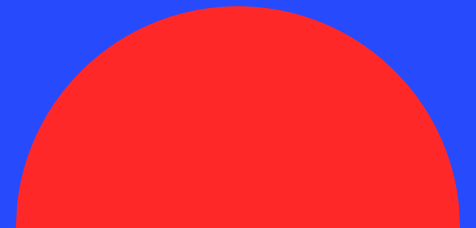
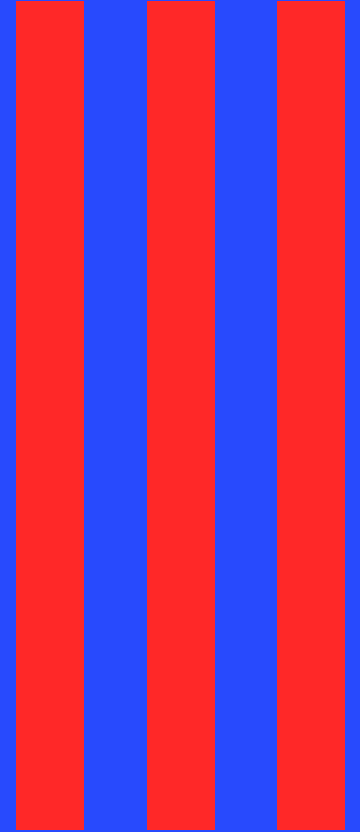


Workplace Rights for Pregnant Employees

PWFA and Beyond



Introduction

- ✓ Pregnancy discrimination protections are critical to the health and economic security of workers and their families.
- ✓ Strategic Enforcement Plan: Identified Subject Matter Priority
- ✓ Legal framework: Title VII (PDA), FMLA, ADA, PUMP Act, PWFA, State & local laws



Statutory Protections for Pregnant Workers

Title VII – Pregnancy Discrimination Act

EMPLOYMENT
DECISIONS AND
EQUAL ACCESS TO
BENEFITS

Prohibits discrimination in employment on the basis of sex, including on the basis of pregnancy, childbirth, or related medical conditions

Americans with Disabilities Act (ADA)

REASONABLE
ACCOMODATIONS

Prohibits discrimination in employment on the basis of disability

Pregnant Workers Fairness Act (PWFA)

PROHIBITED
PRACTICES UNDER
THE ACT

Effective June 27, 2023:

Requires a covered entity to provide reasonable accommodations to a qualified employee or applicant, with a known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, absent undue hardship

Title VII

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)

Title VII (PDA) Covers All Aspects of Employment

- Hiring
- Pay
- Job assignment
- Promotion
- Firing
- Health Insurance/Fringe benefits
- Treatment in comparison with non-pregnant workers similar in their ability or inability to work
- Other terms or conditions

Title VII – PDA Amendment

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of **pregnancy, childbirth, or related medical conditions**; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work [....]

42 U.S.C. § 2000e(k).

Pregnancy, Childbirth, or Related Medical Conditions:

- Current Pregnancy
 - Employer knowledge; stereotypes and assumptions
- Past Pregnancy
 - Close timing; evidence showing motivated adverse action
- Potential or Intended Pregnancy
 - Reproductive risk
 - Intention to become pregnant
 - Infertility Treatments
 - Use of contraception, including insurance coverage
- Medical Conditions Related to Pregnancy or Childbirth
 - Lactation and breastfeeding
 - Abortion – choosing to have or not have an abortion

Types of Discrimination

- **Pregnancy Discrimination as Disparate Treatment**
 - Pregnancy, childbirth, or a related medical condition is a motivating factor in the adverse employment action.
- **Pregnancy Discrimination as Disparate Impact**
 - A neutral policy or practice has a significant negative impact on women affected by pregnancy, childbirth, or a related medical condition, and either the policy or practice is not job related and consistent with business necessity or there is a less discriminatory alternative and the employer has refused to adopt it.

Disparate Treatment (PDA)

- An **explicit policy or statement** made by a decision maker or someone who influenced the decision
 - Pregnancy, childbirth, or a related medical condition is a motivating factors in the adverse employment action.
- **More favorable treatment** of employees of either sex who are not affected by pregnancy, childbirth, or related medical conditions
- The employer **violated or misapplied its own policy**
- A policy or practice that, although not facially discriminatory, **significantly burdens** pregnant employees and cannot be support by a sufficiently strong justification

Disparate Impact

- Based on a statistical showing that a specific employment practice has a discriminatory effect on workers in the protected group.
- The employer can prove business necessity by showing that the requirement is “necessary to safe and efficient job performance.”
- A violation may still be found if there was a less discriminatory alternative that meets the business need and the employer refuses to adopt it.

Title VII (PDA) recap



Prohibits discrimination in employment on the basis of pregnancy, childbirth, or related medical conditions



Analyzes employment decisions under disparate treatment or disparate impact theories



May require evaluating employment decisions or equal access to benefits



Has overlapping protections with PWFA (to be discussed)

Disability Discrimination

- The ADA forbids discrimination in any aspect of employment.
- The ADA
 - prohibits disparate treatment on the basis of disability;
 - limits employer access to information about the disabilities of applicants or employees and requires that employers keep medical information about applicants and employees confidential;
 - Prohibits harassment and retaliation; and
 - **Requires reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability unless doing so would cause undue hardship.**

Pregnancy and the ADA

- Title I of the ADA protects individuals from employment discrimination on the basis of disability.
- Disability is an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having a disability.
- Pregnancy itself is not an impairment within the meaning of the ADA, and is thus never on its own a disability.
- However, some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA

Pregnancy-Related Impairments

- Examples:
 - Pelvic inflammation – may substantially limit walking
 - Pregnancy-related carpal tunnel syndrome – may substantially limit lifting
 - Disorders of uterus or cervix – may substantially limit reproductive function
 - Pregnancy-related sciatica – may substantially limit musculoskeletal function
 - Gestational diabetes – may substantially limit endocrine function
 - Preeclampsia – may substantially limit cardiovascular or circulatory functions
 - Migraines

Reasonable Accommodations

- The ADA requires **reasonable accommodation** to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability unless doing so would cause undue hardship.
 - Requests for changes to workplace facilities to make accessible; 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, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Absent Undue Hardship

- The ADA requires reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability unless doing so would cause **undue hardship**.
 - Significant difficulty or expense ADA 42 U.S.C. 12111(10)(A), (B)
 - Focus on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation

ADA recap

- The ADA protects pregnancy-related disabilities – not pregnancy itself
- The interactive process is required
- Can be combined with Title VII

Pregnant Workers Fairness Act

Effective June 27, 2023

- Requires covered employers to provide reasonable accommodations to a worker or applicant's known limitations related to pregnancy, childbirth, or related medical conditions unless the accommodation will cause an employer "undue hardship"
- Title VII and ADA make it illegal to discriminate against workers on the basis of pregnancy, childbirth, or related medical conditions
- Does not replace more protective federal, state, or local laws

THE PREGNANT WORKERS FAIRNESS ACT (PWFA)

Prepare for this new law before it goes into effect on June 27, 2023.

WHAT IS IT?

The PWFA requires covered employers to provide "reasonable accommodations" to a worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an "undue hardship."



72%

of working women will become pregnant while employed at some time in their lives.

SOURCE: US Census Bureau, "Maternity Leave and Employment Patterns, 1991-2007, 2011"

8 IN 10

first-time pregnant women work until their final month of pregnancy.

SOURCE: U.S. Congress, "Pregnant Workers Fairness Act, 2021, www.congress.gov/116/records/116-101/abstract"

23%

of moms have thought about leaving a job due to a lack of reasonable accommodation or fear of discrimination from an employer during pregnancy, according to one survey.

SOURCE: Republican Party Congress-Marketing Consult'Fol, February 11, 2022

Examples of reasonable accommodations that may be available to workers:

- Offering additional, longer, or more flexible breaks to eat, drink, rest, or use the restroom 
- Changing a work schedule, such as having shorter hours, part-time work, or a later start time 
- Changing food or drink policies to allow a worker to have a water bottle or food 
- Providing leave for medical appointments or to recover from childbirth

TIP FOR EMPLOYERS:

Train supervisors about the PWFA so they are ready when they get reasonable accommodation requests.



 Learn more at [EEOC.gov](https://www.eeoc.gov)

PWFA - Terms

- The PWFA requires a **covered entity** to provide a **reasonable accommodation** to a **qualified employee or applicant** with a **known limitation** related to **pregnancy, childbirth, or related medical conditions**, absent undue hardship

Covered entity

- Private and public sector employers with 15 or more employees
- Federal agencies
- Employment agencies
- Unions
- Entities covered under the Government Employee Rights Act

Qualified Employee or Applicant

1. An employee or applicant with a known limitation related to pregnancy, childbirth, or related medical conditions is qualified if they can perform the essential functions of the position, with or without a reasonable accommodation.
 2. An employee or applicant may be qualified even if they cannot perform an essential function of the job, so long as:
 1. The inability to perform an essential function “is for a temporary period”
 2. The essential function “could be performed in the near future;” **and**
 3. The inability to perform the essential function “can be reasonably accommodated.”
- The determination of whether an employee is qualified should be based on the capabilities of the employee at the time of the relevant employment decision, and not speculation that the employee may become unable in the future, may require leave, or may cause increased health insurance premiums or workers’ compensation costs.

Pregnancy, Childbirth, or Related Medical Conditions

- Same definition as in Title VII, PDA
- Title VII, as amended by the PDA, prohibits discrimination based on current pregnancy, past pregnancy, potential or intended pregnancy, and medical conditions related to pregnancy or childbirth.
- <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues>

Known Limitation

- Physical or mental condition related to, affected by, or arising out of pregnancy, childbirth or related medical conditions that the employee or the employee's representative has communicated to the employer **whether or not such condition meets the definition of disability specified in section 3 of the American with Disabilities Act of 1990**
- “related to, affected by, or arising out of pregnancy”

Reasonable Accommodation

- Uses ADA standard. See PWFA § 102(7).
- House Committee on Education and Labor Report on the PWFA provides several examples of possible RAs, including:
 - Ability to sit, or drink water
 - Receive closer parking
 - Flexible hours
 - Appropriately sized uniforms and safety apparel
 - Additional break time to use the bathroom, eat, and rest
 - Take leave or time off to recover from birth
 - Excused from strenuous or unsafe activities (i.e., exposure to chemicals)

Reasonable Accommodation con't.

- Requests for changes to workplace rules
- Requests to temporarily remove job responsibilities
- Leave/schedule adjustments
 - Could be for medical appointments, recover, or other reasons related to pregnancy, childbirth, or related medical conditions
 - If a worker has a right to take leave under a different law or policy (i.e., FMLA, state laws) there may be no need for an accommodation
- Interactive process is required under PWFA

PWFA

There are **five** prohibited practices under Section 103 of the PWFA:

1. Denial of reasonable accommodation absent undue hardship (Sec. 103(1))
2. Forced accommodation (Sec. 103(2))
3. Denial of employment opportunity to qualified employee or applicant (Sec. 103(3))
4. Forced Leave (paid or unpaid) if another RA can be provided (Sec. 103(4))
5. Taking adverse action for the request or use of RA (Sec. 103(5))

Undue Hardship

- The PWFA requires a covered entity to provide a reasonable accommodation to a qualified employee or applicant with a known limitation related to pregnancy, childbirth, or related medical conditions, absent **undue hardship**
 - Borrowed from the ADA (Sec. 102(7)): Significant difficulty or expense.
 - Focuses on the resources and circumstance of the particular employer in relationship to the cost or difficulty of providing a specific accommodation
 - Additions to undue hardship:
 - A reasonable accommodation may be temporary suspension of an essential function.
 - Accommodations usually temporary, and therefore impact on Respondent may be lessened

Other Notable PWFA Provisions

- Protects against:
 - Retaliation (Sec. 104(f)(1))
 - Coercion (Sec. 104(f)(2))
- Relief
 - Same as under Title VII and the ADA and can include:
 - Injunctive relief (getting an accommodation)
 - Back pay
 - Front pay
 - Compensatory or punitive damages (subject to caps)

EEOC Proposed Rulemaking

What to Watch

- Notice of Proposed Rulemaking to implement the PWFA was published in the Federal Register on August 11, 2023 (comments closed October 10, 2023)
- **Known limitation** includes physical **or mental** condition
- **Pregnancy, childbirth, or related medical conditions** includes current pregnancy, past pregnancy, potential