of Personnel Management (OPM) administers the order, and agencies generally conduct internal investigation and adjudication of complaints.¹⁸⁶ The order does not require accommodation for parents or create enforcement rights, such as recourse to EEOC adjudication.¹⁸⁷ While the order would not provide protection for pregnancy per se, it does bar discrimination on account of soon-to-be motherhood.¹⁸⁸ An example of discrimination, OPM has explained, includes stereotypes that parents of young children should not work or lack commitment to work.¹⁸⁹

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.”).

¹⁸¹ 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, 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).

¹⁸² LaPorta, 163 F. Supp. 2d at 768.

¹⁸³ Jones v. Children’s Hosp. of Philadelphia, No. CV 17-5637, 2019 WL 2640060, at *11 (E.D. Pa. June 27, 2019). The court applied a state accommodations law requiring the “same framework” as the ADA. *Id.*

¹⁸⁴ 42 U.S.C. § 12111(5); see also *supra* note 26.

¹⁸⁵ Exec. Order No. 13152, *Further Amendment to Executive Order 11478, Equal Employment Opportunity in Federal Government*, 65 Fed. Reg. 26115 (May 2, 2000). A parent includes a biological parent, adoptive parent, foster parent, stepparent, and others. *Id.*

¹⁸⁶ *Id.*; Complainant v. Dep’t of Treasury, EEOC Appeal No. 0120143110, 2015 WL 1635909, at *1 (Mar. 10, 2015) (noting agency’s internal process).

¹⁸⁷ Janice R. LaChance, Director, Office of Personnel Management, Memorandum for Heads of Departments and Independent Establishments 2 (January 19, 2001), <https://www.nrc.gov/docs/ML0103/ML010310035.pdf> (last visited June 14, 2021).

¹⁸⁸ The order also protects anyone actively seeking custody or adoption of a child. Exec. Order No. 13,152, *Equal Employment Opportunity in Federal Government*, 65 Fed. Reg. 26,115 (May 2, 2000).

¹⁸⁹ 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, 858 F. Supp. at 1401; Jacobson, No. CV-98-564-ST, 1999 WL 373790, at *3 (reporting manager asking about employee: “what will her commitment be to the company when she has this baby?”).

State Pregnancy Protections

Many states have employment antidiscrimination laws that mirror Title VII, including antidiscrimination measures applicable to pregnancy. In recent years, several states have passed more protective statutes requiring accommodations for pregnant workers.¹⁹⁰ State regulations, too, may implement these measures.¹⁹¹ Some provisions take into account pregnant workers' needs for rest breaks, seating, leave, or other contingencies.¹⁹² State legislators have typically drafted these statutes as amendments to existing laws barring discrimination in employment based on race, sex, religion, and other factors.¹⁹³

Sometimes the protections are more closely modeled on an accommodation standard for disability law. 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."¹⁹⁴ Other states have similar measures.¹⁹⁵

Some statutes specify presumptively reasonable accommodations. 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 manual labor; or modified work schedules."¹⁹⁶

Proposals to Increase Protections for Pregnant Workers

While the PDA bars employers from singling out pregnant workers for adverse action or harassment, some have long called for additional measures. Proposals generally fall into two

¹⁹⁰ For surveys of state statutes providing accommodations, see Nat'l P'ship for Women & Families, *Reasonable Accommodations for Pregnant Workers: State and Local Laws* (May 2020), <https://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf>; 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).

¹⁹¹ See, e.g., HAW. CODE R. § 12-46-107 (implementing Hawaii's Title VII-like antidiscrimination statute and requiring pregnancy accommodations).

¹⁹² See, e.g., COLO. REV. STAT. §§ 24-34-402.3(4)(b); NEV. REV. STAT. §§ 613.4371. See also W. Va. Code §§ 5-11b-4 (authorizing regulations that "identify some reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions").

¹⁹³ See, e.g., S.C. CODE ANN. § 1-13-80; CONN. GEN. STAT. §§ 46a-60.

¹⁹⁴ KY. REV. STAT. ANN. § 344.030(6)(b).

¹⁹⁵ W. VA. CODE ANN. § 5-11B-5 (5) (stating "'Reasonable accommodation' and 'undue hardship' have the meanings given those terms in section 101 of the Americans with Disabilities Act of 1990"); N.D. CENT. CODE ANN. § 14-02.4-03 (requiring reasonable accommodations for worker "with a physical or mental disability, because that individual is pregnant, or because of that individual's religion").

¹⁹⁶ COLO. REV. STAT. ANN. § 24-34-402.3(4)(b); see also NEV. REV. STAT. § 613.4371; VA. CODE § 2.2-3909.

general categories: (1) job modifications along the lines of the “reasonable accommodations” provided for disability and (2) pregnancy leave entitlements.¹⁹⁷

Some have criticized the PDA as insufficient because of its narrow focus on nondiscrimination. Treating pregnant women the same as other workers, they argue, does not help pregnant workers retain employment. An antidiscrimination regime mandating equal treatment, some contend, ignores the fact that only women become pregnant, and so face “specific and predictable obstacles to achieving security in the workplace.”¹⁹⁸

Others have criticized the PDA because of the burdens it places on employers. At least as currently interpreted by the Supreme Court in *Young*, the procedures for comparing pregnant workers to those similarly situated in their working ability are difficult to apply and unpredictable.¹⁹⁹ Under this case law, the statute may not give employers clear guidelines to know whether accommodations are required. Thus, employers may expend time and resources in providing accommodations the law does not require.²⁰⁰

Still others may argue that providing more stringent workplace protections for pregnant workers may have unintended consequences. Burdening employers—whether through the PDA or enhanced pregnancy protections—may negatively affect women’s employment, some argue. Employers may avoid hiring women of childbearing age because of the perceived costs.²⁰¹ Even if an employer is willing to make informal accommodations for pregnant workers, some point out, they may avoid hiring where there is fear of a legal claim to accommodations.²⁰² Employers’ concerns likely arise not only from the potential cost of accommodations, but from potentially greater costs of litigation.²⁰³

Pregnancy Accommodations

Among models for expanding pregnancy protections beyond nondiscrimination, many point to the ADA as an example of an accommodations regime.²⁰⁴ Some have proposed drawing on ADA principles to expand current legislation and require accommodations for pregnancy.²⁰⁵ The ADA,

¹⁹⁷ See Areheart, *supra* note 79 at 1128-30; Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2197 (1994).

¹⁹⁸ Issacharoff & Rosenblum, *supra* note 197 at 2158; see also Siegel, *supra* note 190 at 988.

¹⁹⁹ See *Durham v. Rural/Metro Corp.*, 955 F.3d 1279, 1288 (11th Cir. 2020) (Boggs, J., concurring).

²⁰⁰ Areheart, *supra* note 79 at 1128 n.7 (observing that, given the unpredictability, employers may voluntarily extend accommodations “as a matter of being safe rather than sorry”).

²⁰¹ *Id.* at 1159, 170-71 (acknowledging this difficulty and advocating parental accommodations that include fathers); see also Thomas DeLeire, *The Unintended Consequences of the Americans with Disabilities Act*, 23 REGULATION, no. 1, at 22-23 (2000).

²⁰² Areheart, *supra* note 79 at 1157-59 (noting employers are “the constituency that matters most when it comes to work,” and that they view legal obligations negatively); see also DeLeire, *supra* note 201 at 22-23 (noting mandated disability accommodations may dissuade hiring).

²⁰³ See DeLeire, *supra* note 201 at 23 (noting that passage of ADA may have led firms to reduce hiring of disabled workers because of high litigation costs); *EEOC Litigation Statistics, FY 1997 through FY 2019*, EEOC, <https://www.eeoc.gov/statistics/eeoc-litigation-statistics-fy-1997-through-fy-2019> (last visited June 14, 2021) (tabulating monetary relief obtained in EEOC’s ADA enforcement).

²⁰⁴ State-law pregnant workers protections often require accommodations, similar to those used for disability. See *supra* notes 194-195. Scholars and advocates often point to the ADA as a starting point or a model for potential legislation. See *infra* notes 205-208.

²⁰⁵ Areheart, *supra* note 79 at 1139 (citing support of the ADA as a model, but pointing out stigmatic harm of equating pregnancy with discrimination); Pregnant Workers Fairness Act, S. 1512, 114th Cong. (2015); H.R. 2654, 114th Cong. (2015); H.R. 2694, 116th Cong. (2020); H.R. 1065, 117th Cong. (2021); S. 1486, 117th Cong. (2021); Jeannette Cox,

as mentioned above, allows workers with a disability to request a reasonable modification in workplace conditions or rules, provided they can carry out the essential duties of the position.²⁰⁶ The employer and employee work together to identify an appropriate accommodation, and the employer need not provide one that poses an undue hardship.²⁰⁷ Job modification, in this model, would be available to all pregnant women, even those who do not qualify as having a disability under the ADA.²⁰⁸

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."²⁰⁹ In practice, the provision has enabled employees to alter schedules to avoid Sabbath work, wear religious clothing on the job, or seek exemptions from grooming rules—although whether a request is granted depends on the circumstances, and the requests are often denied.²¹⁰ An employer could generally deny a request for scheduling a Sabbath day off, for example, if the change would contravene a coworker's productivity or seniority-based scheduling rights.²¹¹ Courts have held that an employer suffers undue hardship when required to bear "more than a *de minimis* cost" or imposition upon coworkers for religious accommodations.²¹²

Models for Pregnancy-Related Leave

Disability and religious accommodations are not the only models for constructing possible pregnancy protections. Some commenters have drawn parallels with state and federal measures providing job-protected leave from the workplace to support endeavors like voting, jury duty, court appearances, and military service.²¹³ These protections, some contend, may provide paradigms for protecting employment while enabling pregnancy and child care.²¹⁴

Many federal and state laws offer analogous protection for workers' participation in various socially beneficial undertakings. For example, many give employees a right to leave for participation in the legal system. When called for jury service, workers often have the right to

Pregnancy As "Disability" and the Amended Americans with Disabilities Act, 53 B.C. L. REV. 443, 449 (2012).

²⁰⁶ See *supra* notes 170-178 and accompanying text.

²⁰⁷ 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9.

²⁰⁸ Cox, *supra* note 205 at 449-51.

²⁰⁹ 42 U.S.C. § 2000e(j).

²¹⁰ EEOC v. Reads, Inc., 759 F. Supp. 1150, 1161 (E.D. Pa. 1991); Hudson v. W. Airlines, Inc., 851 F.2d 261, 266 (9th Cir. 1988); Gadson v. Alabama Dep't of Corr., No. 2:13-CV-105-VEH, 2013 WL 5230241, at *2 (N.D. Ala. Sept. 17, 2013). As these cases illustrate, whether an accommodation is an undue burden takes into account collective bargaining agreements, other employees' seniority rights, cost, and other considerations.

²¹¹ Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 146 (5th Cir. 1982).

²¹² Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

²¹³ Bryce Covert, *The American Workplace Still Won't Accommodate Pregnant Workers*, NATION (Aug. 12, 2019), <https://www.thenation.com/article/pregnant-workers-discrimination-workplace-low-wage> (last visited June 14, 2021) (quoting Gillian Thomas of the American Civil Liberties Union as asking employers "If this were not a pregnancy but if it were jury duty, what would you do?").

²¹⁴ 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, 73, 135 (2010) (noting 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").

time off, sometimes with pay.²¹⁵ Federal law bars employers from discharging employees for federal jury service.²¹⁶ 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.²¹⁷

Almost all states also bar an employer from firing an employee because of jury service, and many go further—requiring paid leave for time served as a juror.²¹⁸ Other state laws restrict the working hours an employer can require during jury service or bar employers from requiring jurors use sick leave or vacation to cover their service.²¹⁹ Most states also have rules that facilitate workers’ court participation more broadly, requiring leave or at least nondiscrimination on account of an employee’s taking time off to appear as a witness.²²⁰

Perhaps the most comprehensive of these employment accommodation schemes is federal legislation protecting military reservists, the Uniformed Services Employment and Reemployment Rights Act (USERRA). The statute provides antidiscrimination, antiretaliation, and reemployment rights designed to permit military reserve members to complete periodic training and, when needed, extended deployment.²²¹ One observer characterized the statute as “possibly the most employee-friendly labor/employment law in effect today.”²²² 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.”²²³

Employers cannot fire, refuse to hire, or refuse to promote a servicemember because of his or her past, present, or future service obligations. In applying the statute’s antidiscrimination provisions, courts turn to analyses of animus and causation used in Title VII and other, similar antidiscrimination statutes; indeed, the Supreme Court has assessed the statute as “very similar to Title VII.”²²⁴ USERRA goes further than antidiscrimination, however. Its reemployment provisions ensure that servicemembers can return to work after training or deployment. The

²¹⁵ See, e.g., ALA. CODE § 12-16-8; CAL. LABOR CODE § 230; 705 ILL. COMP. STAT. ANN. 305/4; N.Y. JUD. LAW § 519.

²¹⁶ 28 U.S.C. § 1875.

²¹⁷ *Policy Data, Oversight: Pay & Leave*, Office of Personnel Management, <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/court-leave/> (last visited June 14, 2021); 20 C.F.R. § 615.8(g)(3)(i)(A)).

²¹⁸ Molly Weston Williamson, *The Meaning of Leave: Understanding Workplace Leave Rights*, 22 N.Y.U. J. LEGIS. & PUB. POL’Y 197, 201 (2020) (“Every state except Montana provides some type of specific workplace protection for those serving jury duty.”); Runge, *supra* note 214 at 462 (2012); 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 214 at 462.

²¹⁹ Williamson, *supra* note 218 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).

²²⁰ Williamson, *supra* note 218 at 201 (stating 33 states mandate leave rights for witnesses, crime victims, or their families); *supra* note 214 at 462; Matt Brown, *Updates in Employment Law Leave in South Carolina*, S.C. LAW., at 44, 47 (January 2018). For a list of state laws enabling victims of domestic violence to seek time off for legal matters, see LEGAL MOMENTUM, STATE LAW GUIDE: EMPLOYMENT RIGHTS FOR VICTIMS OF DOMESTIC OR SEXUAL VIOLENCE, <http://www.legalmomentum.org/assets/pdfs/employment-rights.pdf>.

²²¹ 38 U.S.C. § 4311(a).

²²² Kenan Torrans, *A Primer on the Uniformed Services Employment and Reemployment Rights Act*, 47 MD. B.J., at 12 (March/April 2014).

²²³ 38 U.S.C. § 4301(a)(1).

²²⁴ *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011).

statute allows for leave without pay during military service. Upon return, a servicemember receives the same status, benefits, and pay at the rate previously earned.²²⁵ In addition, the servicemember is entitled to the same promotion opportunities or pay increases available to those who did not take leave for military duties and accrues seniority during deployment.²²⁶ Employers can escape this obligation, however, if their “circumstances have so changed as to make such reemployment impossible or unreasonable.”²²⁷

In addition to USERRA’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.²²⁸

Aside from military and court service, state legislatures have mandated leave for many other tasks they seek to enable. Bone marrow or organ donors often receive time off for this endeavor.²²⁹ Some states provide leave for those who volunteer as emergency or disaster service workers.²³⁰ Voting, too, is a common source of leave entitlement, mandated in at least 30 states.²³¹ 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.

Recent Legislative Proposals: The Pregnant Workers Fairness Act and the Equality Act

Against this background, legislators have proposed various legislative reform efforts for pregnancy accommodations.²³² Most notably, the House of Representatives passed the Pregnant Workers Fairness Act (PWFA) in spring 2021.²³³ The proposal largely incorporates the accommodation requirements of the ADA, calling for work adjustments unless they result in “undue hardship” to an employer.²³⁴ It aims to “promote women’s health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition.”²³⁵ Like the ADA, it obliges employers to engage in an interactive process to determine appropriate accommodations.²³⁶

²²⁵ 38 U.S.C. § 4313(a). *See also* Torrans, *supra* note 222 at 12, 15.

²²⁶ 38 U.S.C. § 4313. *See also* Williamson, *supra* note 218 at 216 (noting this accrual of seniority during leave is unusual in employment law, “used essentially exclusively in the context of military service”).

²²⁷ 38 U.S.C. § 4312(d)(1)(A).

²²⁸ Williamson, *supra* note 218 at 202.

²²⁹ Kulow, *supra* note 218 at 95.

²³⁰ *Id.*

²³¹ *Id.* at 95 n.55.

²³² H.R. 2417, 115th Cong. (2017); S. 1101, 115th Cong. (2017); Nancy Gunzenhauser Popper, *House Passes Pregnant Workers Fairness Act*, NAT. L. REV. (Oct. 7, 2020), <https://www.natlawreview.com/article/house-passes-pregnant-workers-fairness-act> (last visited June 14, 2021).

²³³ Pregnant Workers Fairness Act, H.R. 1065, 117th Cong. (2021); *see also* S. 1486, 117th Cong. (2021).

²³⁴ H.R. 1065, 116th Cong. §§ 2(1), 5(7).

²³⁵ *Id.*

²³⁶ *Id.* § 5(7).

The PWFA, however, differs from the ADA in several notable ways. While the ADA requires that an employee be able to perform the essential functions of her job, the PWFA would protect an employee who cannot perform an essential function if that inability (1) is temporary, (2) will be eliminated in the “near future,” and (3) can be reasonably accommodated.²³⁷ This provision has come under criticism, with opponents pointing out that it goes much further than the ADA in requiring employers to retain a worker who cannot complete some job functions.²³⁸ The PWFA also directly addresses the potential concern of mandatory leave, requiring that employers not force a qualified employee to take leave if another accommodation would suffice.²³⁹

In addition, a pregnant worker’s impairment under the PWFA need not meet the definition of a “disability” under the ADA before she may claim protection.²⁴⁰ While there is a substantial body of precedent defining the ADA’s standard for disability, how this new standard would play out is hard to predict.²⁴¹

The PWFA would apply to employers of more than 15 workers and would be enforced by the EEOC, which would issue regulations providing examples of reasonable accommodations.²⁴² The bill would waive sovereign immunity for state employers.²⁴³ Remedies include compensatory damages, punitive damages, and attorneys’ fees.²⁴⁴ Like many other antidiscrimination measures, the PWFA would bar retaliation against a worker who has requested an accommodation.²⁴⁵ Unlike Title VII, the bill would not include an exemption for religious employers.²⁴⁶

All in all, the proposal would significantly expand job modifications for pregnant women. Unlike the ADA, it accounts for pregnancy-related impairments’ temporary nature, requiring workers be permitted provisional job changes to essential duties. And it differs from the PDA and Title VII’s antidiscrimination mandate, separating pregnancy from the equal treatment regime applicable to other forms of sex discrimination.

Besides the PWFA, the Equality Act passed by the House in early 2021 also includes provisions addressing pregnancy.²⁴⁷ The bill includes provisions defining pregnancy discrimination as sex discrimination, and further addresses discrimination against breastfeeding women.²⁴⁸ It would broaden pregnancy antidiscrimination law to include facilities and programs outside of Title VII’s jurisdiction, employment.²⁴⁹

²³⁷ *Id.* § (5)(6).

²³⁸ As one witness in committee hearing on a prior version of the bill put it, a worker might “report for work but not do the job.” H. REP. NO. 116-494 at 51 (2020) (report, together with minority views from the Committee on Education and Labor to accompany 116 H.R. 2694, 116th Cong.) (quoting labor lawyer Ellen McLaughlin).

²³⁹ H.R. 1065, 116th Cong. § 2(4).

²⁴⁰ *Id.* § 5(5).

²⁴¹ H. REP. NO. 116-494 at 53 (quoting labor lawyer Ellen McLaughlin).

²⁴² H.R. 1065, §§ 3(1), 4, 5(2)(B)(i).

²⁴³ *Id.* § 6.

²⁴⁴ *Id.* § 3.

²⁴⁵ *Id.* § 2(5).

²⁴⁶ *See* H. REP. NO. 116-494 at 57 (2020).

²⁴⁷ H.R. 5, 117th Cong. (2021).

²⁴⁸ *Id.* § 2.

²⁴⁹ *Id.* §§ 3, 4, 6, 9; *See also* S. 393, 117th Cong. (2021), § 2.

Conclusion and Considerations for Congress

A cluster of federal statutes currently protects pregnant workers. As it stands, Title VII, including its PDA provisions, primarily offers antidiscrimination protection against bias—barring employers from using pregnancy in employment decisions.²⁵⁰ The FMLA and the ADA provide affirmative benefits for some pregnant workers, most notably unpaid leave for eligible employees and accommodations (including job modifications where reasonable) for pregnancy-related disability.²⁵¹

Over the years, Congress has expanded pregnant workers' protections. It added the PDA to Title VII to clarify its application to pregnancy, and it broadened the definition of disability within the ADA to include temporary disabilities, enhancing protection for pregnant employees (among others).²⁵²

Courts have also played a role in shaping pregnancy protections. The Supreme Court's decision in *Gilbert* motivated passage of the PDA.²⁵³ More recently, the High Court's application of Title VII's PDA provisions in *Young* raises questions about whether and when pregnancy accommodations are required under current law, at least in situations where employers accommodate other employees.²⁵⁴ While *Young* established that an employer who accommodates nonpregnant employees may be obligated to similarly accommodate pregnant women, the Court did not develop a clear test for when this obligation arises. The precedent's call for case-specific analysis makes it difficult to define pregnant workers' protections and their employers' obligations.

In the face of piecemeal legislation and complicated judicial administration, some have called for more explicit pregnancy protections, such as accommodations for nondisabling pregnancy-related conditions or expanded leave. Several states have passed pregnancy accommodations laws to supplement existing antidiscrimination measures.²⁵⁵ Federal proposals have included the PWFA's proposed accommodations requirements modeled on the ADA.²⁵⁶

In the future, if it seeks to enhance or consolidate protections, Congress may choose to amend Title VII, the ADA, or the FMLA. Potential changes include clarifying which workers qualify as similar in their ability to work when considering accommodation requests under the PDA. Congress could expand the FMLA to cover pregnant workers currently excluded.

Another option might be to implement a separate accommodation regime modeled on the ADA. The PWFA, passed by the House in 2021, takes this approach. Because it requires case-by-case analysis of the worker's needs and the potential hardship on a particular employer, some may see this model as the most flexible. It may come with uncertainty, too, as a common pregnancy-related modification may be reasonable in one workplace and not another. Congress might also

²⁵⁰ See *supra* notes 5-26 and accompanying text.

²⁵¹ See *supra* notes 157-178 and accompanying text.

²⁵² 42 U.S.C. § 2000e(k); *id.* § 12102(4)(A); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008); *Young*, 575 U.S. at 252 (Kennedy, J., dissenting); *supra* notes 17-21 and 168-183 and accompanying text.

²⁵³ 42 U.S.C. § 2000e(k); *supra* notes 17-21.

²⁵⁴ See *supra* notes 87-145 and accompanying text.

²⁵⁵ See *supra* notes 190-195 and accompanying text.

²⁵⁶ Pregnant Workers Fairness Act, H.R. 1065, 117th Cong. (2021); see also S. 1486, 117th Cong. (2021).

consider enumerating, as some state laws do, presumptively reasonable pregnancy accommodations.²⁵⁷

Alternatively, federal and state legislation in other contexts unrelated to disabilities or discrimination may provide models for enacting pregnancy-specific job protection and leave options.

In any of these measures defining pregnancy protections, Congress may delineate covered employers, deciding whether to exclude (as some antidiscrimination laws do) smaller employers, religious employers, or certain government employers.²⁵⁸ Employee eligibility may also be a consideration, as Congress could require minimum tenure or full-time status as a prerequisite.

Author Information

April J. Anderson
Legislative Attorney

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²⁵⁷ See, e.g., COLO. REV. STAT. ANN. § 24-34-402.3 (4)(b); NEV. REV. STAT. § 613.4371; VA. CODE § 2.2-3909. The PWFA calls for the EEOC to promulgate examples of reasonable accommodations. H.R. 1065, 117th Cong. § 4.

²⁵⁸ See *supra* notes 24-26 and accompanying text.