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116TH CONGRESS
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HOUSE OF REPRESENTATIVES
REPT. 116–494
Part 1

PREGNANT WORKERS FAIRNESS ACT

SEPTEMBER 8, 2020.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SCOTT of Virginia, from the Committee on Education and Labor, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 2694]

The Committee on Education and Labor, to whom was referred the bill (H.R. 2694) to eliminate discrimination and 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, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Pregnant Workers Fairness Act".

SEC. 2. NONDISCRIMINATION WITH REGARD TO REASONABLE ACCOMMODATIONS RELATED TO PREGNANCY.

It shall be an unlawful employment practice for a covered entity to—

(1) not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;

(2) require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process referred to in section 5(7);

(3) deny employment opportunities to a qualified employee if such denial is based on the need of the covered entity to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee;

(4) require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee; or

(5) take adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee.

SEC. 3. REMEDIES AND ENFORCEMENT.

(a) EMPLOYEES COVERED BY TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.—

(1) IN GENERAL.—The powers, remedies, and procedures provided in sections 705, 706, 707, 709, 710, and 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4 et seq.) to the Commission, the Attorney General, or any person alleging a violation of title VII of such Act (42 U.S.C. 2000e et seq.) shall be the powers, remedies, and procedures this Act provides to the Commission, the Attorney General, or any person, respectively, alleging an unlawful employment practice in violation of this Act against an employee described in section 5(3)(A) except as provided in paragraphs (2) and (3) of this subsection.

(2) COSTS AND FEES.—The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes (42 U.S.C. 1988) shall be the powers, remedies, and procedures this Act provides to the Commission, the Attorney General, or any person alleging such practice.

(3) DAMAGES.—The powers, remedies, and procedures provided in section 1977A of the Revised Statutes (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this Act provides to the Commission, the Attorney General, or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes).

(b) EMPLOYEES COVERED BY CONGRESSIONAL ACCOUNTABILITY ACT OF 1995.—

(1) IN GENERAL.—The powers, remedies, and procedures provided in the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) to the Board (as defined in section 101 of such Act (2 U.S.C. 1301)) or any person alleging a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)) shall be the powers, remedies, and procedures this Act provides to the Board or any person, respectively, alleging an unlawful employment practice in violation of this Act against an employee described in section 5(3)(B), except as provided in paragraphs (2) and (3) of this subsection.

(2) COSTS AND FEES.—The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes (42 U.S.C. 1988) shall be the powers, remedies, and procedures this Act provides to the Board or any person alleging such practice.

(3) DAMAGES.—The powers, remedies, and procedures provided in section 1977A of the Revised Statutes (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies,

and procedures this Act provides to the Board or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes).

(4) OTHER APPLICABLE PROVISIONS.—With respect to a claim alleging a practice described in paragraph (1), title III of the Congressional Accountability Act of 1995 (2 U.S.C. 1381 et seq.) shall apply in the same manner as such title applies with respect to a claim alleging a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)).

(c) EMPLOYEES COVERED BY CHAPTER 5 OF TITLE 3, UNITED STATES CODE.—

(1) IN GENERAL.—The powers, remedies, and procedures provided in chapter 5 of title 3, United States Code, to the President, the Commission, the Merit Systems Protection Board, or any person alleging a violation of section 411(a)(1) of such title shall be the powers, remedies, and procedures this Act provides to the President, the Commission, the Board, or any person, respectively, alleging an unlawful employment practice in violation of this Act against an employee described in section 5(3)(C), except as provided in paragraphs (2) and (3) of this subsection.

(2) COSTS AND FEES.—The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes (42 U.S.C. 1988) shall be the powers, remedies, and procedures this Act provides to the President, the Commission, the Board, or any person alleging such practice.

(3) DAMAGES.—The powers, remedies, and procedures provided in section 1977A of the Revised Statutes (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this Act provides to the President, the Commission, the Board, or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes).

(d) EMPLOYEES COVERED BY GOVERNMENT EMPLOYEE RIGHTS ACT OF 1991.—

(1) IN GENERAL.—The powers, remedies, and procedures provided in sections 302 and 304 of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16b; 2000e–16c) to the Commission or any person alleging a violation of section 302(a)(1) of such Act (42 U.S.C. 2000e–16b(a)(1)) shall be the powers, remedies, and procedures this Act provides to the Commission or any person, respectively, alleging an unlawful employment practice in violation of this Act against an employee described in section 5(3)(D), except as provided in paragraphs (2) and (3) of this subsection.

(2) COSTS AND FEES.—The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes (42 U.S.C. 1988) shall be the powers, remedies, and procedures this Act provides to the Commission or any person alleging such practice.

(3) DAMAGES.—The powers, remedies, and procedures provided in section 1977A of the Revised Statutes (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this Act provides to the Commission or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes).

(e) EMPLOYEES COVERED BY SECTION 717 OF THE CIVIL RIGHTS ACT OF 1964.—

(1) IN GENERAL.—The powers, remedies, and procedures provided in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16) to the Commission, the Attorney General, the Librarian of Congress, or any person alleging a violation of that section shall be the powers, remedies, and procedures this Act provides to the Commission, the Attorney General, the Librarian of Congress, or any person, respectively, alleging an unlawful employment practice in violation of this Act against an employee described in section 5(3)(E), except as provided in paragraphs (2) and (3) of this subsection.

(2) COSTS AND FEES.—The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes (42 U.S.C. 1988) shall be the powers, remedies, and procedures this Act provides to the Commission, the Attorney General, the Librarian of Congress, or any person alleging such practice.

(3) DAMAGES.—The powers, remedies, and procedures provided in section 1977A of the Revised Statutes (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this Act provides to the Commission, the Attorney General, the Librarian of Congress, or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes).

(f) PROHIBITION AGAINST RETALIATION.—

(1) IN GENERAL.—No person shall discriminate against any employee because such employee has opposed any act or practice made unlawful by this Act or because such employee made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

(2) PROHIBITION AGAINST COERCION.—It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of such individual having exercised or enjoyed, or on account of such individual having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.

(3) REMEDY.—The remedies and procedures otherwise provided for under this section shall be available to aggrieved individuals with respect to violations of this subsection.

(g) LIMITATION.—Notwithstanding subsections (a)(3), (b)(3), (c)(3), (d)(3), and (e)(3), if an unlawful employment practice involves the provision of a reasonable accommodation pursuant to this Act or regulations implementing this Act, damages may not be awarded under section 1977A of the Revised Statutes (42 U.S.C. 1981a) if the covered entity demonstrates good faith efforts, in consultation with the employee with known limitations related to pregnancy, childbirth, or related medical conditions who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such employee with an equally effective opportunity and would not cause an undue hardship on the operation of the covered entity.

SEC. 4. RULEMAKING.

Not later than 2 years after the date of enactment of this Act, the Commission shall issue regulations in an accessible format in accordance with subchapter II of chapter 5 of title 5, United States Code, to carry out this Act. Such regulations shall provide examples of reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions.

SEC. 5. DEFINITIONS.

As used in this Act—

(1) the term "Commission" means the Equal Employment Opportunity Commission;

(2) the term "covered entity"—

(A) has the meaning given the term "respondent" in section 701(n) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(n)); and

(B) includes—

(i) an employer, which means a person engaged in industry affecting commerce who has 15 or more employees as defined in section 701(b) of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e(b));

(ii) an employing office, as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301) and section 411(c) of title 3, United States Code;

(iii) an entity employing a State employee described in section 304(a) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16c(a)); and

(iv) an entity to which section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16(a)) applies;

(3) the term "employee" means—

(A) an employee (including an applicant), as defined in section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f));

(B) a covered employee (including an applicant), as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301);

(C) a covered employee (including an applicant), as defined in section 411(c) of title 3, United States Code;

(D) a State employee (including an applicant) described in section 304(a) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16c(a)); or

(E) an employee (including an applicant) to which section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16(a)) applies;

(4) the term "person" has the meaning given such term in section 701(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(a));

(5) the term "known limitation" means physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee's representative has communicated to the employer whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102);

(6) the term "qualified employee" means an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position, except that an employee or applicant shall be considered qualified if—

(A) any inability to perform an essential function is for a temporary period;

(B) the essential function could be performed in the near future; and

(C) the inability to perform the essential function can be reasonably accommodated; and

(7) the terms "reasonable accommodation" and "undue hardship" have the meanings given such terms in section 101 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111) and shall be construed as such terms are construed under such Act and as set forth in the regulations required by this Act, including with regard to the interactive process that will typically be used to determine an appropriate reasonable accommodation.

SEC. 6. WAIVER OF STATE IMMUNITY.

A State shall not be immune under the 11th Amendment to the Constitution from an action in a Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

SEC. 7. RELATIONSHIP TO OTHER LAWS.

Nothing in this Act shall be construed to invalidate or limit the powers, remedies, and procedures under any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions.

SEC. 8. SEVERABILITY.

If any provision of this Act or the application of that provision to particular persons or circumstances is held invalid or found to be unconstitutional, the remainder of this Act and the application of that provision to other persons or circumstances shall not be affected.

PURPOSE AND SUMMARY

When Congress passed the *Pregnancy Discrimination Act of 1978*,[1] which amended Title VII of the *Civil Rights Act of 1964*,[2] its objective was to eradicate pregnancy discrimination in the workplace and ensure that pregnant workers were treated the same as their coworkers. Yet nearly 42 years after its passage, federal law still falls short of guaranteeing that all pregnant workers have reasonable workplace accommodations. H.R. 2694, the *Pregnant Workers Fairness Act*, ensures that pregnant workers who work for employers with 15 or more employees have access to reasonable accommodations in the workplace for pregnancy, childbirth, and related medical conditions. When pregnant workers do not have access to reasonable workplace accommodations, they are often forced to choose between their financial security and a healthy pregnancy. Ensuring that pregnant workers have access to reasonable accommodations will promote the economic well-being of working mothers and their families and promote healthy pregnancies.

H.R. 2694, as amended in markup, has been endorsed by 1,000 Days, 9to5, 9to5 California, 9to5 Colorado, 9to5 Georgia, 9to5 Wisconsin, A Better Balance, Adobe, Advocates for Youth, African American Ministers In Action, Alianza Nacional de Campesinas, All-Options, Amalgamated Bank, American Association of University Women (AAUW), American Civil Liberties Union (ACLU), American Federation of Labor and Congress of Industrial Organi-

[1] 42 U.S.C. § 2000e(k).
[2] 42 U.S.C. § 2000e.

zations (AFL–CIO), American Federation of State, County, and Municipal Employees (AFSCME), American Federation of Teachers (AFT), Asian Pacific American Labor Alliance, Association of Maternal & Child Health Programs, Association of Women's Health, Obstetric and Neonatal Nurses, Breastfeeding Mother, Building Pathways, California Breastfeeding Coalition, California Women's Law Center, California Work & Family Coalition, Casa de Esperanza: National Latin@ Network for Healthy Families and Communities, Center for Parental Leave Leadership, Center for Public Policy Priorities, Center for Reproductive Rights, Centro de Trabajadores Unidos (United Workers Center), U.S. Chamber of Commerce, Child Care Law Center, Chinese Progressive Association (San Francisco), Church World Service, Citizen Action of NY, Center for Law and Social Policy (CLASP), Clearinghouse on Women's Issues, Closing the Women's Health Gap, Coalition on Human Needs, Coalition of Labor Union Women, Coalition of Labor Union Women Philadelphia Chapter, Communication Workers of America (CWA), Congregation of Our Lady of the Good Shepherd, U.S. Provinces, DC Jobs with Justice, Disciples Center for Public Witness, Economic Policy Institute, EMC Strategies, Equal Pay Today, Equal Rights Advocates, Family Equality, Family Values @ Work, Farmworker Justice, Feminist Majority Foundation, Friends Committee on National Legislation, Futures Without Violence, Gender Justice, Hadassah, Healthy Work Campaign, Center for Social Epidemiology, ICM Partners, In Our Own Voice: National Black Women's Reproductive Justice Agenda, Indiana AFL–CIO, Indiana Chapter of Unite Here Local 23, Indiana Institute for Working Families, Interfaith Worker Justice, Jewish Women International, Jobs With Justice, Justice for Migrant Women, Kansas Breastfeeding Coalition, Inc., Kentucky Equal Justice Center, KWH Law Center for Social Justice and Change, Labor Council for Latin American Advancement (LCLAA), Labor Project, Leadership Conference for Civil and Human Rights (LCCHR), Legal Aid at Work, Legal Momentum, L'Oreal USA, Legal Voice, Levi Strauss & Co, Main Street Alliance, Maine Women's Lobby, Make the Road New York, MANA, A National Latina Organization, March of Dimes, Massachusetts Coalition for Occupational Safety & Health, Metro-Detroit Chapter of the Coalition of Labor Union Women (CLUW), Michigan Immigrant Rights Center, Microsoft Corporation, MomsRising, MS Black Women's Roundtable, Mujeres Unidas y Activas, NARAL Pro-Choice America, NARAL Pro-Choice Colorado, National Advocacy Center of the Sisters of the Good Shepherd, National Advocates for Pregnant Women, National Asian Pacific American Women's Forum (NAPAWF), National Association for the Advancement of Colored People (NAACP), National Center for Lesbian Rights, National Center for Transgender Equality, National Consumers League, National Council for Occupational Safety and Health (COSH), National Council of Jewish Women, National Council of Jewish Women California, National Domestic Workers Alliance, National Education Association (NEA), National Employment Law Project (NELP), National Employment Lawyers Association, National Immigration Law Center, National Network to End Domestic Violence, National Organization for Women, National Resource Center on Domestic Violence, National Partnership for Women & Families, National WIC Association, NC National Orga-

nization for Women (NC NOW), Nebraska Appleseed, NETWORK Lobby for Catholic Social Justice, New Working Majority, NJ Citizen Action; NJ Time to Care Coalition, North Carolina Justice Center, Oxfam America, PA NOW, Parent Voices CA, PathWays PA, PhilaPOSH, Prevent Child Abuse NC, Physicians for Reproductive Health, Poligon Education Fund, PowHer New York, Pride at Work, Public Citizen, Quetzal, Restaurant Opportunities Centers United, RESULTS, RI CLUW, San Francisco CLUW Chapter, Service Employees International Union, SEIU 32BJ, Sexuality Information and Education Council of the United States (SIECUS), Shriver Center on Poverty Law, Silver in the City, Society for Human Resource Management (SHRM), Southern CA Coalition for Occupational Safety & Health, Southwest Pennsylvania National Organization for Women, Southwest Women's Law Center, Spotify, TASH, Technology Concepts Group International, LLC, The Greenlining Institute, The Leadership Conference on Civil and Human Rights, The Ohio Women's Public Policy Network, The Women's Zionist Organization of America, Inc., The Zonta Club of Greater Queens, TIME'S UP Now, United Food and Commercial Workers International Union (UFCW), Ujima Inc: The National Center on Violence Against Women in the Black Community, UltraViolet, UnidosUS, Union for Reform Judaism, United Electrical, Radio and Machine Workers of America, United Food and Commercial Workers International Union (UFCW), United for Respect, United State of Women, United States Breastfeeding Committee, U.S. Women's Chamber of Commerce, United Steelworkers, United Way of Kentucky, University of Illinois at Chicago, School of Public Health, Division of Environmental &, Occupational Health Sciences, Vision y Compromiso, Voices for Children in Nebraska, Voices for Progress, Warehouse Worker Resource Center, Western Center on Law and Poverty, William E. Morris Institute for Justice Arizona, Women4Change, Women's Achievement Network and Development Alliance, Women & Girls Foundation, Women Employed, Women of Reform Judaism, Women's Center for Education and Career Advancement, Women's Employment Rights Clinic Golden Gate University, Women's Foundation of California, Women's Fund of Rhode Island, Women's Law Project, Women's March, Women's Rights and Empowerment Network, The Women's Legal Defense and Education Fund, Work Equity, Workers' Center of Central New York, Worker Justice Center of New York, Worksafe, Workplace Fairness, YWCA Mahoning Valley, YWCA McLean County, YWCA New Hampshire, YWCA Northwestern Illinois, YWCA USA, and ZERO TO THREE.

COMMITTEE ACTION

112TH CONGRESS

On May 8, 2012, Representative Jerrold Nadler (D–NY–10) introduced H.R. 5647, the *Pregnant Workers Fairness Act*. The bill had 112 Democratic cosponsors. The bill required employers to make reasonable accommodations for the known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation imposed an undue hardship on the business. The bill also made it unlawful for employers to deny employment opportunities based on the need for reasonable accommodations; require

employees to accept an accommodation they did not choose; and require employees to take leave if another accommodation could be provided. The bill was referred to the House Committees on Education and the Workforce, Administration, Oversight and Government Reform, and Judiciary. Subsequently, the Committee on Education and the Workforce referred the bill to the Subcommittee on Health, Employment, Labor, and Pensions. The Judiciary Committee referred the bill to the Subcommittee on the Constitution. No further action was taken on the bill.

On September 19, 2012, Senator Robert P. Casey, Jr. (D–PA) introduced S. 3565, the *Pregnant Workers Fairness Act*, as a companion bill to H.R. 5647. The bill had nine cosponsors: eight Democrats and one Independent. The bill was referred to the Senate Committee on Health, Education, Labor, and Pensions. No further action was taken on the bill.

113TH CONGRESS

On May 14, 2013, Representative Nadler introduced H.R. 1975, the *Pregnant Workers Fairness Act*. This bill was identical to the version introduced in the 112th Congress and had 142 Democratic cosponsors. The bill was referred to the House Committees on Education and the Workforce, Administration, Oversight and Government Reform, and Judiciary. Subsequently, the Committee on Education and the Workforce referred the bill to the Subcommittee on Workforce Protections, and the Judiciary Committee referred the bill to the Subcommittee on the Constitution and Civil Justice. No further action was taken on the bill.

On the same day, Senator Casey introduced an identical companion bill in the Senate: S. 942, the *Pregnant Workers Fairness Act*. It had 33 cosponsors: 32 Democrats and one Independent. The bill was referred to the Committee on Health, Education, Labor, and Pensions. No further action was taken on the bill.

114TH CONGRESS

On June 4, 2015, Representative Nadler introduced H.R. 2654, the *Pregnant Workers Fairness Act*. The bill had 149 sponsors: 146 Democrats and three Republicans. This version of the bill had the same four protections as the previously introduced bills, but also added a provision protecting workers from retaliation for requesting or using reasonable accommodations. The bill was referred to the House Committees on Education and the Workforce, Administration, Oversight and Government Reform, and Judiciary. The Committee on Education and the Workforce referred the bill to the Subcommittee on Workforce Protections, and the Judiciary Committee referred the bill to the Subcommittee on the Constitution and Civil Justice. No further action was taken on the bill.

On the same day, Senator Casey introduced S. 1512, the *Pregnant Workers Fairness Act*, as a companion bill. This bill also maintained the same four protections from prior versions and added a provision protecting workers from retaliation for requesting or using reasonable accommodations. The bill had 31 cosponsors, including one Independent and three Republicans. It was referred to the Committee on Health, Education, Labor, and Pensions. No further action was taken on the bill.

115TH CONGRESS

On May 11, 2017, Representative Nadler introduced H.R. 2417, the *Pregnant Workers Fairness Act*. This version of the bill was identical to the one introduced in the 114th Congress. The bill had 131 cosponsors: 129 Democrats and two Republicans. The bill was referred to the House Committees on Education and the Workforce, Administration, Oversight and Government Reform, and Judiciary. The Judiciary Committee referred the bill to the Subcommittee on the Constitution and Civil Justice. No further action was taken on the bill.

On the same day, Senator Casey introduced S. 1101, the *Pregnant Workers Fairness Act*, in the Senate. This version of the bill was identical to the one introduced in the 114th Congress. The bill had 27 cosponsors: 24 Democrats, two Independents, and one Republican. The bill was referred to the Committee on Health, Education, Labor, and Pensions. No further action was taken on the bill.

116TH CONGRESS

On May 14, 2019, Representative Nadler introduced H.R. 2694, the *Pregnant Workers Fairness Act*. This version of the bill is identical to the one introduced in the 115th Congress. The bill was referred to the House Committees on Education and Labor, Administration, Oversight and Reform, and Judiciary. Subsequently, the Committee on Education and Labor referred the bill to the Subcommittee on Civil Rights and Human Services, and the Judiciary Committee referred the bill to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties. There are 233 cosponsors as of the date of the filing of this report, including 16 Republicans. The bill makes it an unlawful employment practice to: (1) refuse to make reasonable accommodations for the known limitations related to the pregnancy, childbirth, or related medical conditions of a job applicant or qualified employee, unless the accommodation would impose an undue hardship on an entity's business operation; (2) require job applicants or employees to accept an accommodation that they do not want, if such accommodation is unnecessary to perform the job; (3) deny employment opportunities based on the need of the entity to make such reasonable accommodations to an applicant or employee; (4) require employees to take paid or unpaid leave if another reasonable accommodation can be provided; or (5) take adverse action in terms, conditions, or privileges of employment against an employee requesting or using reasonable accommodations. The bill sets forth enforcement procedures and remedies under various statutes that cover different types of employees, including private sector, state, local, federal, and congressional employees. The bill requires the Equal Employment Opportunity Commission to issue regulations within two years after the date of enactment. The bill makes clear that States are not immune from legal action under the Eleventh Amendment to the U.S. Constitution.

To date, there is no Senate companion bill.

On October 22, 2019, the House Committee on Education and Labor's Subcommittee on Civil Rights and Human Services held a legislative hearing entitled "Long Over Due: Exploring the Preg-

nant Workers Fairness Act (H.R. 2694)" (October 22nd Hearing). The hearing examined the health and economic effects of pregnant workers' lack of access to reasonable accommodations. The hearing also examined how H.R. 2694 would fill a gap in the existing legal framework by guaranteeing pregnant workers the right to reasonable workplace accommodations. The witnesses were: The Honorable Jerrold Nadler (D–NY–10); Michelle Durham, former Emergency Medical Technician (EMT), Arab, AL; Iris Wilbur, Vice President of Government Affairs and Public Policy at Greater Louisville Inc. The Metro Chamber of Commerce, Louisville, KY; Dina Bakst, Co-Founder and Co-President of A Better Balance, New York, NY; and Ellen McLaughlin, Partner at Seyfarth Shaw LLP, Chicago, IL.

On January 14, 2020, the House Committee on Education and Labor marked up H.R. 2694 and ordered it to be reported favorably, as amended, to the House of Representatives by a vote of 29 Yeas and 17 Nays.

At the markup, the Committee considered the following amendments to H.R. 2694:

- Representative Robert C. "Bobby" Scott (D–VA–3), Chairman of the House Committee on Education and Labor, offered an amendment in the nature of a substitute (ANS). The ANS: (1) amended Section 2 to ensure that an employer cannot require a qualified employee to accept an accommodation other than one established during the employer-employee interactive negotiation process; (2) amended Section 3 to add a good faith defense for covered entities and provided that damages may not be awarded if the covered entity demonstrates good faith in engaging in the interactive process to identify and make reasonable accommodations; (3) amended Section 4 to remove unnecessary rulemaking language but preserves the Equal Employment Opportunity Commission's obligation to promulgate regulations that provide examples of reasonable accommodations within two years of enactment; (4) amended Section 5 to clarify that the term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees as defined in Title VII of the *Civil Rights Act of 1964* [3]; (5) amended Section 5 to add a new definition of who is considered a "qualified employee" by incorporating key elements from the *Americans with Disabilities Act of 1990* [4]; (6) amended Section 5 to add a new definition of the term "known limitations"; and (7) added a new Section 8 to include a severability clause in the legislation. The ANS was adopted by voice vote.
- Representative Virginia Foxx (R–NC–5), Ranking Member of the House Committee on Education and Labor, offered an amendment in the nature of a substitute. It was similar to the ANS offered by Chairman Scott but included a provision to exempt religious organizations from coverage under the bill and would have allowed religious employers to deny workers reasonable accommodations under the law. The amendment was defeated by a vote of 17 Yeas and 27 Nays.

[3] 42 U.S.C. § 2000e(b).
[4] 42 U.S.C. § 12101.

COMMITTEE VIEWS

The Committee on Education and Labor (Committee) is committed to protecting pregnant workers' health and economic security. No worker should have to choose between their health, the health of their pregnancy, and the ability to earn a living. H.R. 2694, the *Pregnant Workers Fairness Act* (PWFA), makes clear that pregnant workers have the right to reasonable accommodations absent undue hardship on the employer. The PWFA eliminates a lack of clarity in the current legal framework that has frustrated pregnant workers' legal rights to reasonable accommodations while providing clear guidance to both workers and employers.

THE PREGNANCY DISCRIMINATION ACT OF 1978 AND THE AMERICANS WITH DISABILITIES ACT OF 1990 ARE INSUFFICIENT TO GUARANTEE PREGNANT WORKERS REASONABLE ACCOMMODATIONS

Seventy-five percent of working women will become pregnant while employed at some time in their lives.[5] Women are increasingly either the primary or co-breadwinners of households.[6] As a result, more pregnant women work later into their pregnancies. Research suggests that more than 80 percent of first-time mothers work until their final month of pregnancy.[7] Pregnant workers may need reasonable accommodations to protect the health of both mother and baby. Reasonable accommodations can include providing seating, water, and light duty. They do not need to be, nor are they typically, complicated or costly. But when pregnant workers do not have access to the reasonable workplace accommodations they need, they are forced to choose between their financial security and a healthy pregnancy.

Although workers in need of pregnancy-related accommodations may be able to seek recourse under the *Pregnancy Discrimination Act of 1978* (PDA)[8] and Title I of the Americans with Disabilities Act of 1990 (ADA),[9] varying interpretations have created an unworkable legal framework. This has frustrated pregnant workers' ability to secure reasonable accommodations. Under the PDA, a pregnant worker must show that her employer accommodated a coworker who is "similar in their ability or inability to work" (known as a comparator), which is a burdensome and often impossible standard to meet. Under the ADA, a pregnancy-related impairment that substantially limits a major life activity is a disability for which an employer may be required to provide reasonable accommodations.[10] However, this standard leaves women with less serious pregnancy-related impairments, and who need accommodations, without legal recourse. As explained further below, the pro-

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[5] Melissa Alpert, Center for American Progress, Labor Pains: Improving Employment and Income Security for Pregnant Women and New Mothers, 2 (2009), https://cdn.americanprogress.org/wp-content/uploads/issues/2009/08/pdf/labor_pains.pdf?_ga=2.262643852.1428433223.1599244597-106194704.1597112689.

[6] Sarah Jane Glynn, Center for American Progress, Breadwinning Mothers Continue To Be the U.S. Norm, 1 (2019) https://cdn.americanprogress.org/content/uploads/2019/05/12070012/Breadwinners2019-report1.pdf?_ga=2.257334027.1474637733.1598641131-106194704.1597112689.

[7] Lynda Laughlin, U.S. Census Bureau, Maternity Leave and Employment Patterns: 2006–2008 8 (2011), https://www.census.gov/prod/2011pubs/p70-128.pdf.

[8] 42 U.S.C. § 2000e(k).

[9] 42 U.S.C. §§ 12111–12117.

[10] 29 C.F.R. §1630.

tections under these two statutes are insufficient to ensure that pregnant workers receive the accommodations they need.

HISTORY OF PREGNANT WORKERS' STATUTORY PROTECTIONS: THE PREGNANCY DISCRIMINATION ACT OF 1978

COURTS MISINTERPRETED CONGRESSIONAL INTENT IN TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Congress passed Title VII of the *Civil Rights Act of 1964*[11] (Title VII) to eliminate discrimination in employment on the basis of race, sex, color, national origin, and religion. In 1972, the Equal Employment Opportunity Commission (EEOC) issued guidelines on pregnancy discrimination, concluding that Title VII's prohibition against sex discrimination in the workplace included discrimination based on pregnancy.[12] However, in two U.S. Supreme Court decisions in the 1970s, the Court ruled that pregnancy discrimination was not considered sex discrimination.

In *Geduldig* v. *Aiello*,[13] the Court analyzed whether California's exclusion of pregnancy-related disabilities from its disability insurance program was a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution and concluded it was not. The Court held that because benefits were not denied on the basis of gender,

> [t]he California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification.[14]

Two years later, the Supreme Court decided General Electric Company v. Gilbert.[15] At issue in Gilbert was a private employee disability benefits plan that excluded pregnancy-related disability from coverage. Relying heavily on the prior decision in Aiello, the Court ruled that the exclusion did not constitute sex discrimination as prohibited by Title VII.[16]

WITH THE PREGNANCY DISCRIMINATION ACT OF 1978, CONGRESS SOUGHT TO OVERTURN SUPREME COURT PRECEDENT

Congress passed the PDA to overturn the Supreme Court's erroneous interpretation of Title VII. The Senate Committee on Human Resources report for the PDA stated:

> [T]he assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace. A failure to address discrimination based on pregnancy, in fringe benefits or in any other

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[11] 42 U.S.C. § 2000e
[12] 29 CFR §1604.10(b) (1973).
[13] *Geduldig* v. *Aiello*, 417 U.S. 484 (1974).
[14] 417 U.S. 484, 496–97 n. 20 (1974).
[15] *General Electric Company* v. *Gilbert*, 429 U.S. 125, 135–36 (1976).
[16] *Id.*

> employment practice, would prevent the elimination of sex discrimination in employment.[17]

Congress sought, through the PDA, to codify the EEOC's original interpretation of Title VII and "make clear that the prohibitions against sex discrimination in the act include discrimination in employment on the basis of pregnancy."[18] In order to overturn *Gilbert*, the PDA amended Title VII in two parts. First, it amended the Title VII's definition of "sex" to include discrimination on the basis of pregnancy, childbirth, or related medical conditions as sex discrimination.[19] In doing so, the PDA made clear that discrimination on the basis of pregnancy was discrimination on the basis of sex.[20] Second, it added a provision that stated that pregnant workers "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."[21] This language created the need for a pregnant worker to identify a comparable coworker or group of coworkers to determine whether she's been discriminated against. According to the House Committee on Education and Labor report for the PDA:

> This legislation would clearly establish that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 includes a prohibition against employment-related discrimination on the basis of pregnancy, childbirth, or related medical conditions. As an amendment to Title VII, the bill will apply to all aspects of employment—hiring, reinstatement, termination, disability benefits, sick leave, medical benefits, seniority, and other conditions of employment currently covered by Title VII. Pregnancy-based distinctions will be subject to the same scrutiny on the same terms as other acts of sex discrimination proscribed in the existing statute.[22]

At the October 22nd Hearing, Ms. Bakst summarized Congress' intent with respect to the PDA:

> Thus, when Congress mandated that employers treat pregnant women the same as 'other persons similar in their ability or inability to work' the intended result was, and continues to be, that such treatment would lead to women's equality in the workplace. While the comparative standard has led to positive results for some pregnant workers, for far too many, equality in the workplace remains elusive.[23]

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[17] S. Rep. No. 95–331, at 3 (1977).
[18] *Id*. at 1.
[19] 42 U.S.C. § 2000e(k).
[20] Brief for Members of Congress as Amici Curiae Supporting Petitioner at 9, *Young* v. *United States Parcel Service, Inc*., 135 S. Ct. 1338 (2015) (No. 12–1226).
[21] 42 U.S.C. § 2000e(k).
[22] H. Rep. No. 95–948, at 4 (1978).
[23] *Long Over Due: Exploring the Pregnant Workers Fairness Act (H.R. 2694) Before the Subcomm. on Civil Rights & Human Servs. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019) (Testimony of Dina Bakst, Co-Founder & Co President, A Better Balance: The Work & Family Legal Center, at 10) [hereinafter Bakst Testimony].

COURT INTERPRETATIONS OF THE PDA LEFT NUMEROUS GAPS IN PROTECTIONS

Prior to 2015, the circuit courts were split on how to determine which type of workers were "similar in their ability or inability to work" or would serve as a valid and relevant comparator to a pregnant worker for the purpose of securing reasonable accommodations under the PDA. In identifying a "relevant comparator," the majority of circuits focused on the source of the injury by comparing the pregnant worker's treatment to those employees who had sustained non-ADA-qualifying, off-the-job injuries.[24] "In other words, a pregnant worker was only entitled to be treated as well (or as poorly) as those injured off the job." [25] Only the Sixth Circuit interpreted the PDA to mean that if a nonpregnant worker with a lifting restriction, for example, was accommodated, then a pregnant worker with a similar lifting restriction should likewise be accommodated.[26]

The PDA does not affirmatively require that an employer reasonably accommodate a pregnant worker. Ms. Bakst testified at the October 22nd Hearing to the legal obstacles encountered by pregnant workers leading up to the landmark 2015 decision regarding the PDA in *Young* v. *United Parcel Service, Inc. (UPS)*: [27]

> [W]e reviewed 200 Pregnancy Discrimination Act cases in the two years leading up to the *Young* decision and found that of those cases that dealt with an issue of pregnancy accommodation, in nearly two-thirds of cases, courts rejected the plaintiff's PDA claim largely because the pregnant worker could not provide adequate comparators.[28]

THE SUPREME COURT DECISION IN YOUNG V. UNITED PARCEL SERVICE, INC. ESTABLISHED A NEW STANDARD THAT IS UNWORKABLE IN PRACTICE

In 2015, the Supreme Court decided *Young* v. *UPS*,[29] which set forth a new, controlling standard for a plaintiff to establish a disparate treatment claim of discrimination in securing a reasonable accommodation under the PDA.

In that case, Peggy Young worked as a part-time delivery driver for UPS, and her job consisted of picking up and delivering packages. When Young became pregnant, her doctor advised her to lift no more than twenty pounds. Young, who was required by company policy to be able to lift up to 70 pounds, requested a light-duty work assignment for the duration of her pregnancy. Because UPS's policy was to only grant an accommodation to employees who had been injured on the job, were eligible for an ADA accommodation, or had lost their Department of Transportation (DOT) certification, UPS denied her request for a light-duty accommodation.[30]

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[24] Lara Grow, *Pregnancy Discrimination in the Wake of Young* v. *UPS*, 19 U.PA. J.L. & Soc. Change 133, 144, (2016).
[25] *Id*. at 145.
[26] *Id*. at 144.
[27] *Young* v. *United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015).
[28] Bakst Testimony at 12.
[29] 135 S. Ct. 1338 (2015).
[30] Lara Grow, *Pregnancy Discrimination in the Wake of Young* v. *UPS*, 19 U. Pa. J.L. & Soc. Change 133, 147 (2016).

UPS did not consider Young's pregnancy to constitute an on-the-job injury. Because of the unwillingness of her employer to place her on light duty due to her pregnancy-related lifting restriction, Young was forced to take an extended leave of absence without pay or medical coverage.

Young sued UPS alleging disparate treatment under the PDA and pursued her case to the U.S. Supreme Court.[31] In a 6–3 decision, the Supreme Court set out a new test for pregnant workers to prove that their employers acted unlawfully under the PDA when the employer denied the pregnant worker an accommodation.[32]

- First, a plaintiff must demonstrate "that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work."[33]
- Second, the employer can rebut this showing by providing "legitimate, nondiscriminatory reasons for denying her accommodation."[34] In making such a showing, the Court made clear that the employer's reason "cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ("similar in their ability or inability to work") whom the employer accommodates."[35] Essentially, the employer must provide a non-economic justification for its actions.
- Third, if the employer successfully demonstrates "legitimate, nondiscriminatory reasons" for its actions, the employee must rebut the employer's justification. The Court held that a plaintiff can rebut this argument as pretextual "by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers" and that the employer's "reasons are not sufficiently strong to justify the burden."[36] The Court explained that the employee can demonstrate that the policy imposes a significant burden "by providing evidence that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers."[37] But the Court failed to define "a large percentage" and, critically, who of the non-pregnant workers should be considered "relevant comparators" when crafting that percentage.

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[31] *See* Brief of Petitioner at 13, *Young* v. *United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015) (Young filed suit in a Maryland District Court. The court granted summary judgement to UPS. Young appealed to the Fourth Circuit. The Fourth Circuit ruled in favor of UPS, holding that the company's policy was neutral with respect to pregnancy, as pregnant workers were treated the same as other similarly situated employees who sustained off-the-job injuries, and thus did not constitute unlawful pregnancy discrimination. Young appealed the ruling to the Supreme Court.).

[32] The six to three decision in *Young* v. *United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015), was rooted in the legal framework set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

[33] *Young* v. *United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015).

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

THE TEST UNDER YOUNG DOES NOT ADEQUATELY PROTECT PREGNANT WORKERS

The Court's holding in *Young* does not guarantee pregnant workers a reasonable accommodation. Under the *Young* framework, pregnant workers face high evidentiary hurdles to prove that their employer should provide them with reasonable accommodations. The decision still requires pregnant workers who bring a failure to accommodate claim under the PDA to provide a comparator, but it did little to provide clarity as to who constitutes a relevant comparator other than to say the standard should not be "onerous" on workers.[38] Forcing pregnant workers to identify a comparator creates an oftentimes insurmountable hurdle.

At odds with Justice Breyer's majority opinion in *Young* stating that the comparator standard should not be onerous on workers, testimony received by the Committee at the October 22nd Hearing points out that a requirement to establish a valid comparator "places a unique burden on pregnant workers" and "is also tone deaf to the realities of the American workplace, where workers lack clout, bargaining power, and access to their co-workers' accommodations requests or personnel files."[39] Indeed, in an analysis of reasonable accommodation PDA cases decided after *Young*, "over two-thirds of workers lost their pregnancy accommodation cases. Nearly seventy percent of those losses can be traced to courts' rejection of women's comparators or inability to find comparators."[40]

Additionally, some courts have placed categorical bans on certain types of comparators.[41] This was the experience of Kimberlie Durham, who testified at the October 22nd Hearing. Ms. Durham, an Emergency Management Technician (EMT), requested a temporary reassignment after being told by her doctor that she should not lift anything over 50 pounds; her job required lifting patients and stretchers on a regular basis.[42] Despite her employer's policy of giving "light duty" or "modified duty" assignments to EMTs with lifting restrictions for reasons other than pregnancy and the availability of vacant positions that Durham could fill that would not require lifting, Durham's employer denied her request. Durham's employer would only offer light or modified duty to EMTs injured on the job, and pregnant workers didn't qualify; instead, she would had to have taken an unpaid leave of absence.[43] Durham tried to work with her employer to come to a solution, but her employer was unresponsive until she filed for unemployment insurance:

> After a month of silence, I filed for unemployment benefits so that I could at least pay my bills. *That's* what got a response from Rural/Metro: the company opposed my application, telling the state that I still worked there—even though it had refused to schedule me for any shifts. After that, I had no choice but to file a charge of discrimination

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[38] *Id.*
[39] Bakst Testimony at 14.
[40] *Id.* at 3.
[41] *Id.*
[42] *Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694) Before the Subcomm. on Civil Rights & Human Servs. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019) (Written testimony of Kimberlie M. Durham, at 4) [Hereinafter Durham Testimony].
[43] Durham Testimony at 5.

> with the Equal Employment Opportunity Commission, followed by a lawsuit in federal court in the fall of 2016.[44]

In *Durham* v. *Rural/Metro Corporation*,[45] the federal district court for the Northern District of Alabama found that Durham did not have a PDA claim for the employer's failure to accommodate her lifting restriction, even though she could point to three other co-workers who were given light or modified duty when they too had lifting restrictions. The court's reasoning hinged on the fact that those three people had on-the-job injuries. In April 2020, an appellate court ruled in Ms. Durham's favor after nearly five years in litigation.[46]

Pregnant workers must also discredit their employer's justification for failing to accommodate them. The *Young* decision requires that the pregnant worker demonstrate that the "employer's policies impose a significant burden on pregnant workers."[47] Ms. Bakst testified at the October 22nd Hearing, "the 'significant burden' standard the Court laid out in *Young* as part of the pretext analysis in the third step of the test [sic] has also proven harmful to women. If workers are even able to make it to this step in the analysis, the 'significant burden' analysis remains an additional hurdle."[48]

Additionally, using the *Young* framework can take years to get a remedy. As Ms. Bakst testified at the October 22nd Hearing:

> [U]nder the framework established by the court's majority in *Young*, a pregnant worker who wants to prove unlawful treatment based on her employer's failure to accommodate her pregnancy must go through a multi-step process that can only be fleshed out through lengthy litigation. Yet most workers we hear from simply want an accommodation to continue working and comply with their doctor's orders. They cannot afford to wait weeks, months, or years for a court decision. Once their baby has started elementary school, it is obviously too late to ensure the pregnancy is healthy at the outset and to prevent a downward spiral of financial woes.[49]

Even if a pregnant worker can surmount the evidentiary hurdles under the *Young* framework, her case will likely take years, lasting well past the pregnancy and leaving her without a remedy during her pregnancy. In the case of Ms. Durham, for example, by the time a court finally ruled in her favor, her child was four years old. Her remedy was long overdue.

THE HISTORY OF PREGNANT WORKERS' PROTECTIONS: THE AMERICANS WITH DISABILITIES ACT OF 1990

The ADA defines a disability as "a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded

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[44] *Id.*
[45] *Durham* v. *Rural/Metro Corp.*, No. 4:16–CV–01604–ACA, 2018 U.S. Dist. LEXIS 173461 (N.D. Ala. Oct. 9, 2018).
[46] *Durham* v. *Rural/Metro Corp.*, 955 F.3d 1279 (11th Cir. 2020).
[47] 135 S. Ct. 1338, 1354 (2015).
[48] Bakst Testimony at 16.
[49] Bakst Testimony at 21.

as having such an impairment."[50] Title I of the ADA further provides that, "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[51] Since the passage of the ADA, there has been a significant amount of debate over whether pregnancy could ever be considered a disability under the definition above.[52]

Prior to the passage of the *ADA Amendments Act of 2008* (ADAAA),[53] the EEOC took the position that pregnancy was not an "impairment" and therefore could not be considered a disability even if it was the cause of a substantial limitation.[54] Courts relied on this guidance and held in a line of cases that "absent unusual circumstances, pregnancy does not constitute a 'physical impairment' under the ADA."[55] In addition to the EEOC's determination that pregnancy was not an "impairment," EEOC regulations in 1999 listed as factors that should be considered in determining whether an individual is substantially limited in a major life activity: the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.[56] Given that pregnancy lasts approximately nine months and any limitations resulting from pregnancy may last only for a portion of that timespan, it is not surprising that few courts determined that pregnancy was covered by the ADA prior to the ADAAA.

THE ADA AMENDMENTS ACT OF 2008 PROVIDES LIMITED PROTECTIONS FOR PREGNANT WORKERS

Under the ADAAA, pregnancy itself may not be considered a disability but pregnant workers may have conditions that could qualify them for accommodations under the law. The ADAAA was passed in response to a series of cases in which the Supreme Court limited who could be considered disabled under the ADA and "[n]arrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect."[57]

In guidance related to pregnancy discrimination adopted after the ADAAA, the EEOC advised that, "[a]lthough pregnancy itself is not a disability, pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA . . . A number of pregnancy-related impairments are likely to be disabilities, even though they are temporary, such as pregnancy-re-

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[50] 42 U.S.C. § 12102.
[51] 42 U.S.C. § 12112(a).
[52] Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 Va. L. Rev. 397, 407 (2000) (citing Mary Crossley, *The Disability Kaleidoscope*, 74 Notre Dame L. Rev. 621, 668–716 (1999)).
[53] 42 U.S.C. § 12102.
[54] 29 U.S.C. Pt. 1630; *See also*, U.S. Equal Emp't Opportunity Comm'n, The Family and Medical Leave Act, the ADA, and Title VII of the Civil Rights Act of 1964 (1995), https://www.eeoc.gov/laws/guidance/family-and-medical-leave-act-ada-and-title-vii-civil-rights-act-1964.
[55] *Villarreal* v. *J.E. Merit Constructors*, 895 F. Supp. 149, 152 (S.D. Tex. 1995).
[56] 29 C.F.R. § 1630.2.
[57] 42 U.S.C. § 12101 (see note on Findings and Purposes of Pub. L. 110–325).

lated carpal tunnel syndrome, gestational diabetes, pregnancy-related sciatica, and preeclampsia."[58]

The ADAAA also expanded the definition of "major life activities" to include "major bodily functions."[59] Additionally, "[u]nder the ADAAA and its implementing regulations, an impairment is not categorically excluded from being a disability simply because it is temporary."[60] Therefore, a pregnant worker may be a qualified individual with a disability for purposes of the ADA if her pregnancy impairs a major bodily function (such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions) or her ability to perform a major life activity (such as caring for oneself, performing manual tasks, sleeping, walking, standing, lifting, bending, speaking, learning, reading, concentrating, thinking, communicating, and working).

Although the ADAAA's definition of disability is almost broad enough to cover any limitation related to pregnancy, courts have been reticent to apply the broad definition of disability urged by the ADAAA.[61] While the EEOC has been careful to adhere to the ADAAA's expansive view of disability in the context of pregnancy, a review of the caselaw suggests that courts have been more aggressive in limiting the application of the ADAAA to pregnant workers. "In order to make out a prima facie case of disability discrimination under the ADA, [the plaintiff] must establish that she (1) has a 'disability,' (2) is a 'qualified individual,' and (3) has suffered an adverse employment action because of that disability."[62] In order to establish the prima facie case for discrimination on the basis of an employer's failure to make a reasonable accommodation, a plaintiff must show that: "(1) plaintiff is a person with a disability under the meaning of the ADA; (2) an employer covered by the statute had notice of [her] disability; (3) with reasonable accommodation, plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations."[63]

To determine whether a plaintiff's condition meets the legal definition of "disability," courts must assess whether the worker has "a physical or mental impairment that substantially limits one or more major life activities of such individual."[64] If the court determines that the plaintiff did not have an "impairment," the individual will not reach the second part of the inquiry to determine whether the individual is substantially limited in one or more major life activities. Numerous courts applying the ADAAA have continued to hold that, "pregnancy, absent unusual circumstances,

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[58] *Fact Sheet for Small Businesses: Pregnancy Discrimination*, U.S. Equal Emp't Opportunity Comm'n, https://www.eeoc.gov/eeoc/publications/pregnancy_factsheet.cfm (last visited Mar. 18, 2020).

[59] 42 U.S.C. § 12102.

[60] *Summers* v. *Altarum Inst., Corp.*, 740 F.3d 325, 333 (4th Cir. 2014).

[61] Nicole B. Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 Geo. J. Poverty Law & Pol'y 383, 392 (2019). Of nearly 1,000 ADA cases decided between 2014 and 2018, the federal courts erroneously ruled that workers were not individuals with disabilities entitled to the protections of the ADA in 210 of them.

[62] *Turner* v. *Hershey Chocolate*, 440 F.3d 604, 611 (3d Cir. 2006).

[63] *Monterroso* v. *Sullivan & Cromwell, LLP*, 591 F. Supp. 2d 567, 577 (S.D.N.Y. 2008).

[64] 42 U.S.C. § 12102(1)(a).

is not considered a disability under the ADA."[65] In response to questions for the record for the October 22nd Hearing submitted by Representative Suzanne Bonamici (D–OR–1), Chair of the Committee's Subcommittee on Civil Rights and Human Services, Ms. Bakst stated:

> Disturbingly, courts are finding that even when pregnant women have quite serious complications, those complications do not merit ADAAA protections . . . Courts also explicitly distinguish 'pregnancy-related complications' from an ADAAA qualifying 'disability,' thus acknowledging that even those pregnant women with complications may have no recourse under the ADAAA.[66]

In fact, one court stated, "only in extremely rare cases have courts found that conditions that arise out of pregnancy qualify as a disability."[67] Another court acknowledged, "[a]lthough the 2008 amendments broadened the ADA's definition of disability, these changes only have had a modest impact when applied to pregnancy-related conditions."[68]

There are many cases where courts have found that even severe complications related to pregnancy do not constitute disabilities triggering ADAA protection. In *Adireje* v. *ResCare, Inc.*,[69] the court dismissed a health care worker's ADAAA claim even though she experienced unbearable cramping, bleeding, and a miscarriage. The court held, "even if Adireje had a pregnancy-related complication . . . [she] was not disabled for purposes of the ADA because there is no evidence that her cramps limited her ability to work or other major life activities."[70]

In addition to the general reticence to equate pregnancy and disability, courts have sometimes pointed to the short duration of pregnancy complications as a reason to reject an ADAAA claim. The EEOC's guidance on the ADAAA states that, "[i]mpairments that last only for a short period of time are typically not covered,

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[65] *See Tomiwa* v. *PharMEDium Servs., LLC*, No. 4:16–CV–3229, 2018 U.S. Dist. LEXIS 66772, at *13 (S.D. Tex. Apr. 20, 2018) ("Absent unusual circumstances, pregnancy and related medical conditions do not constitute a physical impairment."); *Mayorga* v. *Alorica, Inc.*, No. 12–21578–CIV–HUCK/BANDSTRA, 2012 U.S. Dist. LEXIS 3043021, at *32 (S.D. Fla. July 25, 2012) (citing, inter alia, *Selkow* v. *7-Eleven, Inc.*, No. 11–CV–456–T–33EAJ, 2012 U.S. Dist. LEXIS 79265, at *37 (M.D. Fla. June 7, 2012) ("Absent unusual circumstances, pregnancy is not considered a disability—temporary or otherwise—under the ADA or FCRA."); *Jeudy* v. *Holder*, No. 10–22873–CIV–HUCK/BANDSTRA, 2011 U.S. Dist. LEXIS 128746, at *13 (S.D. Fla. Nov. 7, 2011) (noting "that pregnancy is not normally considered a disability")).

[66] *Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694) Before the Subcomm. on Civil Rights Human. & Servs. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019) (Questions for the record submitted by Dina Bakst, Co-Founder & Co-President, A Better Balance, at 7–10).

[67] *Sam-Sekur* v. *Whitmore Grp., Ltd.*, No. 11–CV–4938 (JFB) (GRB), 2012 U.S. Dist. LEXIS 83586, at *24 (E.D.N.Y. June 15, 2012); *see also Wanamaker* v. *Westport Board of Education*, 899 F.Supp.2d 193, 211 (D. Conn. 2012) (Citing to *Sam-Sekur* and the EEOC guidance that short-term impairments must be "sufficiently severe" for the proposition that pregnancy-related conditions are only ADAAA-qualifying in rare cases. Additionally, finding plaintiff teacher could not pursue her ADA claim because she "failed to allege that her transverse myelitis limit[ed] a major life activity and that any impairment as a result of her transverse myelitis was not for a short period of time" and "no other facts indicating that [her] condition was chronic." *Id.* at 212.).

[68] *Scheidt* v. *Floor Covering Assocs., Inc.*, No. 16–CV–5999, 2018 U.S. Dist. LEXIS 167480, at *23–24 (N.D. Ill. Sept. 28, 2018) (holding allergies, including rashes and breathing problems, do not constitute a disability that impairs a major life activity).

[69] *Adireje* v. *ResCare, Inc.*, No. 1:18–CV–01429–TWP–DLP, 2019 U.S. Dist. LEXIS 170125 (S.D. Ind. Sept. 30, 2019).

[70] *Id.* at 24.

although they may be covered if sufficiently severe."[71] Courts continue to read a durational requirement into the ADAAA.[72] For example, one court held that "temporary, non-chronic impairments of short-duration, with little or no long term or permanent impact, are usually not disabilities."[73] Regardless of the merits of the individual cases, the reality is that, as one court stated, "only in extremely rare cases have courts found that conditions that arise out of pregnancy qualify as a disability."[74] As Ms. Bakst noted at the October 22nd Hearing, "courts consistently make clear that pregnancy itself is not a disability and does not merit reasonable accommodations under the ADAAA . . . courts have been unwilling to extend ADAAA coverage for pregnancy-related disabilities, even in cases where workers have presented serious pregnancy complications."[75]

Given the case law, it is abundantly clear that the ADA, as amended by the ADAAA, does not provide a sufficient avenue for receiving reasonable accommodations that would allow a worker to continue to earn a living while maintaining a healthy pregnancy.[76]

THE PREGNANT WORKERS FAIRNESS ACT PROMOTES PREGNANT WORKERS' HEALTH AND ECONOMIC WELLBEING

Women comprise nearly half the U.S. workforce.[77] Women are the primary, sole, or co-breadwinners in nearly 64 percent of families, earning at least half of their total household income.[78] Not surprisingly, women are increasingly working later into their pregnancies. According to the U.S. Census Bureau, between 2006 and 2008, 88 percent of first-time mothers worked during their last trimester and 82 percent worked into their last month of pregnancy.[79] When pregnant workers are not provided reasonable accommoda-

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[71] *See* 29 C.F.R. § 1630 (Appendix to Part 1630, Interpretive Guidance on Title I of the Americans with Disabilities Amendments Act).

[72] *Love* v. *First Transit, Inc.*, No. 16–CV–2208, 2017 U.S. Dist. LEXIS 37716, at *16 (N.D. Ill. Mar. 16, 2017). *See also Lang* v. *Wal-Mart Stores East, L.P.*, No. 13–CV–349–LM, 2015 U.S. Dist. LEXIS 44185, at *4 (D.N.H. Apr. 3, 2015) ("[P]regnancy is not an actionable disability, unless it is accompanied by a pregnancy-related complication."); *Annobil* v. *Worcester Skilled Care Ctr., Inc.*, No. 11–40131–TSH, 2014 U.S. Dist. LEXIS 126643, at *36 (D. Mass. Sept. 10, 2014) (granting summary judgment for defendant where plaintiff "provides no legal argument as to whether such symptoms [including headaches, nausea and vomiting] differ from normal symptoms of pregnancy and how these complications are disabling"); *Mayorga* v. *Alorica, Inc.*, No. 12–21578–CIV–HUCK/BANDSTRA, 2012 U.S. Dist. LEXIS 103766, at *5 (S.D. Fla. July 25, 2012).

[73] *Wanamaker* v. *Westport Bd. of Educ.*, 899 F. Supp. 2d 193, 211 (D. Conn. 2012).

[74] *Sam-Sekur* v. *Whitmore Grp., Ltd.*, No. 11–CV–4938 (JFB) (GRB), 2012 U.S. Dist. LEXIS 83586, at *24 (E.D.N.Y. June 15, 2012); *see also Wanamaker* v. *Westport Board of Education*, 899 F. Supp. 2d 193, 211 (D. Conn. 2012) (Citing to *Sam-Sekur* and the EEOC guidance that short-term impairments must be "sufficiently severe" for the proposition that pregnancy-related conditions are only ADAAA-qualifying in rare cases. Additionally, finding plaintiff teacher could not survive her ADA claim because she "failed to allege that her transverse myelitis limit[ed] a major life activity and that any impairment as a result of her transverse myelitis was not for a short period of time" and "no other facts indicating that [her] condition was chronic." *Id.* at 212.).

[75] Bakst Testimony at 17.

[76] *Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694) Before the Subcomm. on Civil Rights Human. & Servs. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019) (Questions for the record submitted by Dina Bakst, Co-Founder & Co-President, A Better Balance, at 7–10).

[77] Catalyst, *Quick Take: Women in the Workforce—United States* (June 5, 2019), https://www.catalyst.org/research/women-in-the-workforce-united-states/.

[78] Sarah Jane Glynn, Center for American Progress, Breadwinning Mothers Continue to be the U.S. Norm 5 (2019), https://cdn.americanprogress.org/content/uploads/2019/05/12070012/Breadwinners2019-report1.pdf.

[79] Lynda Laughlin, U.S. Bureau of the Census, Maternity Leave and Employment Patterns of First-Time Mothers: 1961–2008 6 (2011), https://www.census.gov/library/publications/2011/demo/p70-128.html.

tions on the job, they are oftentimes forced to choose between economic security and their health or the health of their babies.

REASONABLE ACCOMMODATIONS FOR PREGNANT WORKERS PROMOTE HEALTHY PREGNANCIES

According to the American College of Obstetricians and Gynecologists (ACOG), providing reasonable accommodations to pregnant workers is critical for the health of women and their children.[80] Depending on the circumstances of the pregnancy, physicians recommend that pregnant women avoid or limit certain risks in the workplace, including exposure to certain compounds, heavy lifting, overnight work, extended hours, or prolonged periods of sitting or standing.[81] Some studies have shown increased risk of miscarriage, preterm birth, low birth weight, urinary tract infections, and fainting as a result of these exposures.[82]

According to ACOG, these health risks can be addressed with simple accommodations such as: seating; water; closer parking; flexible hours; appropriately sized uniforms and safety apparel; additional breaktime to use the bathroom, eat, and rest; excusing the worker from strenuous activities; and excusing the worker from activities that involve exposure to compounds not safe for pregnancy.[83] A 2014 survey found that the most common temporary pregnancy-related accommodation sought (71 percent of participants) was more frequent breaks (e.g., bathroom breaks).[84]

A 2014 survey issued by the National Partnership for Women and Families estimated that one quarter million pregnant workers are denied their requests for reasonable workplace accommodations nationally each year.[85] Additionally, women of color are especially impacted as they are more likely to work in low wage, physically demanding jobs. In written testimony submitted for the record for the October 22nd Hearing, Emily Martin of the National Women's Law Center stated:

> [O]ver 40 percent of full-time workers in low-wage jobs report that their employers do not permit them to decide when to take breaks, and roughly half report having very little or no control over the scheduling of hours. This culture of inflexibility can lead to reflexive denials when workers in low-wage jobs seek pregnancy-related accommodations, which is of particular concern given that more than one in five (20.9%) pregnant workers is employed in a low-wage job. Moreover, pregnant Black women and Latinas are disproportionately represented in low-wage jobs. Nearly one in three Black and Latina pregnant workers hold low-wage jobs (30.0 percent and 31.3 percent, re-

[80] The American College of Obstetricians and Gynecologists, Employment Considerations During Pregnancy and the Postpartum Period e117 (2018), https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2018/04/employment-considerations-during-pregnancy-and-the-postpartum-period.pdf.

[81] *Id.* at, e120.

[82] Dina Bakst et al., A Better Balance, Long Overdue: It's Time for the Federal Pregnant Workers Fairness Act 23 (2019), https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf.

[83] *Id.*

[84] Nat'l Partnership for Women and Families, Listening to Mothers: The Experiences of Expecting and New Mothers in the Workplace 2 (2014), https://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf.

[85] *Id.* at 3.

> spectively). This means a lack of clear legal rights to pregnancy accommodations likely hits Black women and Latinas particularly hard.[86]

When simple accommodations like those suggested by ACOG are not provided, the impacts on a worker's health and pregnancy can be deadly. At the October 22nd Hearing, Representative Steve Cohen (D–TN–9) highlighted a constituent's experience at a warehouse in Memphis, TN:

> Memphis has a plant that XPO ran. It was the subject of a major story in the New York Times concerning work conditions there and particularly pregnant women . . . One of the former employees, Ms. Tasha Morelle brought her doctor's note instructing that she do no heavy lifting. The supervisor did not accommodate the doctor's note, nor reassign her to a different area. Ms. Morelle continued doing her assigned work of lifting boxes weighing almost 50 pounds. As a result, she suffered a miscarriage.[87]

At the October 22nd Hearing, Representative Jahana Hayes (D–CT–5), a member of the Committee, described her experience when reasonable accommodations were not provided to her at work:

> I was a working mom, an educator who had an uneventful pregnancy. I was not older [sic] I did not have any complications and what I thought was a reasonable accommodation [became] a tremendous inconvenience. I was a classroom teacher and all I needed was to go to the bathroom which I thought was a reasonable request to ask but you can imagine in a high school with more than 1,000 kids, to get coverage, I was often told 'well you just had your break' or 'we only have two more periods before it's time for lunch.' And thinking that I have to go right now was just something that I just dealt with which led to further complications with bladder issues so what started out as an uneventful pregnancy ended up having complications as a result of this minor accommodation not being met.[88]

With the COVID–19 health pandemic ravaging the country, pregnant workers are in even greater need of reasonable accommodations. According to the Centers for Disease Control and Prevention (CDC), "pregnant people might be at an increased risk for severe illness from COVID–19."[89] Pregnant women who contract COVID–19 "are more likely to be hospitalized and are at increased risk for intensive care unit (ICU) admission and receipt of mechanical ven-

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[86] *Long Overdue: Exploring the Pregnant Workers Fairness Act (H.R. 2694). Before the Subcomm. on Civil Rights & Human Servs. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019) (Statement of Emily Martin, Vice President for Education and Workplace Justice, National Women's Law Center, at 3).

[87] House Committee on Educ. & Labor, *Long Over Due: Exploring the Pregnant Workers' Fairness Act*, YouTube (Oct. 22, 2019), https://www.youtube.com/watch?time_continue=2&v=SI3WK-7KVNE&feature=emb_logo (See statement of Rep. Steve Cohen, at 1:52:15).

[88] House Committee on Educ. & Labor, *Long Over Due: Exploring the Pregnant Workers' Fairness Act*, YouTube (Oct. 22, 2019), https://www.youtube.com/watch?time_continue=2&v=SI3WK-7KVNE&feature=emb_logo (See statement of Rep. Jahana Hayes, at 1:08:43).

[89] Pregnancy & Breastfeeding, Ctr. For Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnancy-breastfeeding.html (last visited Aug. 31, 2020).

tilation than nonpregnant women."[90] Women, and in particular women of color, make up a disproportionate share of the essential workforce.[91] Pregnant workers on the frontlines could be at increased risk of contracting COVID–19 and complicating their pregnancies. One study of pregnant women in Philadelphia found that Black and Hispanic women are "five times more likely to be exposed to coronavirus."[92] Guaranteed reasonable accommodations could be pivotal in pregnant workers maintaining healthy pregnancies during COVID–19.

REASONABLE ACCOMMODATIONS FOR PREGNANT WORKERS PROMOTE FAMILIES' ECONOMIC STABILITY

Families increasingly rely on pregnant workers' income. Seventy-five percent of women will be pregnant and employed at some point in their careers.[93] In 2017, 41 percent of mothers were the sole or primary breadwinners in their households, and one-quarter of mothers were co-breadwinners, bringing home 25 percent to 49 percent of earnings for their families.[94] Ensuring pregnant workers have reasonable accommodations helps ensure that pregnant workers remain healthy and earn an income when they need it the most. Pregnant mothers want, and oftentimes need, to keep working during their pregnancies, both for income and to retain health insurance.[95] According to an analysis from the non-profit organization A Better Balance:

> Many pregnant workers are forced to use up allotted leave time early, sometimes even before they give birth, leaving no time remaining for recovery from childbirth. Others are fired when they request accommodations or exhaust their leaves of absence, and then face a particularly difficult time re-entering the workforce as new mothers. Some women lose their health benefits when they are fired or forced onto unpaid leave and then must switch providers and/or delay medical care while securing replacement health insurance. For women who lose their health insurance shortly before going into labor, they could be looking at staggering healthcare costs for childbirth, which

[90] Pregnancy Data, Ctr. For Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/special-populations/pregnancy-data-on-covid-19.html (last visited August 31, 2020).

[91] *See* Hye Jin Rho, Ctr. for Econ. And Policy Research, A Basic Demographic Profile of Workers in Frontline Industries 3 (2020), https://cepr.net/a-basic-demographic-profile-of-workers-in-frontline-industries/. See also Jocelyn Frye, Ctr. For American Progress, On the Frontlines at Work and at Home: The Disproportionate Economic Effects of the Coronavirus Pandemic on Women of Color 8 (2020), https://www.americanprogress.org/issues/women/reports/2020/04/23/483846/frontlines-work-home/

[92] News Release, Penn Medicine News, Pregnant Black and Hispanic Women Five Times More Likely to Be Exposed to Coronavirus (July 29, 2020), https://www.pennmedicine.org/news/news-releases/2020/july/pregnant-black-and-hispanic-women-five-times-more-likely-to-be-exposed-to-coronavirus.

[93] Dina Bakst et al., A Better Balance, Long Overdue: It's Time for the Federal Pregnant Workers Fairness Act 23 (2019), https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf.

[94] Sarah Jane Glynn, Center for American Progress, Breadwinning Mothers Continue to be the U.S. Norm 5 (2019), https://cdn.americanprogress.org/content/uploads/2019/05/12070012/Breadwinners2019-report1.pdf.

[95] A Better Balance, Pregnant and Jobless: Thirty-Seven Years after Pregnancy Discrimination Act, Pregnant Women Still Choose Between a Paycheck and a Healthy Pregnancy 11 (2015), https://www.abetterbalance.org/wp-content/uploads/2017/01/PregnantandJobless.pdf.

> averages $30,000 for a vaginal delivery and $50,000 for a C-section in the U.S.[96]

Pregnant workers who are pushed out of the workplace might feel the effects for decades, losing out on everything from 401(k) or other retirement contributions to short-term disability benefits, seniority, pensions, social security contributions, life insurance, and more.[97]

Guaranteeing reasonable accommodations for pregnant workers also promotes women's labor force participation. In a letter to Congress, eighteen leading members of the employer community encouraged Congress to pass the PWFA because "[w]omen'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"[98] As Ms. Wilbur testified at the October 22nd Hearing:

> The Act would help boost our country's workforce participation rate among women. In states like Kentucky, which ranks 44th in the nation for female labor force participation, we know one contributor to this abysmal statistic is a mother or soon-to-be mother who is forced out or quits a job due to a lack of reasonable workplace accommodations. We can help prevent such situations by clearly laying the groundwork for an informed dialogue between employers and employees on how these employees can continue working safely and productively throughout the course of a pregnancy and afterwards.[99]

THE PREGNANT WORKERS FAIRNESS ACT ENSURES WORKERS HAVE THE RIGHT TO REASONABLE ACCOMMODATIONS

The PWFA establishes a pregnant worker's right to reasonable accommodations and eliminates the evidentiary hurdles to defend that right. It applies to private sector employers with 15 or more employees as well as public sector employers. Covered employers must make reasonable accommodations and cannot deny employment opportunities for job applicants or employees affected by a "known limitation" related to pregnancy, childbirth, or a related medical condition.[100] Under the PWFA, a "known limitation" means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the pregnant worker or her representative has communicated to the employer. Similar to the ADA, employers are not required to make an accommodation if it imposes an undue hardship on an employer's business.

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[96] Dina Bakst et al., A Better Balance, Long Overdue: It's Time for the Federal Pregnant Workers Fairness Act 23 (2019), https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf.

[97] Pregnant and Jobless, *supra* note 96, at 11.

[98] Letter from Adobe et al., to Members of Congress (June 17, 2020) https://www.nationalpartnership.org/our-work/resources/economic-justice/coalition/an-open-letter-in-support-of-PWFA-from-private-sector-employers.pdf.

[99] *Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694) Before the Subcomm. on Civil Rights & Human Servs. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019) (Written testimony of Iris Wilbur, Vice President of Government Affairs & Public Policy, Greater Louisville Inc.—The Metro Chamber of Commerce, at 2).

[100] National Partnership For Women And Families, Pregnant Workers Fairness Act Section by Section 1 (2019), http://www.nationalpartnership.org/our-work/resources/workplace/pregnancy-discrimination/pregnant-workers-fairness-act-section-by-section.pdf.

For private sector employees and job applicants, the PWFA is written to mirror the enforcement powers, procedures, and remedies established under the Civil Rights Act of 1964.[101] A court may award lost pay, interest, compensatory damages, punitive damages, costs, reasonable attorneys' fees, and experts' fees, to the extent that such relief is available under the law. For public sector employees and job applicants, the PWFA provides mirrors the powers, remedies, and procedures under the Congressional Accountability Act,[102] Title V of the United States Code,[103] Section 717 of the Civil Rights Act of 1964,[104] and the Government Employee Rights Act of 1991.[105] For both the private and public sectors, if the employer engaged in good faith negotiations with the employee during the interactive process but the parties cannot agree to a reasonable accommodation, the employer is not liable for damages.

THE PREGNANT WORKERS FAIRNESS ACT MIRRORS KEY PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT OF 1990

The PWFA requires private sector employers with 15 or more employees and public sector employers to make "reasonable accommodations" to the "known limitations" related to pregnancy, childbirth, or related medical conditions of a "qualified" employee unless doing so would be an "undue hardship" for the employer. Additionally, the PWFA uses ADA terminology to require the use of the "interactive process" for establishing reasonable accommodations.

THE PREGNANT WORKERS FAIRNESS ACT INCLUDES A WIDE ARRAY OF PREGNANCY-RELATED CONDITIONS

Throughout the bill's text, the PWFA ensures that workers have access to reasonable accommodations for conditions connected with a pregnancy, not just a pregnancy itself. Section 2 guarantees workers reasonable accommodations for the "known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee." The bill further defines "known limitations" to mean a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee has communicated to the employer, whether or not such limitation meets the definition of disability outlined in the ADA. The definition of "known limitation" allows the worker to communicate her need for a reasonable accommodation. However, this provision is broad and recognizes that there may be times when a worker's representative may communicate this request on her behalf. Importantly, PWFA does not import the ADA's definition of disability, but rather requires employers to make accommodations to the "known limitations" related to pregnancy, childbirth, or related medical conditions.

ONLY "QUALIFIED EMPLOYEES" ARE ELIGIBLE FOR THE PREGNANT WORKERS FAIRNESS ACT'S REASONABLE ACCOMMODATIONS

The PWFA limits which employees are eligible for reasonable accommodations to those employees and applicants who are qualified.

[101] 42 U.S.C. § 2000e.
[102] 2 U.S.C. § 1301.
[103] 3 U.S.C. § 411.
[104] 42 U.S.C. § 2000e–16.
[105] 42 U.S.C. § 2000e–16b.

The definition of qualified under PWFA is very similar to the definition used in the ADA, which requires that the applicant or employee must "satisfy job requirements for educational background, employment experience, skills, licenses, and any other qualification standards that are job related and be able to perform those tasks that are essential to the job ("essential functions"), with or without reasonable accommodation." [106]

The PWFA defines a qualified employee as "an employee or applicant who, with or without reasonable accommodations, can perform the essential functions of the employment position." [107] PWFA's "qualified individual" definition deviates from the ADA's by providing the following caveat: "[E]xcept that an employee or applicant shall be considered qualified if—(A) any inability to perform an essential function is for a temporary period; (B) the essential function could be performed in the near future; and (C) the inability to perform the essential function can be reasonably accommodated." [108]

This language was inserted into the PWFA to make clear that the temporary inability to perform essential functions due to pregnancy does not render a worker "unqualified." Just as there is precedent under the ADA for the temporary excusal of essential functions, there may be a need for a pregnant worker to temporarily perform other tasks before fully returning to her position. Under the ADA, courts have found workers are entitled to reasonable accommodations if they only need a finite leave of absence or a transfer that would allow them to perform the essential functions of the job "in the near future." [109]

Because the ADA's "essential functions" language is mirrored in the PWFA, current understanding of "essential functions" under the ADA is instructive to the PWFA. According to the EEOC, factors to consider in determining if a function is "essential" include:

- whether the reason the position exists is to perform that function;
- the number of other employees available to perform the function or among whom the performance of the function can be distributed; and
- the degree of expertise or skill required to perform the function.[110]

A written job description prepared before advertising or interviewing for a job will be considered as evidence of "essential functions," but it is not the only evidence considered. Other kinds of evidence that the EEOC will consider include:

- the actual work experience of present or past employees in the job;
- the time spent performing a function;
- the consequences of not requiring that an employee perform a function; and

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[106] *The ADA: Your Responsibilities as an Employer*, U.S. Equal Emp't Opportunity Comm'n (Jan. 15, 1997) https://www.eeoc.gov/facts/ada17.html#:~:text=Essential%20functions%20are%20the%20basic,tasks%20are%20essential%20to%20performance.

[107] H.R. 2694, 116th Cong. § 5(6) (2019) (as reported).

[108] *Id.*

[109] *See, e.g. Robert* v. *Bd. of Cty. Comm'rs of Brown Cty., Kans.*, 691 F.3d 1211, 1218 (10th Cir. 2012).

[110] *The ADA: Your Responsibilities as an Employer*, U.S. Equal Emp't Opportunity Comm'n (Jan. 15, 1997) https://www.eeoc.gov/facts/ada17.html#:~:text=Essential%20functions%20are%20the%20basic,tasks%20are%20essential%20to%20performance.

- the terms of a collective bargaining agreement.[111]

THE PREGNANT WORKERS FAIRNESS ACT USES THE REASONABLE ACCOMMODATION FRAMEWORK WITHIN THE AMERICANS WITH DISABILITIES ACT OF 1990

The PWFA uses the term "reasonable accommodation," as defined under the ADA, throughout the bill's text. Under the ADA, a "reasonable accommodation" means:

> (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
>
> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or
>
> (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.[112]

Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, and the provision of qualified readers or interpreters are all included in a non-exhaustive list of possible ADA accommodations.[113]

The Job Accommodation Network (JAN), an ADA technical assistance center funded by the U.S. Department of Labor's Office of Disability Employment Policy (ODEP), lists numerous potential accommodations related to disabilities that might arise during pregnancy, including more than 20 suggested accommodations just for a lifting restriction related to pregnancy; the PWFA would include all of these accommodations as possibilities as well. Other possible accommodations that would be available under the PWFA include scheduling changes due to morning sickness or reassignment to a vacant position. Under the ADA, "[a] qualified individual with a disability may work part-time in his/her current position, or occasionally take time off, as a reasonable accommodation if it would not impose an undue hardship on the employer."[114] Similarly, leave is one possible accommodation under the PWFA, including time off to recover from delivery. However, Section 2(4) of the PWFA makes clear that an employer "cannot require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided."[115]

EMPLOYERS ARE NOT REQUIRED TO PROVIDE REASONABLE ACCOMMODATIONS THAT CREATE AN UNDUE HARDSHIP

As with the ADA, Section 2 of the PWFA does not require employers to provide reasonable accommodations that would impose

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[111] *Id.*
[112] 29 C.F.R. § 1630.2(o).
[113] 42 U.S.C. § 12111.
[114] U.S. Equal Emp't Opportunity Comm'n, The Family and Medical Leave Act, the ADA, and Title VII of the Civil Rights Act of 1964 (1995), https://www.eeoc.gov/laws/guidance/family-and-medical-leave-act-ada-and-title-vii-civil-rights-act-1964.
[115] H.R. 2694, 116th Cong. § 2(4) (2019) (as reported).

an undue hardship on the employer. Under the ADA, an undue hardship is a "significant difficulty or expense incurred by a covered entity, when considered in light of a variety of factors including the structure and overall resources of the employer and the impact of the accommodation on the operations of the covered entity."[116] Moreover, although "undue hardship" under the ADA is always determined on a case-by-case basis, "[i]n general, a larger employer with greater resources would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer with fewer resources."[117] Like the ADA, the PWFA seeks to balance the interests of the employer and employee and, although there may be some costs associated with making a reasonable accommodation, the "undue hardship" standard limits the employer's exposure both to overly burdensome accommodation requests and lawsuits that would attempt to hold the employer liable for failing to provide a prohibitively expensive accommodation.

THE PREGNANT WORKERS FAIRNESS ACT USES THE AMERICANS WITH DISABILITIES ACT OF 1990'S "INTERACTIVE PROCESS" FOR REASONABLE ACCOMMODATIONS

The PWFA explicitly references the "interactive process" that has long been used under the ADA—and even before that under Section 504 of the *Rehabilitation Act of 1973*[118]—to determine an effective reasonable accommodation.[119] In the context of the ADA, the interactive process "simply means that employers and employees with disabilities who request accommodations work together to come up with accommodations."[120] In some cases under the PWFA, the worker will request an accommodation that will easily address a known limitation of pregnancy, rendering the "interactive process" either unnecessary or virtually non-existent. For example, a pregnant worker who is in the last trimester of her pregnancy who usually stands to do her job may request a stool to sit on. In this case, the worker's pregnancy is likely known to the employer or readily apparent, and the solution is inexpensive, readily available, and—depending on the exact nature of the job minimally disruptive to the employer's operation. As Ms. Bakst stated at the October 22nd Hearing:

> The beauty of the flexible reasonable accommodation standard within the PWFA is that it makes no assumptions about what pregnant workers may need or not need, and therefore it ensures that the law does not perpetuate gender inequality by providing women with overly broad and unnecessary protections. Instead, in recognition that every pregnancy and workplace is different, the PWFA requires only an interactive process between employer and employee to determine whether a reasonable accommoda-

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[116] 29 C.F.R. § 1630.2.

[117] *What is Considered an "Undue Hardship" for a Reasonable Accommodation?,* ADA National Network, https://adata.org/faq/what-considered-undue-hardship-reasonable-accommodation (last visited Mar. 19, 2020).

[118] 29 U.S.C. § 701.

[119] *See, e.g., Barnett* v. *U.S. Air, Inc.,* 228 F.3d 1105, 1112 (9th Cir 2000), *rev'd on other grounds, U.S. Airways, Inc.* v. *Barnett,* 535 U.S. 391 (2002).

[120] *Accommodation and Compliance: Interactive Process,* Job Accommodation Network, https://askjan.org/topics/interactive.cfm (last visited Mar. 19, 2020).

tion will allow the worker to continue working without jeopardizing her health.[121]

However, under the ADA, there may be times when the "interactive process" is critical to providing reasonable accommodations, and an employer may be committing a prohibited act of discrimination if it fails to engage in the interactive process in good faith. In interpreting the ADA, one court noted, "[t]he ADA imposes upon employers a good-faith duty to engage [with their employees] in an interactive process to identify a reasonable accommodation. This duty is triggered when an employee communicates her disability and desire for an accommodation—even if the employee fails to identify a specific, reasonable accommodation." [122] This good-faith duty will apply to employers under the PWFA.

Under the PWFA, once an employer has been made aware of a "known limitation" related to pregnancy, childbirth, or a related medical condition, the employer will be required to engage with the employee in the process of identifying a reasonable accommodation. According to the JAN, there are six steps to the interactive process under the ADA: recognizing the request, gathering information including documentation of disability, exploring accommodation options, choosing an accommodation, implementing the accommodation, and monitoring the effectiveness of the accommodation.[123]

Under the PWFA, the interactive process would operate in a similar way for pregnant workers as it has for decades under the ADA. Both the employer and employee are responsible for engaging in the interactive process in good faith. Not all of the steps are required in determining reasonable accommodations for pregnant workers; oftentimes, the interactive process can take place in a short amount of time.

An employee who fails to engage in the interactive process may not later claim that their employer failed to accommodate their disability under the ADA, or the known limitations of pregnancy under the PWFA; numerous courts have rejected claims under the ADA on these grounds.[124] Additionally, an employer will not be liable for failure to engage in the interactive process if the employee ultimately fails to demonstrate the existence of a reasonable accommodation that would allow her to perform the essential functions of the position.[125]

THE PREGNANT WORKERS FAIRNESS ACT PROVIDES CLARITY FOR EMPLOYERS

As of September 2020, 30 states, the District of Columbia, and 4 cities require employers to provide accommodations to pregnant workers. Still, workers and employers face a patchwork of state and local laws that leave many pregnant workers with no protections at all. Ms. Wilbur urged Congress to create a federal standard during the October 22nd Hearing, "Greater Louisville is home to many multi-state businesses and corporate headquarters, so the

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[121] Bakst Testimony at 23.

[122] *Jacobs* v. *N.C. Admin. Office of the Courts,* 780 F.3d 562, 581 (4th Cir. 2015)

[123] *Accommodation and Compliance: Interactive Process,* Job Accommodation Network, https://askjan.org/topics/interactive.cfm (last visited Mar. 19, 2020).

[124] *Griffin* v. *United Parcel Serv., Inc.*, 661 F.3d 216, 225 (5th Cir. 2011) (quoting *Loulseged* v. *Akzo Nobel Inc.*, 178 F.3d 731, 734 (1999)).

[125] *Jacobs* v. *N.C. Admin. Office of the Courts,* 780 F.3d 562, 581 (4th Cir. 2015) (internal quotation marks omitted).

ability to have uniformity related to pregnant worker accommodations throughout our region and entire country is important. Therefore, [Greater Louisville Inc.—The Metro Chamber of Commerce] urges Congress to advance the PWFA at the federal level." [126]

By guaranteeing pregnant workers the right to reasonable accommodations in the workplace, the PWFA could also decrease employers' legal uncertainty. Ms. Wilbur attested to this at the October 22nd Hearing:

> The PWFA also gives much-needed clarity because it explicitly provides 'reasonable accommodations' for pregnant and new mothers, in addition to the proper procedures for providing them, thereby increasing the potential to resolve requests for accommodations quickly and informally (as employers have done for decades for workers with disabilities) and reducing the potential for costly litigation. We believe that the Act will lead to a reduction, not an increase, in litigation for precisely this reason. At least two states with pregnant worker accommodation laws have reported a reduction in litigation since the laws went into effect. Before Kentucky's law was enacted this summer, our employers were forced to navigate a complex web of federal laws and court decisions to figure out what their obligations are when it comes to appropriately accommodating pregnant workers and new mothers. Clearly defining what constitutes 'reasonable accommodations' and when an employer is and is not obligated to provide them will establish important guidance for businesses, especially the smaller and mid-size companies we represent who cannot afford expensive legal advisors.[127]

The PWFA would provide clarity and uniformity for employers and would not come at significant cost to employers. The JAN found that "fifty-seven percent of requested accommodations by employees were granted at no cost, while thirty-six percent of employers reported a one-time cost." [128]

THE PREGNANT WORKERS FAIRNESS ACT DOES NOT ALTER RELIGIOUS EXEMPTIONS THAT MAY EXIST UNDER CURRENT LAW

The PWFA does not change existing exemptions for religious employers under current law.[129] Further, the PWFA remains neutral with respect to claims that may be brought under the *Religious*

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[126] *Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694) Before the Subcomm. on Civil Rights & Human Servs. of the H. Comm. on Educ. & Labor,* 116th Cong. (2019) (Written testimony of Iris Wilbur, Vice President of Government Affairs & Public Policy, Greater Louisville Inc.—The Metro Chamber of Commerce, at 2).

[127] *Id.*

[128] Job Accommodation Network, Workplace Accommodations: Low Cost, High Impact 3 (2019) https://askjan.org/publications/Topic-Downloads.cfm?pubid=962628&action=download&pubtype=pdf.

[129] Religious employers may be afforded a limited exemption from, for example, Title VII of the Civil Rights Act of 1964's prohibition on religious discrimination. *See e.g., Rayburn* v. *Gen. Conf. of Seventh-Day Adventists,* 772 F.2d 1164, 1166 (4th Cir. 1985) ("The language and the legislative history of Title VII both indicate that the statute exempts religious institutions only to a narrow extent.") Furthermore, the constitutional "ministerial exception" applies to employees of houses of worship and religious schools who carry out important religious functions at houses of worship and religious schools. Although the types of positions that are covered by the "ministerial exception" are limited, it allows religious employers to disregard altogether Title VII and other civil rights employment laws for those positions.

Freedom Restoration Act (RFRA)[130] and does not include language exempting PWFA-covered employers from RFRA's provisions. Although religious employers may claim that a required accommodation is a substantial burden on their free exercise of religion under RFRA, fundamentally the Committee believes that nondiscrimination provisions are a compelling government interest and the least restrictive means to achieve the policy of equal employment opportunity. Moreover, even though this Administration seeks to erroneously use RFRA to undermine nondiscrimination provisions,[131] RFRA cannot and should not be used to create exemptions that would harm the rights of an employee.[132]

THE PREGNANT WORKERS FAIRNESS ACT ENJOYS BROAD BIPARTISAN SUPPORT

According to a recent poll, 89 percent of voters favor the PWFA, with 69 percent of voters strongly favoring it.[133] The PWFA has "high levels of support across the political spectrum including Republicans (81%), Independents (86%), and Democrats (96%) along with Trump voters (80%) and Clinton voters (97%), very conservative voters (80%), and liberals (95%)."[134]

The PWFA is about ensuring that pregnant workers can stay safe and healthy on the job by being provided reasonable accommodations for pregnancy, childbirth, or related medical conditions unless those accommodations are an undue burden for the employer. The PWFA is one crucial step needed to reduce the disparities pregnant workers face by ensuring that pregnant women, and especially pregnant women of color, can remain safe and healthy at work.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section states that the title of the bill is the *Pregnant Workers Fairness Act* (the Act or this Act).

Section 2. Nondiscrimination with regard to reasonable accommodations related to pregnancy

This section makes it unlawful for a covered entity to:

- Fail to provide reasonable accommodations for pregnant workers (Pregnant workers covered under the Act are those qualified employees with known limitations related to pregnancy, childbirth, or related medical conditions. Covered enti-

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[130] 42 U.S.C. § 2000bb.

[131] U.S. Department of Labor, *Guidance Regarding Federal Grants and Executive Order 13798,* https://www.dol.gov/agencies/oasam/grants/religious-freedom-restoration-act (last visited July 7, 2020).

[132] The Establishment Clause of the First Amendment limits the government's ability to provide religious exemptions from generally applicable laws for religious or moral reasons. The Constitution requires that any "accommodation must be measured so that it does not override other significant interests" or have a "detrimental effect on any third party." *Cutter* v. *Wilkinson,* 544 U.S. 709, 722 (2005); *Burwell* v. *Hobby Lobby Stores, Inc.,* 123 S. Ct. 2751, 2781 n. 37 (citing Cutter, 544 U.S. at 720). Providing such an exemption under the PWFA would undoubtedly cause harm to women.

[133] Brian Nienaber, The Tarrance Group, Pregnant Workers Fairness Act Survey Memo 2 (2020) https://www.aclu.org/sites/default/files/field_document/pwfa_survey_memo_2-20-20_1_1_2.pdf.

[134] *Id.*

ties do not have to provide reasonable accommodations if doing so would cause them undue hardship.);

- Require pregnant workers to accept an accommodation other than a reasonable accommodation arrived at through the interactive process (as set forth in Section 5);
- Deny employment opportunities to pregnant workers because of the need for a reasonable accommodation;
- Require a pregnant worker to take paid or unpaid leave if another reasonable accommodation can be provided; or
- Take adverse employment actions against a pregnant worker for requesting or using a reasonable accommodation.

Section 3. Remedies and enforcement

In general under this section, pregnant workers alleging pregnancy discrimination under the Act shall have the same rights and remedies available to those employees alleging discrimination on the basis of race, color, religion, sex, or national origin under Title VII of the *Civil Rights Act of 1964*,[135] the *Congressional Accountability Act of 1995*,[136] Chapter 5 of Title 3 of the United States Code,[137] Section 717 of the *Civil Rights Act of 1964*,[138] and the *Government Employee Rights Act of 1991*.[139] Remedies include equitable relief, including back pay, and reasonable attorney's fees. Claimants may also be awarded compensatory and punitive damages.[140]

Prohibition Against Retaliation. The Act makes it unlawful to coerce, intimidate, threaten, or interfere with any individual who has exercised rights provided under the Act or who has helped another individual exercise rights provided under the Act.

Limitation. The Act provides covered entities with a good faith defense. The Act provides that damages may not be awarded if the covered entity demonstrates good faith in engaging in the interactive process with the pregnant worker to identify and make a reasonable accommodation. This provision mirrors a similar provision under the *Americans with Disabilities Act of 1990*.[141]

Section 4. Rulemaking

This section requires the EEOC to issue regulations, including examples of reasonable accommodations under the Act, within two years.

Section 5. Definitions

This section defines the following key terms used throughout the Act.

Commission. The term Commission refers to the Equal Employment Opportunity Commission (EEOC).

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[135] 42 U.S.C. § 2000e.
[136] 2 U.S.C. § 1301.
[137] 3 U.S.C. § 411.
[138] 42 U.S.C. § 2000e–16.
[139] 42 U.S.C. § 2000e–16b.
[140] Punitive damages generally cannot be awarded to employees of the legislative, judicial, or executive branch. Compensatory and punitive damages are subject to statutory caps. For employers with 15–100 employees, the limit is $50,000. For employers with 101–200 employees, the limit is $100,000. For employers with 201–500 employees, the limit is $200,000. For employers with more than 500 employees, the limit is $300,000.
[141] 42 U.S.C. § 12101.

Covered Entity. A covered entity includes a private sector employer who has 15 or more employees, employment agencies, labor organizations, legislative branch employers, executive branch employers, governmental agencies (including state and local governments and the government of the District of Columbia), political subdivisions, units of the judicial branch of the Federal Government having positions in the competitive service, and the offices of state and local elected officials.

Employee. An employee is someone who is employed by a private-sector employer; this includes job applicants. The term employee also includes those in the legislative branch; the executive branch; certain federal judicial branch employees (those with positions in the competitive service); and state and local government employees, including those who work for elected officials.

Person. A person is defined the same way such term is defined under Title VII of the *Civil Rights Act of 1964*.

Known Limitation. A known limitation means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee has communicated to the employer, whether or not such limitation meets the definition of disability outlined in the *Americans with Disabilities Act of 1990*.

Qualified Employee. A qualified employee is an employee, or job applicant, who, with or without reasonable accommodation, can perform the essential functions of the job (essential function). An individual is considered qualified if any inability to perform an essential function is for a temporary period, the essential function could be performed in the near future, and the inability to perform the essential function can be reasonably accommodated.

Reasonable Accommodation. A reasonable accommodation is defined the same way such term is defined under the *Americans with Disabilities Act of 1990*. This definition adopts the requirement for a good faith interactive negotiation between employers and employees to determine a reasonable accommodation (interactive process). Under the Act, reasonable accommodations would be provided in light of known limitations related to pregnancy, rather than a disability.

Undue Hardship. An undue hardship is defined the same way such term is defined under the *Americans with Disabilities Act of 1990*. An undue hardship means an action requiring significant difficulty or expense, when considering factors such as the nature and cost of the accommodation and the employer's overall financial resources.

Section 6. Waiver of State Immunity

This section makes clear that States shall not be immune from the Act under the 11th amendment to the U.S. Constitution.

Section 7. Relationship to Other Laws

This section makes clear that nothing in the Act limits pregnant workers' rights under a federal, State, or local law that provides greater or equal protection.

Section 8. Severability

This section states that if any portion of the Act is found unconstitutional, the remainder of the Act shall not be affected.

EXPLANATION OF AMENDMENTS

The amendments, including the amendments in the nature of a substitute, are explained in the descriptive portions of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Pursuant to section 102(b)(3) of the *Congressional Accountability Act of 1995*, Pub. L. No. 104–1, H.R. 2694, as amended, applies to terms and conditions of employment within the legislative branch. Section 5(2)(B)(i) includes an employing office as defined by section 101 of the *Congressional Accountability Act of 1995* (2 U.S.C. 1301) and section 411(c) of title 3, United States Code, in the definition of a "covered entity."

UNFUNDED MANDATE STATEMENT

Pursuant to Section 423 of the *Congressional Budget and Impoundment Control Act of 1974*, Pub. L. No. 93–344 (as amended by Section 101(a)(2) of the *Unfunded Mandates Reform Act of 1995*, Pub. L. No. 104–4), the Committee traditionally adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office (CBO) pursuant to section 402 of the *Congressional Budget and Impoundment Control Act of 1974*. The Committee reports that because this cost estimate was not timely submitted to the Committee before the filing of this report, the Committee is not in a position to make a cost estimate for H.R. 2694, as amended.

EARMARK STATEMENT

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2694 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as described in clauses 9(e), 9(f), and 9(g) of rule XXI.

ROLL CALL VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following roll call votes occurred during the Committee's consideration of H.R. 2694:

Date: 01/14/2020

COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE

Roll Call: 1 Bill: H.R. 2694 Amendment Number: 2

Disposition: defeated by a vote of 17-27

Sponsor/Amendment: Foxx/ includes Chairman Scott's ANS and incorporates the inapplicability to religious organizations from Section 702(a) of the Civil Rights Act of 1964

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. SCOTT (VA) (Chairman)		X		Mrs. FOXX (NC) (Ranking)	X		
Mrs. DAVIS (CA)		X		Mr. ROE (TN)	X		
Mr. GRIJALVA (AZ)		X		Mr. THOMPSON (PA)	X		
Mr. COURNTEY (CT)		X		Mr. WALBERG (MI)	X		
Ms. FUDGE (OH)		X		Mr. GUTHRIE (KY)			X^
Mr. SABLAN (MP)		X		Mr. BYRNE (AL)			X
Ms. WILSON (FL)		X		Mr. GROTHMAN (WI)			X^
Ms. BONAMICI (OR)		X		Ms. STEFANIK (NY)	X		
Mr. TAKANO (CA)		X		Mr. ALLEN (GA)	X		
Ms. ADAMS (NC)		X		Mr. SMUCKER (PA)			X^
Mr. DESAULNIER (CA)			X	Mr. BANKS (IN)	X		
Mr. NORCROSS (NJ)		X		Mr. WALKER (NC)			X
Ms. JAYAPAL (WA)		X		Mr. COMER (KY)	X		
Mr. MORELLE (NY)		X		Mr. CLINE (VA)	X		
Ms. WILD (PA)		X		Mr. FULCHER (ID)	X		
Mr. HARDER (CA)		X		Mr. TAYLOR (TX)	X		
Mrs. MCBATH (GA)		X		Mr. WATKINS (KS)	X		
Ms. SCHRIER (WA)		X		Mr. WRIGHT (TX)	X		
Ms. UNDERWOOD (IL)		X		Mr. MEUSER (PA)	X		
Mrs. HAYES (CT)		X		Mr. JOHNSON (SD)	X		
Ms. SHALALA (FL)		X		Mr. KELLER (PA)	X		
Mr. LEVIN (MI)		X		Mr. MURPHY (NC)	X		
Ms. OMAR (MN)		X					
Mr. TRONE (MD)		X					
Ms. STEVENS (MI)		X					
Mrs. LEE (NV)		X					
Mrs. TRAHAN (MA)		X					
Mr. CASTRO (TX)		X					

TOTALS: Ayes: 17 Nos: 27 Not Voting: 6

Total: 50 / Quorum: / Report:

(28 D - 22 R)

^Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.

Date: 01/14/2020

COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE

Roll Call: 2 Bill: H.R. 2694 Amendment Number: Motion

Disposition: Adopted by a vote of 29-17

Sponsor/Amendment: McBath/ to report to the House with an amendment and with recommendation that the amendment be agreed to, and the bill as amended, do pass

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. SCOTT (VA) (Chairman)	X			Mrs. FOXX (NC) (Ranking)		X	
Mrs. DAVIS (CA)	X			Mr. ROE (TN)		X	
Mr. GRIJALVA (AZ)	X			Mr. THOMPSON (PA)		X	
Mr. COURNTEY (CT)	X			Mr. WALBERG (MI)		X	
Ms. FUDGE (OH)	X			Mr. GUTHRIE (KY)		X	
Mr. SABLAN (MP)	X			Mr. BYRNE (AL)			X
Ms. WILSON (FL)	X			Mr. GROTHMAN (WI)			X
Ms. BONAMICI (OR)	X			Ms. STEFANIK (NY)	X		
Mr. TAKANO (CA)	X			Mr. ALLEN (GA)		X	
Ms. ADAMS (NC)	X			Mr. SMUCKER (PA)		X	
Mr. DESAULNIER (CA)			X	Mr. BANKS (IN)		X	
Mr. NORCROSS (NJ)	X			Mr. WALKER (NC)			X
Ms. JAYAPAL (WA)	X			Mr. COMER (KY)	X		
Mr. MORELLE (NY)	X			Mr. CLINE (VA)		X	
Ms. WILD (PA)	X			Mr. FULCHER (ID)		X	
Mr. HARDER (CA)	X			Mr. TAYLOR (TX)		X	
Mrs. MCBATH (GA)	X			Mr. WATKINS (KS)		X	
Ms. SCHRIER (WA)	X			Mr. WRIGHT (TX)		X	
Ms. UNDERWOOD (IL)	X			Mr. MEUSER (PA)		X	
Mrs. HAYES (CT)	X			Mr. JOHNSON (SD)		X	
Ms. SHALALA (FL)	X			Mr. KELLER (PA)		X	
Mr. LEVIN (MI)	X			Mr. MURPHY (NC)		X	
Ms. OMAR (MN)	X						
Mr. TRONE (MD)	X						
Ms. STEVENS (MI)	X						
Mrs. LEE (NV)	X						
Mrs. TRAHAN (MA)	X						
Mr. CASTRO (TX)	X						

TOTALS: Ayes: 29 Nos: 17 Not Voting: 4

Total: 50 / Quorum: / Report:

(28 D - 22 R)

^Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.

STATEMENT OF PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause (3)(c) of rule XIII of the Rules of the House of Representatives, the goals of H.R. 2694 are to establish an affirmative right to reasonable accommodations for workers with known limitations relating to childbirth, pregnancy, or related medical conditions without imposing an undue hardship for employers.

DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c)(5) of rule XIII of the Rules of the House of Representatives, the Committee states that no provision of H.R. 2694 establishes or reauthorizes a program of the Federal Government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

HEARINGS

Pursuant to section 103(i) of H. Res. 6 for the 116th Congress, on October 22, 2019, the Committee on Education and Labor's Subcommittee on Civil Rights and Human Services held a hearing entitled "Long Over Due: Exploring the Pregnant Workers Fairness Act (H.R. 2694)," which was used to consider H.R. 2694. The hearing explored the health and economic effects of pregnant workers' lack of access to reasonable accommodations and examined how H.R. 2694 would fill a gap in the existing legal framework by guaranteeing pregnant workers the right to reasonable workplace accommodations. The Committee heard testimony from: The Honorable Jerrold Nadler (D–NY–10); Michelle Durham, former Emergency Medical Technician (EMT), Arab, AL; Iris Wilbur, Vice President of Government Affairs and Public Policy at Greater Louisville Inc.—The Metro Chamber of Commerce, Louisville, KY; Dina Bakst, Co-Founder and Co-President of A Better Balance, New York, NY; and Ellen McLaughlin, Partner at Seyfarth Shaw LLP, Chicago, IL.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

Pursuant to clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the *Congressional Budget and Impoundment Control Act of 1974*, and pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the *Congressional Budget and Impoundment Control Act of 1974*, the Committee has requested but not received a cost estimate for the bill from the Director of the Congressional Budget Office.

COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 2694. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the *Congressional Budget and Impoundment Control Act of 1974*. The Committee reports that because this cost estimate was not timely submitted to the Committee before the filing of this report, the Committee is not in a position to make a cost estimate for H.R. 2694, as amended.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

The bill does not change existing law for purposes of clause 3(e) of rule XIII of the Rules of the House of Representatives.

COMMITTEE CORRESPONDENCE

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CHAIRPERSON

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VICE CHAIRPERSON

SUSAN DAVIS, CALIFORNIA
G.K. BUTTERFIELD, NORTH CAROLINA
MARCIA FUDGE, OHIO
PETE AGUILAR, CALIFORNIA

JAMIE FLEET, STAFF DIRECTOR

Congress of the United States
House of Representatives
COMMITTEE ON HOUSE ADMINISTRATION
1309 Longworth House Office Building
Washington, D.C. 20515–6157
(202) 225–2061
https://cha.house.gov

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RANKING MINORITY MEMBER

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ONE HUNDRED SIXTEENTH CONGRESS

JEN DAULBY, MINORITY STAFF DIRECTOR

March 10, 2020

The Honorable Robert C. "Bobby" Scott
Chairman, Committee on Education and Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Scott:

I am writing to you concerning H.R. 2694, the Pregnant Workers Fairness Act. There are certain provisions in the legislation which fall within the Rule X jurisdiction of the Committee on House Administration.

In the interest of permitting your committee to proceed expeditiously to floor consideration, the Committee on House Administration agrees to forego action on the bill. This is done with the understanding that the Committee on House Administration's jurisdictional interests over this and similar legislation are in no way diminished or altered. In addition, the Committee reserves its right to seek conferees on any provisions within its jurisdiction which are considered in a House-Senate conference and requests your support if such a request is made.

I would appreciate your response confirming this understanding with respect to H.R. 2694 and ask that a copy of our exchange of letters on this matter be included in your committee report on the bill and in the *Congressional Record* during consideration of the bill on the House floor.

Sincerely,

Zoe Lofgren
Chairperson

cc: The Honorable Nancy Pelosi, Speaker of the House
The Honorable Rodney Davis, Ranking Member, Committee on House Administration
The Honorable Virginia Foxx, Ranking Member, Committee on Education and Labor
Mr. Thomas J. Wickham, Jr., Parliamentarian

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COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6100

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JEFFERSON VAN DREW, NEW JERSEY

March 11, 2020

The Honorable Zoe Lofgren
Chairperson
Committee on House Administration
1309 Longworth House Office Building
Washington, DC 20515

Dear Chairperson Lofgren:

In reference to your letter of March 10, 2020, I write to confirm our mutual understanding regarding H.R. 2694, the "Pregnant Workers Fairness Act."

I appreciate the Committee on House Administration's waiver of consideration of H.R. 2694 as specified in your letter. I acknowledge that the waiver was granted only to expedite floor consideration of H.R. 2694 and does not in any way waive or diminish the Committee on House Administration's jurisdictional interests over this or similar legislation.

I would be pleased to include our exchange of letters on this matter in the committee report for H.R. 2694 and in the *Congressional Record* during floor consideration of the bill to memorialize our joint understanding.

Again, thank you for your assistance with this matter.

Very truly yours,

ROBERT C. "BOBBY" SCOTT
Chairman

cc: The Honorable Rodney Davis, Ranking Member, Committee on House Administration
The Honorable Virginia Foxx, Ranking Member, Committee on Education and Labor
The Honorable Nancy Pelosi, Speaker
The Honorable Steny Hoyer, Majority Leader
The Honorable Thomas Wickham, Jr., Parliamentarian

JERROLD NADLER, New York
CHAIRMAN

DOUG COLLINS, Georgia
RANKING MINORITY MEMBER

U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515–6216
One Hundred Sixteenth Congress

March 6, 2020

The Honorable Bobby Scott
Chairman
Committee on Education and Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Scott:

This is to advise you that the Committee on the Judiciary has now had an opportunity to review the provisions in H.R. 2694, the "Pregnant Workers Fairness Act," that fall within our Rule X jurisdiction. I appreciate your consulting with us on those provisions. The Judiciary Committee has no objection to your including them in the bill for consideration on the House floor, and to expedite that consideration is willing to forgo action on H.R. 2694, with the understanding that we do not thereby waive any future jurisdictional claim over those provisions or their subject matters.

In the event a House-Senate conference on this or similar legislation is convened, the Judiciary Committee reserves the right to request an appropriate number of conferees to address any concerns with these or similar provisions that may arise in conference.

Please place this letter into the *Congressional Record* during consideration of the measure on the House floor. Thank you for the cooperative spirit in which you have worked regarding this matter and others between our committees.

Sincerely,

Jerrold Nadler
Chairman

c: The Honorable Douglas Collins, Ranking Member, Committee on the Judiciary
The Honorable Thomas J. Wickham, Jr., Parliamentarian
The Honorable Virginia Foxx, Ranking Member, Committee on Education and Labor

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March 10, 2020

The Honorable Jerrold Nadler
Chairman
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Nadler:

In reference to your letter of March 6, 2020, I write to confirm our mutual understanding regarding H.R. 2694, the "Pregnant Workers Fairness Act."

I appreciate the Committee on the Judiciary's waiver of consideration of H.R. 2694 as specified in your letter. I acknowledge that the waiver was granted only to expedite floor consideration of H.R. 2694 and does not in any way waive or diminish the Committee on the Judiciary's jurisdictional interests over this or similar legislation.

I would be pleased to include our exchange of letters on this matter in the committee report for H.R. 2694 and in the *Congressional Record* during floor consideration of the bill to memorialize our joint understanding.

Again, thank you for your assistance with this matter.

Very truly yours,

ROBERT C. "BOBBY" SCOTT
Chairman

cc: The Honorable Doug Collins, Ranking Member, Committee on the Judiciary
The Honorable Virginia Foxx, Ranking Member, Committee on Education and Labor
The Honorable Nancy Pelosi, Speaker
The Honorable Steny Hoyer, Majority Leader
The Honorable Thomas Wickham, Jr., Parliamentarian

CAROLYN B. MALONEY
CHAIRWOMAN

ONE HUNDRED SIXTEENTH CONGRESS

JIM JORDAN, OHIO
RANKING MINORITY MEMBER

Congress of the United States
House of Representatives
COMMITTEE ON OVERSIGHT AND REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6143
Majority (202) 225–5051
Minority (202) 225–5074
http://oversight.house.gov

March 11, 2020

The Honorable Robert C. "Bobby" Scott
Chairman
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to you concerning H.R. 2964, the "Pregnant Workers Fairness Act." There are certain provisions in the legislation which fall within the Rule X jurisdiction of the Committee on Oversight and Reform.

In the interest of permitting your Committee to proceed expeditiously on this bill, I am willing to waive this Committee's right to sequential referral. I do so with the understanding that by waiving consideration of the bill, the Committee on Oversight and Reform does not waive any future jurisdictional claim over the subject matters contained in the bill which fall within its Rule X jurisdiction. I request that you urge the Speaker to name Members of this Committee to any conference committee which is named to consider such provisions.

Please place this letter into the Congressional Record during consideration of the measure on the House floor. Thank you for the cooperative spirit in which you have worked regarding this matter and others between our respective Committees.

Sincerely,

Carolyn B. Maloney
Chairwoman

cc: The Honorable Jim Jordan, Ranking Member
Committee on Oversight and Reform

The Honorable Virginia Foxx, Ranking Member
Committee on Education and Labor

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March 12, 2020

The Honorable Carolyn B. Maloney
Chairwoman
House Committee on Oversight and Reform
2157 Rayburn House Office Building
Washington, DC 20515

Dear Chairwoman Maloney:

In reference to your letter of March 11, 2020, I write to confirm our mutual understanding regarding H.R. 2694, the "Pregnant Workers Fairness Act."

I appreciate the Committee on Oversight and Reform's waiver of consideration of H.R. 2694 as specified in your letter. I acknowledge that the waiver was granted only to expedite floor consideration of H.R. 2694 and does not in any way waive or diminish the Committee on Oversight and Reform's jurisdictional interests over this or similar legislation.

I would be pleased to include our exchange of letters on this matter in the committee report for H.R. 2694 and in the *Congressional Record* during floor consideration of the bill to memorialize our joint understanding.

Again, thank you for your assistance with this matter.

Very truly yours,

ROBERT C. "BOBBY" SCOTT
Chairman

cc: The Honorable Jim Jordan, Ranking Member, Committee on Oversight and Reform
The Honorable Virginia Foxx, Ranking Member, Committee on Education and Labor
The Honorable Nancy Pelosi, Speaker
The Honorable Steny Hoyer, Majority Leader
The Honorable Thomas Wickham, Jr., Parliamentarian

MINORITY VIEWS

INTRODUCTION

Committee Republicans unequivocally believe that discrimination of any kind is abhorrent and should not be tolerated, and that unlawful discrimination should not be permitted. This is why federal laws are already in place to protect workers from discrimination in the workplace, including discrimination because of pregnancy.

Prior to the Committee markup of H.R. 2694 on January 14, 2020, significant progress was made negotiating a bipartisan compromise, and Committee Republicans commend Chairman Robert C. "Bobby" Scott (D–VA) for his willingness to negotiate on several issues. The Chairman's Amendment in the Nature of a Substitute (Scott ANS) addressed a number of important concerns raised by Republicans, resulting in a much-improved product. However, one significant issue remains to be addressed in H.R. 2694 relating to protections for religious organizations.

PURPOSE OF H.R. 2694

H.R. 2694 is a stand-alone bill that would create a new statute. H.R. 2694 makes it unlawful for an employer not to provide reasonable accommodations for known limitations related to the pregnancy, childbirth, or related medical conditions of an employee or applicant unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business.[1] H.R. 2694 is intended to address perceived shortcomings in the Supreme Court's 2015 decision in *Young* v. *United Parcel Service, Inc.* (*Young*).[2] The Supreme Court in that case applied the requirements of the *Pregnancy Discrimination Act of 1978* (PDA), which is part of Title VII of the *Civil Rights Act of 1964* (CRA) and states that discrimination because of "sex" includes discrimination because of "pregnancy, childbirth, or related medical conditions; and 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."[3]

In *Young*, a part-time driver for United Parcel Service (UPS) named Peggy Young requested an accommodation of light duty due to her pregnancy and her doctor's recommendation that she not lift over 20 pounds. UPS refused the request and did not allow her to return to work because lifting over 20 pounds was an essential function of her job. Notably, UPS accommodated on-the-job injuries with light-duty assignments but did not offer light duty to employees who had medical conditions unrelated to a work injury. UPS

[1] H.R. 2694, 116th Cong. § 2(1) (2019).
[2] 575 U.S. 206 (2015).
[3] 42 U.S.C. § 2000e(k).

based its decision on the provisions of a collective bargaining agreement.[4]

The Supreme Court ruled in favor of Ms. Young, vacating the judgment of the lower court, and held that a pregnant employee can potentially establish discrimination under the PDA by alleging the employer denied a request for an accommodation and the employer accommodated others similar in their ability or inability to work. Under the PDA, a plaintiff can reach a jury by showing "the employer's policies impose a significant burden on pregnant workers" and the employer's non-discriminatory reasons for the policies are not "sufficiently strong to justify the burden."[5] Differential treatment between pregnant workers and other workers is a factor in determining whether the employer's policies impose a significant burden on pregnant workers and whether the employer's non-discriminatory reasons are sufficiently strong to justify the burden. However, the Court did not agree that pregnancy accommodations must automatically be provided to the same extent as any other accommodations, including on-the-job injury accommodations. In addition, the Court noted that statutory changes to Title I of the *Americans with Disabilities Act of 1990* (ADA) in the *Americans with Disabilities Act Amendments Act of 2008*, which were made after the facts at issue in *Young*, "may limit the future significance" of the Court's interpretation of the PDA because Congress "expanded the definition of 'disability' under the ADA to make clear that 'physical or mental impairment[s] that substantially limi[t]' an individual's ability to lift, stand or bend are ADA-covered disabilities."[6]

H.R. 2694 explicitly requires a reasonable accommodation for known limitations related to pregnancy, childbirth, or related medical conditions without reference to whether other workers' limitations, injuries, or impairments have been accommodated, but it does so in a stand-alone bill that does not amend the PDA or the ADA.

NEGOTIATED IMPROVEMENTS TO H.R. 2694

Essential Functions Requirement

At a hearing on H.R. 2694 on October 22, 2019, Representative Jerrold Nadler (R–NY), the bill's author, testified before the Subcommittee on Civil Rights and Human Services that the legislation uses "the framework and language of the ADA."[7] Accordingly, H.R. 2694 incorporates the ADA definitions of "reasonable accommodation" and "undue hardship."[8] The ADA prohibits employment discrimination "on the basis of disability," which can include "not making reasonable accommodations to the known physical or men-

[4] In 2014, UPS changed its policy to make pregnant employees eligible for light-duty assignments prior to oral argument at the Supreme Court, but the Court proceeded with the case. Brief for Respondent at 11, *Young* v. *United Parcel Serv.*, 575 U.S. 206 (2015) (No. 12–1226).

[5] 575 U.S. at 229.

[6] *Id.* at 218–19. The plaintiff did not petition the Supreme Court to review whether UPS had violated the ADA. The Court noted that the Equal Employment Opportunity Commission (EEOC) issued regulations in 2014 interpreting the ADA to require employers to accommodate employees whose temporary lifting restrictions originated off the job. *Id.* at 219.

[7] *Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694): Hearing Before the Subcomm. on Civ. Rights & Hum. Serv. of the H. Comm. on Educ. & Lab.*, 116th Cong. (2019) (written statement of Rep. Jerrold Nadler at 4).

[8] H.R. 2694, 116th Cong. § 5(5) (2019).

tal limitations of an otherwise qualified individual with a disability."[9] However, to qualify for potential protection under the ADA, the employee or applicant must be able to "perform the essential functions of the employment position," "with or without reasonable accommodation."[10]

H.R. 2694 as introduced did not include a requirement that the employee or applicant be able to perform the essential functions of the job, with or without reasonable accommodation. Ms. Ellen McLaughlin, a partner with Seyfarth Shaw LLP specializing in labor and employment law, raised significant concerns with this omission, calling it a "key provision of the ADA" when she testified before the Subcommittee on Civil Rights and Human Services. She stated:

> The types of accommodation that an employer must provide under the ADA are numerous and defined, but *they do not extend to accommodating an employee who remains unable to perform the essential functions of the job even with those accommodations*. By eliminating the essential function criteria, the Bill appears to require employers to take steps to keep the employee on the job regardless of her ability to continue to perform the core functions of the job. The consequences for employers—and employees—are unclear. Does this require an employer to keep an employee in a position despite being unable to perform the core tasks associated with that position—effectively allowing the employee to report for work but not do the job? If an employee cannot work mandatory overtime due to pregnancy and mandatory overtime is clearly an essential job function, is the pregnant employee—unlike the employee with a disability under the ADA—excused from working the mandatory overtime? Or does it require an employer to reassign the employee to a totally different position and, if so, can the employer make appropriate wage adjustments to reflect the compensation in that job?[11]

To address these concerns, the Scott ANS adds a requirement that the employee or applicant be "qualified," meaning the individual, "with or without reasonable accommodation, can perform the essential functions of the employment position."[12] In addition, to address concerns from supporters of H.R. 2694 that workers with known limitations related to pregnancy who are temporarily unable to perform an essential function be able to receive an accommodation, the Scott ANS includes an exception that an employee or applicant "shall be considered qualified if—(A) any inability to perform an essential function is for a temporary period; (B) the essential function could be performed in the near future; and

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[9] 42 U.S.C. § 12112(a), (b)(5).
[10] *Id.* § 12111(8).
[11] *Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694): Hearing Before the Subcomm. on Civ. Rights & Hum. Serv. of the H. Comm. on Educ. & Lab.*, 116th Cong. (2019) (written statement of Ellen McLaughlin, Partner, Seyfarth Shaw LLP, at 7–8) (emphasis in original) [hereinafter McLaughlin Statement].
[12] Scott ANS § 5(6).

(C) the inability to perform the essential function can be reasonably accommodated."[13]

This compromise language maintains the ADA essential-function requirement while indicating it is also appropriate to consider other ADA forms of reasonable accommodation such as "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, . . . and other similar accommodations"—which are incorporated in H.R. 2694 through its adoption of the ADA definition of reasonable accommodation—as well as leave.[14] The "essential functions" language in the Scott ANS thus incorporates the ADA concept of "essential functions" in H.R. 2694, although temporary limitations related to pregnancy must also be considered when determining the appropriate reasonable accommodation. Moreover, under the Scott ANS, to trigger the exception to the essential functions requirement, the limitation must be "temporary," the essential function at issue must be something that would be performed in the "near future," and the limitation can be "reasonably accommodated," which could include leave. The Scott ANS therefore does not require an employer to allow an employee to report for work but not do the job.

A key part of the ADA interactive process that takes place between a worker and employer to determine a reasonable accommodation is often a discussion of the essential functions of the worker's job. Establishing what are and are not essential functions is often critical in determining whether the employee can stay in the current position with a reasonable accommodation or whether another accommodation—such as job restructuring, a modified work schedule, reassignment to a vacant position, or leave—is needed. In its definition of the term "qualified individual," the ADA states that "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."[15] This is a practical, commonsense provision in the ADA because it is the employer who must ultimately choose the duties and assignments of each position so that the enterprise as a whole can function and thrive. Under H.R. 2694, courts will also need to consider the employer's judgment regarding the essential functions of the job.

Like the ADA, H.R. 2694 does not require "red circle" rates of pay for employees reassigned to vacant positions as reasonable accommodations. A red circle pay rate is a higher-than-normal pay rate for the job classification. Under the ADA and H.R. 2694, if a reasonable accommodation consists of reassignment to a vacant position, the pay can be commensurate with the vacant position's normal rate, even if this pay rate is lower than the rate for the employee's current position.[16]

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[13] *Id.*

[14] 42 U.S.C. § 12111(9)(B); *see also* EEOC, EMPLOYER-PROVIDED LEAVE AND THE AMERICANS WITH DISABILITIES ACT ("Granting Leave as a Reasonable Accommodation").

[15] 42 U.S.C. § 12111(8).

[16] *See, e.g.*, JOB ACCOMMODATION NETWORK, TECHNICAL ASSISTANCE MANUAL FOR TITLE I OF THE ADA ch. 3.10.5, https://askjan.org/publications/ada-specific/Technical-Assistance-Manual-for-Title-I-of-the-ADA.cfm#spy-scroll-heading-32 (employer may reassign individual to lower-graded

Definition of Known Limitations

The ADA includes a broad, comprehensive definition of "disability" so that workers and employers understand what impairments are covered by the statute.[17] In contrast, H.R. 2694 as introduced did not define "known limitations" related to pregnancy, childbirth, and related medical conditions. Ms. McLaughlin in her testimony explained why a definition of this central term in H.R. 2694 is needed:

> The phrase "known limitations" is clearly different than the definition of a covered disability under the ADA, and appears to be an express rejection of that term. While the definitions of the ADA may be imperfect, they have been interpreted and analyzed by courts over a period of years, and employers are familiar with and have been applying the ADA standards for some time. The decision to not cross-reference the ADA indicates that a different scope of coverage is intended by the drafters of the Bill. It is entirely unclear, however, what scope of coverage is intended, and precisely how that coverage differs from a covered disability under the ADA. Given the language of the Bill, it appears that any limitation of any type is covered, as long as the employer is aware of it.[18]

To address these concerns, the Scott ANS includes a definition of "known limitation," although this definition is far from being as detailed or specific as the ADA definition of "disability." The Scott ANS defines "known limitation" as a "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee's representative has communicated to the employer whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102)."[19] Thus the "known limitation" must be a "physical or mental condition" related to pregnancy, and it must be communicated to the employer, who is not under an obligation to guess or take affirmative steps to find out whether the worker has a limitation.

The Scott ANS definition confirms that "known limitation" goes beyond the ADA definition of "disability" by stating the condition can qualify "whether or not such condition meets the definition of disability specified in [the ADA.]" Supporters of H.R. 2694 were concerned that the already broad ADA definition of "disability" has not been interpreted by all courts to include limitations associated with pregnancy, including healthy pregnancies.

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position and does not have to maintain the individual's salary at the level of the higher-graded position).

[17] 42 U.S.C. § 12102(1) ("The term 'disability' means . . . a physical or mental impairment that substantially limits one or more major life activities . . . ."); *id*. § 12102(2)(A) ("[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."); *id*. § 12102(2)(B) ("[A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.").

[18] McLaughlin Statement, *supra* note 11, at 7.

[19] Scott ANS § 5(5).

While the definition in the Scott ANS of "known limitation" falls far short of the specificity and detail of the ADA definition of "disability," this compromise language defining "known limitation" is not completely open-ended and will give workers and employers some guidance. As a backstop, H.R. 2694's incorporation of the ADA definition of "reasonable accommodation" places a limit on an employer's obligations—i.e., the requested accommodation must be reasonable and proportional under the bill. A minor limitation will presumably only require a minor accommodation.

Interactive Process

Under the ADA, a reasonable accommodation will often be determined through a balanced, interactive process involving dialogue between the worker and the employer.[20] H.R. 2694 incorporates the definition of "reasonable accommodation" from the ADA, including a reference to the interactive process that is typically used.[21] However, Sections 2(2) and 2(4) of H.R. 2694 as introduced seem to give the employee unilateral veto power over offered accommodations, in contrast to the ADA's balanced, interactive process for determining reasonable accommodations.[22] Ms. McLaughlin raised concerns about Section 2(2) in her testimony:

> The Bill also includes a provision that allows an employee to *not* accept an accommodation offered by the employer. . . . Does this provision really contemplate that the employee can veto an accommodation proposed by the employer? Are there any limits to that veto right? For example, what if the employer believes in good faith that the employee cannot safely perform the job, for herself or others, without that specific accommodation? . . . [A]n employer may want to impose a restriction on the amount of weight that can be lifted by an employee in the second or third trimester based on medical documentation. Can the employer only do so with the employee's approval?[23]

She had similar concerns with Section 2(4), which seems to give the employee unilateral veto power over an offered accommodation of leave:

> [T]he Bill contemplates that a pregnant employee cannot be required to go on leave if another accommodation would address the "known limitations" of that employee. . . . What if the pregnant worker is still physically capable of

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[20] *See* 29 C.F.R. § 1630.2(o)(2)(3) ("To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.").

[21] *See* H.R. 2694, 116th Cong. § 5(5) (2019) ("[T]he terms 'reasonable accommodation' and 'undue hardship' have the meanings given such terms in section 101 of the [ADA] and shall be construed as such terms have been construed under such Act and as set forth in the regulations required by this Act, including with regard to the interactive process that will typically be used to determine an appropriate reasonable accommodation.").

[22] *See* H.R. 2694, 116th Cong. § 5(2) (2019) (unlawful to "require a job applicant or employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation that such applicant or employee chooses not to accept, if such accommodation is unnecessary to enable the applicant or employee to perform her job"); *id*. § 5(4) (unlawful to "require an employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of an employee").

[23] McLaughlin Statement, *supra* note 11, at 8 (emphasis in original).

> performing the job, but it would expose the fetus to unsafe conditions, such as lead or radiation? Under circumstances such as those, employers should be able to require the pregnant worker not to report to the job site, but the Bill appears to prohibit such a requirement.

It is also unclear what happens if the accommodation sought by the employee creates an undue hardship on the employer. Using the ADA scheme, the employer would be able to place the worker on leave, but Section 2(4) of the Bill suggests that the employer cannot place the worker on leave if an accommodation exists that would address the "known limitation," even if that accommodation results in an undue hardship.[24]

To address these concerns, the Scott ANS amends Section 2(2) to incorporate explicitly the ADA's balanced, interactive process. Under amended Section 2(2), it is unlawful to "require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process referred to in section 5(7) [of the Act]." This compromise language makes clear that reasonable accommodations arrived at through the interactive process, including an accommodation of leave, are not subject to a unilateral veto by the employee. The longstanding and well-developed ADA interactive process will be the framework for accommodations under Sections 2(2) and 2(4).

In determining a reasonable accommodation under the ADA, when a "need for an accommodation is not obvious," an employer may require the employee to provide medical "documentation of the need for the accommodation."[25] Because H.R. 2694 incorporates the ADA definition of "reasonable accommodation," including the interactive process between the employee and employer typically used to determine a reasonable accommodation, H.R. 2694 presumably allows employers to require such documentation when the need for an accommodation is not obvious.

In addition, the ADA includes a defense the employer can raise if the employer has a "qualification standard" that includes a "requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[26] The Supreme Court has ruled that this includes a direct threat that may be posed to the individual's own health or safety.[27] The Occupational Safety and Health Administration has noted that "exposure to reproductive hazards in the workplace is an increasing health concern."[28] Under H.R. 2694, if the workplace environment—such as exposure to chemical, physical, or biological hazards—poses a threat to the health or safety of the pregnant employee, the employer will be able to take into account such threats to health or safety in determining a reasonable accommodation, including through the interactive process with the employee.

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[24] McLaughlin Statement, *supra* note 11, at 8–9.
[25] 29 C.F.R. pt. 1630, App. at 37–38.
[26] 42 U.S.C. § 12113(b).
[27] *See Chevron USA, Inc.* v. *Echazabal*, 536 U.S. 73, 83 (2002).
[28] U.S. DEP'T OF LAB., OCCUPATIONAL SAFETY & HEALTH ADMIN., REPRODUCTIVE HAZARDS, https://www.osha.gov/SLTC/reproductivehazards/index.html.

Fifteen-employee Threshold

Title VII of the CRA and Title I of the ADA only apply to employers with 15 or more employees.[29] H.R. 2694 did not include a similar limitation of coverage, even though the bill is intended to address the Supreme Court's 2015 decision in *Young* interpreting the PDA (which is part of Title VII), and even though, as Rep. Nadler testified, H.R. 2694 uses the framework of the ADA. To address this omission and conform the bill to Title VII's and the ADA's coverage, the Scott ANS limits H.R. 2694's coverage to employers with 15 or more employees by incorporating this limitation from Section 701(b) of the CRA.[30]

Good Faith Efforts

The CRA states that damages shall not be awarded in ADA cases if the employer "demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity . . . ."[31] This is a sensible provision in the CRA so that damages are not available if the employer has made good faith efforts through the ADA interactive process to determine a reasonable accommodation.

Such a provision was not included in H.R. 2694 as introduced, but the Scott ANS adds a provision so that damages are not available under the bill if the employer has made good faith efforts through the interactive process with the worker to determine a reasonable accommodation for the worker's known limitations related to pregnancy, childbirth, and related medical conditions.[32] The Scott ANS conforms H.R. 2694's remedies to the CRA's remedies and will further encourage employers to make good faith efforts to determine reasonable accommodations under the bill through the balanced, interactive process.

Rulemaking Authority

H.R. 2694 requires the Equal Employment Opportunity Commission (EEOC) to issue regulations within two years of the bill's enactment. As introduced, the rulemaking section states: "Such regulations shall provide examples of reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions *that shall be provided to a job applicant or employee affected by such known limitations unless the covered entity can demonstrate that doing so would impose an undue hardship*."[33]

The italicized phrase is too prescriptive. It seems to indicate that the examples of reasonable accommodations in EEOC's regulation are mandatory, even if they do not apply to the specific employer and employee because of circumstances that are different than those outlined in the example. To address this concern, the Scott ANS strikes the phrase "that shall be provided to a job applicant

[29] 42 U.S.C. § 2000e(b); *id.* § 12111(5)(A).
[30] Scott ANS § 5(2)(B)(i).
[31] 42 U.S.C. § 1981a(a)(3).
[32] Scott ANS § 3(g).
[33] H.R. 2694, 116th Cong. § 4 (2019) (emphasis added).

or employee affected by such known limitations unless the covered entity can demonstrate that doing so would impose an undue hardship." This strike clarifies that the examples in the regulation are merely examples of potential reasonable accommodations and not mandatory.[34]

UNRESOLVED CONCERN WITH H.R. 2694

The CRA is the nation's flagship civil rights law. Title VII of the CRA includes a limited but longstanding provision stating that the statute will not apply to a "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[35] This provision allows religious organizations to make religiously based employment decisions so they are not compelled to violate their faith. They can make employment decisions based on the worker's religion conforming to the organization's religion, including following the religious tenets of the organization,[36] but the CRA provision is not a license to discriminate in employment on other grounds.[37] The CRA provision applies to "the entire realm of the employment arena," not just the hiring of individuals.[38] Title I of the ADA includes a similar provision.[39]

Neither H.R. 2694 as introduced nor the Scott ANS incorporate the CRA religious-organization protection or any provision protecting religious organizations. During negotiations over H.R. 2694, Committee Republicans requested inclusion of such a provision, but it was not included in the Scott ANS. As Ranking Member Virginia Foxx (R–NC) stated during the Committee markup, without such a provision, H.R. 2694 could force a religious organization to make employment decisions in violation of the organization's faith.

For example, if an employee working for a religious organization requests time off to have an abortion procedure, H.R. 2694 could require the organization to comply with this request as a reasonable accommodation of known limitations related to pregnancy, childbirth, or related medical conditions. This accommodation could be required to include paid leave if the employee is eligible for paid medical leave as part of the employer's workplace policies. These kinds of accommodations, however, could be contrary to the organization's religious beliefs, placing the organization in a position of either violating federal law or violating its faith.

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[34] *See* Scott ANS § 4.

[35] 42 U.S.C. § 2000e–1(a).

[36] *See, e.g.*, *Gosche* v. *Calvert High Sch.*, 997 F. Supp. 867, 872 (N.D. Ohio 1998) (religious school could make adherence to moral standards of the church a requirement for continued employment), *affirmed* by 181 F.3d 101 (6th Cir. 1999).

[37] *See, e.g.*, *Rayburn* v. *Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) (while "religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin").

[38] *Hopkins* v. *Women's Div.*, Gen. Bd. of Glob. Ministries, 238 F. Supp.2d 174, 180 (D.D.C. 2002).

[39] 42 U.S.C. § 12113(d) ("This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. . . . [A] religious organization may require that all applicants and employees conform to the religious tenets of such organization.").

Religious-organization protections are a common feature of the pregnancy-accommodation laws that have been enacted by states. One of the Democrat-invited witnesses at the October 22, 2019, Subcommittee on Civil Rights and Human Services hearing on H.R. 2694 pointed to Kentucky's recently-enacted law requiring reasonable accommodations for pregnant workers as a model of a successful pregnant-worker accommodation law for Congress to consider.[40] The Kentucky law includes a religious-organization protection very similar to Title VII's protection.[41] At least 15 other states and the District of Columbia have pregnancy-nondiscrimination or pregnancy-accommodation laws that include a religious-organization protection similar to Title VII's. The states include Arkansas, Hawaii, Iowa, Maine, Nebraska, New Jersey, New York, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Wisconsin, and Wyoming.[42]

Committee Democrats contended during the markup of H.R. 2694 that religious organizations are already protected by the *Religious Freedom Restoration Act of 1993* (RFRA), and inclusion of the CRA's religious-organization protection is unnecessary. RFRA states that the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," except that the government "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest." An organization "may assert" a violation of RFRA "as a claim or defense in a judicial proceeding and obtain appropriate relief" against the government.[43]

Unfortunately, RFRA does not render the inclusion of a religious-organization protection in H.R. 2694 unnecessary. The CRA's provision provides important protections that are stronger than those provided by RFRA. The CRA provision limits the statute's application with respect to religiously based employment decisions. Under the CRA, the federal government and the courts cannot interfere with these decisions if the organization is a religious organization and its employment decisions are based on the organization's religion. RFRA, on the other hand, merely provides a defense to governmental action and creates a balancing test to determine whether the government may impose a burden on the exercise of religion. Under RFRA, the federal government may substantially burden the exercise of religion if it demonstrates the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.

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[40] *See Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694): Hearing Before the Subcomm. on Civ. Rights & Hum. Serv. of the H. Comm. on Educ. & Lab.* (2019) (statement of Iris Wilbur, Vice President of Gov't Affairs & Pub. Pol'y, Greater Louisville Inc.).

[41] *See* KY. REV. STAT. ANN. § 344.090 ("[I]t is not an unlawful practice for . . . [a] religious corporation, association, or society to employ an individual on the basis of his religion to perform work connected with the carrying on by such corporation, association, or society of its religious activity.").

[42] *See* ARK. CODE ANN. § 16–123–103; D.C. CODE § 2–1401.03; HAW. REV. STAT. § 378–3; IOWA CODE § 216.6; ME. STAT. tit. § 5, § 4573–A; NEB. REV. STAT. § 48–1103; N.J. STAT. ANN. 10:5–12; N.Y. EXEC. LAW § 296.11; OHIO REV. CODE ANN. § 4112.02(P); Okla. Stat. tit. 25, § 1307; S.C. CODE ANN. § 1–13–80; TENN. CODE ANN. § 4–21–405; TEX. LAB. § 21.109; UTAH CODE ANN. § 34A–5–102(i); WISC. STAT. § 111.337; Wyo. Stat. Ann. § 27–9–102(b).

[43] *Id.* § 2000bb–1.

If H.R. 2694 is enacted, federal agencies enforcing H.R. 2694 and private plaintiffs will argue in the courts that the requirements in the Act are furthering a compelling governmental interest, i.e., clarifying the nondiscrimination rights of pregnant workers. Lower courts have ruled that nondiscrimination laws and policies serve a compelling governmental interest with respect to RFRA claims.[44] After likely meeting this burden in a case brought under H.R. 2694, the federal agency or private plaintiff would next argue H.R. 2694 is the least restrictive means to further this interest. It is unclear at best whether a religious organization raising RFRA as a defense will be able to overcome these arguments in federal court. Indeed, Mr. J. Matthew Sharp, Senior Counsel with the Alliance Defending Freedom, noted in his testimony at a hearing on RFRA before the Committee on Education and Labor on June 25, 2019, that courts rule in favor of the federal government and against those attempting to be free of a substantial burden on their religion in over 80 percent of RFRA cases.[45] To ensure religious organizations are not forced to violate their faith in complying with H.R. 2694, the bill should include the CRA's provision limiting the application of the Act with respect to the religiously based employment decisions of religious organizations.

REPUBLICAN AMENDMENT

Committee Republicans offered one amendment during the Committee markup. This substitute amendment offered by Ranking Member Foxx included Chairman Scott's ANS in its entirety and simply added language incorporating the religious-organization protection from the CRA. Ranking Member Foxx's substitute amendment acknowledges the improvements made to H.R. 2694 in the Scott ANS, as discussed above. Although the Scott ANS is not the bill Republicans might write given a blank slate, its improvements provide sufficient clarity to pregnant workers and employers regarding their rights and responsibilities under H.R. 2694 with the exception of the omission relating to religious organizations. All Committee Republicans present voted for the amendment, but all Democrats present voted against the amendment.

CONCLUSION

Committee Republicans strongly believe workplaces should be free of discrimination, and pregnant workers deserve protections against workplace discrimination. Committee Republicans have long supported workplace protections for pregnant workers, including those in the PDA and ADA. To address circumstances in which pregnant workers may not be receiving reasonable accommodations from employers, Committee Republicans support the provisions in

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[44] *See, e.g.*, *EEOC* v. *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 592 (6th Cir. 2018) ("EEOC's compelling interest in eradicating discrimination"), *cert. granted on other grounds*, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (2019); Hsu v. Roslyn Union Free Sch. Dist. No. 3, 876 F. Supp. 445, 462 (E.D.N.Y. 1995) (compelling interest in "eliminating and preventing" discrimination), *aff'd in part, rev'd in part on other grounds*, 85 F.3d 839 (2d Cir. 1996).

[45] *Do No Harm: Examining the Misapplication of the "Religious Freedom Restoration Act": Hearing Before the H. Comm. on Educ. & Lab.*, 116th Cong. (June 25, 2019) (written statement of J. Matthew Sharp, Senior Couns., Alliance Defending Freedom, at 5) (citing Lucien J. Dhooge, *The Religious Freedom Restoration Act at 25: A Quantitative Analysis of the Interpretative Case Law*, 27 WM. & MARY BILL OF RTS. J. 153, 193, 198 (2018)).

the Scott ANS as a compromise measure that includes sufficient clarity regarding the bill's application to workers and employers. However, the omission of a protection for religious organizations, which is a longstanding part of the CRA—the nation's flagship civil rights law—must be addressed so that religious organizations are not faced with a conflict between their faith and the requirements of federal law. Committee Republicans stand ready to continue working with Committee Democrats to find a bipartisan agreement on this outstanding issue.

VIRGINIA FOXX,
Ranking Member.
GLENN "GT" THOMPSON.
JAMES COMER.
RUSS FULCHER.
BEN CLINE.
DANIEL MEUSER.

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