

An Introduction to the Pregnant Workers Fairness Act (PWFA)

Center for WorkLife Law and ACLU in partnership with NELA

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Final PWFA votes: **House vote 315-101 + Senate vote 73-24**

Congressional Champions

- Sen. Bob Casey (D-PA)
- Sen. Patty Murray (D-WA)
- Rep. Nadler (NY)
- Rep. Lucy McBath (GA)
- Democratic Women's Caucus
- Sen. Bill Cassidy (R-LA)
- Sen. Richard Burr (-NC)
- Rep. John Katko (NY)
- Rep. Herrera-Beutler (WA)

Leadership

- Speaker Nancy Pelosi, Majority Leader Chuck Schumer, Leader Mitch McConnell

Path to Passage – Strategy #1: Education on the Need for PWFA

Pregnancy Changes You!

- In the early months: fatigue, nausea
- In the later months: center of gravity shifts, weight gain, pain, difficulty breathing and moving
- Pregnancy complications

Education on the Need for PWFA (cont.)

Listen to Real Women's Stories

- Michelle, an EMT in Alabama with a lifting restriction
- Hilda, in NY who worked as a cashier and needed a stool
- Tanja, a firefighter in FL, needed light duty to avoid hazardous call
- Diana, a letter carrier in Minnesota, with a heat restriction
- Tesia, a retail store employee in Minnesota, who needed to carry bottled water

Estimated 250,000 denied accommodations annually & 2.8 million could benefit

Education on the Need for PWFA (cont.)

Check your handouts for a more extensive list of needs and accommodations:

1. chair or stool to sit on
2. bottle of water or snack at workstation
3. longer breaks
4. workstation near restroom
5. assistance with lifting
6. change in duties to avoid tasks such as climbing ladders
7. light duty
8. change in schedule to permit doctor's visits or to eliminate overtime
9. leave or reduced hours
10. transfer to a less hazardous position
11. work from home
12. break time and space for expressing milk

Education on the Need for PWFA (cont'd)

Impact of denying accommodations

- Refusing to accommodate leads to negative health outcomes:
 - preterm birth
 - miscarriage
 - stillbirth
- Termination or unpaid leave
 - immense stress and anxiety which also leads to negative health outcomes
- U.S. has one of the highest maternal mortality rates among developed countries

Education on the Need for PWFA (cont'd)

Current Law Wasn't Working

- PDA, ADA, FMLA, state anti-discrimination laws failing
- Impact of *Young v. United Parcel Serv. Inc.* disappointing
 - Two-thirds of plaintiffs post-*Young* lost their cases
(*Long Overdue*, *A Better Balance*)

PWFA Framework Already Working

- 30 states passed state-specific laws

Path to Passage – Strategy #2: **Create a Powerful Coalition with Business Support**

Key business groups supported PWFA:

- U.S. Chamber of Commerce
- National Retail Federation
- Society of Human Resource Management
- National Association of Manufacturers
- Women’s Chamber of Commerce

Create a Powerful Coalition with Business Support (cont'd)

Open Letter in Support of the Pregnant Workers Fairness Act From Leading Private-Sector Employers

February 14, 2022

Dear Members of Congress,

Women's labor force participation is critical to the strength of our companies, the growth of our economy and the financial security of most modern families. The private sector and our nation's elected leaders must work together to ensure that working women and families have the protections and opportunities they need to participate fully and equally in the workplace. The leading companies and associations listed below from across states and industries have come together in support of pregnant workers and their families by calling on Congress to pass the bipartisan Pregnant Workers Fairness Act (H.R. 1065/S. 1486) without delay.

Signed:

Adobe | San Jose, CA
Amalgamated Bank | New York, NY
AnitaB.org | Belmont, CA
Atlassian | San Francisco, CA
BASF Corporation | Florham Park, NJ
Care.com, Inc. | Waltham, MA
Chobani | Norwich, NY
Cigna Corp. | Bloomfield, CT
Dow | Midland, MI
Eventbrite | San Francisco, CA
Expedia Group | Seattle, WA

Facebook | Menlo Park, CA
Gap Inc. | San Francisco, CA
H&M USA | New York, NY
HP | Palo Alto, CA
ICM Partners | Los Angeles, CA
J. Crew | New York, NY
Johnson & Johnson | New Brunswick, NJ
L'Oréal USA | New York, NY
Levi Strauss & Co. | San Francisco, CA
Madewell | Long Island City, NY
Mastercard | Purchase, NY

Microsoft Corporation | Redmond, WA
Navient, LLC. | Wilmington, DE
National Association of Manufacturers | Washington, DC
Patagonia | Ventura, CA
PayPal | San Jose, CA
Pinterest | San Francisco, CA
Postmates | San Francisco, CA
Salesforce | San Francisco, CA
Society of Women Engineers | Chicago, IL
Spotify | New York, NY

Square, Inc. | San Francisco, CA
Sun Life | Wellesley, MA
The Pill Club | San Mateo, CA
Thinx | New York, NY
Tilt | Fort Collins, CO
U.S. Women's Chamber of Commerce | Washington, DC
Verizon | New York, NY
Yum! Brands, Inc. | Louisville, KY
Zendesk | San Francisco, CA

The Sustainable Food Policy Alliance:

Danone North America | White Plains, NY
Mars, Incorporated | McLean, VA
Nestlé USA | Arlington, VA
Unilever United States | Englewood Cliffs, NJ

Leader Schumer: Pass the Pregnant Workers Fairness Act Before It's Too Late!



Week of Action
November 14th–18th
#ProtectPregnantWorkers



Providing Urgent Maternal Protections for Nursing Mothers Act

The PUMP Act:

- Passed 276-149 in the House in 2021, 92-5 in the Senate in 2022.
- Break Time for Nursing Mothers provision of Affordable Care Act inadvertently excluded 9 million women of childbearing age from coverage and was unenforceable in court.
- The PUMP Act closes these gaps, making the law applicable to almost all employees and giving aggrieved employees the right to sue for meaningful monetary damages.

Keep an eye out for upcoming an upcoming webinar from this group on the PUMP Act.

Overview of the Pregnant Workers Fairness Act (PWFA)

- ❖ Goes into effect on June 27, 2023
- ❖ Similar framework to the ADA
- ❖ EEOC will issue regulations by December 27, 2023
- ❖ Covered entities:
 - Private employers of 15 or more employees
 - Federal, state, and local gov't employers
 - Employment agencies
 - Labor organizations


It is an unlawful employment practice to ...

“not make **reasonable accommodations** to **the known limitations** related to the **pregnancy, childbirth, or related medical conditions** of a **qualified employee**, unless [the employer] can demonstrate that the accommodation would **impose an undue hardship**”

“not make reasonable accommodations to the known physical or mental limitations, whether permanent or temporary, of a qualified individual who can demonstrate that the accommodation would impo

ncy,
] can

Means the same thing as under the ADA



**Pregnancy, Childbirth, and Related Medical Conditions:
Common Workplace Limitations and Reasonable Accommodations Explained**

Working during pregnancy is generally safe.¹ Many pregnant and postpartum employees need work accommodations, whether because of risks posed by their particular job duties, because of medically-complicated pregnancies, or simply because of the normal physical changes that occur during pregnancy. Employees may also have work limitations resulting from related medical conditions like lactation, abortion, miscarriage, pregnancy loss, fertility treatment, and menstruation. This guide provides an overview of these workplace needs for non-medical professionals. It may be particularly useful to lawyers and HR professionals.

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Questions? For information about the laws that give rights to employees who need accommodations for pregnancy and related conditions, contact the Center for WorkLife Law at 415-565-4640 or info@worklifelaw.org.

¹ Am. Coll. of Obstetricians and Gynecologists, No. 733, *Employment Considerations During Pregnancy and the Postpartum Period*, in 131 *Obstetrics & Gynecology* 115-23 (2018), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/04/employment-considerations-during-pregnancy-and-the-postpartum-period>.

1

“not make reasonable accommodations to **the known limitations** related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship”

**Mental or physical condition that the employee has
communicated to the employer
(Need not be a disability)**

“not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship”

- Language from the Pregnancy Discrimination Act (PDA), includes:
 - Normal physical changes of pregnancy and childbirth
 - Complications of pregnancy and childbirth
 - Lactation
 - Abortion
 - Miscarriage and pregnancy loss
 - Fertility treatment
 - Menstruation

“not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of **a qualified employee**, unless [the employer] can demonstrate that the accommodation would impose an undue hardship”

- An employee or applicant who can perform the essential functions of the job, either with or without an accommodation
- BUT, an employee who CANNOT perform essential functions is still qualified IF
 - ◆ The inability to perform the essential functions is temporary,
 - ◆ The essential functions can be performed in the near future, and
 - ◆ The inability can be reasonably accommodated

“not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless [the employer] can demonstrate that the accommodation would **impose an undue hardship**”

Means the same thing as under the ADA
(significant difficulty or expense)

The Interactive Process

- ❖ Employer and Employee will typically use the interactive process to identify an appropriate reasonable accommodation, unless the accommodation is obvious and no further discussion is necessary
- ❖ Has the same meaning as under the ADA

Other Unlawful Employment Practices

- ❖ Forcing an employee to accept an accommodation, unless one has been requested and the employer has engaged in the interactive process
 - BUT employee is not entitled to “first choice” accommodation

- ❖ Forcing an employee out on leave (whether paid or unpaid) if they don’t want to take leave and another responsive accommodation exists

- ❖ Using retaliation or coercion against an employee or other individual related to:
 - Requesting or using an accommodation
 - Opposing unlawful practices

Remedies: Mirror Title VII & Other Anti-discrimination Laws

- ❖ Administrative exhaustion required
 - EEOC or the relevant government employee's EEO office

- ❖ Remedies for employees covered by Title VII
 - Compensatory & punitive damages (except public employers)
 - Damages caps apply
 - Attorneys fees and costs

- ❖ Good faith defense to damages: “Good faith efforts, in consultation with the employee . . . to identify and make a reasonable accommodation that would provide [the] employee with an equally effective opportunity.”

A few more things to know about PWFA:

- ❖ Does not limit state/federal laws that provide greater rights

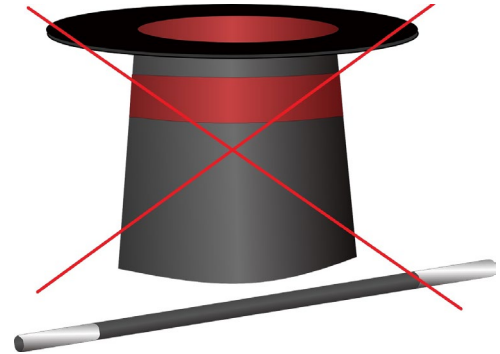
- ❖ Employer-provided health plans cannot be required to cover any particular treatment or procedure

- ❖ Adopts Title VII's exception for religious employers, shielding them from *religious discrimination* claims for favoring co-religionists (Section 702)
 - BUT federal appellate courts unanimously hold: religious employers cannot discriminate on basis of sex (which includes pregnancy)

Helping Employees Get Accommodations under the PWFA

Requesting an Accommodation

- No Magic Words
- Make the limitation “known”
 - Does not need to be detailed
 - Example: “I have swollen feet and that makes it hard to stand.”
- Employee or representative tells employer



Requesting Accommodation (cont.)

- Identify link to pregnancy, childbirth, or related medical condition
- Examples:
 - “Due to my pregnancy”
 - “Following my miscarriage”
 - “Because I recently gave birth”
 - “Related to my gestational diabetes”



Requesting Accommodation (cont.)

- Writing not required
- Writing strongly suggested
 - Email
 - Request form
 - Doctor's note



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Accommodation Request

You may request changes that you need at work to meet your health needs related to your pregnancy, childbirth, lactation, or related medical conditions. Changes made to your work duties, space, schedule, or other conditions, which are provided to meet your health needs, are called reasonable accommodations. It is not necessary for you to submit your request for a reasonable accommodation in writing, but doing so will make it easier for your employer to work with you to provide an accommodation that meets your needs.

Today's date: _____
Name: _____
Department: _____
Email: _____
Phone: _____

What limitation(s) do you have?
(Limitations can be mental or physical conditions, or environmental conditions that could be harmful to you. They can be common conditions related to pregnancy, such as morning sickness, swelling, fatigue, and back aches. They can also include less common conditions such as a high-risk pregnancy, gestational diabetes, and placenta previa. They can also include working conditions, such as being near chemicals or having to climb ladders.)

Is your limitation related to pregnancy, childbirth, lactation, or a related medical condition? ___yes ___no

What accommodation(s) are you requesting?
(You do not have to request a specific accommodation, but if you have some suggestions for options that will meet your health needs while you continue to work, it may make it easier to identify an accommodation.)

Please provide any additional information you think would be helpful to your employer in deciding an appropriate accommodation.

Requesting Accommodation (cont.)



- Specific accommodation request not required
- Specific accommodation request will speed up the process and improve chances of getting what want

Brainstorming Accommodations

- Source for ideas: handouts
 - Pregnancy Accommodations Explanation contains suggestions for common conditions
 - AskJAN (the Job Accommodation Network) - link on Resources page

Brainstorming Accommodations (cont.)

- One approach: Think about goal, not job description
- Example: description says “Carry boxes from point A to B”
 - focus on the objective – moving boxes – rather than the word “carry”
 - Boxes can be moved by dolly or cart, or with assistance of workers



Brainstorming Accommodations (cont.)

- If not possible: Suggest restructuring job
 - If carrying is non-essential, suggest removing it
 - If essential, suggest removing it
 - PWFA: workers are still “qualified” if their inability to do an essential function is temporary and inability can be accommodated
 - Suggest trading tasks with co-worker (e.g., co-worker carries, employee does co-worker’s paperwork) or changing job duties to ones that employee can do (e.g., all seated tasks, employer divvies up other tasks among other employees)

Brainstorming Accommodations (cont.)

- If still not possible: suggest
 - light duty
 - transfer to another position
- Leave is a last resort, only if there is no other way to accommodate

Brainstorming Accommodations (cont.)

- Make sure that suggested accommodation is possible. Examples:
 - Move to another office: make sure there is a vacancy
 - Transfer to another position: make sure there is a vacancy and employee is qualified

Brainstorming Accommodations (cont.)

- Strengthens employee's position to have several alternatives
 - Increases chance of reaching agreement
 - Could be evidence that there were several ways employee could have been accommodated
 - Repeated denial could be evidence of lack of good faith

Interactive Process

- Like ADA, use an interactive process to determine an appropriate reasonable accommodation
 - Informal
 - Varies with circumstances
 - Where need and accommodation are obvious (chair, breaks, water bottle), there will be little need for discussion



Interactive Process (cont.)

- Employer may ask for medical certification if accommodation need is not obvious
 - Under ADA, only limited medical information (job-related, limited to business necessity)
 - Employer may use a medical certification form
 - Doctor's note: see WLL's note writing tool on the pregnantatwork.org website (Resources handout)



Interactive Process (cont.)

- If employer rejects employee's suggested accommodations (or employee doesn't make any), employer should offer accommodation it can make
 - Like ADA, employee not entitled to preferred accommodation but employer should consider it
- Employer cannot force employee to accept accommodation unless it has engaged in the interactive process

Interactive Process (cont.)

- If employer rejects suggestions, see if other employees are receiving accommodations like what employee requested
 - Shows reasonableness
 - May be comparative evidence for other statutes



Image by Freepik

Note about Accommodations

- Suggestion for employers: respond quickly, look for interim accommodations while engaging in the interactive process so employee can continue to work safely
- Delay in accommodating
 - Could constitute denial
 - Could be evidence of lack of good faith

WLL Hotline

- Helps workers, particularly low-wage workers
 - Legal rights info
 - Accommodation ideas
 - Negotiation suggestions
 - Strategies for handling denials
 - Services in English and Spanish; other languages on request



Image by sergiorjoes on Freepik

Hotline@worklifelaw.org OR 415-703-8276 (leave message)

PWFA's Interaction with Other Statutes

- ❖ Pregnancy Discrimination Act
- ❖ Americans with Disabilities Act
- ❖ Family and Medical Leave Act
- ❖ State and Local PWFA laws
- ❖ PUMP Act

The Pregnancy Discrimination Act

Two clauses:

- **Clause One** clarifies that Title VII’s ban on “sex” discrimination includes discrimination because of “pregnancy, childbirth, and related medical conditions”
 - Unaffected by PWFA

- **Clause Two** requires employers to treat pregnant workers – “for all employment related purposes” – the “same as others similar in the ability or inability to work”
 - PWFA largely displaces Clause Two as best federal statutory vehicle for securing needed accommodations

Why would we still use the PDA?

- ❖ ***“Related medical conditions”***
- ❖ ***Clause One*** claims of discrimination and harassment
- ❖ ***Clause Two***
 - If there is a dispute about whether your client’s limitations were “known” to the employer
 - Look to employer procedures for granting accommodations to others “similar in their ability or inability to work”
 - Disparate impact (e.g., attendance policies)
 - Remains applicable to all other claims with respect to other benefits

The Americans with Disabilities Act

- ❖ Although pregnancy by itself is not considered a disability, many pregnancy-related conditions could be considered disabilities
 - EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015)
- ❖ Interaction of pregnancy with underlying disability may trigger need for accommodation

Why would we still use the ADA?

- ❖ ADA protects those who have a *perceived* disability
- ❖ ADA protects those who have a *record of* a disability
- ❖ Disability discrimination or harassment
- ❖ Adverse action based on association with a person with a pregnancy-related disability
- ❖ Some jurisdictions have generous interpretations of key provisions (e.g., failure to engage in interactive process as a standalone violation; narrow temporal window for employer to grant accommodation, etc.)

The Family and Medical Leave Act

- ❖ Provides up to 12 weeks of unpaid, job-protected leave in any 12-month period
 - eligible workers
 - qualifying employers
- ❖ Time off for:
 - the worker's own "serious medical condition"
 - the serious medical condition of a spouse, child, or parent
 - birth or care of newborn
 - placement of child through adoption or foster care
- ❖ May be taken intermittently, in increments as small as one hour
- ❖ No interference, no retaliation

Why use the FMLA?

- ❖ Leave unrelated to one's own pregnancy-related care
 - self-care unrelated to pregnancy
 - family member's serious medical condition (including pregnancy)
 - baby-bonding, adoption or foster care bonding

State and local PWFAs

- ❖ More than 30 states and localities have enacted versions of the PWFA to fill gaps in federal law

Why use a state or local PWFA?

- ❖ Some apply to smaller employers
- ❖ More generous substantive protections
 - No interactive process, no undue hardship defense
 - No medical certification required for certain accommodations

No damages caps

Longer statutes of limitations

PUMP Act – Why Use It?

- ❖ Applies to employers of all sizes
- ❖ No undue hardship defense for employers > 50 employees
- ❖ Specifically mandates accommodation time frame (up to 1 year)
- ❖ Specifically mandates parameters for pumping location and frequency
- ❖ Certain additional remedies (e.g., liquidated damages)

Resources:

- ❖ DOL: <https://www.dol.gov/agencies/whd/pump-at-work>
- ❖ ABB/ACLU/CWLL/MomsRising/NWA/USBC explainer:
<https://worklifelaw.org/news/new-explainer-on-the-pump-for-nursing-mothers-act/>

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