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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1636

RIN 3046-AB30

Regulations to Implement the Pregnant Workers Fairness Act

AGENCY: Equal Employment Opportunity Commission.

ACTION: Proposed rule.

SUMMARY: The Equal Employment Opportunity Commission is issuing a proposed rule to implement the Pregnant Workers Fairness Act, which requires a covered entity to provide reasonable accommodations to a qualified employee's or applicant's known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause an undue hardship on the operation of the business of the covered entity.

DATES: Comments regarding this proposal must be received by the Commission on or before [INSERT 60 DAYS AFTER DATE OF PUBLICATION IN *FEDERAL REGISTER*]. Please see the sections below entitled **ADDRESSES** and **SUPPLEMENTARY INFORMATION** for additional information on submitting comments.

ADDRESSES: You may submit comments, identified by RIN number 3046-AB30, by any of the following methods:

- Federal eRulemaking Portal: https://www.regulations.gov. Follow the instructions for submitting comments.
- Fax: 202-663-4114. Only comments of six or fewer pages will be accepted via FAX transmittal, in order to assure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request

confirmation of receipt by calling the Executive Secretariat staff at 202-921-2815 (voice), 1-800-669-6820 (TTY), or 1-844-234-5122 (ASL video phone).

- Mail: Raymond Windmiller, Executive Officer, Executive Secretariat, U.S. Equal Employment Opportunity Commission, 131 M Street, NE, Washington, DC 20507.
- Hand Delivery / Courier: Raymond Windmiller, Executive Officer, Executive Secretariat, U.S. Equal Employment Opportunity Commission, 131 M Street, NE, Washington, DC 20507.

Instructions: The Commission invites comments from all interested parties. All comment submissions must include the agency name and docket number or the Regulatory Information Number (RIN) for this rulemaking. Comments need be submitted in only one of the above-listed formats. All comments received will be posted without change to https://www.regulations.gov, including any personal information you provide. However, the EEOC reserves the right to refrain from posting libelous or otherwise inappropriate comments, including those that contain obscene, indecent, or profane language; that contain threats or defamatory statements; that contain hate speech directed at race, color, sex, national origin, age, religion, disability, or genetic information; or that promote or endorse services or products.

Docket: For access to the docket to read background documents or comments received, go to https://www.regulations.gov and search for "EEOC" and "RIN 3046-AB30." The received comments also will be available for review at the Commission's library, 131 M Street, NE, Suite 4NW08R, Washington, DC 20507, between the hours of 9:30 a.m. and 5 p.m., from [INSERT DATE 60 DAYS FROM PUBLICATION IN FEDERAL REGISTER] until the Commission publishes the rule in final form.

FOR FURTHER INFORMATION CONTACT: Sharyn Tejani, Associate Legal Counsel, sharyn.tejani@eeoc.gov; Office of Legal Counsel at 202-900-8652 (voice), 1-800-669-6820 (TTY). Requests for this rulemaking in an alternative format should be made to the Office of

Communications and Legislative Affairs at (202) 921-3191 (voice), 1-800-669-6820 (TTY), or 1-844-234-5122 (ASL video phone).

SUPPLEMENTARY INFORMATION:

Introduction

On December 29, 2022, President Biden signed the Pregnant Workers Fairness Act (PWFA) into law.[1] The PWFA requires a covered entity to provide reasonable accommodations to a qualified employee's or applicant's known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, absent undue hardship on the operation of the business of the covered entity. 42 U.S.C. 2000gg-3 requires the Equal Employment Opportunity Commission (EEOC or Commission) to promulgate regulations to implement the PWFA.

The PWFA requires employers to provide reasonable accommodations to qualified workers affected by pregnancy, childbirth, or related medical conditions so they can remain healthy and in their jobs. The PWFA received broad bipartisan support in both chambers of Congress and from a wide variety of organizations representing industries, business associations, individual businesses, numerous civil rights and women's rights organizations, unions, and faith-

[1] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Division II, 136 Stat. 4459, 6084 (2022) (codified at 42 U.S.C. 2000gg–2000gg-6).

based organizations.[2] The bill passed in the House by a vote of 315 to 101 and in the Senate by a vote of 73-24.[3]

The PWFA Addresses Limitations in Coverage under Title VII, the ADA, and the FMLA.

The PWFA recognizes that there are gaps in the Federal legal protections for workers affected by pregnancy, childbirth, or related medical conditions, even though they may have certain rights under existing civil rights laws, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. (as amended by the Pregnancy Discrimination Act (PDA)) (Title VII), the Americans with Disabilities Act of 1990, 42 U.S.C. 12111 et seq. (ADA),[4] the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 et seq. (FMLA), and various State and local laws.[5]

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[2] *See, e.g.*, *Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination, Joint Hearing Before the Subcomm. on Civ. Rts. & Hum. Servs. and the Subcomm. on Workforce Prots. of the H. Comm. on Educ. & Lab.*, 117th Cong. 153 (2021) [hereinafter *Fighting for Fairness*] (letter from scores of civil rights and women's rights groups supporting the Pregnant Workers Fairness Act); *id.* at 151 (letter of support from over two dozen individual businesses, the U.S. Women's Chamber of Commerce, and the National Association of Manufacturers); *Long Over Due: Exploring the Pregnant Workers Fairness Act (H.R. 2694), Hearing Before the Subcomm. on Civ. Rts. & Hum. Servs. of the H. Comm. on Educ. & Lab.*, 116th Cong. 142 (2019) [hereinafter *Long Over Due*] (letter of support from health care providers and public health professionals); *id.* at 179 (letter of support from the National WIC Association); *id.* at 183 (letter of support from the March of Dimes); 168 Cong. Rec. S7,049 (daily ed. Dec. 8, 2022) (statement of Sen. Patty Murray) ("[t]his is, fundamentally, a bipartisan bill that we have worked closely with our Republican colleagues on. Senator Cassidy coleads this bill. He has been an amazing partner"); *id.* at S7,048 (statement of Sen. Robert P. Casey, Jr.) (noting that the bill has bipartisan support and that "[e]veryone from the ACLU to the U.S. Conference of Catholic Bishops, to the U.S. Chamber of Commerce supports this legislation").

[3] *Roll Call 143, Bill Number: H.R. 1065*, Office of the Clerk, U.S. House of Representatives (May 14, 2021), https://clerk.house.gov/Votes/2021143 (setting out the House vote tally for the Pregnant Workers Fairness Act); 168 Cong. Rec. S10,071 (daily ed. Dec. 22, 2022) (setting out the Senate vote tally for the Pregnant Workers Fairness Act to be added as an amendment to the Consolidated Appropriations Act, 2023).

[4] The references to the ADA in this preamble are intended to apply equally to the Rehabilitation Act of 1973, as all nondiscrimination standards under Title I of the ADA also apply to Federal agencies under Section 501 of the Rehabilitation Act, and Federal applicants and employees are covered by the PWFA.

[5] *See, e.g.*, Cal. Gov't Code 12945(a)(3); N.D. Cent. Code Ann. 14-02.4-03; W. Va. Code 5-11B-2; *see also* U.S. Dep't of Lab., *Employment Protections for Workers Who Are Pregnant or Nursing*, https://www.dol.gov/agencies/wb/pregnant-nursing-employment-protections (last visited Apr. 4, 2023) [hereinafter *Employment Protections for Workers Who Are Pregnant or Nursing*]. In addition, Federal laws involving Federal funding such as Title IX of the Education Amendments Act of 1972 (20 U.S.C. 1681 et seq.) and the Workforce Innovation and Opportunities Act (29 U.S.C. 3240) provide protection

Under Title VII, a worker affected by pregnancy, childbirth, or related medical conditions may be able to obtain a workplace modification to allow them to continue to work.[6] Typically courts have only found in favor of such claims if the worker can identify another individual similar in their ability or inability to work who received such an accommodation, or if there is some direct evidence of disparate treatment (such as a biased comment or a policy that, on its face, excludes pregnant workers).[7] However, there may not always be similarly situated employees. For this reason, some pregnant workers have not received simple, common-sense accommodations, such as a stool for a cashier[8] or bathroom breaks for a preschool teacher.[9] And even when the pregnant worker can identify other workers who are similar in their ability or inability to work, some courts have still not found a Title VII violation.[10]

Under the ADA, certain workers affected by pregnancy, childbirth, or related medical conditions may have the right to accommodations if they show that they have an ADA disability;

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from sex discrimination, including discrimination based on pregnancy, childbirth, or related medical conditions.

[6] Title VII protects workers from discrimination based on sex, which includes pregnancy, childbirth, or related medical conditions. 42 U.S.C. 2000e(k). Title VII's prohibition on sex discrimination includes discrimination "with respect to . . . compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1). Title VII also provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. 2000e(k).

[7] *See, e.g.*, *Young v. United Parcel Serv., Inc.,* 575 U.S. 206, 229 (2015).

[8] *See, e.g.*, *Portillo v. IL Creations Inc.*, 2019 WL 1440129, at *5 (D.D.C. Mar. 31, 2019).

[9] *See, e.g.*, *Wadley v. Kiddie Acad. Int'l, Inc.*, 2018 WL 3035785, at *4 (E.D. Pa. June 19, 2018).

[10] *See, e.g.*, *EEOC v. Wal-mart Stores East, L.P.*, 46 F.4th 587, 597-99 (7th Cir. 2022) (concluding that the employer did not engage in discrimination when it failed to accommodate pregnant workers with light duty assignments, even though the employer provided light duty assignments for workers who were injured on the job); *but see, e.g.*, *Legg v. Ulster Cnty.*, 820 F.3d 67, 69, 75-77 (2d Cir. 2016) (vacating judgment for the employer where officers injured on the job were entitled to light duty but pregnant workers were not).

this standard does not include pregnancy itself but instead requires the showing of a pregnancy-related disability.[11]

Under the FMLA, covered workers can receive up to 12 weeks of job-protected unpaid leave for, among other things, a serious health condition, the birth of a child, and bonding with a newborn within one year of birth.[12] However, employees must work for an employer with 50 or more employees within 75 miles of their worksite and meet certain tenure requirements in order to be entitled to FMLA leave.[13] Survey data from 2018 show that only 56 percent of employees are eligible for FMLA leave.[14] Further, the FMLA only provides unpaid leave—it does not require reasonable accommodations that would allow workers to stay on the job and continue to be paid.

The PWFA responds to these and other limitations and fills the gaps in current Federal legal protections. Under the PWFA, as set forth fully below, coverage is the same as Title VII and the ADA, and reasonable accommodations are available to help apply for a job; to perform a job; to enjoy equal benefits and privileges of employment; and to temporarily suspend the performance of an essential function of a position, if certain conditions are met. Importantly, the

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[11] 42 U.S.C. 12102(2) & (4); 29 CFR part 1630 app. 1630(h); EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* II (2015), https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues [hereinafter *Enforcement Guidance on Pregnancy Discrimination*].

[12] 29 U.S.C. 2612(a)(1); 29 CFR 825.120.

[13] 29 U.S.C. 2611(2)(A), (B).

[14] Scott Brown et al., *Employee and Worksite Perspectives of the Family and Medical Leave Act: Executive Summary for Results from the 2018 Surveys* 3 (2020), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD_FMLA2018SurveyResults_ExecutiveSummary_Aug2020.pdf [hereinafter *Brown et al.*].

PWFA allows workers[15] with uncomplicated pregnancies to seek accommodations, recognizing that even uncomplicated pregnancies may create limitations for workers.[16]

In addition to pregnancy and childbirth, the PWFA covers "related medical conditions."[17] "Related medical conditions" is a term used in Title VII, that previously has been defined by the Commission.[18] As discussed in detail in the section-by-section analysis of part 1636.3(b), the proposed rule explains that the existing definition will be used for the PWFA, as it is appropriate for the text of the statute. This definition reflects the government's longstanding and consistent interpretation of the phrase and, based on canons of statutory interpretation, is the legal definition Congress intended by choosing to use the same language in the same type of statute. Further, as explained in the proposed rule, the PWFA covers limitations stemming from medical conditions that are episodic in nature and related to pregnancy or childbirth. The PWFA also covers existing conditions that are exacerbated by, and therefore related to, pregnancy or childbirth, such as high blood pressure, anxiety, or carpal tunnel syndrome. While some workers may be able to address any issues that arise related to these conditions without a reasonable accommodation, indeed without even mentioning the issue at the workplace, others may need reasonable accommodations that are covered under the PWFA.

As set out in detail in the section-by-section analysis of parts 1636.3(h) and (i), the types of reasonable accommodations that a worker may seek under the PWFA include, but are not limited to: job restructuring; part-time or modified work schedules; more frequent breaks;

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[15] This preamble uses the term "worker" interchangeably with "employee or applicant." For purposes of the PWFA, the term "worker" does not apply to independent contractors.

[16] *See, e.g.*, *Long Over Due*, *supra* note 2, at 7 (statement of Rep. Jerrold Nadler) ("Pregnancy is not a disability. Sometimes, due to complications or even in healthy pregnancies, workers need a reasonable accommodation from their employer."). Throughout this document, the EEOC uses the term "uncomplicated" pregnancy rather than "healthy" or "normal."

[17] 42 U.S.C. 2000gg-1.

[18] 42 U.S.C. 2000e(k); *See Enforcement Guidance on Pregnancy Discrimination*, *supra* note 11, at I.A.4 (2015).

acquisition or modification of equipment, uniforms, or devices; allowing seating for jobs that require standing or standing in jobs that require sitting; appropriate adjustment or modification of examinations or policies; permitting the use of paid leave (whether accrued, short-term disability, or another type of employer benefit) or providing unpaid leave, including to attend health care-related appointments and to recover from childbirth;[19] assignment to light duty;[20] telework; and, accommodating a worker's inability to perform one or more essential functions of a job by temporarily suspending the requirement that the employee perform that function, if the inability to perform the essential function is temporary and the worker could perform the essential function in the near future.[21] The proposed regulation includes a non-exhaustive list of examples of possible reasonable accommodations, and the preamble and the proposed appendix include additional examples.

Reasonable Accommodations for Pregnancy, Childbirth, or Related Medical Conditions are Critically Important for Workers and Their Families.

The reasonable accommodations provided by the PWFA for workers experiencing pregnancy, childbirth, or related medical conditions are critical to the economic security of women workers and their families. Women are the primary, sole, or co-breadwinners in nearly

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[19] The Commission recognizes that different types of employers use different terms for time away from work, including leave, paid time off (PTO), time off, sick time, vacation, and administrative leave, among others. Throughout the preamble, the proposed regulation, and the proposed appendix, the Commission uses the term "leave" or "time off" and intends those terms to cover leave however it is identified by the specific employer.

[20] The Commission recognizes that "light duty" programs, or other programs providing modified duties, can vary depending on the covered entity. EEOC, *Enforcement Guidance: Workers' Compensation and the ADA*, text above Question 27 (1996), https://www.eeoc.gov/laws/guidance/enforcement-guidance-workers-compensation-and-ada [hereinafter *Enforcement Guidance: Workers' Compensation*]. In the context of the proposed regulation, the Commission intends "light duty" to include the types of programs included in Questions 27 & 28 of the *Enforcement Guidance on Workers' Compensation* and any other policy, practice, or system that a covered entity has for accommodating employees, including when one or more essential functions of a position are temporarily excused.

[21] 42 U.S.C. 2000gg(6).

64 percent of families, earning at least half of their total household income.[22] As of 2021, over 66 percent of women in the United States who gave birth in the prior year were in the labor force,[23] up from about 57 percent in 2006.[24] Moreover, an increasing number of pregnant workers are working later into their pregnancies—over 80 percent of first-time mothers who worked during their pregnancy worked into the last three months before their child's birth.[25] The lack of accommodations for pregnancy, childbirth, or related medical conditions means that pregnant workers can be faced with an impossible choice between their job and a necessary paycheck or their health or the health of their pregnancy.[26] Without accommodations, pregnant workers too often may find that they must quit their jobs or face being fired, which can also mean that workers lose their employer-sponsored health insurance at a time when they especially need it. Others are forced to take leave, which can mean that the worker does not have leave to recover

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[22] H.R. Rep. No. 117-27, pt.1, at 21-22 (2021) (internal citations omitted); *id.* at 25 (noting that "[p]regnant 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"). In the NPRM, when using language from specific sources, EEOC uses the language of that source (e.g., "women" or "pregnant women").

[23] U.S. Census Bureau, *Births in the Past Year and Labor Force Participation for Women Aged 16-50, by Education: 2006 to 2019*, (select "Historical Table 5") (Feb. 15, 2023), https://www.census.gov/library/visualizations/time-series/demo/fertility-time-series.html [hereinafter *Births in the Past Year and Labor Force Participation*]; *see also* Steven Ruggles et al., IPUMS USA: Version 12.0 (2022), https://doi.org/10.18128/D010.V12.0 [hereinafter *IPUMS Data*] (providing that, in 2021, over 66 percent of women in the U.S. who gave birth in the prior year were in the labor force). Data are available by request to registered IPUMS USA users; please contact ipums@umn.edu.

[24] *Births in the Past Year and Labor Force Participation*, *supra* note 23, (select "Historical Table 5").

[25] Lynda Laughlin, U.S. Census Bureau, U.S. Dep't of Com., *Maternity Leave and Employment Patterns of First-Time Mothers: 1961-2008* 6 (2011), https://www2.census.gov/library/publications/2011/demo/p70-128.pdf [hereinafter *Maternity Leave and Employment Patterns of First-Time Mothers*].

[26] *See, e.g.*, Markup of the Paycheck Fairness Act; Pregnant Workers Fairness Act; Workplace Violence Prevention for Health Care and Social Service Workers Act 54:46 (2021), https://www.youtube.com/watch?v=p6Ie2S9sTxs [hereinafter *Markup of the Pregnant Workers Fairness Act*] (statement of Rep. Kathy Manning) (stating that the goal of the PWFA is to help pregnant workers "to deliver healthy babies while maintaining their jobs"); *id.* at 21:50 (statement of Rep. Robert C. Scott) (stating that, "without the basic protections, too many workers are forced to choose between a healthy pregnancy and their paychecks"); *id.* at 1:35:03 (statement of Rep. Lucy McBath) (stating that "no mother should ever have to choose between the health of themselves and their child or a paycheck").

from childbirth later. By providing a path for accommodations for these workers, the PWFA will protect workers' ability to earn, remain in the workforce, and advance in their careers.

Importantly, the economic damage done to pregnant workers and their families due to the lack of a right to reasonable accommodation during pregnancy is especially hard-hitting for workers in low-wage jobs. These workers are the least likely to have flexibility in their jobs or savings upon which to draw if they are unemployed or on unpaid leave.[27]

Accommodations for limitations due to pregnancy, childbirth, or related medical conditions are especially necessary for pregnant workers who face complications or a high risk of complications, or for those who hold particular kinds of jobs. As Representative Jahana Hayes noted during the debate preceding the House Committee vote on the PWFA, "women of color…are more likely to hold inflexible and physically demanding jobs that can present specific challenges for pregnant workers, such as home health aides, food service workers, package handlers, and cleaners. The labor-intensive requirements of these jobs sometimes require a temporary reasonable accommodation so women can remain on the job while protecting the health of themselves and their babies."[28]

In fact, "Black women are more than three times as likely as White women to die from pregnancy-related causes, while American Indian/Alaska Native [women] are more than twice as likely" [29] and a recent study shows that negative health outcomes during pregnancy disproportionately affect Black women compared to White women regardless of wealth.[30]

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[27] H.R. Rep. No. 117-27, pt. 1 at 22-23.

[28] *Markup of the Pregnant Workers Fairness* Act, *supra* note 26, at 1:41 (statement of Rep. Jahana Hayes).

[29] *White House Blueprint for Addressing the Maternal Health Crisis* 15 (2022), https://www.whitehouse.gov/wp-content/uploads/2022/06/Maternal-Health-Blueprint.pdf.

[30] Kate Kennedy-Moulton et al., *Maternal and Infant Health Inequality: New Evidence from Linked Administrative Data* 5, Nat'l Bureau of Econ. Rsch., Working Paper No. 30,693, (2022), https://www.nber.org/system/files/working_papers/w30693/w30693.pdf (finding that maternal and infant health vary with income, but infant and maternal health in Black families at the top of the income distribution is similar to or worse than that of White families at the bottom of the income distribution).

Additionally, "Black mothers are more likely to experience stillbirth compared to Hispanic and White mothers."[31] Providing for workplace accommodations due to pregnancy, childbirth or related medical conditions is one step that may help address the maternal health crisis.[32]

The PWFA Limits the Burden on Covered Entities.

The PWFA is carefully designed to limit the burden on covered entities. Like the ADA, the PWFA provides for reasonable accommodations in certain circumstances. While there are not data regarding the costs of accommodations under the PWFA, there are data regarding the costs of accommodations under the ADA, which show that most accommodations are low or no cost. According to a study by the Job Accommodation Network (JAN) regarding accommodations for people with disabilities, most employers report no costs or low costs for providing these accommodations. Of the 720 employers who were able to provide cost information related to accommodations they had provided, 356 (49.4 percent) said the accommodations needed by their employees cost nothing. Another 312 (43.3 percent) experienced a one-time cost. Only 52 (7.2 percent) said the accommodation resulted in an ongoing, annual cost to the company. Of those accommodations that did have a one-time cost, the median one-time expenditure as reported by the employer was $300.[33] While there are not data regarding the cost for accommodations specifically for pregnancy,

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[31] CDC, *Black Mothers Are More Likely to Experience Stillbirth Compared to Hispanic and White Mother*, (Nov. 3, 2022), https://www.cdc.gov/ncbddd/stillbirth/features/kf-black-mothers-stillbirth.html.

[32] *See* U.S. Dep't of Lab., *Black Mothers at Work: A Discussion on Workplace Challenges and Supports*, (Apr. 11, 2023), https://usdolevents.webex.com/recordingservice/sites/usdolevents/recording/654d1e18bab8103bbdff00505681d077/playback (discussing how Federal employment laws can respond to some of the issues faced by Black mothers at work).

[33] Job Accommodation Network, *Costs and Benefits of Accommodation*, (May 4, 2023), https://askjan.org/topics/costs.cfm [hereinafter *Costs and Benefits of Accommodation*].

one survey concluded that the most common accommodation needed by pregnant workers was additional breaks, especially for using the bathroom, which is a low- to no-cost accommodation.[34] Moreover, given the nature of the accommodations required by the PWFA, virtually all will be temporary. Given these facts and the cost data from accommodations under the ADA, the actual costs an employer may face will likely be temporary and low.

Additionally, as set out in the accompanying economic analysis of the PWFA pursuant to Executive Order 12866, the number of workers seeking an accommodation from a given employer in a year will be small. The EEOC has calculated that in 2021, women of reproductive age (aged 16-50 years) comprised approximately 33 percent of U.S. workers. Of these, approximately 4.7 percent gave birth to at least 1 child the previous year.[35] Not all pregnant workers require an accommodation, so the actual number of accommodations may be even lower than this number suggests. And, because the law will keep pregnant workers in the workforce, even if an employer does incur costs to provide a PWFA accommodation, the employer also may experience a reduction in turnover and money spent to hire and train a new employee.

Most of the PWFA's provisions will be familiar to covered entities because the PWFA borrows intentionally and extensively from existing civil rights laws, both in describing coverage and in imposing requirements. For example, the PWFA incorporates Title VII's definition of "employer,"[36] and Title VII's enforcement procedures.[37] The PWFA borrows the definition of "reasonable accommodation" and "undue hardship" from the ADA and uses the same interactive

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[34] Eugene R. Declercq et al., *Listening to Mothers III: New Mothers Speak Out* 36 (2013), https://www.nationalpartnership.org/our-work/resources/health-care/maternity/listening-to-mothers-iii-new-mothers-speak-out-2013.pdf [hereinafter *Listening to Mothers III*].

[35] *See IPUMS Data*, *supra* note 23; *see also Fighting for Fairness*, *supra* note 2, at 109 (testimony of Fatima Goss Graves, President & CEO, National Women's Law Center) (noting that even in occupations in which women are the most likely to be employed, the number of pregnancies per year is quite small; "[f]or example pregnant women are most likely to work as elementary school teachers and middle school teachers, but only 3.2 percent of all elementary and middle school teachers are pregnant in a given year").

[36] 42 U.S.C. 2000gg(2)(B)(i).

[37] 42 U.S.C. 2000gg-2(a).

process as is commonly used under the ADA.[38] By borrowing language and concepts from Title VII and the ADA, the PWFA allows employers to build on existing policies and processes.

Like the ADA, the PWFA does not require a covered entity to provide a reasonable accommodation that would cause undue hardship.[39] A covered entity may therefore lawfully deny any requested accommodation that would impose significant difficulty or expense on its operations, as defined under the ADA.

Finally, the PWFA is similar to existing laws in 30 States and localities regarding accommodations for pregnant workers; employers in those States and localities already are familiar with and comply with laws similar to the PWFA.[40] The PWFA sets a standard for the entire nation so that employees have a consistent minimum level of protection regardless of where they live in the United States, and no State's employers are significantly disadvantaged by differences in State law protections for employees affected by pregnancy, childbirth, or related medical conditions.

Voluntary Compliance Is Critical for the PWFA.

As with other civil rights laws, voluntary compliance is critical to the success of the PWFA. If a worker quits their job because they do not receive an accommodation, it is of little use to that worker that years later they are able to establish through litigation that they should have received an accommodation. Voluntary compliance should be the norm because, while the form of reasonable accommodation will vary depending on the job and the worker's needs, the accommodations that most workers will seek likely will be no cost to low cost and may be as simple as access to water during the workday, additional bathroom breaks, or sitting or standing. Thus, participation in a good faith interactive process to quickly find an accommodation once it

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[38] 42 U.S.C. 2000gg(7).

[39] 42 U.S.C. 2000gg-2(g).

[40] *Employment Protections for Workers Who Are Pregnant or Nursing*, *supra* note 5.

is requested is key, both for workers who need accommodations and for employers who need to keep workers on the job and avoid litigation costs.

Communication between workers and covered entities is the key to voluntary compliance. As set out in the proposed regulations, employees and applicants have the responsibility of asking for an accommodation. In doing so, they do not need to mention the PWFA, say any specific phrases, or use medical terms, and the request does not have to be in writing. Rather, the worker can communicate (or have someone communicate on their behalf) that the worker has a limitation that is related to pregnancy, childbirth, or related medical conditions and the need for an adjustment or change at work. Because the statute and the regulations emphasize employee notice that is simple and straightforward, and need not be in writing, covered entities should train first-line supervisors to recognize such requests as requests for accommodations and to act on them accordingly.

Once the need for an accommodation has been communicated, the covered entity must respond to the request. If the need is straightforward and can be easily accommodated (e.g., providing a stool for a pregnant cashier, or allowing a pregnant worker to carry a bottle of water with them and to drink as needed), the entity should act quickly and provide the accommodation. If the entity has questions or wants to explore different reasonable accommodations, the covered entity and the employee can engage in the interactive process by, for example, having an informal conversation about the employee's needs and possible accommodations. For accommodations that require more information, the entity may need to analyze the essential functions of the job and may, when necessary and permitted under the proposed PWFA rules described below, request reasonable medical documentation. In general, these steps should be familiar to covered entities, as they are similar to the reasonable accommodation provisions, including the interactive process, of the ADA.

Importantly, the physical or mental condition leading the worker to seek an accommodation can be a modest, minor, and/or episodic problem or impediment: there is no

threshold of severity required under the PWFA. This is to ensure that employees and applicants, including those with uncomplicated pregnancies, have access to accommodations and that accommodations are available in order for workers to maintain their health or the health of their pregnancies. A severity threshold is not supported by the text of the PWFA and would frustrate the purposes of the Act.

Executive Summary of the PWFA's Major Provisions and an Outline of this NPRM.

The PWFA requires a covered entity to provide reasonable accommodations, absent undue hardship, to a qualified employee or applicant with a known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The Commission's proposed rule addresses each element of this requirement in greater detail; this section contains a summary in outline form. As required by the PWFA, the proposed regulations also provide examples of reasonable accommodations.

(1) Coverage (42 U.S.C. 2000gg(2) & (3)):

a. The PWFA covers employers (as well as unions and employment agencies), employees, applicants, and former employees who are currently covered by 1) Title VII; 2) the Congressional Accountability Act of 1995, 2 U.S.C. 1301 et seq.; [41] 3) the Government Employee Rights Act of 1991, 42 U.S.C. 2000e-16b; 2000e-16c (GERA); or 4) section 717 of Title VII, 42 U.S.C. 2000e-16, which covers Federal employees. Whoever satisfies the definition of an "employer" or "employee" under any of these statutes is an employer or employee for purposes of the PWFA.

(2) Remedies and Enforcement (42 U.S.C. 2000gg-2):

[41] The EEOC does not have enforcement authority for the Congressional Accountability Act; thus, these proposed regulations do not apply to workers or employers covered by that law. The PWFA directs the Office of Congressional Workplace Rights to issue regulations within six months after the Commission issues a final rule in this rulemaking. 42 U.S.C. 2000gg-3(b).

a. The procedures for filing a charge or claim under the PWFA, as well as the available remedies, including the ability to obtain damages, are the same as under 1) Title VII; 2) the Congressional Accountability Act; 3) GERA; and 4) section 717 of Title VII, for the employees covered by the respective statutes. Limitations regarding available remedies under these statutes likewise apply under the PWFA. As with the ADA, damages are limited if the claim involves the provision of a reasonable accommodation, and the employer makes a good faith effort to meet the need for a reasonable accommodation.

(3) Known Limitation (42 U.S.C. 2000gg(4)):

a. "Known limitation" is a "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" under the ADA.

b. The proposed regulation explains the operative terms in this definition.

i. "Known" means "the employee or applicant, or a representative of the employee or applicant, has communicated the limitation to the covered entity."

ii. "Limitation" means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The physical or mental condition that is the limitation may be a modest, minor, and/or episodic impediment or problem. The physical or mental condition also may be that a worker affected by pregnancy, childbirth, or related medical conditions has a need or problem related to maintaining their health or the health of their pregnancy. The definition also includes when a worker is seeking health care related to pregnancy, childbirth, or a related medical condition itself.

iii. "Pregnancy, childbirth, or related medical conditions" is a phrase used in Title VII (42 U.S.C. 2000e(k)) and has the same meaning as in that statute; the proposed regulation also provides additional examples of related medical conditions.

(4) Qualified (42 U.S.C. 2000gg(g)):

a. The PWFA has two definitions of qualified.

i. First, the PWFA uses language from the ADA ("an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position" is qualified).

ii. Second, the PWFA allows an employee or applicant to be "qualified"—even if they cannot perform one or more essential functions of the job—if the inability to perform the essential function(s) is "temporary," the worker could perform the essential function(s) "in the near future," and the inability to perform the essential function(s) can be reasonably accommodated. The proposed rule defines the terms "temporary" (lasting for a limited time, not permanent, and may extend beyond "in the near future") and "in the near future" (generally within forty weeks). It also discusses the meaning of the requirement that the inability to perform the essential functions(s) can be reasonably accommodated.

(5) Essential Function:

This is a term from the ADA, and the proposed rule uses the same definition as in the ADA. In general terms, it means the fundamental duties of the job.

(6) Reasonable Accommodation (42 U.S.C. 2000gg(7)):

This is a term from the ADA, and the PWFA uses a similar definition as in the ADA. Generally, it means a change in the work environment or how things are usually done. Because of the text

and purpose of the PWFA, the proposed rule includes supplemental provisions and specific examples of reasonable accommodations, as explained in detail below.

(7) Undue Hardship (42 U.S.C. 2000gg(7)):

This is a term from the ADA and the PWFA uses a similar definition as in the ADA. Generally, it means significant difficulty or expense for the operation of the covered entity. Because of the text and purpose of the PWFA, the proposed regulation includes supplemental provisions to the ADA's definition, as explained in detail below.

(8) Interactive Process (42 U.S.C. 2000gg(7)):

This is a method from the ADA to help the covered entity and the worker figure out a reasonable accommodation; the PWFA anticipates that covered entities will use it for requests to accommodate known limitations related to pregnancy, childbirth, or related medical conditions. Generally, it means a discussion or two-way communication between an employer and an employee or applicant to identify a reasonable accommodation.

(9) Prohibited Acts (42 U.S.C. 2000gg-1):

a. The PWFA prohibits a covered entity from denying a qualified employee or applicant with a known limitation a reasonable accommodation, absent undue hardship.

b. The PWFA prohibits a covered entity from requiring a qualified employee or applicant to accept an accommodation other than one arrived at through the interactive process.

c. The PWFA prohibits a covered entity from denying employment opportunities to a qualified employee or applicant if the denial is based on the covered entity's need to make a reasonable accommodation for the known limitation of the employee or applicant.

d. The PWFA prohibits a covered entity from requiring a qualified employee with a known limitation to take leave, either paid or unpaid, if another effective reasonable accommodation exists, absent undue hardship.

e. The PWFA prohibits a covered entity from taking an adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation for a known limitation.

(10) Prohibition on Retaliation and Coercion (42 U.S.C. 2000gg(f)):

a. Like Title VII and the ADA, the PWFA prohibits retaliation against any employee, applicant, or former employee because that person has opposed acts or practices made unlawful by the PWFA or has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the PWFA.

b. Like the ADA, the PWFA prohibits coercion, intimidation, threats, or interference with any individual in the exercise or enjoyment of rights under the PWFA or with any individual aiding or encouraging any other individual in the exercise or enjoyment of rights under the Act. The proposed regulation also specifically provides that like the ADA's retaliation and interference provisions, the PWFA's retaliation and coercion provisions prohibit harassment based on an individual's exercise or enjoyment of rights under the PWFA or aid or encouragement of any other individual in doing so.

Section-by-Section Analysis of the Regulation

The Commission seeks comment on any part of the proposed regulation, the section-by-section analysis, and the appendix. The proposed appendix, entitled Appendix A to 29 CFR part 1636 – Interpretive Guidance on the Pregnant Workers Fairness Act, will become part of 29 CFR

part 1636 when the proposed rule is finalized. The Interpretive Guidance represents the Commission's interpretation of the issues addressed within it, and the Commission will be guided by the regulation and the Interpretive Guidance when enforcing the PWFA. The material currently in the appendix comes from the preamble to the proposed rule. In addition, in the section-by-section analysis the Commission has identified certain topics about which it is specifically seeking comment. For ease of reference, the list of directed questions appears at the end of the section-by-section analysis.

Where applicable, throughout the proposed rule, this preamble, and the proposed appendix, the Commission proposes using definitions from the ADA or Title VII, the ADA's implementing regulations, or the EEOC's enforcement guidance regarding both statutes.

Section 1636.1 Purpose

In this section, the Commission sets forth the provisions of the PWFA in general terms to describe the purpose of the law.

Section 1636.2 Definitions—General

Rather than redefine "Commission," "covered entity," "respondent," "employer," "employing office," and "employee," the PWFA incorporates existing definitions from other civil rights statutes. In the proposed rule, the Commission uses the same language as the statutory provisions, except that it provides a full description of the types of employers and employees covered by the Government Employee Rights Act of 1991 (42 U.S.C. 2000e-16(c)(a)) (GERA), rather than merely referencing GERA's definitions.

The PWFA at 42 U.S.C. 2000gg(3) uses "employee (including an applicant)" in its definition of "employee." Thus, throughout the statute, the proposed regulations, and the proposed appendix, the term "employee" should be understood to include "applicant" where relevant. Because the PWFA relies on Title VII for its definition of "employee," the proposed

rule clarifies that the term also includes "former employee," where relevant.[42] The PWFA applies to "covered entities," which include, as under Title VII, public or private employers with fifteen or more employees, unions, employment agencies, and the Federal Government.

The NPRM, proposed regulation, and proposed appendix use the term "covered entity" and the term "employer" interchangeably. The NPRM, proposed regulation, and proposed appendix use the term "employee or applicant" and "employee"; where appropriate, "employee" or "employee or applicant" means "employee, applicant, or former employee."

Section 1636.3 Definitions Specific to PWFA

1636.3(a) Known Limitation

The proposed rule reiterates the definition of "known limitation" from section 2000gg(4) of the PWFA and then provides definitions for the operative terms.

1636.3(a)(1) Known

Paragraph (1) adopts the definition of "known" based on the PWFA and thus defines it to mean that the employee or applicant, or a representative of the employee or applicant, has communicated the limitation to the covered entity.

1636.3(a)(2) Limitation

Paragraph (2) adopts the definition of "limitation" based on the PWFA and thus defines it to mean a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The "physical or mental condition" that is the limitation

[42] 42 U.S.C. 2000e(f). Under Title VII, the term "employee" includes former employees. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding that including former employees within sec. 704(a) of Title VII's coverage of "employee" was "consistent with the broader context of Title VII and the primary purpose of § 704(a)); *see also* EEOC, *Compliance Manual Section 2: Threshold Issues* 2-III.A (2009), http://www.eeoc.gov/policy/docs/threshold.html#2-III-A.

may be a modest, minor, and/or episodic impediment or problem. The definition encompasses when a worker affected by pregnancy, childbirth, or related medical conditions has a need or problem related to maintaining their health or the health of their pregnancy.[43] The definition also includes when the worker is seeking health care related to the pregnancy, childbirth, or a related medical condition itself. This is consistent with the ADA which permits reasonable accommodations for obtaining medical treatment[44] and recognizes that for pregnancy, childbirth, or related medical conditions the proper course of care can include regular appointments and monitoring by a health care professional.[45]

The general principle informing the proposed rule's definition is that the physical or mental condition (the limitation) required to trigger the obligation to provide a reasonable accommodation under the PWFA does not require a specific level of severity. This is clear from the text of the statute, which does not contain a level of severity, other than stating that the limitation does not need to meet the definition of a "disability" under the ADA.[46] The lack of a level of severity is also necessary given the need the statute seeks to fill. Workers who can show that their pregnancy-related condition meets the definition of a disability may be eligible to

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[43] The preamble, proposed regulation, and proposed appendix use the term "maintain health or the health of the pregnancy." This includes avoiding risk to the employee's or applicant's health or to the health of their pregnancy.

[44] EEOC, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, at text after n. 49 (2002), http://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada [hereinafter *Enforcement Guidance on Reasonable Accommodation*].

[45] *See, e.g.*, Office of Women's Health, U.S. Dep't of Health and Human Servs., *Prenatal Care* (last visited July 18, 2023) (stating that during pregnancy usually visits are once a month until week 28, twice a month from weeks 28-36 and once a week from weeks 36 to birth) https://www.womenshealth.gov/a-z-topics/prenatal-care; Am. Coll. of Obstetricians & Gynecologists, Comm. Opinion No. 736, *Optimizing Post-Partum Care* (stating the importance of regular post-partum care) (2021) (https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/05/optimizing-postpartum-care) & Opinion No. 826, *Protecting and Expanding Medicaid to Improve Women's Health* (encouraging the expansion of Medicaid to improve post-partum care) (2021) (https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/06/protecting-and-expanding-medicaid-to-improve-womens-health).

[46] 42 U.S.C. 2000gg(4).

receive an accommodation under the ADA; workers whose limitations do not reach that threshold are ineligible for such accommodations, and the PWFA is intended to cover those workers.[47] Additionally, the definition covers situations where a worker seeks an accommodation in order to maintain their health or the health of their pregnancy and avoid more serious consequences and when a worker seeks health care for their pregnancy, childbirth, or related medical conditions.[48] Practically, allowing for accommodations to maintain health and attend medical appointments also increases the chances that the accommodation is minor and may decrease the need for a more extensive accommodation because the worker may be able to avoid more serious complications.

Because the standard for known limitation in the statute does not include a specific level of severity and accommodations are available for non-severe physical or mental conditions, whether a worker has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions shall be construed broadly to the maximum extent permitted by the PWFA.

Related to, Affected by, or Arising Out of

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[47] 42 U.S.C. 2000gg(4). *See, e.g.*, H.R. Rep. No. 117-27, pt. 1, at 12 (workers whose pregnancy-related impairments do not substantially limit a major life activity and who are not covered by the ADA can be covered by the PWFA); *id.* at 22-23 (accommodations are frequently needed by, and should be provided to, people with healthy pregnancies); *id.* (example of an "uneventful pregnancy" in which a woman needed more bathroom breaks); *id.* at 14-22 (outlining the gaps left by Title VII and the ADA that the PWFA is intended to fill so that pregnant workers can receive reasonable accommodations); *id.* at 56 (noting that "minor limitations" can be covered because they presumably only require minor accommodations).

[48] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at text above Question 17 (providing reasons for which an employee may receive an accommodation, including to obtain medical treatment and to avoid temporary adverse conditions in the work environment because of the effect on the worker's health). *See, e.g.*, *Markup of the Pregnant Workers Fairness Act*, *supra* note 26, at 54:46 (statement of Rep. Kathy E. Manning) (goal of the PWFA is help pregnant workers "to deliver healthy babies while maintaining jobs"); *id.* at 21:50 (statement of Rep. Robert C. Scott) ("[W]ithout these protections, too many workers are forced to choose between a healthy pregnancy and their paychecks"); *id.* at 1:35 (statement of Rep. Lucy McBath) ("[N]o mother should ever have to choose between the heath of themselves and their child or paycheck."); *id.* at 1:44 (statement of Rep. Suzanne Bonamici) ("[P]regnant workers should not have to choose between a healthy pregnancy and a paycheck.").

Whether a physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions usually will be obvious. For example, if an employee is pregnant and as a result has pain when standing for long periods of time, the employee's physical or mental condition (pain when standing for a protracted period) is related to the employee's pregnancy. An employee who is pregnant and because of the pregnancy cannot lift more than 20 pounds has a physical condition related to pregnancy. An employee who is pregnant and is seeking time off for prenatal health care appointments is attending a medical appointment related to the pregnancy. An employee who requests an accommodation to attend therapy appointments for postpartum depression has a medical condition related to pregnancy (postpartum depression) and is obtaining health care for the related medical condition. A pregnant employee who is seeking an accommodation to limit exposure to secondhand smoke to protect the health of their pregnancy has a physical or mental condition (trying to maintain the employee's health or the health of their pregnancy or increased sensitivity to secondhand smoke) related to pregnancy. A pregnant worker seeking time off in order to get an amniocentesis is attending a medical appointment related to the pregnancy. An employee who requests leave for IVF treatment for the worker to get pregnant has a related medical condition (difficulty in becoming pregnant or infertility) and is seeking health care related to it. An employee whose pregnancy is causing fatigue has a physical condition (fatigue) related to pregnancy. An employee whose pregnancy is causing back pain has a physical condition (back pain) related to pregnancy. This is not an exhaustive list of physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.

The Commission recognizes, however, that some physical or mental conditions or limitations, including some of those in the examples above, may occur even if a person is not pregnant (e.g., depression, hypertension, constraints on lifting). To the extent that a covered entity has reasonable concerns about whether a physical or mental condition or limitation is "related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions,"

the employer may request information from the employee regarding the connection, using the principles set out in section 1636.3(l) about the interactive process and supporting documentation. For the most part, the Commission anticipates that determining whether a limitation or physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions will be a straightforward determination that can be accomplished through a conversation between the employer and the employee as part of the interactive process and without the need for the employee to obtain documentation or verification, such as documentation from a health care provider. Of course, even if a covered entity concludes that a limitation is not covered by the PWFA, the covered entity should consider whether the limitation constitutes a disability that is covered by the ADA.

There may be situations where a physical or mental condition begins as something that is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, and, once the pregnancy, childbirth, or related medical condition is over, the limitation remains. If an employer has questions regarding whether the limitation is still related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, the employer may use the principles set out in the sections regarding the interactive process and supporting documentation. Additionally, there may be situations where that limitation qualifies as a disability under the ADA. In those situations, an employer may use the principles set out in the sections on the interactive process and supporting documentation for the ADA.

1636.3(b) Pregnancy, Childbirth, or Related Medical Conditions

The PWFA uses the term "pregnancy, childbirth, or related medical conditions," which appears in Title VII's definition of sex.[49] Because Congress chose to write the PWFA using the same language as Title VII, in the proposed rule the Commission gives the term "pregnancy,

[49] 42 U.S.C. 2000e(k).

childbirth, or related medical conditions" the same meaning under the PWFA as under Title VII.[50]

To assist workers and covered entities, the proposed regulation includes a non-exhaustive list of examples of pregnancy, childbirth, or related medical conditions that the Commission has concluded generally fall within the statutory definition. These include conditions that Federal courts and the EEOC have already concluded are part of the definition under Title VII as well as other conditions that are based on the expertise of medical professionals. The list in the proposed regulation for the definition of "pregnancy, childbirth, or related medical conditions" includes current pregnancy, past pregnancy, potential pregnancy, lactation (including breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, or having or choosing not to have an abortion, among other conditions.[51]

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[50] *See, e.g.*, *Texas Dep't of Housing & Cmty. Affs. v. Inclusive Cmtys. Project*, 576 U.S. 519, 536 (2015) ("If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation." (omissions in original) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* 323 (2012)); *Bragdon v. Abbott*, 524 U.S. 624, 644-45 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."); *Hall v. U.S. Dep't of Agric.*, 984 F.3d 825, 840 (9th Cir. 2020) ("Congress is presumed to be aware of an agency's interpretation of a statute. We most commonly apply that presumption when an agency's interpretation of a statute has been officially published and consistently followed. If Congress thereafter reenacts the same language, we conclude that it has adopted the agency's interpretation.") (citations and internal quotations omitted); Antonin Scalia & Bryan A. Garner, *Reading Law* 323 (2012) ("[W]hen a statute uses the very same terminology as an earlier statute—especially in the very same field, such as securities law or civil-rights law—it is reasonable to believe that the terminology bears a consistent meaning.").

[51] *Enforcement Guidance on Pregnancy Discrimination*, *supra* note 11, at I.A. ("pregnancy, childbirth, or related medical conditions" include current pregnancy, past pregnancy, potential or intended pregnancy, infertility treatment, use of contraception, lactation, breastfeeding, and the decision to have or not to have an abortion, among other conditions); *see, e.g.*, *Hicks v. City of Tuscaloosa*, 870 F.3d 1253, 1259–60 (11th Cir. 2017) (finding lactation and breastfeeding covered under the PDA, and asserting that "[t]he PDA would be rendered a nullity if women were protected during a pregnancy but then could be readily terminated for breastfeeding—an important pregnancy-related physiological process") (internal citation and quotation omitted); *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 429–30 (5th Cir. 2013) ("[A]s both menstruation and lactation are aspects of female physiology that are affected by pregnancy, each seems readily to fit into a reasonable definition of 'pregnancy, childbirth, or related medical conditions'"); *Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008) (holding that the PDA prohibits an employer from discriminating against a female employee because she has exercised her right to have an

The Commission emphasizes that the list in the regulation is non-exhaustive, and to receive an accommodation an employee or applicant does not have to specify a condition on this list or use medical terms to describe a condition.

However, to be a "related medical condition" as applied to the specific employee or applicant in question, the condition must relate to pregnancy or childbirth. Some of the "related medical conditions" listed in the regulation are conditions that commonly, but not necessarily, relate to pregnancy or childbirth. If a worker has a condition that is listed in the regulation but, in their situation, it does not relate to pregnancy or childbirth, the condition shall not be covered under the PWFA. For example, if a worker has high blood pressure but that medical condition is not related to pregnancy or childbirth, a physical or mental condition related to the worker's high

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abortion); *Kocak v. Cmty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 470 (6th Cir. 2005) (stating that the plaintiff "cannot be refused employment on the basis of her potential pregnancy"); *Turic v. Holland Hosp., Inc*., 85 F.3d 1211, 1214 (6th Cir. 1996) (finding the termination of a pregnant employee because she contemplated having an abortion violated the PDA); *Piraino v. Int'l Orientation Res., Inc.*, 84 F.3d 270, 274 (7th Cir. 1996) (rejecting "surprising claim" by the defendant that no pregnancy discrimination can be shown where the challenged action occurred after the birth of the plaintiff's baby); *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 648 (8th Cir. 1987) (referencing the PDA's legislative history and noting commentator agreement that "[b]y broadly defining pregnancy discrimination, Congress clearly intended to extend protection beyond the simple fact of an employee's pregnancy to include 'related medical conditions' such as nausea or potential miscarriage") (citations and internal quotations omitted); *Ducharme v. Crescent City Déjà Vu, L.L.C.*, 406 F. Supp. 3d 548, 556 (E.D. La. 2019) (finding that "abortion is encompassed within the statutory text prohibiting adverse employment actions 'because of or on the basis of pregnancy, childbirth, or related medical conditions'"); *Donaldson v. Am. Banco Corp., Inc.*, 945 F. Supp. 1456, 1464 (D. Colo. 1996) ("It would make little sense to prohibit an employer from firing a woman during her pregnancy but permit the employer to terminate her the day after delivery if the reason for termination was that the woman became pregnant in the first place. The plain language of the statute does not require it, and common sense precludes it."); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1402-03 (N.D. Ill. 1994) (PDA gives women "the right . . . to be financially and legally protected before, during, and after her pregnancy" and stating "[a]s a general matter, a woman's medical condition rendering her unable to become pregnant naturally is a medical condition related to pregnancy and childbirth for purposes of the Pregnancy Discrimination Act.") (internal citations and quotations omitted); *Neessen v. Arona Corp.*, 2010 WL 1731652, at *7 (N.D. Iowa Apr. 30, 2010) (finding the plaintiff covered by the PDA where the defendant allegedly refused to hire her because she had recently been pregnant and given birth); 29 CFR part 1604 app. Questions 34–37 (1979); H.R. Rep. No. 95-1786, at 4 (1978), *as reprinted in* 95th Cong., 2d Sess. 4, 1978 U.S.C.C.A.N. 4749, 4766 ("Because the bill applies to all situations in which women are 'affected by pregnancy, childbirth, and related medical conditions,' its basic language covers decisions by women who chose to terminate their pregnancies. Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion."); EEOC, *Commission Decision on Coverage of Contraception* (2000), https://www.eeoc.gov/commission-decision-coverage-contraception ("The PDA's prohibition on discrimination against women based on their ability to become pregnant thus necessarily includes a prohibition on discrimination related to a woman's use of contraceptives.").

blood pressure is not eligible for an accommodation under the PWFA. Other civil rights statutes, such as the ADA, separately may entitle the worker to reasonable accommodation. If an employer has questions regarding whether a condition is related to pregnancy or childbirth, the employer may use the principles set out in the sections regarding the interactive process and supporting documentation.

"Related medical conditions" include conditions that existed before pregnancy or childbirth (and for which an individual was perhaps receiving reasonable accommodation under the ADA) but that may be or have been exacerbated by pregnancy or childbirth, such that additional or different accommodations are needed. For example, a worker who was using unpaid leave as an accommodation to attend treatment for anxiety may experience a worsening of anxiety due to pregnancy or childbirth and request an additional accommodation. A worker who received extra breaks to eat or drink due to Type 2 diabetes before pregnancy may need additional accommodations during pregnancy to monitor and manage the diabetes more closely and avoid or minimize adverse health consequences to the worker or their pregnancy. A worker may have high blood pressure that can be managed prior to the pregnancy, but once the worker is pregnant, the high blood pressure poses a risk to the pregnancy and the worker needs bed rest. In these situations, an employee could request an additional accommodation under the ADA or an accommodation under the PWFA.

1636.3(c) Employee's Representative

Paragraph (c) of this section of the proposed rule defines "employee's representative" because the known limitation may be communicated to the covered entity by the employee or the employee's representative. Under the ADA, a representative may also make the request for an accommodation. [52] Thus, the proposed rule uses the same definition from the ADA and states

[52] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, Question 2.

that this term encompasses any representative of the employee or applicant, including a family member, friend, health care provider, or other representative.

1636.3(d) Communicated to the Employer

Paragraph (d) of this section of the proposed rule states that the PWFA's requirement that the known limitation be "communicate[d] to the employer" means to make known to the covered entity either by communicating with a supervisor, manager, someone who has supervisory authority for the employee (or the equivalent for an applicant), or human resources personnel, or by following the covered entity's policy to request an accommodation. This should not be a difficult task, and the employer should permit an employee or applicant to request an accommodation through multiple avenues and means. Given that many accommodations requested under the PWFA will be straightforward—like additional bathroom breaks or water—the Commission emphasizes the importance of employees being able to obtain accommodations by communicating with the people who assign them daily tasks and whom they would normally consult if they had questions or concerns. Employees should not be made to wait for a reasonable accommodation that is simple and imposes negligible cost, and is often likely temporary, because they asked the wrong supervisor. The Commission seeks comment on whether the definition of whom the employee or applicant may communicate with to start the reasonable accommodation process is appropriate or whether it should be expanded or limited with the understanding that the process should not be burdensome for the worker.

Paragraphs (d)(1) and (2) explain that a request for a reasonable accommodation under the PWFA, as with the ADA, does not need to be in writing or use any specific words or phrases. Instead, employees or applicants may request accommodations in conversation or may use another mode of communication to inform the employer.[53] A covered entity may choose to write

[53] *Id.* at Question 3.

a memorandum or letter confirming a request or may ask the employee or applicant to fill out a form or submit the request in written form. However, the covered entity cannot ignore or close the initial request because that initial request is sufficient to place the employer on notice.[54] Additionally, even though it is not required, an employee may choose email or other similar written means to submit a request for an accommodation to ensure clarity and create a record.

Paragraph (d)(3) of this section of the proposed regulation sets out what an employee or applicant must communicate to the employer to request an accommodation under the PWFA. Such a request has two parts. First, the employee or applicant (or their representative) must identify the limitation that is the physical or mental condition and that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. Second, the employee or applicant (or their representative) must indicate that they need an adjustment or change at work. As with the ADA, to request an accommodation, an employee or applicant may use plain language and need not mention the PWFA; use the phrases "reasonable accommodation," "known limitation," "qualified," "essential function;" use any medical terminology; or use any other specific words or phrases.

Examples

> Example 1636.3 #1: A pregnant employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of morning sickness."
>
> Morning sickness is a physical condition related to pregnancy that impedes a person's ability to eat and drink and requires access to a bathroom. The employee has identified a change needed at work (change in work schedule). This is a request for a reasonable accommodation under the PWFA.
>
> Example 1636.3 #2: An employee who gave birth three months ago tells the person who assigns her work at the employment agency, "I need an hour off once a week for treatments to help with my back problem that started during my pregnancy."
>
> The back problem is a physical condition related to pregnancy, and the employee has identified a change needed at work (leave for medical appointments). This is a request for a reasonable accommodation under the PWFA.

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[54] *Id*.

Example 1636.3 #3: An employee tells a human resources specialist that they are worried about continuing to lift heavy boxes because they are concerned that it will harm their pregnancy.

The employee has a limitation because they have a need or a problem related to maintaining their health or the health of their pregnancy, the employee identified a change needed at work (assistance with lifting), and the employee communicated this information to the employer. This is a request for a reasonable accommodation under the PWFA.

Example 1636.3 #4: An employee's spouse, on the employee's behalf, requests light duty for the employee because the employee has a lifting restriction related to pregnancy; the employee's spouse uses the employer's established process for requesting a reasonable accommodation or light duty for the employee.

The lifting restriction is a physical condition related to the employee's pregnancy, and the employee's representative (their spouse) has identified a change needed at work (light duty). This is a request for a reasonable accommodation under the PWFA.

Example 1636.3 #5: An employee verbally informs a manager of her need for more frequent bathroom breaks, explains that the breaks are needed because the employee is pregnant, but does not complete the employer's online form for requesting accommodation.

The need to urinate more frequently is a physical condition related to pregnancy, and the employee has identified a change needed at work (additional bathroom breaks). An employee need not use specific words or any specific form or template to make a request for accommodation. This is a request for a reasonable accommodation under the PWFA.

Example 1636.3 #6: An employee tells a supervisor that she needs time off to recover from childbirth.

The need or a problem is related to maintaining the employee's health after childbirth, and the employee has identified a change needed at work (time off). This is a request for a reasonable accommodation under the PWFA.[55]

1636.3(e) Mitigating Measures

[55] *See infra* § 1636.3(h) *Particular Matters Regarding Leave as a Reasonable Accommodation* for a discussion of how requests for leave interact with situations where an employee has a right to leave under an employer's policy or another law; *see also* EEOC, *Employer-Provided Leave and the Americans with Disabilities Act*, Communication After an Employee Requests Leave (2016), https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act [hereinafter *Technical Assistance on Employer-Provided Leave*], for an explanation of this interaction and other helpful information about the interaction between the ADA and other laws requiring employers to provide leave to employees.

There may be steps that a worker can take to mitigate, or lessen, the effect of a known limitation. Paragraph (e) of this section of the proposed rule explains that, as with the ADA, the ameliorative, or positive, effects of mitigating measures, as that term is defined in the Commission's ADA regulations, shall not be considered when determining if the employee has a limitation under the PWFA. However, again as under the ADA, the detrimental or non-ameliorative effects of mitigating measures, such as negative side effects of medication, the burden of following a particular treatment regimen, and complications that arise from surgery, may be considered when determining if an employee has a limitation under the PWFA.[56]

1636.3(f) Qualified Employee or Applicant

An employee or applicant must meet the definition of "qualified" in the PWFA in one of two ways.[57]

In paragraph (f) of this section, the proposed rule reiterates the statutory language that "qualified employee" means an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the position. Additionally, following the statute, the proposed rule also states that an employee or applicant shall be considered qualified if: (1) any 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 proposed rule relies on the ADA's definition of

[56] 29 CFR 1630.2(j)(1)(vi), (4)(ii); *see also* 29 CFR part 1630 app. 1630.2(j)(1)(vi).

[57] The PWFA does not address prerequisites for a position; thus, whether an employee or applicant is qualified for the position in question is determined based on whether the employee or applicant can perform the essential functions of the position, with or without a reasonable accommodation, or based on the second part of the PWFA's definition of "qualified." 42 U.S.C. 2000gg(6).

"qualified individual" for applicants and employees,[58] with necessary modifications to account for differences in the language of the statutes, as explained below.

As with the ADA, the determination of whether an employee with a known limitation is qualified should be based on the capabilities of the employee at the time of the relevant employment decision and should not be based on speculation that the employee may become unable in the future to perform certain tasks, may require leave, or may cause increased health insurance premiums or workers' compensation costs.[59]

1636.3(f)(1) The First Part of PWFA's Definition of Qualified Employee or Applicant—With or Without Reasonable Accommodation

Under 42 U.S.C. 2000gg(6), employees are qualified if they can perform the essential functions of their jobs with or without reasonable accommodation, which is the same language as in the ADA and is interpreted accordingly in the proposed rule. "Reasonable" has the same meaning as under the ADA on this topic—an accommodation that "seems reasonable on its face, i.e., ordinarily or in the run of cases," "feasible," or "plausible."[60] Many workers seeking reasonable accommodations under the PWFA will meet this part of the definition. For example, a pregnant attorney who uses the firm's established telework program to work at home during morning sickness does not need an accommodation to perform the essential functions of the job and therefore is qualified without a reasonable accommodation. A pregnant cashier who needs a stool to perform the job will be qualified with the reasonable accommodation of a stool. A

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[58] 42 U.S.C. 12111(8); 29 CFR 1630.2(m).

[59] 29 CFR part 1630 app. 1630.2(m).

[60] *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401-02 (2002); *see, e.g.*, *Shapiro v. Twp. of Lakewood*, 292 F.3d 356, 360 (3d Cir. 2002) (citing the definition from *Barnett*); *Osborne v. Baxter Healthcare Corp.*, 798 F.3d 1260, 1267 (10th Cir. 2015) (citing the definition from *Barnett*); *EEOC v. United Airlines*, *Inc.*, 693 F.3d 760, 762 (7th Cir. 2012) (citing the definition from *Barnett*); *see also Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at text accompanying nn.8-9 (citing the definition from *Barnett*).

teacher recovering from childbirth who needs additional bathroom breaks will be qualified with a reasonable accommodation that allows such breaks.

Determining "Qualified" for the Reasonable Accommodation of Leave

The proposed rule explains that when determining whether an employee who needs leave as a reasonable accommodation meets the definition of "qualified," the relevant inquiry is whether the employee would be able to perform the essential functions of the position, with or without reasonable accommodation (or, if not, if the inability to perform the essential function(s) is for a temporary period, the essential function(s) could be performed in the near future, and the inability to perform the essential function(s) can be reasonably accommodated), with the benefit of a period of intermittent leave, after a period of part-time work, or at the end of a period of leave or time off.[61] Thus, an employee who needs some form of leave to recover from a known limitation caused, for example, by childbirth or a miscarriage, can meet the definition of "qualified" because it is reasonable to conclude that once they return from the period of leave (or during the time they are working if it is intermittent leave) they will be able to perform the essential functions of the job, with or without additional reasonable accommodations or will be qualified under the second part of the PWFA definition that is described in the next subsection. Of course, if an employer can demonstrate that leave would pose an undue hardship, for example, due to the length, frequency, or unpredictable nature of the time off that was requested, it may lawfully deny the request.[62]

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[61] If the employee will not be able to perform all of the essential functions at the end of the leave period, with or without accommodation, the employee may still be qualified under the second part of the PWFA's definition of qualified employee or applicant. 42 U.S.C. 2000gg(6).

[62] As with the ADA, in determining whether leave under the PWFA causes an undue hardship, an employer may consider leave that the employee has already used under, for example, the FMLA. *See Technical Assistance on Employer-Provided Leave*, *supra* note 55, at Examples 17 and 18. For more information regarding leave as a reasonable accommodation, *see infra* § 1636.3(h) *Particular Matters Regarding Leave as a Reasonable Accommodation.*

1636.3(f)(2) The Second Part of PWFA's Definition of Qualified Employee or Applicant—Temporary Inability to Perform an Essential Function

The PWFA provides that an employee or applicant can meet the definition of "qualified" even if they cannot perform one or more essential functions of the position in question, provided three conditions are met: (1) the inability to perform an essential function(s) is for a temporary period; (2) the essential function(s) could be performed in the near future; and (3) the inability to perform the essential function(s) can be reasonably accommodated.[63]

Based on the overall structure and wording of the statute, the second part of the definition of "qualified" is relevant only when an employee or applicant cannot perform one or more essential functions of the job in question because of a known limitation under the PWFA. It is not relevant in any other circumstance. If the employee or applicant can perform the essential functions of the position with or without a reasonable accommodation, the first definition of "qualified" applies (able to do the job with or without a reasonable accommodation). For example, if a pregnant worker requests additional restroom breaks, the question of whether they are qualified is simply whether they can perform the essential functions of their job with the reasonable accommodation of additional restroom breaks, and there is no need to apply the definitions of "temporary" or "in the near future," or to determine whether the inability to perform an essential function can be reasonably accommodated (as no such inability exists).

By contrast, some examples of situations where the second definition may be relevant include: (1) a pregnant construction worker is told by their health care provider to avoid lifting more than 20 pounds during the second through ninth months of pregnancy, an essential function of the worker's job requires lifting more than 20 pounds, and there is not a reasonable accommodation that will allow the worker to perform that function without lifting more than 20

[63] 42 U.S.C. 2000gg(6).

pounds; and (2) a pregnant police officer is unable to perform patrol duties during the third through ninth months of the pregnancy, patrol duties are an essential function of the job, and there is not a reasonable accommodation that will allow the worker to perform the essential functions of the patrol position.

> Example 1636.3 #7/Qualified Employee: Launa has been working as a landscaper for two years, and her job regularly involves moving bags of soil that weigh 35-40 pounds. Launa becomes pregnant and lets her supervisor know that she has a lifting restriction of 20 pounds because of her pregnancy.
>
> 1. Known Limitation: Launa's lifting restriction is a physical condition related to pregnancy; Launa needs a change or adjustment at work; Launa has communicated this information to the employer.
> 2. Qualified:
>   a. Launa may be qualified with a reasonable accommodation of a device that helps with lifting.
>   b. If there is no device or other reasonable accommodation (or the device or other reasonable accommodation is too expensive or otherwise causes undue hardship for the employer) the employer must consider whether Launa meets the second definition of qualified: whether (1) the inability to perform the essential function is temporary, (2) Launa could perform the essential function in the near future, and (3) the inability to perform the essential function can be reasonably accommodated.

If the employer establishes that all possible accommodations that would allow the employee to temporarily suspend one or more essential functions would impose an undue hardship, then the employee will not be qualified under the PWFA's second definition of qualified (because the inability to perform the essential function cannot be reasonably accommodated).[64]

The PWFA does not provide definitions of the terms "temporary" or "in the near future," nor does it give any additional explanation of the third prong of this definition. The Commission has provided definitions for these terms pursuant to its authority to issue regulations to implement the PWFA.[65]

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[64] If there is no reasonable accommodation that allows the worker to continue to work, absent undue hardship, the employee may be qualified for leave as a reasonable accommodation if leave does not cause an undue hardship.

[65] 42 U.S.C. 2000gg-3.

1636.3(f)(2)(i) Temporary

The proposed rule defines the term "temporary" to mean that the need to suspend one or more essential functions is "lasting for a limited time,[66] not permanent, and may extend beyond 'in the near future.'" As explained below, how long it may take before the essential function can be performed is further limited by the definition of "in the near future."

1636.3(f)(2)(ii) In the Near Future

The proposed rule defines "in the near future" to mean generally forty weeks from the start of the temporary suspension of an essential function. This is based on the time of a full-term pregnancy (forty weeks). In the Commission's view, to define "in the near future" as less than generally forty weeks—i.e., the duration of a full-term pregnancy—would run counter to a central purpose of the PWFA of keeping pregnant workers in the workforce even when pregnancy, childbirth, or related medical conditions necessitate the reasonable accommodation of temporarily suspending the performance of one or more essential functions of a job.[67] Of course,

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[66] *Temporary, Merriam-Webster.com* Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/temporary ("lasting for a limited time") (last visited June 13, 2023). This definition is consistent with *Robert v. Bd. of Cnty. Comm'rs' of Brown Cnty., Kan.*, 691 F.3d 1211, 1218 (10th Cir. 2012) which was cited in the House Report in the discussion of this term. H.R. Rep. No. 117-27, at n.109) (when determining whether a request for leave could be "reasonable" under the ADA, defining "temporary" as that the essential function can be resumed).

[67] *See* H.R. Rep. No. 117-27, pt. 1, at 5 ("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."); *id.* at 22 ("When pregnant workers are not provided reasonable accommodations on the job, they are oftentimes forced to choose between economic security and their health or the health of their babies."); *id.* at 24 ("Ensuring pregnant workers have reasonable accommodations helps ensure that pregnant workers remain healthy and earn an income when they need it the most."); *id.* at 33 ("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 . . . . 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.").

if an accommodation is sought that requires the temporary suspension of an essential function, regardless of the amount of time sought, the employer may raise the undue hardship defense.

The Commission also recognizes there may be physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions for which workers may seek the temporary suspension of an essential function when the worker is not currently pregnant. These conditions include pre-pregnancy limitations such as infertility, and post-pregnancy limitations such as acute cardio-vascular problems that are a consequence of the pregnancy. Although the length of pre- and post- partum physical or mental conditions will vary, the Commission proposes using "generally forty weeks" to measure whether the worker meets the "in the near future" requirement in the second definition of "qualified" in every situation where the reasonable accommodation sought under the PWFA is the temporary suspension of one or more essential functions.

The Commission's decision is based on several factors. First, in the first year after childbirth, severe health conditions, including ones that may require the temporary suspension of an essential function, are common.[68] According to a Centers for Disease Control and Prevention (CDC) study, 53% of pregnancy-related deaths occurred from one week to one year after delivery, and 30% occurred one and one half months to one year post-partum.[69] Likely for similar reasons, thirty-five States and the District of Columbia provide twelve months of

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[68] Susan Trost et. al., *Pregnancy-Related Deaths: Data from Maternal Mortality Review Committees in 36 U.S. States, 2017-2019*, Ctrs. for Disease Control & Prevention, U.S. Dep't of Health and Human Servs. (2022), https://www.cdc.gov/reproductivehealth/maternal-mortality/erase-mm/data-mmrc.html.

[69] *Id.* More deaths occurred seven to 365 days after delivery than occurred during delivery itself (53.3% v. 21.6%). The leading causes of death were mental health conditions, hemorrhage, cardiac and coronary conditions, infection, thrombotic embolism, and cardiomyopathy. The leading causes of death varied by race and ethnicity. For Black individuals, cardiac and coronary conditions were the leading causes of death; for White individuals and Hispanic individuals, the leading cause was mental health conditions; for Asian individuals, the leading cause of death was hemorrhage. The leading cause of death for Native American individuals was not reported due to small sample size.

comprehensive Medicaid coverage after delivery, rather than sixty days.[70] Thus, allowing a worker to meet the second definition of "qualified" if they need an essential function temporarily suspended for generally forty weeks after return to work from childbirth (or for other reasons related to a known limitation) is a reasonable approximation of the period of time needed "in the near future" for conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions and therefore is consistent with the purpose of the PWFA. Finally, in the Commission's view, one definition for "in the near future" will allow for simplified administration.

The Commission emphasizes that the definition in this section does not mean that the essential function(s) must always be suspended for forty weeks, or that if an employee seeks the temporary suspension of an essential function(s) for forty weeks it must be automatically granted. The actual length of the temporary suspension of the essential function(s) will depend upon what the employee requires, and the covered entity always has available the defense that it would create an undue hardship. However, the mere fact that the temporary suspension of one or more essential functions is needed for any time period up to and including generally forty weeks will not, on its own, render a worker unqualified under the PWFA.

Further, the Commission recognizes that workers may need an essential function temporarily suspended because of pregnancy; may take leave to recover from childbirth; and, upon returning to work, may need the same essential function or a different one temporarily suspended due to a new or different physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. In keeping with the requirement that the determinations as to whether an individual is qualified under the PWFA

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[70] Centers for Medicare & Medicaid Services, U.S. Dep't of Health and Human Servs., *States that have Expanded Postpartum Coverage*, (last visited July 19, 2023) https://www.medicaid.gov/medicaid/quality-of-care/downloads/image-maternity-care-expansion.png.

should be made based on the situation at hand and the accommodation currently at issue,[71] the Commission proposes that the determination of "in the near future" would be made when the employee asks for each accommodation that requires the suspension of one or more essential functions. Thus, a worker who is three months pregnant seeking an accommodation of the temporary suspension of an essential function will meet the definition of "qualified" for "in the near future" because the pregnancy will be over in less than forty weeks. When the worker returns from leave after childbirth, if the worker needs an essential function temporarily suspended, they will meet the definition of "qualified" for "in the near future" if they could perform the essential function within forty weeks of the suspension. In other words, for "in the near future," the forty weeks would restart once the pregnancy is over and the worker returns to work after leave.

In the Commission's view, restarting the calculation of "generally forty weeks" in the definition of "qualified" for "in the near future" is necessary because it would often be difficult, if not impossible, for a pregnant employee to predict what their limitations (if any) will be after pregnancy. Before childbirth, they may not know whether, and if so, for how long, they will have a known limitation or need an accommodation after giving birth. They also may not know whether the accommodation after childbirth will require the temporary suspension of an essential function, and, if so, for how long. All of these questions may be relevant under the PWFA's second definition of "qualified."

Further, a rule that allows a covered entity to combine periods of the temporary suspension of essential function(s) during pregnancy and the post-partum period in order to determine if a worker is "qualified" would raise questions about, for example, whether the requests were close enough in time to be combined and whether the forty weeks should restart if

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[71] *See* 29 CFR part 1630 app. 1630.1 ("The determination of whether an individual with a disability is qualified is to be made at the time of the employment decision. The determination should be based on the capabilities of the individual with the disability at the time of the employment decision, and not be based on speculation that the employee may become unable in the future").

a different essential function needs to be temporarily suspended. Determining where and how those lines should be drawn would require litigation regarding the term "qualified" and create confusion around implementation of the statute.

The Commission notes that leave related to recovery from pregnancy, childbirth, or related medical conditions does not count as time when an essential function is suspended and thus is not relevant for the second prong of the definition of qualified. If an individual needs leave as a reasonable accommodation under the PWFA or, indeed, any reasonable accommodation other than the temporary suspension of an essential function, only the first definition of "qualified" is relevant. In the case of leave, the question would be whether the individual, after returning from the requested period of leave, would be able to perform the essential functions of the position with or without reasonable accommodation (or, if not, if the inability to perform the essential function(s) is for a temporary period, the essential function(s) could be performed in the near future, and the inability to perform the essential function(s) can be reasonably accommodated). Furthermore, for some workers, leave to recover from childbirth will not require a reasonable accommodation because they have a right to leave under Federal, State, or local law or as part of an employer policy. Thus, for the purpose of determining whether the employee is qualified under the second prong of "qualified" regarding the suspension of an essential function, the Commission does not intend for employers or workers to count time on leave for recovery from childbirth.[72]

The Commission does not believe that its definition of "in the near future" will cause excessive difficulties for covered entities because the "generally forty weeks" time period is only to determine if the worker can be considered qualified under this definition. If the temporary suspension of the essential function causes undue hardship or (as explained in the next section)

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[72] For additional information on how leave should be addressed under the PWFA, *see supra With or Without Reasonable Accommodation – Leave* and *infra* § 1636.3(h) *Particular Matters Regarding Leave as a Reasonable Accommodation.*

the temporary suspension of the essential function cannot be reasonably accommodated, the employer does not have to provide the reasonable accommodation.

The Commission seeks comment on the proposed definition of "in the near future" including a) whether the definition of "in the near future" post-pregnancy should be one year rather than generally forty weeks; b) whether periods of temporary suspension of an essential function during pregnancy and post-pregnancy should be combined, and, if so, how should that be done and what rule should be adopted to ensure that a pregnant worker is not required to predict what limitations they will experience after pregnancy given that a pregnant worker will not generally be able to do so; and c) whether there are alternative approaches that would more effectively ensure that workers are able to seek the accommodations they need while limiting the burden on covered entities.

1636.3(f)(2)(iii) Can Be Reasonably Accommodated

The proposed rule also explains that to satisfy the PWFA's second definition of "qualified," the covered entity must be able to reasonably accommodate the inability to perform one or more essential functions without undue hardship. For some positions, this may mean that one or more essential functions are temporarily suspended, with or without reassignment to someone else, and the employee continues to perform the remaining functions of the job. For other jobs, some of the essential functions may be temporarily suspended, with or without reassignment to someone else, and the employee may be assigned other tasks to replace them. In yet other situations, one or more essential functions may be temporarily suspended, with or without reassignment to someone else, and the employee may perform the functions of a different job to which the employer temporarily transfers or assigns them, or the employee may participate in the employer's light or modified duty program.[73] Throughout this process, as with

[73] *See* H.R. Rep. No. 117-27, pt. 1, at 27 ("the temporary inability to perform essential functions due to pregnancy, childbirth, or related medical conditions does not render a worker "unqualified…. there may

other reasonable accommodation requests, an employer may need to consider more than one alternative to identify a reasonable accommodation that does not pose an undue hardship. Depending on how the temporary suspension is accomplished, the covered entity may have to prorate or change a performance or production standard so that the accommodation is effective.[74]

Example 1636.3 #8: One month into a pregnancy, Akira, a worker in a paint manufacturing plant, is told by her health care provider that she should avoid certain chemicals for the remainder of the pregnancy. One of the essential functions of this job involves regular exposure to these chemicals. Akira talks to her supervisor, explains her limitation, and asks that she be allowed to switch duties with another worker whose job does not require the same exposure but otherwise involves the same functions. There are numerous other tasks that Akira could accomplish while not being exposed to the chemicals.

1. Known limitation: Akira has a need or a problem relating to maintaining the health of her pregnancy, which is a physical condition related to pregnancy; Akira needs a change or adjustment at work; Akira has communicated this information to her employer.
2. Qualified: Akira needs the temporary suspension of an essential function.
    a. Akira's inability to perform the essential function is temporary.
    b. Akira could perform the essential functions of her job in the near future because Akira needs an essential function suspended for less than forty weeks.
    c. Akira's inability to perform the essential function may be reasonably accommodated. The employer can suspend the essential function that requires her to work with the chemicals and have her do the remainder of her job. Alternatively, Akira can perform the other tasks that are referenced or switch duties with another worker. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #9: Two months into a pregnancy, Lydia, a delivery driver, is told by her health care provider that she should not lift more than 20 pounds. Lydia routinely has to lift 30-40 pounds as part of the job. She discusses the limitation with her employer. The employer is unable to provide Lydia with assistance in lifting packages, and Lydia requests placement in the employer's light duty program, which is used for drivers who have on-the-job injuries.

1. Known limitation: Lydia's lifting restriction is a physical condition related to pregnancy; she needs a change in work conditions; and she has communicated this information to the employer.
2. Qualified: Lydia needs the temporary suspension of an essential function.
    a. Lydia's inability to perform the essential function is temporary.
    b. Lydia could perform the essential functions of her job in the near future because Lydia needs an essential function suspended for less than forty weeks.

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be a need for a pregnant worker to temporarily perform other tasks or otherwise be excused from performing essential functions before fully returning to her position once she is able.").

[74] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at Question 19.

c. Lydia's need to temporarily suspend an essential function of her job may be reasonably accommodated through the existing light duty program. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

1636.3(g) Essential Functions

The proposed rule adopts the Commission's definition of "essential function" contained in the regulations implementing the ADA regulations: "the fundamental job duties of the employment position the individual . . . holds or desires," excluding "the marginal functions of the position."[75] Thus, in determining whether something is an essential function, the first consideration is whether employees in the position actually are required to perform the function, and relevant evidence includes both the position description and information from incumbents (including the employee requesting the accommodation) about what they actually do on the job.[76]

The Commission seeks comments on whether there are additional factors that should be considered in determining whether a function is essential for purposes of the PWFA.[77] For example, given that many, if not all, known limitations under the PWFA will be temporary, should the definition of "essential function" under the PWFA consider whether the function is essential to be performed by the worker in the limited time for which an accommodation will be needed.

1636.3(h) Reasonable Accommodation—Generally

42 U.S.C. 2000gg(7) states that the term "reasonable accommodation" has the meaning given to it in section 101 of the ADA and shall be construed as it is construed under the ADA

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[75] 29 CFR 1630.2(n).

[76] 29 CFR 1630.2(n); 29 CFR part 1630 app. 1630.2(n).

[77] *See* H.R. Rep. No. 117-27, pt. 1, at 28 (stating that the factors adopted by the EEOC to determine essential functions under the ADA are "instructive, although not determinative" for the PWFA).

and the Commission's regulations implementing the PWFA. As stated in the Appendix to the ADA Regulations, "[t]he obligation to make reasonable accommodation is a form of non-discrimination" and is therefore "best understood as a means by which barriers to the equal employment opportunity [of an employee or applicant with a known limitation under the PWFA] are removed or alleviated."[78] A modification or adjustment is reasonable if it "seems reasonable on its face, i.e., ordinarily or in the run of cases;" this means it is "reasonable" if it appears to be "feasible" or "plausible."[79] An accommodation also must be effective in meeting the needs of the employee or applicant, meaning it removes a workplace barrier and provides the individual with equal opportunity.[80]

Under the PWFA, a reasonable accommodation has the same definition as under the ADA.[81] Therefore, like the ADA, reasonable accommodations under the PWFA include modifications or adjustments to the job application process that enable a qualified applicant with a known limitation to be considered for the position; modifications or adjustments to the work environment, or to the manner or circumstances under which the position is done to allow a person with a known limitation to perform the essential functions of the job; and modifications or adjustments that enable an employee with a known limitation to enjoy equal benefits and privileges of employment.[82] Because the PWFA also provides for reasonable accommodations

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[78] 29 CFR part 1630 app. 1630.9.

[79] *See supra* note 60.

[80] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at Question 9 and 29 CFR part 1630 app. 1630.9 (providing that a reasonable accommodation "should provide the individual with a disability with an equal employment opportunity. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability.").

[81] 42 U.S.C. 2000gg(7).

[82] 29 CFR 1630.2(o)(1)(i-iii). The requirement for reasonable accommodations that provide for equal benefits and privileges is shorthand for the requirement that an accommodation should provide the individual with an equal employment opportunity (29 CFR part 1630 app. 1630.9). This requirement stems from the ADA's prohibition on discrimination in "terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). The PWFA prohibits adverse action in the terms, conditions, or

when a worker temporarily cannot perform one or more essential functions of a position but could do so in the near future, reasonable accommodation under the PWFA also includes modifications or adjustments that allow an employee with a known limitation to temporarily suspend one or more essential functions of the position.

Additions to the Definition of Reasonable Accommodation

Because 42 U.S.C. 2000gg(7) states that "reasonable accommodation" should have the meaning of the term under the ADA and the regulations set forth in for the PWFA, the proposed rule takes the definition of "reasonable accommodation" provided in the regulations implementing the ADA[83] and makes five additions to apply it in the context of the PWFA.

First, the proposed rule replaces references to "individual with a disability" and similar terms with "employee with a known limitation" and similar terms.[84]

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privileges of employment against a qualified employee for using or requesting an accommodation and Title VII—which applies to workers affected by pregnancy, childbirth, or related medical conditions—prohibits discrimination in the terms, conditions, and privileges of employment. 42 U.S.C. 2000e-2(a)(1). Based on the text of the PWFA, Title VII, and the requirement under the PWFA that reasonable accommodation has the same definition as in the ADA, the same requirement applies. Thus, a reasonable accommodation under the PWFA includes a change to allow employees affected by pregnancy, childbirth, or related medical conditions. nondiscrimination in the terms, conditions, or privileges of employment or, in shorthand, to enjoy equal benefits and privileges. S*ee also* EEOC Compliance Manual Section 613 *Terms, Conditions, and Privileges of Employment,* 613.1(a) (1982) ("terms, conditions, and privileges of employment" are "to be read in the broadest possible terms" and "a distinction is rarely made between terms of employment, conditions of employment, or privileges of employment"), https://www.eeoc.gov/laws/guidance/cm-613-terms-conditions-and-privileges-employment#:~:text=The%20following%20employment%20practices%20or%20activities%20which%20are,or%20activity%20is%20considered%20in%20its%20broad%20sense [hereinafter *Compliance Manual on Terms, Conditions, and Privileges of Employment*].

[83] 29 CFR 1630.2(o).

[84] The proposed rule also deletes examples of reasonable accommodation that are unlikely to be relevant to the PWFA, i.e., "provision of qualified readers or interpreters." A person covered by the PWFA who is blind or deaf who needs these reasonable accommodations because of their disability may be entitled to them under the ADA. Nothing added or deleted from the PWFA's proposed list of reasonable accommodations is intended to alter the ADA's standards. Nor does the exclusion of these reasonable accommodations mean that they could not be required under the PWFA in appropriate circumstances, such as when pregnancy exacerbates a pre-existing medical condition.

Second, the proposed rule includes an addition to the ADA's definition of reasonable accommodation that is required by the PWFA. As explained in the discussion of the term qualified employee above, the PWFA provides that the temporary suspension of one or more essential functions is a potential reasonable accommodation by defining "qualified employee" to include an employee who cannot perform one or more essential functions of the position for a temporary period, provided they could do so in the near future, and the inability to perform the essential function(s) can be reasonably accommodated without undue hardship. The proposed rule illustrates the implications, meaning, and application of this requirement.

Third, the proposed rule incorporates certain examples of accommodations long recognized by the EEOC as reasonable accommodations for individuals with disabilities but not explicitly included in the non-exhaustive examples of reasonable accommodation in the ADA regulation. These are discussed below in § 1636.3(i).

Fourth, in addition to noting paid leave (whether accrued, short-term disability, or another type of employer benefit) and unpaid leave as examples of reasonable accommodations, the proposed rule states that either type of leave to recover from childbirth is an example of a potential reasonable accommodation for pregnancy, childbirth, or related medical conditions. This is explained in more detail below.

Finally, the proposed rule provides details about potential reasonable accommodations related to lactation.

Alleviating Increased Pain or Risk to Health Due to the Known Limitation

Under the PWFA and the proposed rule, a worker may seek a reasonable accommodation in order to alleviate increased pain or increased risk to health that is attributable to the physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related

medical conditions that has been communicated to the employer (the known limitation).[85] When dealing with requests for accommodation concerning the alleviation of increased pain or increased risk to health associated with a known limitation, the goal is to provide an accommodation that allows the worker to alleviate the identified increase in pain or risk to health.

Example 1636.3 #10: Celia is a factory worker whose job requires her to move boxes that weigh 50 pounds regularly. Prior to her pregnancy, Celia occasionally felt pain in her knee when she walked for extended periods of time. After returning to work after having a cesarean section, Celia's health care provider says she should limit the tasks that require moving boxes to no more than 30 pounds for three months because heavier lifting could increase the risk to her health and recovery. Celia can seek an accommodation that would help her lift between 30 and 50 pounds because it is needed for her known limitation related to childbirth. However, the PWFA would not require the employer to provide an accommodation regarding Celia's knee pain because that situation is not attributable to Celia's known limitation, unless there is evidence that the pain in walking was exacerbated by Celia's pregnancy, childbirth, or related medical conditions. The employer may have accommodation responsibilities regarding Celia's knee pain under the ADA.

Example 1636.3 #11: Lucille has opioid use disorder that she controls with medication. After giving birth, she experiences postpartum depression. As a result, she is put on an additional medication that she must take with food, and she starts therapy with a new provider. Under the PWFA, Lucille requests that she be allowed to take breaks to eat when she needs to take her medication and that she be allowed to use intermittent leave to attend her therapy appointments. Under the PWFA, the employer is required to provide the requested accommodations (or other reasonable ones) absent undue hardship. The employer does not have to provide an accommodation for Lucille's underlying opioid use disorder under the PWFA, although it may have accommodation responsibilities under the ADA.

Example 1636.3 #12: Jackie's position at a fabrication plant involves working with certain chemicals, which Jackie thinks is the reason she has a nagging cough and chapped skin on her hands. Once she becomes pregnant, Jackie seeks the accommodation of a temporary suspension of an essential function of working with the chemicals because the chemicals create an increased risk to her pregnancy. The employer provides the accommodation. After Jackie gives birth and returns to work, she no longer has any known limitations. Thus, she can be assigned to work with the chemicals again even if she would rather not do that work, because the PWFA only requires an employer to provide an accommodation that is needed due to the known limitation related to pregnancy, childbirth, or related medical conditions. Jackie's employer may also have accommodation responsibilities under the ADA.

Example 1636.3 #13: Margaret is a retail worker who is pregnant. Because of her pregnancy, Margaret feels pain in her back and legs when she has to move stacks of

[85] Depending on the facts of the case, the accommodation sought will allow the employee to apply for the position, to perform the essential functions of the job, to enjoy equal benefits and privileges of employment, or allow the temporary suspension of an essential function of the job.

clothing from one area to the other, which is one of the essential functions of her position. She can still manage to move the clothes, but, because of the pain, she requests a cart to use when she is moving the garments. Under the PWFA, the employer is required to provide the requested accommodation (or another reasonable accommodation), absent undue hardship, because doing so accommodates Margaret's limitation arising out of her pregnancy. If Margaret also has wrist pain that is not caused or exacerbated by the pregnancy, Margaret's employer is under no obligation under the PWFA to provide an accommodation for the wrist pain because it is not related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. However, the employer may have accommodation responsibilities regarding Margaret's wrist pain under the ADA.

Particular Matters Regarding Leave as a Reasonable Accommodation

The Commission has long recognized the use of all forms of paid and unpaid leave as a potential reasonable accommodation under the ADA, including for part-time schedules.[86] Given Congress' extensive use of ADA terms and provisions in the PWFA— including specifically the definition of "reasonable accommodation"— the Commission proposes to include these potential reasonable accommodations in this proposal's definition of reasonable accommodation.

Leave, including intermittent leave, may be a reasonable accommodation even if the covered entity does not offer it as an employee benefit.[87] If an employee requests leave as an accommodation or if there is no other reasonable accommodation that does not cause an undue hardship, the covered entity must consider providing leave as a reasonable accommodation under the PWFA, even if the employee is not eligible for leave under the employer's leave policy or the employee has exhausted the leave the covered entity provides as a benefit (including leave exhausted under a workers' compensation program, the FMLA, or similar State or local laws).[88]

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[86] *See* 29 CFR 1630.2(o)(2)(ii); 29 CFR part 1630 app. 1630.2(o); *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at text accompanying nn.48-49.

[87] *See Technical Assistance on Employer-Provided Leave*, *supra* note 55, at text above Example 4.

[88] *Id.* Of course, if an employee has a right to leave under the FMLA, an employer policy, or a State or local law, the employee is entitled to leave regardless of whether they request leave as a reasonable accommodation. An employee who needs leave beyond what they are entitled to under those laws or policies will need to request leave as a reasonable accommodation.

The proposed rule also provides that leave to recover from childbirth, miscarriage, stillbirth, or other related conditions is a potential reasonable accommodation (absent undue hardship).[89] The proposed rule further explains that workers protected by the PWFA must be permitted to choose whether to use paid leave (whether accrued, as part of a short-term disability program, or as part of any other employee benefit) or unpaid leave to the same extent that the covered entity allows employees using leave for reasons unrelated to pregnancy, childbirth, or related medical conditions to choose between these various types of leave.[90] However, as under the ADA, an employer is not required to provide additional paid leave under the PWFA beyond the amount to which the employee is otherwise entitled.

The Commission recognizes that there may be situations where an employer accommodates a pregnant employee with a stool or additional breaks or temporarily suspends one or more essential functions under the PWFA, and then the employee requests leave to recover from childbirth. In these situations, the covered entity should consider the request for the reasonable accommodation of leave to recover from childbirth in the same manner that it would any other request for leave as a reasonable accommodation. This requires first considering whether the employee will be able to perform the essential functions of the position with or without a reasonable accommodation after the period of leave, or, if not, whether, after the period of leave, the employee will meet the second definition of "qualified" under the PWFA.

Under the ADA regulations, a reasonable accommodation cannot excuse an employee from complying with valid production standards that are applied uniformly to all employees.[91] However, for example, when the reasonable accommodation is leave, the employee may not be

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[89] H.R. Rep. No. 117-27, pt. 1, at 29 (noting that "leave is one possible accommodation under the PWFA, including time off to recover from delivery").

[90] A failure to allow a worker affected by pregnancy, childbirth, or related medical conditions to use paid or unpaid leave to the same extent that the covered entity allows employees using leave for reasons unrelated to pregnancy, childbirth, or related medical conditions to do so may be a violation of Title VII as well.

[91] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at text accompanying n.14.

able to meet a production standard during the period of leave or, depending on the length of the leave, meet that standard for a defined period of time (e.g., the production standard measures production in one year and the employee was on leave for four months). Thus, if the reasonable accommodation is leave, the production standard may need to be prorated to account for the reduced amount of time the employee worked.[92] For example, if a call center employee with a known limitation requests and is granted two hours of leave in the afternoon for rest, the employee's required number of calls may need to be reduced proportionately, as could the employee's pay. Alternatively, the accommodation could allow for the employee to make up the time at a different time during the day so that the employee's production standards and pay would not be reduced.

As under the ADA, an employee with a known limitation who is granted leave as a reasonable accommodation under the PWFA is entitled to return to their same position unless the employer demonstrates that holding open the position would impose an undue hardship.[93] Likewise, an employer must continue an employee's health insurance benefits during their leave period to the extent that it does so for other employees in a similar leave status. When the employee is ready to return to work, the employer must allow the individual to return to the same position (assuming that there was no undue hardship in holding it open) if the employee is still qualified (i.e., the employee can perform the essential functions of the position with or without reasonable accommodation or if the employee meets the PWFA's second definition of qualified).[94]

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[92] *Id.* at Question 19.

[93] *See id.* at Question 18. As under the ADA, if an employer cannot hold a position open during the entire leave period without incurring undue hardship, the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue their leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position.

[94] *Id.* at Question 21.

Under the PWFA, an employer may deny a reasonable accommodation if it causes an undue hardship—a significant difficulty or expense. Thus, if an employer can demonstrate that the leave requested as a reasonable accommodation poses an undue hardship—for example, because of its length, frequency, or unpredictable nature, or because of another factor—it may lawfully deny the requested leave under the PWFA.

Ensuring that Workers are not Penalized for Using Reasonable Accommodations

Covered entities making reasonable accommodations must ensure that their ordinary workplace policies or practices do not operate to penalize employees for utilizing such accommodations. For example, when a reasonable accommodation involves a pause in work — such as a break, a part-time or other reduced work schedule, or leave — an employee cannot be penalized for failing to perform work during such a non-work period. Similarly, policies that monitor workers for time on task (whether through automated means or otherwise) and penalize them for being off task may need to be modified to avoid imposing penalties for non-work periods that the employee was granted as a reasonable accommodation. Likewise, if an accommodation under the PWFA involves the temporary suspension of an essential function of the position, a covered entity may not penalize an employee for not performing the essential function that has been temporarily suspended.

Penalizing an employee in these situations would be retaliation for the employee's use of a reasonable accommodation to which they are entitled under the law.[95] It would also render the accommodation ineffective, thus making the covered entity liable for failing to provide a reasonable accommodation.[96] The Commission seeks comment on whether there are other situations where this may apply and whether examples would be helpful to illustrate this point.

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[95] *Id.* at Question 19; *see* also 2000gg-1(5), 2000gg-2(f) and the accompanying regulations.

[96] *Id.* at Question 19.

Personal Use

The obligation to provide reasonable accommodation under the PWFA, like the ADA, does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a known limitation. However, adjustments or modifications that might otherwise be considered personal may be required as reasonable accommodations "where such items are specifically designed or required to meet job-related rather than personal needs."[97]

For example, if a warehouse employee is pregnant and is having difficulty sleeping, the PWFA would not require as a reasonable accommodation for the employer to provide a pregnancy pillow and a white noise machine to help with sleeping because they are strictly for an employee's personal use. However, allowing the employee some flexibility in start times for the workday may be a reasonable accommodation because it modifies an employment-related policy. In a different context, if the employee who is having trouble sleeping works at a job that involves sleeping between shifts on-site, such as a job as a firefighter, sailor, emergency responder, health care worker, or truck driver, a pregnancy pillow may be a reasonable accommodation because the employee is having a difficult time sleeping because of the pregnancy, the employer is providing the place and items necessary for sleeping, and the employee needs a modification of the items and place.

All Services and Programs

Under the PWFA, as under the ADA, the obligation to make reasonable accommodation applies to all services and programs and to all non-work facilities provided or maintained by an employer for use by its employees so that employees or applicants with known limitations can

[97] 29 CFR part 1630 app. 1630.9.

enjoy equal benefits and privileges of employment.[98] Accordingly, the obligation to provide reasonable accommodation, barring undue hardship, includes providing access to employer-sponsored placement or counseling services, such as employee assistance programs, and to employer-provided cafeterias, lounges, gymnasiums, auditoriums, transportation, and to similar facilities, services, or programs.[99]

Interim Reasonable Accommodation

Providing an interim reasonable accommodation is a best practice under the PWFA in certain circumstances.[100] An employee may have an urgent need for a reasonable accommodation due to the nature or sudden onset of a known limitation under the PWFA. For example, a pregnant employee may experience vaginal bleeding, which may indicate a more serious problem. Upon discovering the bleeding, the employee may ask for immediate leave to go see their health care provider. The employee then may need additional leave, telework, rest breaks, or a later start time, beginning immediately. In this situation, a covered entity, as a best practice, should consider providing an interim reasonable accommodation that meets the employee's needs while the interactive process is conducted. Similarly, an employee recovering from childbirth may ask for the reasonable accommodation of more frequent or longer bathroom breaks, and the covered entity should consider meeting that need, as an interim reasonable accommodation, before the conclusion of the interactive process. Covered entities that do not provide interim reasonable accommodations are reminded that an unnecessary delay in the

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[98] *Id.*

[99] *Id*.

[100] The same is true under the ADA. EEOC, *Final Report on Best Practices for Employment of People with Disabilities in the State Government* II.B.1 (2005), http://www.eeoc.gov/laws/guidance/final-report-best-practices-employment-people-disabilities-state-government [hereinafter *Best Practices State Government*] (noting that "[t]emporary accommodations may enable a worker who has made a request for reasonable accommodation under the ADA to continue working while a final determination of whether to grant or deny the accommodation is being made").

interactive process or providing a reasonable accommodation may lead to liability under 42 U.S.C. 2000gg-1(1) even if the reasonable accommodation is eventually granted, as explained in detail in § 1636.4(a) of the proposed regulation.

1636.3(i) Reasonable Accommodation—Examples

The definition of "reasonable accommodation" in the proposed PWFA rule incorporates certain accommodations long recognized by the EEOC as reasonable accommodations but not explicitly included in the non-exhaustive examples of reasonable accommodations in the ADA regulation. The inclusion of these possible reasonable accommodations in the proposed regulation also helps to meet the requirement in 42 U.S.C. 2000gg-3 that EEOC's regulations provide examples of reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions. The Commission notes that an employee or applicant may need more than one of these accommodations at the same time or as a pregnancy progresses.

- Frequent breaks. The EEOC has long construed the ADA to require additional breaks as a reasonable accommodation, absent undue hardship.[101] For example, a pregnant employee might need more frequent breaks due to shortness of breath; an employee recovering from childbirth might need more frequent restroom breaks or breaks due to fatigue because of recovery from childbirth; or an employee who is lactating might need more frequent breaks for water or food.[102]

[101] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at Question 22; *see also See* H. R. Rep. 117-27, pt. 1, at 22; 168 Cong. Rec. S7,048 (daily ed. Dec. 8, 2022) (statement of Sen. Robert P. Casey, Jr.); 168 Cong. Rec. S10,081 (daily ed. Dec. 22, 2022) (statement of Sen. Robert P. Casey, Jr.).

[102] Breaks may be paid or unpaid depending on the employer's normal policies and other applicable laws. Breaks may exceed the number that an employer normally provides because reasonable accommodations may require an employer to alter its policies, barring undue hardship.

- Sitting/Standing. The Commission has recognized the provision of seating for jobs that require standing and standing for those that require sitting as a potential reasonable accommodation under the ADA.[103] Reasonable accommodation of these needs might include, but is not limited to, policy modifications and the provision of equipment, such as seating, a sit/stand desk, or anti-fatigue floor matting, among other possibilities.
- Schedule changes, part-time work, and paid and unpaid leave. The Appendix to the ADA Regulations explains that permitting the use of paid leave (whether accrued, as part of a short-term disability program, or as part of any other employee benefit) or providing additional unpaid leave is a potential reasonable accommodation under the ADA.[104] Additionally, the Appendix recognizes that leave for medical treatment can be a reasonable accommodation.[105] By way of example, an employee could need a schedule change to attend a round of IVF appointments to get pregnant; a part-time schedule to address fatigue during pregnancy; or additional unpaid leave for recovery from childbirth, medical treatment, post-partum treatment or recuperation related to a cesarean section, episiotomy, infection, depression, thyroiditis, or preeclampsia.
- Telework. Telework or "work from home" has been recognized by the EEOC as a potential reasonable accommodation.[106] Telework could be used to accommodate, for example, a period of bed rest or a mobility impairment.
- Parking. Providing reserved parking spaces if the employee is otherwise entitled to use employer-provided parking may be reasonable accommodation to assist a worker who is

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[103] *See Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at General Principles, Example B; *see also* H.R. Rep. No. 117-27, pt. 1, at 11, 22, 29.

[104] 29 CFR part 1630 app. 1630.2(o); *see also Technical Assistance on Employer-Provided Leave*, *supra* note 55. Additionally, an employer prohibiting a worker from using accrued leave for pregnancy- related reasons or while allowing other workers to use leave for similar reasons may also violate Title VII.

[105] 29 CFR part 1630 app. 1630.2(o).

[106] *See*, *e.g.*, *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at Question 34.

experiencing fatigue or limited mobility because of pregnancy, childbirth, or related medical conditions.

- Light duty. Assignment to light duty or placement in a light duty program has been recognized by the EEOC as a potential reasonable accommodation under the ADA, even if the employer's light duty positions are normally reserved for those injured on-the-job and the person with a disability seeking a light duty position does not have a disability stemming from an on-the-job injury.[107]
- Making existing facilities accessible or modifying the work environment.[108] Examples of reasonable accommodations might include allowing access to an elevator not normally used by employees; moving the employee's workspace closer to a bathroom; providing a fan to regulate temperature; or moving a pregnant or lactating employee to a different workspace to avoid exposure to chemical fumes. As noted in the proposed regulation, this also may include modifications of the work environment to allow an employee to pump breast milk at work.[109]

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[107] EEOC, *Enforcement Guidance: Workers' Compensation*, *supra* note 20, at Question 28; *see also* 168 Cong. Rec. S7,048 (daily ed. Dec. 8, 2022) (statement of Sen. Robert P. Casey, Jr.) ("What are other types of reasonable accommodations that pregnant workers may request? Light duty is a common example."); *id.* at S7,049 (statement of Sen. Patty Murray) (noting that workers need accommodations because "their doctors say they need to avoid heavy lifting"); H.R. Rep.117- 27, pt. 1, at 14-17 (discussing *Young v. United Parcel Serv., Inc.*, 575 U.S. 206 (2015), a case involving light duty for pregnant workers).

[108] 29 CFR 1630.2(o)(1)(ii); (2)(i).

[109] On December 29, 2022, President Biden signed the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) (P.L. 117-328 Division KK). The law extended coverage of the Fair Labor Standards Act's (FLSA) protections for nursing employees to apply to most workers. The FLSA provides most workers with the right to break time and a place to pump breast milk at work. 29 U.S.C. 218d; U.S. Dep't of Lab., Fact Sheet #73: FLSA Protections for Employees to Pump Breast Milk at Work (Jan. 2023), https://www.dol.gov/agencies/whd/pump-at-work.2023), https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers. Employees who are not covered by the PUMP Act or employees who seek to pump longer than one year may seek reasonable accommodations regarding pumping under the PWFA. Further, employees who are covered by the PUMP Act may seek additional related accommodations, such as access to a sink, a refrigerator, and electricity. *See, e.g.*, U.S. Dep't of Lab., *Notice on Reasonable Break Time for Nursing Mothers*, 75 FR 80073, 80075-76 (Dec. 21, 2010) (discussing space requirements and noting factors such as the location of the area for pumping compared to the employee's workspace, the availability of a sink and running water, the location of a refrigerator to

- Job restructuring.[110] Job restructuring might involve, for example, removing a marginal function that required a pregnant employee to climb a ladder or occasionally retrieve boxes from a supply closet.
- Temporarily suspending one or more essential functions. For some positions, this may mean that one or more essential functions are temporarily suspended, and the employee continues to perform the remaining functions of the job. For others, the essential function(s) will be temporarily suspended, and the employee may be assigned other tasks. For others, the essential function(s) will be temporarily suspended, and the employee may perform the functions of a different job to which the employer temporarily transfers or assigns them. For yet others, the essential function(s) will be temporarily suspended, and the employee will participate in the employer's light or modified duty program.
- Acquiring or modifying equipment, uniforms, or devices.[111] Examples of reasonable accommodations might include providing uniforms and equipment, including safety equipment, that account for changes in body size during and after pregnancy, including during lactation; providing devices to assist with mobility, lifting, carrying, reaching, and bending; or providing an ergonomic keyboard to accommodate pregnancy-related hand swelling or tendonitis.
- Adjusting or modifying examinations or policies.[112] Examples of reasonable accommodations include allowing workers with a known limitation to postpone an examination that requires physical exertion. Adjustments to policies also could include increasing the time or frequency of breaks to eat or drink or to use the restroom.

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store milk, and electricity may affect the amount break time needed). The PUMP Act is enforced by the Department of Labor, not the EEOC.

[110] 29 CFR 1630.2 (o)(2)(ii).

[111] *Id.*

[112] *Id.*

The proposed PWFA rule includes these additional examples in the regulatory language.

Below the Commission provides some examples of types of reasonable accommodations and how they can be analyzed. The Commission seeks comment on whether more examples would be helpful and, if so, the types of conditions and accommodations that should be the focus of the additional examples.

Examples of Types of Reasonable Accommodations

> Example 1636.3 #14/Telework: Gabriela, a billing specialist in a doctor's office, experiences nausea and vomiting beginning in her first trimester of pregnancy. Her doctor believes the nausea and vomiting will pass within a couple of months. Because the nausea makes commuting extremely difficult, Gabriela makes a verbal request to her manager stating she has nausea and vomiting due to her pregnancy and requests that she be permitted to work from home for the next two months so that she can avoid the difficulty of commuting. The billing work can be done from her home or in the office.
>
> 1. Known limitation: Gabriela's nausea and vomiting is a physical condition related to pregnancy; Gabriela needs an adjustment or change at work; Gabriela has communicated the information to the employer.
> 2. Qualified: Gabriela can do the billing work with the reasonable accommodation of telework.
> 3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

> Example 1636.3 #15/Temporary Suspension of an Essential Function: Nisha, a nurse assistant working in a large elder care facility, is advised in the fourth month of pregnancy to stop lifting more than 25 pounds for the rest of the pregnancy. One of the essential functions of the job is to assist patients in dressing and bathing, and moving them from or to their beds, tasks that typically require lifting more than 25 pounds. Nisha sends an email to human resources asking that she not be required to lift more than 25 pounds for the remainder of her pregnancy and requesting a place in the established light duty program under which workers who are hurt on the job take on different duties while coworkers take on their temporarily suspended duties.
>
> 1. Known limitation: Nisha's lifting restriction is a physical condition related to pregnancy; Nisha needs an adjustment or change at work; Nisha has communicated that information to the employer.
> 2. Qualified: Nisha is asking for the suspension of an essential function. The suspension is temporary, and Nisha could perform the essential functions of the job "in the near future" (generally within forty weeks). It appears that the inability to perform the function can be reasonably accommodated through its temporary suspension and Nisha's placement in the established light duty program.
> 3. The employer must grant the reasonable accommodation of temporarily suspending the essential function, or another reasonable accommodation, absent undue hardship. As part of the temporary suspension, the employer may assign Nisha to the light duty program.

Example 1636.3 #16: Same facts as above but the employer establishes the light duty program is limited to 10 slots and that all 10 slots are filled for the next 6 months. In these circumstances, the employer must consider other possible reasonable accommodations, such as the temporary suspension of an essential function without assigning Nisha to the light duty program, or job restructuring outside of the established light duty program. If such accommodations cannot be provided without undue hardship, then the employer must consider a temporary reassignment to a vacant position for which Nisha is qualified, with or without reasonable accommodation. For example, if the employer has a vacant position that does not require lifting patients which Nisha could perform with or without a reasonable accommodation, the employer must offer her the temporary reassignment as a reasonable accommodation, absent undue hardship.

Example 1636.3 #17/Assistance with Performing an Essential Function: Mei, a warehouse worker, requests via her employer's online accommodation process that a dolly be provided to assist her in moving items that are bulky to accommodate her post-cesarean section medical restrictions for three months.

1. Known Limitation: Mei's need for assistance in moving bulky items is a physical condition related to childbirth; Mei needs an adjustment or change at work; Mei has communicated this information to the employer.
2. Qualified: Mei could perform the essential functions of her position with the reasonable accommodation of a dolly.
3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #18/Appropriate Uniform and Safety Gear: Ava, a pregnant police officer, asks their union representative for help getting a larger size uniform and larger size bullet proof vest in order to cover their growing pregnancy. The union representative asks management for an appropriately sized uniform and vest for Ava.

1. Known Limitation: Ava's inability to wear the standard uniform and safety gear is a physical condition related to pregnancy; Ava needs an adjustment or change at work; Ava's representative has communicated this information to the employer.
2. Qualified: Ava is qualified with the reasonable accommodation of appropriate gear.
3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #19/Temporary Suspension of Essential Function(s): Darina, a pregnant police officer in the third month of pregnancy, talks to human resources about being taken off of patrol and put on light duty for the remainder of her pregnancy to avoid physical altercations such as subduing suspects that may harm her pregnancy. The department has an established light duty program that it uses for officers with injuries that occurred on the job.

1. Known Limitation: Darina has a need or a problem related to maintaining the health of her pregnancy; Darina needs an adjustment or change at work; Darina has communicated this information to the employer.
2. Qualified: The suspension of the essential functions of patrol duties is temporary and could end "in the near future" (within generally forty weeks) And it appears that the temporary suspension of the essential function can be accommodated through the light duty program.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship. In determining if there is an undue hardship, the employer cannot rely on the fact that this type of modification is normally reserved for those with on-the-job injuries. The fact that the employer provides this type of modification for other employees points to this not being an undue hardship.

Example 1636.3 #20/Temporary Suspension of Essential Function(s): Rory works in a fulfillment center where she is usually assigned to a line where she has to move packages that weigh 20 pounds. After returning from work after giving birth, Rory has a lifting restriction of 10 pounds due to sciatica during her pregnancy. The restriction is for 12 weeks. The employer does not have an established light duty program. There are other lines in the warehouse that do not require lifting more than 10 pounds and some of the packages on Rory's usual line weigh less than 10 pounds.

1. Known Limitation: Rory has a known limitation related to pregnancy, childbirth, or a related medical condition.
2. Qualified: The suspension of the essential function of lifting packages that weigh up to 20 pounds is temporary and Rory could be able to perform the essential function in the near future. It appears that the temporary suspension of the essential function could be accommodated by temporarily suspending the requirement that Rory lift more than 10 pounds or by assigning her to a different line.
3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #21/Unpaid Leave: Tallah, a newly hired cashier at a small bookstore, has a miscarriage in the third month of pregnancy and asks a supervisor for ten days of leave to recover. As a new employee, Tallah has only earned 2 days of paid leave. The employer is not covered by the FMLA and does not have a company policy regarding the provision of unpaid leave, but Tallah is covered by the PWFA.

1. Known limitation: Tallah's need to recover from the miscarriage is a physical or mental condition related to pregnancy or arising out of a medical condition related to pregnancy; Tallah needs an adjustment or change at work; Tallah has communicated this information to the employer.
2. Qualified: After the reasonable accommodation of leave, Tallah will be able to do the essential functions of the position with or without accommodation.
3. The employer must grant the accommodation of unpaid leave (or another reasonable accommodation) absent an undue hardship.

Example 1636.3 #22/Unpaid Leave for Prenatal Appointments: Margot started working at a retail store shortly after she became pregnant. She has an uncomplicated pregnancy. Because she has not worked at the store very long, she has earned very little leave and is not covered by the FMLA. In her fifth month of pregnancy, she asks her supervisor for the reasonable accommodation of unpaid time off beyond the leave she has earned to attend her regularly scheduled prenatal appointments.

1. Known limitation: Margot's need to attend health care appointments is a need or a problem related to maintaining her health or the health of her pregnancy; Margot needs an adjustment or change at work; Margot has communicated the information to the employer.

2. Qualified: Margot can do her job with the reasonable accommodation of leave to attend health care appointments.
3. The employer must grant the accommodation of unpaid time off (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #23/Unpaid Leave for Recovery from Childbirth: Sofia, a custodian, is pregnant and will need six to eight weeks of leave to recover from childbirth. Sofia is nervous about asking for leave so Sofia asks her mother, who knows the owner, to do it for her. The employer has a sick leave policy but no policy for longer periods of leave. Sofia does not qualify for FMLA leave.

1. Known limitation: Sofia's need to recover from childbirth is a physical condition; Sofia needs an adjustment or change at work; Sofia's representative has communicated this information to the employer.
2. Qualified: After the reasonable accommodation of leave, Sofia will be able to do the essential functions of the position.
3. The employer must grant the accommodation of unpaid leave (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #24/Unpaid Leave for Medical Appointments: Taylor, a newly hired member of the waitstaff, requests time off to attend therapy appointments for postpartum depression. As a new employee, Taylor has not yet accrued sick or personal leave and is not covered by the FMLA. Taylor asks her manager if there is some way that she can take time off.

1. Known limitation: Taylor's postpartum depression is a medical condition related to pregnancy, and she is seeking health care; Taylor needs an adjustment or change at work; Taylor has communicated this information to the employer.
2. Qualified: Taylor can do the essential functions of the job with a reasonable accommodation of time off to attend the therapy appointments.
3. The employer must grant the accommodation of unpaid leave (or another reasonable accommodation) absent an undue hardship.

Example 1636.3 #25/Unpaid Leave or Schedule Change: Claudine is six months pregnant and needs to have regular check-ups. The clinic where Claudine gets her health care is an hour drive away, and they frequently get backed up and she has to wait for her appointment. Depending on the time of day, between commuting to the appointment, waiting for the appointment, and seeing her provider, Claudine may miss all or most of an assigned day at work. Claudine is not covered by the FMLA and does not have any sick leave left. Claudine asks human resources for a reasonable accommodation such as time off or changes in scheduling so she can attend her medical appointments.

1. Known limitation: Claudine needs health care related to her pregnancy; Claudine needs an adjustment or change at work; Claudine has communicated that information to the employer.
2. Qualified: Claudine can do the essential functions of the job with a reasonable accommodation of time off or a schedule change to attend medical appointments.
3. The employer must grant the accommodation of time off or a schedule change (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #26/Telework: Raim, a social worker, is in the seventh month of pregnancy and is very fatigued as a result. She asks her supervisor if she can telework and see clients virtually so she can rest between appointments.

1. Known limitation: Raim's fatigue is a physical condition related to pregnancy; Raim needs an adjustment or change at work; Raim has communicated that information to the employer.
2. Qualified: Assuming the appointments can be conducted virtually, Raim can perform the essential functions of her job with the reasonable accommodation of working virtually. If there are certain appointments that must be done in person, the reasonable accommodation could be a few days of telework a week and then other accommodations that would give Raim time to rest, such as assigning Raim in-person appointments at times when traffic will be light so that they are easy to get to or setting up Raim's assignments so that on the days when she has in-person appointments she has breaks between them. Or the reasonable accommodation could be the temporary suspension of the essential function of in-person appointments.
3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #27/Temporary Workspace/Possible Temporary Suspension of an Essential Function: Brooke, a pregnant research assistant in her first trimester of pregnancy, asks the lead researcher on the project for a temporary workspace that would allow her to work in a well-ventilated area because her work involves hazardous chemicals that her health care provider has told her to avoid. She also points out that there are several research projects she can work on that do not involve exposure to hazardous chemicals.

1. Known limitation: Brooke's need to avoid the chemicals is a physical or mental condition related to maintaining the health of her pregnancy; Brooke needs a change or adjustment at work; Brooke has communicated this information to the employer.
2. Qualified: If working with hazardous chemicals is an essential function of the job, Brooke may be able to perform that function with the accommodation of a well-ventilated work area. If providing a well-ventilated work area would be an undue hardship, Brooke could still be qualified with the temporary suspension of the essential function of working with the hazardous chemicals because Brooke's inability to work with hazardous chemicals is temporary, and Brooke could perform the essential functions in the near future (within generally forty weeks). And it appears that her need to avoid exposure to hazardous chemicals could also be accommodated by allowing her to focus on the other research projects.
3. The employer must provide an accommodation such as a well-ventilated space or another reasonable one, absent undue hardship. If the employer cannot accommodate Brooke in a way that allows Brooke to continue to perform the essential functions of the position, the employer must consider alternative reasonable accommodations, including temporarily suspending one or more essential function(s), absent undue hardship.

Example 1636.3 #28/Temporary Transfer to Different Location: Katherine, a budget analyst who has cancer, is also pregnant, which creates complications for her treatment. She asks the manager for a temporary transfer to an office in a larger city that has a medical center that can address her medical needs due to the combination of cancer and pregnancy.

1. Known limitation: Katherine has a need or problem related to maintaining her health or the health of her pregnancy; Katherine needs a change or adjustment at work: Katherine has communicated that information to the employer.
2. Qualified: Katherine is able to do the essential functions of her position with the reasonable accommodation of a temporary transfer to a different location.
3. As under the ADA, a PWFA reasonable accommodation can include a workplace change to facilitate medical treatment, including accommodations such as leave, a schedule change, or a temporary transfer to a different work location needed in order to obtain treatment. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #29/Pumping Breast Milk: Salma gave birth thirteen months ago and wants to be able to pump breast milk at work. Salma works at an employment agency that sends her to different jobs for a day or week at a time. Salma asks the person at the agency who makes her assignments to only assign her to employers who will allow her to take a break to pump breast milk at work.

1. Known limitation: Salma's need to express breast milk is a physical condition related to lactation which is a related medical condition; Salma needs a change or adjustment at work; Salma has communicated this information to the covered entity.
2. Qualified: Salma is able to perform the functions of the jobs to which she is assigned with the reasonable accommodation of being assigned to workplaces that will allow her to pump at work.
3. The agency must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #30/Additional Breaks: Afefa, a pregnant customer service agent, requests two additional 10-minute rest breaks and additional bathroom breaks as needed during the workday. The employer determines that these breaks would not pose an undue hardship and grants the request. Because of the additional breaks, Afefa responds to three fewer calls during a shift. Afefa's supervisor should evaluate her performance taking into account her productivity while on duty, excluding breaks. Penalizing an employee for failing to meet production standards due to receipt of additional breaks as a reasonable accommodation would render the additional breaks an ineffective accommodation. It also may constitute retaliation for use of a reasonable accommodation. However, if there is evidence that Afefa's lower production was due not to the additional breaks, but rather to misconduct (for example, if she has frequent and unexcused absences to make or receive personal phone calls) or other performance issues, the employer may consider the lower production levels consistent with the employer's production and performance standards.

1636.3(j) Undue Hardship

The PWFA at 42 U.S.C. 2000gg(7) uses the definition of "undue hardship" from section 101 of the ADA. The PWFA provides that the term shall be construed under the PWFA as it is under the ADA and as set forth in these regulations. The proposed rule, at (j)(1) of this paragraph, reiterates the definition of undue hardship provided in the ADA regulations, which

explains that undue hardship means significant difficulty or expense incurred by a covered entity. The proposed rule then, at (j)(2) of this paragraph, outlines some factors to be considered when determining if undue hardship exists.[113]

Consistent with the ADA, a covered entity that claims that a reasonable accommodation will cause an undue hardship must consider whether there are other reasonable accommodations it can provide, absent undue hardship.[114] Additionally, if the employer can only provide a part of the reasonable accommodation absent undue hardship—for example, the employer can provide six weeks of leave absent undue hardship but the eight weeks that the employee is seeking would cause undue hardship—the employer must provide the reasonable accommodation up to the point of creating an undue hardship. Thus, in the example, the employer would have to provide the six weeks of leave and then consider if there are other reasonable accommodations it could provide that would not cause an undue hardship.

> Example 1636.3 #31/Undue Hardship: Patricia, a convenience store clerk, requests that she be allowed to go from working full-time to part-time for the last 3 months of her pregnancy due to extreme fatigue. The store assigns two clerks per shift, and if Patricia's hours are reduced, the other clerk's workload will increase significantly beyond his ability to handle his responsibilities. The store determines that such an arrangement will result in inadequate coverage to serve customers in a timely manner, keep the shelves stocked, and maintain store security. Based on these facts, the employer likely can show undue hardship based on the significant disruption to its operations and, therefore, can refuse to reduce Patricia's hours. The employer, however, should explore whether any other reasonable accommodation will assist Patricia without causing undue hardship, such as providing a stool and allowing rest breaks throughout the shift.
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> Example 1636.3 #32/Undue Hardship: Shirin, a dental hygienist who is undergoing IVF treatments, is fatigued and needs to attend medical appointments near her house every other day. She asks her supervisor if she can telework for the next 3 months. Full-time telework may be an undue hardship for the employer because Shirin's essential functions include treating patients at the dental office. However, the employer must consider other reasonable accommodations, such as part-time telework while Shirin can perform the billing functions of her job, a schedule that would allow Shirin breaks between patients, part-time work, or a reduced schedule.

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[113] 29 CFR 1630.2(p).

[114] *Enforcement Guidance on Reasonable Accommodations*, *supra* note 44, at text after n.116.

An employer's claim that the accommodation a worker seeks would cause a safety risk to co-workers or clients will be assessed under the PWFA's undue hardship standard. For example, consider a pregnant worker in a busy fulfillment center that has narrow aisles between the shelves of products. The worker asks for the reasonable accommodation of a cart to use while they are walking through the aisles filling orders. The employer's claim that the aisles are too narrow and its concern for the safety of other workers being bumped by the cart would be a defense based on undue hardship, specifically § 1636.3(j)(2)(v) ("the impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business."). As with other requested reasonable accommodations, if a particular reasonable accommodation causes an undue hardship because of safety, the employer must consider if there are other reasonable accommodations that would not do so. Importantly, claims by employers that workers create a safety risk merely by being pregnant (as opposed to a safety risk that stems from a pregnancy-related limitation) should be addressed under Title VII's bona fide occupational qualification (BFOQ) standard and not under the PWFA.[115]

1636.3(j)(3) Undue Hardship—Temporary Suspension of an Essential Function

To address that under the PWFA an employer may have to accommodate an employee's temporary inability to perform an essential function, the proposed rule adds additional factors that may be considered when determining if the temporary suspension of an essential function causes an undue hardship. These additional factors include consideration of the length of time

[115] *See, e.g.*, *UAW v. Johnson Controls*, 499 U.S. 187 (1991) (striking down employer's fetal protection policy that limited the opportunities of women); *Everts v. Sushi Brokers LLC*, 247 F. Supp. 3d 1075, 1082–83 (D. Ariz. 2017) (relying on *Johnson Controls* and denying BFOQ in a case regarding a pregnant worker as a restaurant server noting that "[u]nlike cases involving prisoners and dangers to customers where a BFOQ defense may be colorable, the present situation is exactly the type of case that Title VII guards against"); *EEOC v. New Prime, Inc.*, 42 F. Supp. 3d 1201, 1214 (W.D. Mo. 2014) (relying on *Johnson Controls* and denying a BFOQ allegedly in place for the "privacy" and "safety" of women workers); *Enforcement Guidance on Pregnancy Discrimination*, *supra* note 11, at I(B)(1)(c).

that the employee or applicant will be unable to perform the essential function(s); whether, through the methods listed in 1636.3(f)(2)(iii) (describing potential reasonable accommodations related to the temporary suspension of essential functions) or otherwise, there is work for the employee or applicant to accomplish; the nature of the essential function, including its frequency; whether the covered entity has provided other employees or applicants in similar positions who are unable to perform essential function(s) of their positions with temporary suspensions of those functions and other duties; if necessary, whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function(s) in question; and whether the essential function(s) can be postponed or remain unperformed for any length of time and, if so, for how long.

As with other reasonable accommodations, if the covered entity can establish that accommodating a worker's temporary suspension of an essential function(s) would impose an undue hardship if extended beyond a certain period of time, the covered entity would only be required to provide that accommodation for the period of time that it does not impose an undue hardship. For example, consider the situation where an employee seeks to have an essential function suspended for six months. The employer can go without the function being done for four months, but after that, it will be an undue hardship. The employer must accommodate the worker's inability to perform the essential function for the four months and then consider whether there are other reasonable accommodations that it can provide, absent undue hardship.

1636.3(j)(4) Undue Hardship—Predictable Assessments

The proposed rule adds to the definition of "undue hardship" a paragraph titled "predictable assessments." The Commission anticipates that many accommodations sought under the PWFA will be for modest or minor changes in the workplace for limitations that will be temporary. Without the accommodation, a pregnant worker may quit their job or risk their health, thereby frustrating the purpose of the Act. Thus, in the proposed regulation, the

Commission identifies a limited number of simple modifications that will, in virtually all cases, be found to be reasonable accommodations that do not impose an undue hardship when requested by an employee due to pregnancy.

Under the ADA, the Commission has determined that certain conditions will, in virtually all cases, result in a determination of coverage as disabilities.[116] In a similar manner, the Commission seeks to improve how quickly employees will be able to receive certain simple, common accommodations for pregnancy under the PWFA and to reduce litigation. The identification of certain modifications as "predictable assessments" does not alter the definition of undue hardship or deprive a covered entity of the opportunity to bring forward facts to demonstrate a proposed accommodation imposes an undue hardship for its business under its own particular circumstances. Instead, it explains that in virtually all cases a limited number of simple modifications are reasonable accommodations that do not impose undue hardship when requested by an employee due to pregnancy.

These modifications are: (1) allowing an employee to carry water and drink, as needed, in the employee's work area; (2) allowing an employee additional restroom breaks; (3) allowing an employee whose work requires standing to sit and whose work requires sitting to stand, and (4) allowing an employee breaks, as needed, to eat and drink.[117]

The proposed rule includes this addition after reviewing the information provided by legislators and congressional witnesses that these changes are regularly requested by pregnant

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[116] *See* 29 CFR 1630.2(j)(3). There, as here, the Commission did not supplant or alter the individualized inquiry required by the statute but provided common examples to illustrate its application in frequently occurring circumstances.

[117] The first and fourth categories of predictable accommodations are related but separate. The first category of accommodations addresses a worker's ability to carry water on the worker's person to where the worker carries out job duties, facilitating ready access to water without requiring the worker to take a break to access and drink it. The Commission recognizes that there may be work locations where, unlike the presence of water in most (if not all) work locations, the presence of food or non-water beverages could contribute to an undue hardship due to safety or other issues, such that a worker must take a break from the location in which the worker performs her duties in order to access and consume those items. The fourth category of accommodations addresses a worker's ability to take additional, short breaks in

workers and that in practice these modifications are virtually always reasonable accommodations that do not impose an undue hardship.[118] Additionally, certain State laws that are analogous to the PWFA single out these modifications as ones that cannot be challenged as an undue hardship or where different rules regarding documentation may apply.[119]

Finally, the Commission emphasizes that adoption of the predictable assessments provision does not alter the meaning of the terms "reasonable accommodation" or "undue hardship." Likewise, it does not change the requirement that, as under the regulation implementing the ADA, employers must conduct an individualized assessment when determining whether a modification is a reasonable accommodation that will impose an undue hardship. Instead, the proposed paragraph informs covered entities that for these specific and simple modifications, in virtually all cases, the Commission expects that individualized assessments will result in a finding that the modification is a reasonable accommodation that does not impose an undue hardship.

Below, the Commission provides some examples regarding predictable assessments and how they can be analyzed. The Commission seeks comment on whether the adoption of the predictable assessment approach facilitates compliance with the PWFA by identifying some of the accommodations most commonly requested by workers due to pregnancy that are simple,

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performing work (either at the worker's work location or a break location) to eat and drink (including beverages which are not water).

[118] *See* H.R. Rep.117- 27, pt. 1, at 11, 22, 29, 113; *Fighting for Fairness*, supra note 2, at 4 (statement of Rep. Suzanne Bonamici); *Long Over Due*, supra note 2, at 7 (statement of Rep. Jerrold Nadler); 25 (statement of Iris Wilbur, Vice President of Government Affairs and Public Policy, Greater Louisville, Inc.); 83 (statement of Rep. Barbara Lee); 168 Cong. Rec. H10,527 (daily ed. Dec. 23, 2022) (statement of Rep. Jerrold Nadler); 168 Cong. Rec. S10,081 (daily ed. Dec. 22, 2022) (statement of Sen. Robert P. Casey, Jr.); 168 Cong. Rec. S7,079 (daily ed. Dec. 8, 2022) (statement of Sen. Robert P. Casey, Jr.); 168 Cong. Rec. H2,324 (daily ed. May 14, 2021) (statement of Rep. Suzanne Bonamici).

[119] *See* Wash. Rev. Code 43.10.005(1)(d) (prohibiting the undue hardship defense if the accommodation is frequent, longer, or flexible restroom breaks; modifying a no food or drink policy; providing seating or allowing employee to sit more frequently if the job requires standing; and certain lifting restrictions); Mass. Gen. Laws ch. 151B(4)(1E)(c) (limiting medical documentation if the accommodation is more frequent restroom, food, or water breaks, and certain lifting restrictions).

inexpensive, and easily available. The Commission further seeks comment on whether different, fewer, or additional types of accommodations should be included in the "predictable assessment" category and whether the category should include predictable assessments for childbirth and/or related medical conditions.

Examples Regarding Predictable Assessments

> Example 1636.3 #33/Predictable Assessments: Amara, a quality inspector for a manufacturing company, experiences painful swelling in her legs, ankles, and feet during the final three months of her pregnancy. Her job requires standing for long periods of time. Amara asks the person who assigns her daily work for a stool so that she can sit while she performs her job. Amara's swelling in her legs and ankles is a physical condition related to pregnancy. Amara's request is for a modification that will virtually always be a reasonable accommodation that does not impose an undue hardship. The employer argues that it has never provided a stool to any other worker who complained of difficulty standing but points to nothing that suggests that this modification is not reasonable or that it would impose an undue hardship in this particular case on the operation of the employer's business. The request must be granted.
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> Example 1636.3 #34/ Predictable Assessments: Jazmin, a pregnant teacher who typically is only able to use the bathroom when her class is at lunch, requests additional bathroom breaks during her 6th month of pregnancy. Additional bathroom breaks are one of the modifications that will virtually always be found to be a reasonable accommodation that does not impose an undue hardship. The employer argues that finding an adult to watch over the teacher's class when she needs to take a bathroom break imposes an undue hardship, but Jazmin points out that there are several teachers with nearby classrooms, some classrooms have aides, and there is an administrative assistant who works in the front office, and that with a few minutes' notice, one of them would be able to either stand in the hallway between classes to allow Jazmin a trip to the bathroom or, in the case of the administrative assistant, sit in the teacher's classroom for a few minutes several times a day. The employer has not established that providing Jazmin with additional bathroom breaks imposes an undue hardship.
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> Example 1636.3 #35/Predictable Assessments: Addison, a clerk responsible for receiving and filing construction plans for development proposals, needs to maintain a regular intake of water throughout the day to maintain a healthy pregnancy. They ask their manager if an exception can be made to the office policy prohibiting liquids at workstations. The ability to access water during the day is one of the modifications that will virtually always be found to be a reasonable accommodation that does not impose an undue hardship. Here, although the manager decides against allowing Addison to bring water into their workstation, he proposes that a table be placed just outside the workstation where water can be easily accessed and gives permission for Addison to access this water as needed. The employer has satisfied its obligation to provide reasonable accommodation.

1636.3(j)(5) Undue Hardship—Cannot Be Demonstrated by Assumption or Speculation

Lastly, the proposed rule provides that a covered entity cannot demonstrate that a reasonable accommodation imposes an undue hardship based on an assumption or speculation that other employees might seek a reasonable accommodation—even the same reasonable accommodation—or the same employee might seek another reasonable accommodation in the future.[120] Relatedly, a covered entity that receives numerous requests for the same or similar accommodation at the same time (for example, parking spaces closer to the factory) cannot deny all of them simply because processing the volume of current or anticipated requests is, or would be, burdensome or because it cannot grant all of them as requested. Rather, the covered entity must evaluate and provide reasonable accommodations unless or until doing so imposes an undue hardship. The covered entity may point to past and cumulative costs or burden of accommodations that have already been granted to other employees when claiming the hardship posed by another request for the same or similar accommodation.

1636.3(k) Interactive Process

General Definition and Additions

The PWFA at 42 U.S.C. 2000gg(7) refers to the definitions from the ADA that apply to the PWFA and states that this includes the "interactive process," a term from the ADA, and how it "will typically be used to determine an appropriate reasonable accommodation." The proposed rule largely adopts the explanation of the interactive process in the regulations implementing the ADA so that the interactive process under the PWFA generally mirrors the same process under the ADA.[121] The proposed rule also notes that there are no rigid steps that must be followed when engaging in the interactive process under the PWFA. The proposed regulation makes the

[120] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at n.113.

[121] 29 CFR 1630.2(o)(3).

following adjustments to the definition of interactive process from the ADA in order to apply it to the PWFA.

First, the definition replaces references to "individual with disability" and similar terms with "employee with known limitations" and similar terms.

Second, the proposed rule does not include the words "precise limitations resulting from the disability" from the ADA's explanation of "interactive process." As a result, the second sentence is: "This process should identify the known limitations and potential reasonable accommodations that could overcome those limitations." Under the ADA, the interactive process may begin with the individual identifying the "precise limitations" of the disability as well as identifying potential reasonable accommodations that could overcome those limitations.[122] It is not necessary under the PWFA that the "precise limitation" be identified because the statute makes clear that an individual is entitled to an accommodation if the "limitation" is known.

Step-by-Step Process

The Appendix to the ADA Regulations provides an example of the steps in a reasonable accommodation process and, for ease of reference, the Commission includes it below with minor changes reflecting the PWFA's requirement to provide reasonable accommodations for known limitations.[123] A covered entity may use these steps and its established ADA-related processes to address requests for reasonable accommodations for workers under PWFA. As with the ADA, a covered entity should respond expeditiously to a request for reasonable accommodation and act promptly to provide the reasonable accommodation.[124]

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[122] *Id*.

[123] 29 CFR part 1630 app. 1630.9.

[124] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at Question 10. Following the steps laid out for the interactive process is not a defense to liability if the employer fails to provide a reasonable accommodation that it could have provided absent undue hardship.

When an employee with a known limitation has requested a reasonable accommodation regarding the performance of the job, the covered entity, using a problem-solving approach, should:

a. Analyze the particular job involved and determine its purpose and essential functions;
b. Consult with the employee with a known limitation to ascertain what kind of accommodation is necessary given the known limitation;
c. In consultation with the employee with the known limitation, identify potential accommodations and assess the effectiveness each would have in enabling the employee to perform the essential functions of the position. If the employee's limitation means that they are temporarily unable to perform one or more essential functions of the position, the parties must also consider whether suspending the performance of one or more essential functions may be a part of the reasonable accommodation if the known limitation is temporary in nature and the employee could perform the essential function(s) in the near future (within generally forty weeks); and
d. Consider the preference of the employee to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the covered entity.[125]

Steps (b) - (d) outlined above can be adapted and applied to requests for reasonable accommodations related to the application process and to benefits and privileges of employment. In those situations, in step (c), the consideration should be how to enable the applicant with a

[125] *See* 29 CFR part 1630 app. 1630.9.

known limitation to be considered for the position in question or how to provide an employee with a known limitation with the ability to enjoy equal benefits and privileges of employment.

In many instances, the appropriate reasonable accommodation may be obvious to either or both the employer and the employee with the known limitation, such that it may not be necessary to proceed in this step-by-step fashion. Although covered entities are cautioned that under 42 U.S.C. 2000gg-1(2) and proposed § 1636.4(b) they cannot unilaterally require a worker with a limitation to accept a specific accommodation, the step-by-step approach may not be necessary when, for example, a pregnant worker requests certain modifications such as allowing the employee to drink water regularly during the workday, additional restroom breaks, modifications in policies regarding sitting or standing, or modifications in polices regarding eating or drinking. These requested modifications will virtually always be found to be reasonable accommodations that do not impose an undue hardship and are therefore unlikely to require significant discussion in the interactive process, and there may be other accommodations that are equally easy to provide. However, in some instances, neither the employee or applicant requesting the accommodation, nor the covered entity, may be able to readily identify an appropriate accommodation. For example, an applicant needing an accommodation may not know enough about the equipment used by the covered entity or the exact nature of the work site to suggest an appropriate accommodation. Likewise, the covered entity may not know enough about the employee's known limitation and its effect on the performance of the job to suggest an appropriate accommodation. In these situations, the steps above may be helpful. In addition, parties may consult outside resources such as State or local entities, non-profit organizations, or

the Job Accommodation Network (JAN) for ideas regarding potential reasonable accommodations.[126]

Failure to Engage in Interactive Process

Failing to engage in the interactive process, in and of itself, is not a violation of the PWFA just as it is not a violation of the ADA. However, a covered entity's failure to initiate or participate in the interactive process with the employee or applicant after receiving a request for reasonable accommodation could result in liability if the employee or applicant does not receive a reasonable accommodation even though one is available that would not have posed an undue hardship.[127] Relatedly, an employee's unilateral withdrawal from or refusal to participate in the interactive process can constitute sufficient grounds for denying the reasonable accommodation.

1636.3(l) Supporting Documentation

In determining when and what types of documentation a covered entity may request of an employee or applicant to support their request for a reasonable accommodation, the Commission is guided by existing rules under the ADA, differences between the relevant statutory provisions of the ADA and the PWFA, and the recognition that accommodations under the PWFA may be small, temporary modifications that may not always lend themselves to medical documentation.

First, and most importantly, a covered entity is not required to seek supporting documentation from a worker who seeks an accommodation under the PWFA. For example, under the ADA, an employer may simply discuss with the employee or applicant the nature of

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[126] The Job Accommodation Network (JAN) provides free assistance regarding workplace accommodation issues. *See generally* Job Accommodation Network, https://askjan.org/ (last visited July 28, 2023).

[127] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at Question 10.

the limitation and the need for an accommodation;[128] the same is true under the PWFA, and this approach is entirely consistent with the PWFA's emphasis on the importance of the interactive process as described in § 1636.3(k).

Additionally, the Commission notes that pregnant workers may experience limitations and, therefore, require accommodations, before they have had any medical appointments. For example, some workers may experience morning sickness and nausea early in their pregnancies and need accommodations such as later start times, breaks, or telework.

The Commission further recognizes that it may be difficult for a pregnant employee to obtain an immediate appointment with a health care provider early in a pregnancy. For example, according to one study, almost a quarter of women did not receive prenatal care during their first trimester, and 12% of births take place in counties with limited or no access to maternity care. [129] Further, even for those who have access to medical care, known limitations may develop between scheduled medical appointments, such that requiring documentation in those situations would increase the cost to the worker and may require them to take additional leave in order to obtain the documentation. Therefore, consistent with the purposes of the PWFA, the Commission encourages employers who choose to require documentation, when that is permitted

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[128] *Id.* at Question 6.

[129] Medical care often is not available or immediately obtained early in a pregnancy. *See, e.g.*, Joyce A. Martin et al., Ctrs. for Disease Control, *Births in the United States, 2019* 2 (2020), https://www.cdc.gov/nchs/data/databriefs/db387-H.pdf (indicating that in 2019, almost 23% of women who gave birth did not receive prenatal care during the first trimester); Christina Brigance et al., March of Dimes, *Nowhere to Go: Maternity Care Deserts Across the U.S.* 4 (2022), https://www.marchofdimes.org/research/maternity-care-deserts-report.aspx (reporting that approximately 12 percent of births in the United States occur in counties with limited or no access to maternity care); American Pregnancy Association, *Your First Prenatal Visit*, https://americanpregnancy.org/healthy-pregnancy/planning/first-prenatal-visit/ (last visited Apr. 3, 2023) (stating that the first prenatal visit for individuals who did not meet with their health care provider pre-pregnancy is generally around 8 weeks after their last menstrual period); University of Utah Health, *Pregnancy - First Trimester, Weeks 1–13*, https://healthcare.utah.edu/womenshealth/pregnancy-birth/1st-trimester (last visited Apr. 3, 2023) (stating that doctors recommend scheduling the first obstetric appointment between the 8th and 10th week of pregnancy); Boston Medical Center, *Newly Pregnant?*, https://www.bmc.org/newly-pregnant (last visited Apr. 3, 2023) (stating that the first prenatal appointment will be scheduled between the 8th and 12th weeks of pregnancy).

under this regulation, to grant interim accommodations as a best practice if an employee indicates that they have tried to obtain documentation but there is a delay in obtaining it, and the documentation will be provided at a later date. For example, if a pregnant employee requests an accommodation for a pregnancy-related limitation in lifting, which may involve the temporary suspension of an essential function, but the employee will not be able to provide a note from a health care practitioner for several weeks, the employer should consider providing an interim reasonable accommodation.[130]

If a covered entity decides to require supporting documentation, it is only permitted to do so under the proposed rule if it is reasonable to require documentation under the circumstances for the covered entity to determine whether to grant the accommodation. When requiring documentation is reasonable, the employer is also limited to requiring documentation that itself is reasonable. The preamble, rule, and appendix set out examples of when it would not be reasonable for the employer to require documentation. The proposed rule also defines "reasonable documentation" as documentation that describes or confirms (1) the physical or mental condition; (2) that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and (3) that a change or adjustment at work is needed for that reason.

As explained below, and set forth at § 1636.4(a)(3), an employer may not defend the denial of an accommodation under 42 U.S.C. 2000gg-1(1) based on the lack of documentation if its request for documentation does not comport with the proposed rule. In these situations, the worker will have met the requirements of § 1636.3(d)(3), and the employer will have sufficient information regarding the known limitation and the need for accommodation. Further, requests for documentation that violate the proposed rule may be a violation of the prohibition on retaliation and coercion in 42 U.S.C. 2000gg-2(f), as set forth in proposed §§ 1636.5(f)(1)(iv), (v) and (f)(2)(iv), (v) because they may deter workers from seeking accommodations.

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[130] *See Best Practices State Government*, *supra* note 100. *See also* above discussion on Interim Reasonable Accommodations.

1636.3(l)(1) Reasonable to Require Documentation Under the Circumstances

Under the proposed rule, a covered entity may require documentation only if it is reasonable to do so under the circumstances for the covered entity to decide whether to grant the accommodation. The regulation provides several examples of when it would not be reasonable for the employer to require documentation.

First, it is not reasonable for the employer to require documentation when both the limitation and the need for reasonable accommodation are obvious. [131] For example, when an obviously pregnant[132] worker states or confirms they are pregnant and asks for a different size uniform or related safety gear, both the limitation and the need for the accommodation are obvious, and "known" under the statute, and the employer may not require supporting documentation. If the pregnancy is obvious, and the worker states or confirms that they are pregnant, but the limitation related to the pregnancy or parameters of a potential accommodation are not, the employer may only request documentation relevant to the accommodation. For example, if a worker who is obviously pregnant, states or confirms that they are pregnant, and asks to avoid lifting heavy objects, it may be reasonable for the employer to request documentation about the limitation such as the extent of the lifting restriction and its expected duration, but not about the pregnancy itself. Similarly, if an obviously pregnant employee requests the reasonable accommodation of leave related to childbirth and recovery and states or confirms that they are pregnant it may be reasonable for the employer to require documentation

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[131] This is similar to the ADA under which requesting documentation when the disability and the need for the accommodation are obvious or otherwise already known would violate the prohibition on disability-related inquires without a business justification. *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA*, Question 5 (2000), http://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees [hereinafter *Enforcement Guidance on Disability-Related Inquires*].

[132] Early or initial physical indications of pregnancy may not be sufficient to make it obvious to an employer that an employee is pregnant.

regarding the amount of time the worker anticipates needing to recover from childbirth, but not reasonable to require documentation of the pregnancy itself.

Second, when the employee or applicant has already provided the employer with sufficient information to substantiate that the worker has a known limitation and needs a change or adjustment at work, it is not reasonable for the employer to require documentation. If a worker has already provided documentation stating that because of their recent cesarean section, they should not lift over 20 pounds for two months, the employer may not require further documentation during those two months because the employee has already provided the employer with sufficient information to substantiate that they have a limitation and need a change at work.

A third example of when it is not reasonable for an employer to require documentation is when a worker at any time during their pregnancy states or confirms that they are pregnant and seeks one of the following accommodations: (1) carrying water and drinking, as needed; (2) taking additional restroom breaks; (3) sitting, for those whose work requires standing, and standing, for those whose work requires sitting; and (4) breaks, as needed, to eat and drink. It is not reasonable to require documentation, beyond self-attestation, when a worker is pregnant and seeks one of the four listed modifications because these are a small set of commonly sought accommodations that are widely known to be needed during an uncomplicated pregnancy and where documentation would not be easily obtainable or necessary. As noted above, particularly early in pregnancy, employees and applicants are less likely to have sought or been able to obtain an appointment with a health care provider for their pregnancy. Further, they may not be able to obtain an appointment with a health care provider repeatedly on short notice for every limitation, as each becomes apparent. The Commission notes that this position is consistent with the overarching goal of the PWFA to assist workers affected by pregnancy to remain on the job by providing them with simple accommodations quickly.

A fourth example of when it is not reasonable to require documentation is when the limitation for which an accommodation is needed involves lactation. Usually, beginning around or shortly after birth, lactation occurs. As the initiation of lactation around birth is nearly universal, the Commission considers the fact of breastfeeding obvious, such that it will not be reasonable for an employer to require documentation regarding lactation or pumping. Pragmatically, the Commission notes that health care providers may not be able to provide documentation regarding whether a worker is pumping, nor the types of accommodations needed in order to pump breast milk.[133] Of course, not all workers can or choose to breastfeed; those who do elect to breastfeed do so for widely varying lengths of time. Although the proposed rule states that it is generally not reasonable for an employer to require supporting documentation for lactation or pumping, an employer will not violate the proposed rule simply by asking the employee whether they require an appropriate place to express breastmilk while at a worksite. Employee confirmation—or a simple request to pump at work—is sufficient confirmation.

If the request for supporting documentation was not reasonable under the circumstances for the covered entity to determine whether to grant the accommodation, a covered entity cannot defend the denial of an accommodation based on the lack of documentation provided by the worker, as set forth in proposed § 1636.4(a)(3). Further, proposed § 1636.5(f) states that it could violate the retaliation and coercion provisions of the PWFA if a covered entity requires the submission of supporting documentation that is not reasonable under the circumstances to determine whether to grant the accommodation because, for example, (1) both the limitation and the need for reasonable accommodation are obvious; (2) the employee or applicant already has provided the employer with sufficient information to substantiate that the individual has a known

[133] *See supra* note 109, for discussion of the PUMP Act and the types of accommodations that may be requested with regard to pumping.

limitation and needs a change or adjustment at work; (3) a pregnant worker is seeking one of the modifications listed at 1636.3(j)(4); or (4) the accommodation requested involves lactation.

> Example 1636.3 #36/Documentation: An employer adopts a policy requiring everyone who requests a reasonable accommodation to provide medical documentation in support of the request. Cora, a production worker who is 8 months pregnant, requests additional bathroom breaks, and the employer applies the policy to her, refusing to provide the accommodation until she submits medical documentation. Cora therefore makes a medical appointment that she does not need and brings in documentation to establish that she is pregnant and has a physical condition that requires additional bathroom breaks. The employer grants the requested accommodation shortly before Cora gives birth. Despite the fact that the accommodation was granted, this employer may have violated the PWFA, 42 U.S.C. 2000gg-1(a) and/or 2000gg-2(f).
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> Example 1636.3 #37/Documentation: An employer adopts a policy requiring everyone who requests a reasonable accommodation to provide medical documentation in support of the request. Fourteen months after giving birth, Alex wants to continue to pump breastmilk at work, explains that to her supervisor, and asks, as a reasonable accommodation, for breaks to pump and that the room that is provided have a chair, a table, and access to electricity and running water. Alex's employer refuses to provide the accommodations unless Alex provides supporting documentation from her health care provider. Alex cannot provide the information, so she stops pumping. The employer cannot use the lack of documentation as a defense to the denial of the accommodation because documentation was not reasonable under the circumstances for the employer to determine whether to grant to accommodation, as set forth in proposed § 1636.4(a)(3).

1636.3(l)(2) Reasonable Documentation

When it is reasonable to require documentation under the circumstances for the covered entity to determine whether to grant the accommodation, the covered entity is permitted to require reasonable documentation, including from a health care provider. The proposed rule defines "reasonable documentation" as documentation that describes or confirms: (1) the physical or mental condition; (2) that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and (3) that a change or adjustment at work is needed for that reason. For example, if an employee asks for leave as a reasonable accommodation to attend therapy appointments due to anxiety early in the employee's pregnancy, the employer could, but is not required to, ask for documentation confirming that there is a physical or mental

condition that is related to, affected by, or arising out of pregnancy, and information about how frequent and long the leave would need to be.

Adopting the longstanding approach under the ADA, proposed § 1636.4(f)(1)(v) and (f)(2)(v) explain that if an employee or applicant provides documentation that is sufficient, continued efforts by the covered entity to require that the individual provide more documentation could be a violation of the PWFA's prohibitions on retaliation and coercion. However, if a covered entity requests additional information based on a good faith belief that the documentation the employee submitted is insufficient, it would not be liable for retaliation or coercion.[134]

The Commission seeks comment regarding this proposed approach to documentation, including: (1) whether this approach strikes the correct balance between what an employee or applicant can provide and the interests of the covered entity; (2) whether it is always reasonable under the circumstances for covered entities to require confirmation of pregnancy beyond self-attestation when the pregnancy is not obvious; (3) if allowed, whether the confirmation of a non-obvious pregnancy should be limited to less invasive methods such as the confirmation of a pregnancy through a urine test; (4) the ability of employees or applicants to obtain relevant information from a health care provider, particularly early in pregnancy; and (5) whether there are other common limitations that occur early in pregnancy, such as fatigue or morning sickness, for which an employer should not be permitted to require documentation beyond self-attestation.

1636.3(l)(3) Appropriate Health Care Provider to Provide Documentation

If the covered entity meets the requirements laid out above to request documentation and does so, the covered entity may request documentation from an appropriate health care provider

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[134] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at n.33; *Enforcement Guidance on Disability-Related Inquiries*, *supra* note 114, at Question 11.

in the particular situation. An appropriate provider may vary depending on the situation; the proposed regulation contains a non-exhaustive list of possible health care providers that is based on the non-exhaustive list for the ADA.[135] The Commission seeks comment on whether other types of health care providers should be included on this list.

The Commission does not believe that it will be practical or necessary for a covered entity to request or require that an employee be examined by a health care provider of the covered entity's choosing based on the PWFA's lower threshold for requiring reasonable accommodations, the temporary duration of PWFA accommodations, and the minimal nature of at least some of the most common reasonable accommodations associated with general limitations of pregnancy, childbirth, or related medical conditions.

The Commission seeks comment about whether there are situations in which an employer should be permitted to require such an examination, what limits should be placed on such a process, and what effect allowing such an examination may have on the willingness of workers to request accommodations under the PWFA.

1636.3(l)(4) Confidentiality

The PWFA does not include a provision specifically requiring covered entities to maintain the confidentiality of medical information obtained in support of accommodation requests under the PWFA. However, applicants, employees, and former employees covered by the PWFA also are covered by the ADA.[136] Under the ADA, covered entities are required to keep medical documentation of applicants, employees, and former employees confidential, with limited exceptions.[137] These ADA rules on keeping medical information confidential apply to all

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[135] *See Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at Question 6.

[136] *See* 42 U.S.C. 12111(5)(a) & 4 (ADA); 42 U.S.C. 2000gg(1)(B)(i) & (3)(A).

[137] 29 CFR 1630.14(b) & (c); *Enforcement Guidance on Disability-Related Inquiries, supra* note 114, at text accompanying nn.9-10; EEOC, *Enforcement Guidance: Preemployment Disability-Related Questions*

medical information, including medical information voluntarily provided as part of the reasonable accommodation process, and, therefore, include medical information obtained under the PWFA. Moreover, as explained in § 1636.5(f), an employer's intentional disclosure of medical information obtained through PWFA's reasonable accommodation process may violate the PWFA's prohibition on retaliation and/or coercion.

Section 1636.4 Prohibited Practices

42 U.S.C. 2000gg-1 sets out five possible violations involving the provision of reasonable accommodations.

1636.4(a) Failing to Provide Reasonable Accommodation

42 U.S.C. 2000gg-1(1) prohibits a covered entity from failing to make a reasonable accommodation for a qualified employee or applicant with a known limitation unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business. This provision of the PWFA uses the same language as the ADA, and the proposed rule likewise uses the language from the corresponding ADA regulation, replacing references to "individual with a disability" and similar terms with "employee with a known limitation" and similar terms.[138] Because 42 U.S.C. 2000gg-1(1) uses the same operative language as the ADA, the Commission proposes interpreting it in a similar manner.

This section is violated when a covered entity denies a reasonable accommodation to a qualified employee or applicant with a known limitation, absent undue hardship. As under the ADA, however, a covered entity does not violate 42 U.S.C. 2000gg-1(1) merely by refusing to

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and Medical Examinations, at text accompanying n.6 (1995), https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical.

[138] 42 U.S.C. 12112(b)(5)(A); 29 CFR 1630.9(a).

engage in the interactive process; for a violation, there also must have been a reasonable accommodation that the employer could have provided absent undue hardship.

1636.4(a)(1) Unnecessary Delay in Responding to a Request for a Reasonable Accommodation

Given that pregnancy-related limitations are frequently temporary, a delay in providing an accommodation may mean that the period necessitating the accommodation could pass without action simply because of the delay.[139] Proposed § 1636.4(a)(1) addresses this issue. As with the ADA, an unnecessary delay in responding to a request for a reasonable accommodation may result in a violation of the PWFA if the delay results in a failure to provide a reasonable accommodation.[140] This can be true even if the reasonable accommodation is eventually provided, when the delay was unnecessary.

The factors set out in § 1636.4(a)(1) include the same factors that are used when determining if a delay in the provision of a reasonable accommodation violates the ADA.[141] This proposed regulation adds to these established factors two new factors. First, in determining whether a delay in providing a reasonable accommodation was unnecessary, the question of whether providing the accommodation was simple or complex is a factor to be considered. There are certain modifications, set forth in § 1636.3(j)(4), that will virtually always be found to be reasonable accommodations that do not impose an undue hardship: (1) allowing a pregnant employee to carry and drink water, as needed; (2) allowing a pregnant employee additional restroom breaks; (3) allowing a pregnant employee whose work requires standing to sit and whose work requires sitting to stand; and (4) allowing a pregnant employee breaks to eat and

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[139] *See, e.g.*, *Long Over Due*, *supra* note 2, at 96 (statement of Rep. Suzanne Bonamici) (praising the PWFA because it would allow pregnant workers to get accommodations without waiting months or years; 168 Cong. Rec. S10,081 (daily ed. Dec. 22, 2022) (statement of Sen. Robert Casey, Jr.) (noting that "pregnant workers need immediate relief to remain healthy and on the job").

[140] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at Question 10, n.38.

[141] *Id.*

drink, as needed. If there is a delay in providing these accommodations, it will virtually always be found to be unnecessary because of the presumption that these modifications will be reasonable accommodations that do not impose an undue hardship. Second, another factor to be considered when determining if a delay in providing a reasonable accommodation was unnecessary is whether the covered entity offered the employee or applicant an interim reasonable accommodation during the interactive process or while waiting for the covered entity's response. The provision of such an interim accommodation will decrease the likelihood that an unnecessary delay will be found. Under this factor, leave is not considered an appropriate interim reasonable accommodation if there is another interim reasonable accommodation that would not cause an undue hardship and would allow the employee to continue working, unless the employee selects or requests leave as an interim reasonable accommodation.[142]

1636.4(a)(2) Employee or Applicant Declining a Reasonable Accommodation

The proposed rule provides, as in the ADA, that if an employee declines a reasonable accommodation, and without it the employee cannot perform one or more essential functions of the position, then the employee will no longer be considered qualified.[143] However, because the PWFA allows for the temporary suspension of one or more essential functions in certain circumstances, an employer must also consider whether one or more essential functions can be temporarily suspended pursuant to the PWFA before a determination is made pursuant to this section that the employee is not qualified.

1636.4(a)(3) Covered Entity Denying a Reasonable Accommodation Due to Lack of Supporting Documentation

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[142] The restriction on using leave as an interim accommodation is based on 42 U.S.C. 2000gg-1(4).

[143] *See* 29 CFR 1630.9(d).

As set out in the section of this preamble regarding supporting documentation, if the request for documentation was not reasonable under the circumstances for the covered entity to determine whether to grant the accommodation, a covered entity cannot defend the denial of an accommodation based on the lack of documentation provided by the worker. The proposed rule contains this provision in § 1636.4(a)(3).

1636.4(a)(4) Choosing Among Possible Accommodations

Similar to the ADA, if there is more than one effective accommodation, the employee's or applicant's preference should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between potential reasonable accommodations and may choose, for example, the less expensive accommodation or the accommodation that is easier for it to provide, or generally the accommodation that imposes the least hardship.[144] In the situation where the employer is choosing between reasonable accommodations and does not provide the accommodation that is the worker's preferred accommodation, the employer does not have to show that it is an undue hardship to provide the worker's preferred accommodation.

A covered entity's "ultimate discretion" to choose a reasonable accommodation is limited by certain other considerations. First, the accommodation must provide the individual with a known limitation with an equal employment opportunity, meaning an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a known limitation.[145] Thus,

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[144] 29 CFR part 1630 app. 1630.9.

[145] 29 CFR part 1630 app. 1630.9 (providing that a reasonable accommodation "should provide the individual with a disability with an equal employment opportunity. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability."); 29 CFR part 1630 app. 1630.2(o) (explaining that reassignment should be to a position with equivalent pay, status, etc., if possible); *see also Enforcement Guidance on Reasonable Accommodation*,

if there is more than one accommodation that does not impose an undue hardship, but one of them does not provide the employee with an equal employment opportunity, the employer must choose the one that provides the worker with equal employment opportunity.[146] Depending on the facts, selecting the accommodation that does not provide equal opportunity could violate 42 U.S.C. 2000gg-1(1), 2000gg-(1)(5) or 2000gg-2(f).[147] The proposed rule, § 1636.4(a)(4), sets out this prohibition.

The Commission seeks comment on whether it should include language in the rule explaining that an employer may not unreasonably select an accommodation that negatively affects an employee's or applicant's employment opportunities or terms and conditions of employment when another available accommodation would not do so or whether the protections in 42 U.S.C. 2000gg-1(1) and (5) and 2000gg-2(f) alone are sufficiently clear in this regard.[148]

Second, 42 U.S.C. 2000gg-1(2) prohibits a covered entity from requiring a qualified employee or applicant affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than a reasonable accommodation arrived at through the interactive process. Third, 42 U.S.C. 2000gg-1(4) prohibits a covered entity from requiring a qualified employee with a known limitation to take leave if there is a reasonable accommodation that will allow the employee to continue to work, absent undue hardship. Fourth, 42 U.S.C. 2000gg-1(5)

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supra note 44, at text following n.80 ("However, if both the employer and the employee voluntarily agree that transfer is preferable to remaining in the current position with some form of reasonable accommodation, then the employer may transfer the employee."); *Cf.* EEOC, *Compliance Manual on Religious Discrimination*, 12-IV.3 (2021) (stating that in the context of a religious accommodation, an accommodation would not be reasonable "if it requires the employee to accept a reduction in pay rate or some other loss of a benefit or privilege of employment and there is an alternative accommodation that does not do so.") https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination [hereinafter *Religious Discrimination Compliance Manual*].

[146] *Enforcement Guidance on Reasonable Accommodations*, *supra* note 44, Question 9 Example B.

[147] Depending on the facts, this could be a violation of Title VII's prohibition on sex discrimination as well.

[148] *Cf.* 29 CFR 1605.2(c)(2)(ii) (when more than one means of accommodation would not cause undue hardship, the employer or labor organization must offer the accommodation that least disadvantages the individual with respect to employment opportunities).

prohibits a covered entity that is, for example, selecting from an array of accommodations, all of which are effective and do not impose an undue hardship, from picking one that results in the covered entity taking adverse action in terms, conditions, or privileges of employment of the employee or applicant. Fifth, 42 U.S.C. 2000gg-2(f) prohibits retaliation and coercion by covered entities. These limitations to the "ultimate discretion" of a covered entity to choose between reasonable accommodations are described in the discussions of § 1636.4(b), (d), and (e) and § 1636.5(f) below.

> Example 1636.4 #38/Failing to Provide an Accommodation: Yasmin's job requires her to travel to meet with clients. Because of her pregnancy, she is not able to travel for three months. She asks that she be allowed to conduct her client meetings via video conferencing. Although this accommodation would allow her to perform her essential job functions and does not impose an undue hardship, her employer reassigns her to smaller, local accounts. Being assigned only to these accounts limits Yasmin's ability to compete for promotions and bonuses as she had in the past.
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> This could be a violation of 42 U.S.C. 2000gg-1(1), because Yasmin is denied an equal opportunity to compete for promotions and is thus denied a reasonable accommodation. The employer's actions could also violate 42 U.S.C. 2000gg-1(5) and 42 U.S.C. 2000gg-2(f), or Title VII's prohibition against pregnancy discrimination.

1636.4(b) Requiring Employee or Applicant to Accept an Accommodation

42 U.S.C. 2000gg-1(2) prohibits a covered entity from requiring an employee or applicant to accept an accommodation other than any reasonable accommodation arrived at through the interactive process. This provision responds to concerns that some employers may unilaterally curtail what a pregnant worker can do in the mistaken belief that the worker needs some type of help.[149] Pursuant to this provision in the PWFA and the proposed rule, a covered

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[149] *Cf.* EEOC, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* II.A.3 (2007), https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities (describing situations in which employers incorrectly assume based on stereotypes that workers with caregiving responsibilities need a change to their workload or work environment); s*ee also UAW v. Johnson Controls*, 499 U.S. 187 (1991) (striking down employer's fetal protection policy that limited the opportunities of women); *Long Over Due*, *supra* note 2, at 192 (written answers of Dina Bakst, Co-Founder & Co-President, A Better Balance) (explaining that employers have been known to unilaterally cut a worker's hours or stop a worker from working late in an attempt to "help" the employee or because the employer felt sorry for the worker, even though an employee did not ask for such accommodation and did not need it).

entity cannot force an employee or applicant to accept an accommodation such as light duty or a temporary transfer, or delay of an examination that is part of the application process, without engaging in the interactive process, even if the covered entity's motivation is concern for the applicant's or employee's health or pregnancy.

42 U.S.C. 2000gg-1(2) does not require that the employee or applicant have a limitation, known or not; thus, a violation of 42 U.S.C. 2000gg-1(2) could occur if a covered entity notices that an employee or applicant is pregnant and decides, without engaging in the interactive process with the employee or applicant, that the employee or applicant needs a particular accommodation, and unilaterally requires the employee or applicant to accept that accommodation, even though the employee or applicant has not requested it and can perform the essential functions of the job without it. For example, this provision could be violated if an employment agency, without discussing the situation with the candidate, decided that a candidate recovering from a miscarriage needed an accommodation in the form of not being sent to certain jobs that the agency viewed as too physical, or if an employer decided to excuse a pregnant worker from overtime as an accommodation, without discussing it with them.[150]

Additionally, a violation could occur if a covered entity receives a request for a reasonable accommodation and unilaterally imposes an accommodation that was not requested without engaging in the interactive process.

> Example 1636.4 #39: Kia, a restaurant server, is pregnant. She asks for additional breaks during her shifts as her pregnancy progresses because she feels tired, and her feet are swelling. Her employer, without engaging in the interactive process with Kia, directs Kia to take host shifts for the remainder of her pregnancy, because she can sit for long periods during the shift. The employer has violated 42 U.S.C. 2000gg-1(2) and § 1636.4(b) of the proposed rule, because it required Kia to accept an accommodation other than one arrived at through the interactive process, even if Kia's earnings did not decrease and her terms, conditions, and privileges of employment were not harmed. The Commission recognizes that the relief in this situation may be limited to requiring the employer to engage in the interactive process with the employee.
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> By contrast, if the host shift does not provide Kia with equal terms, conditions, and privileges of employment (e.g., Kia's wages decrease or Kia no longer can earn tips), the

[150] These actions also could violate Title VII's prohibition of disparate treatment based on sex. *See Enforcement Guidance on Pregnancy Discrimination*, *supra* note 11, at I.B.1.

covered entity also may have violated 42 U.S.C. 2000gg-1(1) (requiring reasonable accommodation absent undue hardship); 42 U.S.C. 2000gg-1(5) (prohibiting adverse action in terms, benefits, or privileges of employment); or 42 U.S.C. 2000gg-2(f) (prohibiting retaliation and coercion) (implemented in the proposed rule at § 1636.4(a), (e) and § 1636.5(f)).

Finally, this provision also could be violated if a covered entity has a rule that requires all pregnant workers to stop a certain function—such as traveling—automatically, without any evidence that the particular worker is unable to perform that function. The Commission seeks comment on whether there are other factual scenarios that would violate this provision and whether additional examples would be helpful.

1636.4(c) Denying Opportunities

42 U.S.C. 2000gg-1(3) prohibits a covered entity from denying employment opportunities to a qualified employee or applicant with a known limitation if the denial is based on the need of the covered entity to make reasonable accommodations to the known limitations of the employee or applicant. Thus, an employee's or applicant's known limitation and need for a reasonable accommodation cannot be part of the covered entity's decision regarding hiring, discharge, promotion, or other employment decisions, unless the reasonable accommodation would impose an undue hardship on the covered entity. This provision in the PWFA uses language similar to that of the ADA, and the proposed rule likewise uses the language similar to the corresponding ADA regulation.[151] Additionally, the proposed rule includes situations where the covered entity's decision is based on the future possibility that a reasonable accommodation will be needed, i.e., 42 U.S.C. 2000gg-1(3) prohibits a covered entity from making a decision based on its belief that an individual may need a reasonable accommodation in the future even if the individual has not asked for one. Thus, under the proposed rule, this prohibition would include situations where a covered entity refuses to hire a pregnant applicant because the covered

[151] 42 U.S.C. 12112(b)(5)(B); 29 CFR 1630.9(b).

entity believes that the applicant will need leave to recover from childbirth, even if the covered entity does not know the exact amount of leave the applicant will require, or the applicant has not mentioned the need for leave as a reasonable accommodation to the covered entity. The Commission proposes this addition to ensure that workers are protected in situations where the employer's actions are based on avoiding the provision of a reasonable accommodation, even if one is not requested.

1636.4(d) Requiring Employee to Take Leave

Sometimes, when employees notify their employers that they are pregnant, employers place them on leave or direct them to use leave.[152] Workers on unpaid leave risk their economic security, and workers who use their leave—whether paid or unpaid—prior to giving birth may not have leave when they need it to recover from childbirth.[153]

42 U.S.C. 2000gg-1(4) seeks to limit this practice. Under this provision, a covered entity may not require a qualified employee with a known limitation to take leave, whether paid or unpaid, if another reasonable accommodation can be provided, absent undue hardship. In other words, under the PWFA, an employee cannot be forced to take leave if another reasonable accommodation can be provided that would not impose an undue hardship and would allow the employee to continue to work.

Of course, this limitation does not prohibit the provision of leave as a reasonable accommodation if leave is the reasonable accommodation requested or selected by the employee, or if it is the only reasonable accommodation that does not cause an undue hardship. As explained above in the preamble's discussion of § 1636.3(h) and (i), both paid leave (accrued, short-term disability, or another employer benefit) and unpaid leave are potential reasonable

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[152] H.R. Rep. No. 117-27, pt. 1, at 24.

[153] *Long Over Due*, *supra* note 2, at 81 (statement of Rep. Jahana Hayes) (explaining that she kept working while pregnant in order to save her leave for after childbirth).

accommodations under the PWFA. 42 U.S.C. 2000gg-1-(4) and the proposed rule merely prohibits an employer from requiring an employee to take leave if there is another reasonable accommodation that would not impose an undue hardship and would allow the employee to remain on the job.

1636.4(e) Adverse Action on Account of Requesting or Using a Reasonable Accommodation

The PWFA contains overlapping provisions that protect workers seeking or using reasonable accommodations. Importantly, nothing in the PWFA limits which provision a worker may use to protect their rights.

One of these provisions is 42 U.S.C. 2000gg-1(5), which prohibits a covered entity from "tak[ing] 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 pregnancy, childbirth, or related medical conditions of the employee." 42 U.S.C. 2000gg-1(5) only applies to situations involving a qualified employee who asks for or uses a reasonable accommodation. The protections provided by 42 U.S.C. 2000gg-1(5) are likely to have significant overlap with 42 U.S.C. 2000gg-2(f), which prohibits retaliation. As explained in the preamble's discussion of 42 U.S.C. 2000gg-2(f) (proposed § 1636.5(f)), however, the PWFA's anti-retaliation provisions apply to a broader group of employees and actions than 42 U.S.C. 2000gg-1(5) does.

The term "take adverse action" in 42 U.S.C. 2000gg-1(5) is not taken from Title VII or the ADA. From the context of this provision and the basic dictionary definitions of the terms, this prohibits an employer from taking a harmful action against an employee.[154]

"Terms, conditions, or privileges of employment" is a term from Title VII, and the EEOC has interpreted it to encompass a wide range of activities or practices that occur in the workplace

[154] *Adverse*, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/adverse ("hostile," "unfavorable" and "harmful.") (last visited June 13, 2023).

including, but not limited to, discriminatory work environment or atmosphere; duration of work (such as the length of an employment contract, hours of work, or attendance); work rules; job assignments and duties; and job advancement (such as training, support, and performance evaluations).[155] In addition, for the purposes of 42 U.S.C. 2000gg-1(5), "terms, conditions, and privileges of employment" can include hiring, discharge, or compensation.[156]

Thus, this provision may be violated when, for example, a covered entity grants a reasonable accommodation but then penalizes the employee.

> Example 1636.4 #40: Nava took leave to recover from childbirth as a reasonable accommodation under the PWFA, and, as a result, failed to meet the sales quota for that quarter, which led to a negative performance appraisal. The negative appraisal could be a violation of 42 U.S.C. 2000gg-1(5) because Nava received it due to the use of a reasonable accommodation.

Also, an employer may violate this provision if there is more than one accommodation that does not impose an undue hardship, and the employer, after the interactive process, chooses the accommodation that causes an adverse action with respect to the terms, conditions, or privileges of employment, despite the existence of an alternative accommodation that would not do so.

> Example 1636.4 #41: Ivy asks for additional bathroom breaks during work because of pregnancy, including during overtime shifts. After talking to Ivy, rather than providing the breaks during overtime, Ivy's supervisor decides Ivy should simply not work overtime, because during the overtime shift there are fewer employees, and the supervisor does not want to bother figuring out coverage for Ivy, although it would not be an undue hardship to do so. As a result, Ivy is not assigned overtime and loses earnings.
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> This conduct could violate 42 U.S.C. 2000gg-1(5) in two ways. First, Ivy's request for a reasonable accommodation led to an adverse action in terms, conditions, or privileges of employment. Second, Ivy's use of the accommodation of not working overtime led to a reduction in pay, i.e., an adverse action in terms, conditions, or privileges of Ivy's

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[155] 42 U.S.C. 2000e-2(a)(1); *Compliance Manual on Terms, Conditions, and Privileges of Employment*, *supra* note 82, at 613.1(a) (stating that the language is to be read in the broadest possible terms and providing a list of examples).

[156] The PWFA's use of the phrase "terms, conditions, and privileges of employment" includes hiring, discharge, and compensation, which are also included within the scope of Title VII. 42 U.S.C. 2000e-2(a)(1).

employment, and there was an alternative accommodation (assigning coverage for Ivy as needed) that would not have done so.

Example 1636.4 #42: Leyla asks for telework due to morning sickness. Through the interactive process, it is determined that both telework and a later schedule combined with an hour rest break in the afternoon would allow Leyla to perform the essential functions of her job and would not impose an undue hardship. Although Leyla prefers telework, the employer would rather Leyla be in the office. It would not be a violation of 42 U.S.C. 2000gg-1(5) to offer Leyla the schedule change/rest break instead of telework as a reasonable accommodation.

The facts set out in examples 40 and 41 could also violate 42 U.S.C. 2000gg-1(1) and 2000gg-2(f).

As stated at the beginning of this section, the PWFA has overlapping protections for workers who request or use reasonable accommodations. The Commission emphasizes that qualified employees with known limitations may bring actions under any of these provisions. Finally, the Commission seeks comment on whether there are other factual scenarios that would violate 42 U.S.C. 2000gg-1(5) and whether additional examples would be helpful.

Section 1636.5 Remedies and Enforcement

In crafting the PWFA remedies and enforcement section, Congress recognized the advisability of using the existing mechanisms in place for redress of other forms of employment discrimination. In this regard, the PWFA and the proposed regulation provide the following:

1636.5(a) Remedies and Enforcement under Title VII

As explained in PWFA, 42 U.S.C. 2000gg-2(a) and (e), the applicable enforcement mechanism and remedies available to employees and others covered by Title VII apply to the PWFA as well. The proposed rule parallels the statutory language, noting that the powers, remedies, and procedures provided in sections 705-707, 709-711, and 717 of Title VII, 42 U.S.C. 2000e-4, shall be the powers, remedies, and procedures provided by the PWFA.

The Commission also emphasizes that its implementing regulations found at 29 CFR parts 1601 (procedural regulations), 1602 (recordkeeping and reporting requirements under Title VII, the ADA, and the Genetic Information Nondiscrimination Act (GINA)), and 1614 (Federal sector equal employment opportunity) apply to the PWFA as well. Thus, employees covered by section 706 of Title VII may file charges with the EEOC, and the EEOC will investigate them using the same process as set out in Title VII. Similarly, employees covered by section 717 of Title VII may file complaints with the relevant Federal agency which will investigate them, and the EEOC will process appeals using the same process as set out in Title VII for Federal employees.

1636.5(b) Remedies and Enforcement under the Congressional Accountability Act

Employees covered by the Congressional Accountability Act of 1995, 2 U.S.C. 1401 et seq. (CAA) must use the procedures set forth in that statute. The Commission has no authority with respect to the enforcement of the PWFA as to employees covered by the CAA.

1636.5(c) Remedies and Enforcement under Chapter 5 of Title 3, United States Code

The applicable procedures and available remedies for employees covered by 3 U.S.C. 401 et seq. are set forth in 3 U.S.C. 451-454. These sections provide for counseling and mediation of employment discrimination allegations and the formal processing of complaints before the Commission using the same administrative process generally applicable to employees in the Executive Branch of the Federal Government; that is, the process set forth in 29 CFR part 1614.

1636.5(d) Remedies and Enforcement under GERA

The applicable procedures and available remedies for employees covered by sections 302 and 304 of the Government Employee Rights Act of 1991, 42 U.S.C. 2000e-16b and -16c

(GERA), apply under the PWFA. EEOC regulations applicable to GERA are found at 29 CFR part 1603.

1636.5(e) Remedies and Enforcement under Section 717 of the Civil Rights Act of 1964

The applicable procedures and available remedies for employees covered by section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, apply under the PWFA.

Damages

As with other Federal employment discrimination laws, the PWFA provides for recovery of pecuniary and non-pecuniary damages, including compensatory and punitive damages. The statute's incorporation by reference of section 1977A of the Revised Statutes of the United States, 42 U.S.C. 1981a, also imports the limitations on the recovery of compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, other nonpecuniary losses, and punitive damages generally applicable in employment discrimination cases, depending on the size of the employer. Punitive damages are not available in actions against the Federal Government or against State or local government employers. The proposed rule lays out these requirements involving damages in separate paragraphs under § 1636.5(a) – (e).

Poster Requirement

Because the PWFA adopts the powers, remedies, and procedures provided in various sections of Title VII, including section 711, covered entities are required to post notices in conspicuous places describing applicable PWFA provisions. The Commission published an updated EEO poster that includes the PWFA when the PWFA went into effect.

1636.5(f) Prohibition Against Retaliation

The anti-retaliation provisions of the PWFA should be interpreted broadly, like those of Title VII and the ADA, to effectuate Congress's broad remedial purpose in enacting these laws.[157] The protections of these provisions extend beyond qualified employees and applicants with known limitations and cover activity that may not yet have occurred, such as a circumstance in which a covered entity threatens an employee or applicant with termination if they file a charge or requires an employee or applicant to sign an agreement that prohibits such individual from filing a charge with the EEOC.[158]

1636.5(f)(1) Prohibition Against Retaliation

The proposed regulation reiterates the statutory prohibition against retaliation from 42 U.S.C. 2000gg-2(f)(1), which uses the same language as Title VII and the ADA.[159] Thus, the types of conduct prohibited and the standard for determining what constitutes retaliatory conduct under the PWFA are the same as they are under Title VII. Accordingly, this provision prohibits discrimination against individuals who engage in protected activity, which includes "'participating' in an EEO process or 'opposing' discrimination."[160] Title VII's anti-retaliation provision is broad and protects an individual from conduct, whether related to employment or not, that a reasonable person would have found "materially adverse," meaning that the action

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[157] EEOC, *Enforcement Guidance on Retaliation and Related Issues* II.A, A.1 (2016), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues [hereinafter *Enforcement Guidance on Retaliation*] (describing the broad protection of the participation clause); *id.* at A.2, A.2.a (describing the broad protection of the opposition clause).

[158] EEOC, *Enforcement Guidance on Non-Waivable Employee Rights under EEOC Enforced Statutes* II (1997), https://www.eeoc.gov/laws/guidance/enforcement-guidance-non-waivable-employee-rights-under-eeoc-enforced-statutes ("[P]romises not to file a charge or participate in an EEOC proceeding are null and void as a matter of public policy. Agreements extracting such promises from employees may also amount to separate and discrete violations of the anti-retaliation provisions of the civil rights statutes.").

[159] 42 U.S.C. 2000e-3(a); 42 U.S.C. 12203(a).

[160] *Enforcement Guidance on Retaliation*, *supra* note 157, at II.A; *see also id.* at II.A.1-A.2 (describing protected activity under Title VII's anti-retaliation clause).

"well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[161] The same interpretation applies to the PWFA's anti-retaliation provision.[162]

The proposed rule contains five other provisions based on the statutory language and established anti-retaliation concepts under Title VII and the ADA.

First, like Title VII and the ADA, the proposed rule protects employees, applicants, and former employees because 42 U.S.C. 2000gg-2(f)(1) protects "employees," not "qualified employees with a known limitation." Therefore, the proposed rule states that an employee, applicant, or former employee need not establish that they have a known limitation or are qualified under the PWFA to bring a claim under 42 U.S.C. 2000gg-2(f)(1).[163] Second, the proposed rule explains that, consistent with the ADA and Title VII, a request for a reasonable accommodation under the PWFA constitutes protected activity, and therefore retaliation for such a request is prohibited.[164] Third, the proposed rule provides that an employee, applicant, or former employee does not have to actually be deterred from exercising or enjoying rights under this section for the retaliation to be actionable.[165] Fourth, as explained in the preamble's discussion of the documentation that can be required in support of a request for reasonable accommodation, the proposed rule notes that it may violate this section for a covered entity to require documentation when it is not reasonable under the circumstances to determine whether to

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[161] *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (internal citations and quotations omitted).

[162] All retaliatory conduct under Title VII (and the ADA), including retaliation that takes the form of harassment, is evaluated under the legal standard for retaliation. *See Enforcement Guidance on Retaliation*, *supra* note 157, at II.B.3.

[163] *See Enforcement Guidance on Retaliation*, *supra* note 157, at III (recognizing that under the ADA, individuals need not establish that they are covered under the statute's substantive discrimination provisions in order to be protected against retaliation); *id.* at II.A.3; *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding that Title VII protects former employees from retaliation).

[164] *Enforcement Guidance on Retaliation*, *supra* note 157, at II.A.2.e and Example 10.

[165] *Id.* at II.B.1, B.2 (stating that the retaliation "standard can be satisfied even if the individual was not in fact deterred" and that "[i]f the employer's action would be reasonably likely to deter protected activity, it can be challenged as retaliation even if it falls short of its goal").

provide the accommodation. Finally, the proposed rule explains that when an employee or applicant provides sufficient documentation to describe the relevant limitation and need for accommodation, continued efforts on the covered entity's part to obtain documentation violates the retaliation prohibition unless the covered entity has a good faith belief that the submitted documentation is insufficient.

1636.5(f)(2) Prohibition Against Coercion

The PWFA's anti-coercion provision uses the same language as the ADA's interference provision, with one minor variation in the title of the section.[166] Similar to the ADA, the scope of the PWFA coercion provision is broader than the anti-retaliation provision; it reaches those instances "when conduct does not meet the 'materially adverse' standard required for retaliation."[167]

The proposed rule follows the language of 42 U.S.C. 2000gg-2(f)(2) and protects "individuals," not "qualified employees with a known limitation under the PWFA." Thus, the proposed rule specifies that, consistent with the ADA's interference provisions, the individual need not be an employee, applicant, or former employee and need not establish that they have a known limitation or that they are qualified (as those terms are defined in the PWFA) to bring a claim for coercion under the PWFA.[168]

The purpose of this provision is to ensure that workers are free to avail themselves of the protections of the statute. Thus, consistent with the ADA regulations for the same provision, the proposed rule adds "harass" to the list of prohibitions, as harassment may be a method to coerce

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[166] The ADA uses the term "Interference, coercion, or intimidation" to preface the prohibition against interference (42 U.S.C. 12203(b)), whereas the PWFA uses "Prohibition against coercion." The language of the prohibitions is otherwise identical.

[167] *Enforcement Guidance on Retaliation*, *supra* note 157, at III.

[168] *Id.*

a worker into not availing themselves of their PWFA rights.[169] The proposed rule also states that an individual does not, in fact, have to be deterred from exercising or enjoying rights under this section for the coercion to be actionable. [170]

The proposed rule contains three examples of actions that could be violations. First, the proposed rule states that it prohibits coercion, intimidation, threats, harassment, or interference because an individual, including an employee, applicant, or former employee, has asked for a reasonable accommodation under the PWFA.

Second, the proposed rule provides that coercion could include situations in which the covered entity requires documentation in support of a request for reasonable accommodation when it is not reasonable under the circumstances to determine whether to provide the accommodation.

Third, the proposed rule states that a covered entity that has sufficient information regarding the known limitation and the need for reasonable accommodation but continues to require additional information or documentation violates the anti-coercion provision unless the covered entity has a good faith belief that the documentation is insufficient.

Some other examples of coercion include:

- coercing an individual to relinquish or forgo an accommodation to which they are otherwise entitled;
- intimidating an applicant from requesting an accommodation for the application process by indicating that such a request will result in the applicant not being hired;

[169] 29 CFR 1630.12(b).

[170] *Enforcement Guidance on Retaliation*, *supra* note 157, at II.B.1-B.2 (noting that actions can be challenged as retaliatory even if the person was not deterred from engaging in protected activity).

- issuing a policy or requirement that purports to limit an employee's or applicant's rights to invoke PWFA protections (e.g., a fixed leave policy that states "no exceptions will be made for any reason");
- interfering with a former employee's right to file a PWFA lawsuit against a former employer by stating that a negative job reference will be given to prospective employers if the suit is filed; and
- subjecting an employee to unwarranted discipline, demotion, or other adverse treatment because they assisted a coworker in requesting a reasonable accommodation.[171]

Examples of Retaliation and/or Coercion

Actions that the courts or the Commission have previously determined may qualify as retaliation or coercion under Title VII or the ADA may qualify under the PWFA as well. Depending on the facts, a covered entity's retaliatory action for activity protected under the PWFA may violate 42 U.S.C. 2000gg-1(5), 2000gg-2(f)(1) and/or 2000gg-2(f)(2), as implemented by proposed rule §§ 1636.4(e) and 1636.5(f). The following examples would likely violate 42 U.S.C. 2000gg-2(f) and may also violate 42 U.S.C. 2000gg-1(5).

> Example 1636.5 #43: Perrin requests a stool due to pregnancy. Lucy, Perrin's supervisor, denies Perrin's request. The corporate human resources department instructs Lucy to grant the request because there is no undue hardship. Angry about being overruled, Lucy thereafter gives Perrin an unjustified poor performance rating and denies Perrin's request to attend training that Lucy approves for Perrin's coworkers.
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> Example 1636.5 #44: Marisol files an EEOC charge after Cyrus, her supervisor, refused to provide her with the reasonable accommodation of help with lifting after her cesarean section. Marisol also alleges that after she asked for the accommodation, Cyrus asked two coworkers to conduct surveillance on Marisol, including watching her at work, noting with whom she associated in the workplace, suggesting to other employees that they should avoid her, and reporting her breaks to Cyrus.
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> Example 1636.5 #45: Mara provides her employer with a note from her health care provider explaining that she is pregnant, has morning sickness, and needs to start work later on certain days. Mara's supervisor requires that Mara confirm the pregnancy through an ultrasound, even though the employer already has sufficient information regarding Mara's pregnancy.

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[171] *Id.* at III.

Example 1636.5 #46: During an interview at an employment agency, Arden tells the human resources staffer, Stanley, that Arden is dealing with complications from their recent childbirth and may need time off for doctor's appointments during their first few weeks at work. Stanley counsels Arden that needing leave so soon after starting will be a "black mark" on their application.

Example 1636.5 #47: Merritt, a client of an employment agency, is discharged from an employer after requesting an accommodation under the PWFA. The employment agency refuses to refer Merritt to other employers, telling Merritt that they only refer workers who will not cause any trouble.

Example 1636.5 #48: Jessie, a factory union steward, ensures that workers know about their rights under the PWFA and encourages workers with known limitations to ask for reasonable accommodations. Jessie helps employees navigate the reasonable accommodation process and provides suggestions of possible reasonable accommodations. Factory supervisors are annoyed at the number of PWFA reasonable accommodation requests and write up Jessie for petty safety violations and other actions that had not been worthy of discipline before.

Example 1636.5 #49: While she was pregnant, Laila requested and received the reasonable accommodation of a temporary suspension of the essential function of moving heavy boxes and placement in the light duty program. After giving birth, Laila tells her employer that she has decided to resign and stay home for a year. Her employer responds by saying that if Laila follows through and resigns now, the employer will have no choice but to give her a negative reference because Laila demanded an accommodation but did not have the loyalty to come back after having her baby.

Example 1636.5 #50: Robbie, a retail worker, is visibly pregnant and would like to sit while working at the cash register. Robbie explains the situation to the manager, who requires Robbie to produce a signed doctor's note saying that Robbie is pregnant and needs to sit. Because Robbie is obviously pregnant, has confirmed the pregnancy, and requests one of the simple modifications that will virtually always be found to be a reasonable accommodation that does not impose an undue hardship, the covered entity is not permitted to require additional medical documentation.

Protection of Confidential Medical Information

As explained in the preamble's discussion of § 1636.3(l) *Documentation,* the established ADA rules requiring covered entities to keep medical information of applicants, employees, and former employees confidential apply to medical information obtained in connection with a reasonable accommodation request under the PWFA.[172] Medical information obtained by the

[172] *Enforcement Guidance on Disability-Related Inquiries, supra* note 114, at text accompanying n.9; EEOC, *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, at text accompanying n.6 and nn.23-25 (1995), https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical.

employer in the process of a worker seeking a reasonable accommodation under the PWFA must be protected as set out in the ADA and failing to do so would violate the ADA. For example, the fact that someone is pregnant or has recently been pregnant, is medical information about that person, as is the fact that they have a medical condition related to pregnancy or childbirth. Thus, disclosing that someone is pregnant, has recently been pregnant, or has a related medical condition violates the ADA, unless an exception applies, as does disclosing that someone is receiving or has requested an accommodation under the PWFA or has limitations for which they requested or are receiving a reasonable accommodation under the PWFA (because revealing this information discloses that the person is pregnant, has recently been pregnant, or has a related medical condition).[173]

In addition, releasing medical information, threatening to release medical information, or requiring an employee or applicant to share their medical information with individuals who have no role in processing a request for reasonable accommodation may violate the PWFA's retaliation and coercion provisions.[174]

1636.5(f)(3) Remedies for Retaliation and Coercion

The PWFA provides that the remedies and procedures for retaliation and coercion claims are the same as the remedies and procedures used for the PWFA nondiscrimination provisions. The proposed rule reiterates the statutory language on this subject.

1636.5(g) Good Faith Efforts

The PWFA at 42 U.S.C. 2000gg-2(g) and the proposed rule, using the language of the Civil Rights Act of 1991, 42 U.S.C. 1981(a)(3), provide a limitation on damages based on a

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[173] 29 CFR 1630.14(c); *Enforcement Guidance on Disability-Related Inquiries*, *supra* note 114, at A.

[174] *See* § 1636.5(f)(1) and (2).

"good faith effort" to provide a reasonable accommodation. Specifically, damages may not be awarded if the covered entity demonstrates good faith efforts, in consultation with the employee with a known limitation, to identify and make a reasonable accommodation that would provide the employee with an equally effective opportunity and would not cause an undue hardship. The covered entity bears the burden of proof for this affirmative defense.

Section 1636.6 Waiver of State Immunity

Because States are employers covered by Title VII, and the PWFA adopts Title VII's definition of employers, States are employers covered by the PWFA. The PWFA at 42 U.S.C. 2000gg-4 waives State immunity under the 11th Amendment in an action in a Federal or State court of competent jurisdiction for a violation of the PWFA. The PWFA at 42 U.S.C. 2000gg-4 also makes remedies at law and in equity available in actions under the PWFA against States to the same extent that such remedies are available for such a violation against any public or private entity other than a State.

Section 1636.7 Relationship to Other Laws

The PWFA at 42 U.S.C. 2000gg-5 and this section of the proposed regulation address the PWFA's relationship to other Federal, State, and local laws.

1636.7(a) Relationship to Other Laws Generally

42 U.S.C. 2000gg-5(a)(1) addresses the relationship of the PWFA to other Federal, State, and local laws governing protections for individuals affected by pregnancy, childbirth, or related medical conditions and makes clear that the PWFA does not limit the rights of individuals affected by pregnancy, childbirth, or related medical conditions under a Federal, State, or local law that provides greater or equal protection. It is equally true that Federal, State, or local laws that provide less protection for individuals affected by pregnancy, childbirth, or related medical

conditions than the PWFA do not limit the rights provided by the PWFA. The proposed regulation reiterates the statutory provision addressing the relationship of the PWFA to other Federal, State, and local laws governing protections for individuals affected by pregnancy, childbirth, or related medical conditions.

Thirty States and five localities have laws that provide accommodations for pregnant workers.[175] Federal laws, including, but not limited to, Title VII, the ADA, the FMLA, the Rehabilitation Act, and the PUMP Act, also provide protections for certain workers affected by pregnancy, childbirth, or related medical conditions.[176] All of the protections regarding discrimination based on pregnancy, childbirth, or related medical conditions in these laws are unaffected by the PWFA. Additionally, if there are greater protections in other laws, those would apply. For example, the State of Washington's Healthy Starts Act provides that certain accommodations, including lifting restrictions of 17 pounds or more, cannot be the subject of an undue hardship analysis.[177] If a worker in Washington is seeking a lifting restriction as a reasonable accommodation for a pregnancy-related reason under the Healthy Starts Act, an employer in Washington cannot argue that a lifting restriction of 20 pounds is an undue hardship, even though that defense could be raised if the claim were brought under the PWFA.

Furthermore, employees and applicants may bring claims under multiple State or Federal laws. Thus, a pregnant applicant denied a position because they are pregnant and will need leave for recovery from childbirth may bring a claim under both Title VII for sex discrimination and the PWFA for the denial of an employment opportunity based on the applicant's need for an accommodation. Similarly, a worker with postpartum depression who, for that reason, is denied

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[175] *Employment Protections for Workers Who Are Pregnant or Nursing*, *supra* note 5.

[176] For an explanation of the interaction between the FMLA and the ADA, *see* 29 CFR 825.702.

[177] Wash. Rev. Code 43.10.005(1)(d).

an equal employment opportunity may bring a claim under both the PWFA and the ADA, and possibly Title VII.

Under Title VII, employees affected by pregnancy, childbirth, or related medical conditions may be able to receive accommodations if they can identify a comparator "similar in their ability or inability to work."[178] Under the PWFA, employees affected by pregnancy, childbirth, or related medical conditions will be able to seek reasonable accommodations whether or not other employees have those accommodations and whether or not the affected employees are similar in their ability or inability to work as employees not so affected. Additionally, if the covered entity offers a neutral reason or policy to explain why employees affected by pregnancy, childbirth or related medical conditions cannot access a specific benefit, the employee with a known limitation under the PWFA still may ask for a waiver of that policy as a reasonable accommodation. Under the PWFA, the employer must grant the waiver, or another reasonable accommodation, absent undue hardship. If, for example, an employer denies a pregnant worker's request to join its light duty program as a reasonable accommodation, arguing that the program is for workers with on-the-job injuries, it may be difficult for the employer to prove that allowing the worker with a known limitation under the PWFA to use that program is an undue hardship. Finally, employers in this situation should remember that if there are others to whom the benefit is extended, the *Young v. United Parcel Serv., Inc.,* Court stated that "[the employer's] reason [for refusing to accommodate a pregnant employee] normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those . . . whom the employer accommodates."[179] Thus, if the undue hardship defense of the employer under the PWFA is based solely on cost or convenience, that defense could, under certain fact patterns, lead to liability under Title VII.

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[178] 42 U.S.C. 2000e(k).

[179] *Young*, 575 U.S. at 229.

42 U.S.C. 2000gg-5(a)(2) makes clear that an employer-sponsored health plan is not required under the PWFA to pay for or cover any item, procedure, or treatment and that the PWFA does not affect any right or remedy available under any other Federal, State, or local law with respect to any such payment or coverage requirement. For example, nothing in the PWFA requires or forbids an employer to pay for health insurance benefits for an abortion. The proposed regulation, at § 1636.6, reiterates the statutory provision regarding such coverage.

1636.7(b) Rule of Construction

42 U.S.C. 2000gg-5(b) provides a "[r]ule of construction"[180] stating that the law is "subject to the applicability to religious employment" set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1(a). The relevant portion of section 702(a) provides that "[Title VII] shall 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."[181]

The proposed regulation reiterates the PWFA's statutory language and adds that nothing in the text of the proposed rule limits the rights of covered entities under the U.S. Constitution, and that nothing in the proposed rule or 42 U.S.C. 2000gg-5(b) limits the rights of an employee, applicant, or former employee under other civil rights statutes. As with assertions of section 702(a) in Title VII matters, when 42 U.S.C. 2000gg-5(b) is asserted by a respondent employer, the Commission will consider the application of the provision on a case-by-case basis.[182]

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[180] 42 U.S.C. 2000gg-5(b) (heading).

[181] The PWFA makes no mention of section 703(e)(2) of the Civil Rights Act of 1964, which provides a second statutory exemption for religious educational institutions in certain circumstances.

[182] The EEOC's procedures ensure that employers have an opportunity to raise religious defenses and that any religious defense to a charge of discrimination is carefully considered. *See Religious Discrimination Compliance Manual*, *supra* note 145, at 12-I(C)(3) (discussing the "nuanced balancing" required and instructing investigators to "take great care"); 29 CFR 1601 et seq. (setting out the EEOC's charge procedures). The EEOC recognizes employers' valid religious defenses and dismisses charges at the

Given the Commission's obligation to give effect to the remedial purpose of the PWFA and provide examples of how the statute's reasonable accommodation requirement applies in certain circumstances, the Commission is considering whether to provide examples that implicate 42 U.S.C. 2000gg-5(b) and whether to adopt a more detailed rule setting forth a specific interpretation of 42 U.S.C. 2000gg-5(b) that would inform the Commission's case-by-case consideration of whether that provision applies to a particular set of facts. The Commission therefore seeks information on how section 702(a) of Title VII, adopted as a rule of construction in PWFA at 42 U.S.C. 2000gg-5(b), may apply in the context of concrete factual scenarios.[183] Specifically, the Commission invites the public to provide examples of:

(1) What accommodations provided under PWFA, 42 U.S.C. 2000gg-1, may impact a religious organization's employment of individuals of a particular religion, and what accommodations may not impact a religious organization's employment of such individuals;

(2) How accommodations provided under PWFA, 42 U.S.C. 2000gg-1, may affect those individuals' performance of work connected with the religious organization's activities, and when they may not affect those individuals' performance of such work;

(3) When the prohibition on retaliatory or coercive actions in PWFA, 42 U.S.C. 2000gg-2(f), may impact a religious organization's employment of individuals of a particular religion, and when it may not impact a religious organization's employment of such individuals;

(4) When prohibiting retaliatory or coercive actions as described in PWFA, 42 U.S.C. 2000gg-2(f), may affect those individuals' performance of work connected with the religious

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administrative stage accordingly. *See Newsome v. EEOC*, 301 F.3d 227, 229-230 (5th Cir. 2002) (per curiam) (EEOC dismissed a charge where the employer offered evidence it fell under the religious organization exemption). The EEOC has no authority to impose penalties on private employers, *see Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 363 (1977); thus, if the EEOC rejects a private employer's asserted religious defense, the EEOC cannot force the employer to resolve the charge or pay any type of damages. To obtain any type of relief if the EEOC is unsuccessful at obtaining voluntary compliance, the EEOC would have to bring a case in Federal court, where the validity of the employer's religious defense would be determined.

[183] PWFA, 42 U.S.C. 2000gg-5(b).

organization's activities, and when it may not affect those individuals' performance of such work; and

(5) Whether any of the above factual scenarios is expected to arise with such regularity that, to facilitate compliance with this provision, the public would benefit from the Commission providing a more detailed interpretation of PWFA, 42 U.S.C. 2000gg-5(b), that would inform the Commission's case-by-case consideration of whether that provision applies to a particular set of facts. Possible alternatives for a more detailed interpretation of 42 U.S.C. 2000gg-5(b) that the Commission could adopt include: (a) a rule of construction that "allows religious institutions to continue to prefer coreligionists in the pregnancy accommodation context," specifically in connection with accommodations that involve reassignment to a job or to duties for which a religious organization has decided to employ a coreligionist;[184] or (b) a rule that construes the PWFA as not requiring a religious entity to make any accommodation that would conflict with the entity's religion.[185]

The Commission also seeks comments regarding any alternative interpretations of PWFA, 42 U.S.C. 2000gg-5(b), that commenters believe, given their answers to questions 1-5, that the Commission should consider.

The Commission will evaluate the comments it receives using the following framework and considerations.

Ministerial Exception and RFRA

[184] *See* 168 Cong. Rec. H10,527-28 (daily ed. Dec. 23, 2022) (statement of Rep. Jerrold Nadler).

[185] *See* 168 Cong. Rec. S10,063, S10,070 (daily ed. Dec. 22, 2022) (statement of Senator Bill Cassidy that "the title VII religious exemption" addresses the same issue as a rejected amendment to the PWFA from Senator James Lankford, which stated: "This division shall not be construed to require a religious entity described in section 702(a) of the Civil Rights Act of 1964 to make an accommodation that would violate the entity's religion").

Religious entities may have a defense to a PWFA claim under the First Amendment or the Religious Freedom Restoration Act (RFRA).

Under the religion clauses of the First Amendment, a religious organization may, in certain circumstances, select those who will "personify its beliefs," "shape its own faith and mission," or "minister to the faithful."[186] This rule is known as the "ministerial exception" and may provide an affirmative defense to an otherwise cognizable claim under certain anti-discrimination laws, including Title VII[187] and the PWFA. The exception applies to discrimination claims involving the selection, supervision, and removal by a religious institution of employees who perform vital religious duties at the core of the mission of the religious institution.[188] In determining whether the ministerial exception applies to a claim, the Commission applies the Supreme Court's reasoning in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*[189] and *Our Lady of Guadalupe School v. Morrissey-Berru*[190] on a case-by-case basis, including reviewing the factors set out by the Supreme Court.

RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion" even if the burden "results from a rule of general applicability" except when the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[191] Most courts to consider the issue have held

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[186] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188-89 (2012).

[187] *Religious Discrimination Compliance Manual*, *supra* note 145, at 12-I.C.2.

[188] *Id.* at 12-I.C.2 (noting that "unlike the statutory religious organization exemption, the ministerial exception applies regardless of whether the challenged employment decision was for 'religious' reasons").

[189] 565 U.S. at 190-94.

[190] 140 S. Ct. 2049, 2063-69 (2020).

[191] 42 U.S.C. 2000bb-1(a)-(b).

that a RFRA defense does not apply in suits involving only private parties.[192] The Commission carefully considers assertions of a defense under RFRA on a case-by-case basis.[193]

Section 702(a) of the Civil Rights Act of 1964

Entities Considered Religious Organizations

Under section 702(a) of the Civil Rights Act of 1964, an employer that is a "religious corporation, association, educational institution, or society" qualifies for the religious exemption set forth in that provision. This exemption only applies to those organizations whose purpose and character are primarily religious. Courts have articulated different factors to determine whether an entity is a religious organization, including: (1) whether the entity operates for a profit; (2) whether it produces a secular product; (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose; (4) whether it is owned, affiliated with, or financially supported by a formally religious entity such as a church or synagogue; (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees; (6) whether the entity holds itself out to the public as secular or sectarian; (7) whether the entity regularly includes prayer or other forms of worship in its activities; (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution; and (9) whether its membership is made up by coreligionists.[194]

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[192] *See, e.g.*, *Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 736-37 (7th Cir. 2015); *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 409-12 (6th Cir. 2010). The Second Circuit has held otherwise, *Hankins v. Lyght*, 441 F.3d 96, 103-04 (2d Cir. 2006) (holding that an employer could raise RFRA as a defense to an employee's Age Discrimination in Employment Act (ADEA) claim because the ADEA is enforceable both by the EEOC and private litigants), but the court has questioned the correctness of *Hankins* given the text of RFRA, *Rweyemamu v. Cote*, 520 F.3d 198, 203 & n.2 (2d Cir. 2008).

[193] *Religious Discrimination Compliance Manual*, *supra* note 145, at 12-I.C.3 (counseling EEOC investigators to "take great care" in situations involving the First Amendment and RFRA).

[194] *LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217, 226 (3d Cir. 2007); *Religious Discrimination Compliance Manual*, *supra* note 145, at 12-I.C.1.

Courts have recognized that engaging in secular activities does not disqualify an employer from being a "religious organization" within the meaning of section 702(a).[195] Section 702(a) does not distinguish between nonprofit and for-profit status, and Title VII case law has not definitively determined whether a for-profit corporation that satisfies the other factors referenced above can constitute a religious corporation under Title VII.[196] When the religious organization exemption is asserted by a respondent employer, the Commission considers on a case-by-case basis whether an employer is a religious organization, utilizing the factors outlined above; no one factor is dispositive in determining if a covered entity is a religious organization under section 702(a).

Application of Section 702(a) to Sex- and Pregnancy-Based Discrimination and the PWFA

"Religious organizations are subject to the Title VII prohibitions against discrimination on the basis of race, color, sex, and national origin (as well as the anti-discrimination provisions of the other EEO laws such as the ADEA, ADA, and GINA), and they may not engage in related retaliation."[197] Indeed, every U.S. court of appeals to have considered the question has held that

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[195] *See, e.g.*, *LeBoon*, 503 F.3d at 229 (holding that a Jewish community center was a religious organization under Title VII, despite engaging in secular activities such as secular lectures and instruction with no religious content, employing overwhelmingly Gentile employees, and failing to ban non-kosher foods).

[196] *Religious Discrimination Compliance Manual*, *supra* note 145, at 12-I.C.1; *see LeBoon*, 503 F.3d at 229 (stating that "the religious organization exemption would not extend to an enterprise involved in a wholly secular and for-profit activity"); *see also EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619 (9th Cir. 1988) (holding that evidence the company was for profit, produced a secular product, was not affiliated with a church, and did not mention a religious purpose in its formation documents, indicated that the business was not "primarily religious" and therefore did not qualify for the religious organization exemption).

[197] *Religious Discrimination Compliance Manual*, *supra* note 145, at 12-I.C.1 n.65 (citing *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011) (holding that the exemption "does not exempt religious organizations from Title VII's provisions barring discrimination on the basis of race, gender, or national origin"); *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996) (stating that the exemption "does not . . . exempt religious educational institutions with respect to all discrimination"); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 173 (2d Cir. 1993) ("Religious institutions that otherwise qualify as 'employer[s]' are subject to Title VII provisions relating to discrimination based on race, gender and national origin"); *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) ("While the language of § 702 makes clear that religious

section 702(a) does not exempt religious organizations from Title VII's prohibitions against discrimination when an employment decision is based upon race, color, sex, or national origin.[198] However, the Commission has previously stated that a qualified religious organization may argue as a defense that it made the challenged decision on the basis of religion.[199]

The PWFA addresses sex discrimination by making it an unlawful employment practice for a covered entity to deny a reasonable accommodation (absent undue hardship) to a qualified employee with a known limitation related to pregnancy, childbirth, or related medical conditions,[200] and uses the same language as Title VII's definition of sex.[201] Because the PWFA uses the same language as Title VII and, like Title VII, addresses sex discrimination, it is logical that the language in the rule of construction set forth in 42 U.S.C. 2000gg-5(b) of the PWFA should be interpreted the same as the Title VII language. The Title VII language does not categorically exempt religious organizations from making reasonable accommodations to the known limitations of employees under the PWFA.

Additional Considerations

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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."); *cf. Garcia v. Salvation Army*, 918 F.3d 997, 1004-05 (9th Cir. 2019) (holding that Title VII retaliation and hostile work environment claims related to religious discrimination were barred by the religious organization exception, but adjudicating the disability discrimination claim on the merits)).

[198] *Id.* For additional information about the Commission's position on the scope of section 702(a), *see Religious Discrimination Compliance Manual*, *supra* note 145, at 12-I-C.1, nn.67, 69-70.

[199] *See Religious Discrimination Compliance Manual*, *supra* note 145, at 12-I-C.1; *but see* Rescission of Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption Rule, 88 Fed. Reg. 12842, 12854 (Mar. 1, 2023) ("In OFCCP's view, however, the cases cited in the EEOC's 2021 Compliance Manual do not support the proposition that asserting such a defense exempts the organization from the Title VII prohibitions against discrimination on the basis of race, color, sex, and national origin.").

[200] 42 U.S.C. 2000gg-1(1); *see, e.g.*, 42 U.S.C. 12112(b)(5)(A) (listing the denial of reasonable accommodations under the ADA as a type of discrimination).

[201] 42 U.S.C. 2000gg(4); *see* 42 U.S.C. 2000e(k).

The Commission's review of the comments regarding this provision also will be informed by the fact that individuals may bring claims under both Title VII and the PWFA; the legislative history of the PWFA, which is different from that of Title VII; and possible decisions by the courts of appeals in pending cases.[202]

Section 1636.8 Severability

The PWFA at 42 U.S.C. 2000gg-6 contains a severability provision that allows for parts of the statute to continue to be applicable even if other parts are held invalid as to particular persons or held unconstitutional. The proposed regulation repeats the statutory provision and also addresses the Commission's intent regarding the severability of the Commission's proposed regulation.

Following Congress's rule for the statute, in places where the proposed regulation uses the same language as the statute, if any of those identical proposed regulatory provisions, or the application of those provisions to particular persons or circumstances, is held invalid or found to be unconstitutional, the remainder of the regulation and the application of that provision of the regulation to other persons or circumstances shall not be affected. For example, if § 1636.4(b) of the regulation is held to be invalid or unconstitutional, it is the intent of the Commission that the remainder of the regulation shall not be affected.

In other places, where the proposed regulation provides additional guidance to carry out the PWFA, including examples of reasonable accommodations, following Congress's intent regarding the severability of the provisions of the statute, it is the Commission's intent that if any

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[202] *E.g.*, *Billard v. Charlotte Cath. High Sch.*, No. 3:17-cv-00011, 2021 WL 4037431 (W.D.N.C. Sept. 3, 2021) (rejecting a Catholic school's argument that it was exempt from the plaintiff's sex-based discrimination claims under Title VII's religious exemption provisions), *appeal filed* (4th Cir. Apr. 25, 2022); *Garrick v. Moody Bible Inst.*, 494 F. Supp. 3d 570, 576-77 (N.D. Ill. 2020) (rejecting religious educational institution's argument that it was exempt, under section 702(a), from the plaintiff's sex discrimination and retaliation claims where the plaintiff alleged that her employer's asserted "religious justification [for firing her was] a *pretext* for gender discrimination") (emphasis in original), *appeal filed* (7th Cir. Sept. 14, 2021).

of those proposed regulatory provisions or the application of those provisions to particular persons or circumstances is held invalid or found to be unconstitutional, the remainder of the regulation and the application of that provision of the regulation to other persons or circumstances shall not be affected. For example, if § 1636.3(j)(4) is held to be invalid or unconstitutional, it is the Commission's intent that the remainder of the regulation shall not be affected.

Consolidated List of NPRM Directed Questions

The Commission encourages the public to comment on the proposed rule in general. In addition, the Commission specifically seeks comment on the following topics:

1. Section 1636.3(d): Definition of "Communicated to the Employer"
   The Commission seeks comment on whether the definition of whom the employee or applicant may communicate with to start the reasonable accommodation process is appropriate, or whether it should be expanded or limited with the understanding that the process should not be burdensome for the worker.

2. Section 1636.3(f)(2)(i) - (iii): Definitions of "Temporary," "In the Near Future," and "The Inability to Perform the Essential Function Can be Reasonably Accommodated"
   The Commission seeks comment regarding the proposed definitions of the terms from 42 U.S.C. 2000gg(6)(A)-(C) ("temporary," "in the near future," and "the inability to perform the essential function can be reasonably accommodated"), including: a) whether the definition of "in the near future" post-pregnancy should be one year rather than generally forty weeks; b) whether periods of temporary suspension of an essential function during pregnancy and post-pregnancy should be combined, and, if so, how should that be done, and what rule should be adopted to ensure that a pregnant worker is not required to predict what limitations they will experience after pregnancy given that a pregnant worker will not generally be able to do so; and c) whether there are alternative approaches that would more effectively ensure that workers are able to seek the accommodations they need while limiting the burden on covered entities.

3. Section 1636.3(g): Definition of "Essential Functions"
   The Commission seeks comment on whether there are additional factors that should be considered in determining whether a function is essential for purposes of the PWFA. For example, given that many, if not all, known limitations under the PWFA will be temporary, should the definition of "essential function" under the PWFA consider whether the function is essential to be performed by the worker in the limited time for which an accommodation will be needed.

4. Section 1636.3(h): Ensuring that Workers are not Penalized for Using Reasonable Accommodations
   The Commission seeks comment on its explanation ensuring that workers are not penalized for using reasonable accommodations, whether there are other situations where this may apply, and whether examples would be helpful to illustrate this point.

5. Section 1636.3(i): Reasonable Accommodation Examples
   Throughout the preamble, the Commission provides examples of reasonable accommodations and related analysis. The Commission seeks comment on whether more examples would be helpful and, if so, the types of conditions and accommodations that should be the focus of the additional examples.

6. Section 1636.3(i) Reasonable Accommodation Examples
   The Commission seeks comment on whether there are examples or other information that should be included to account for situations in which a worker who already has a reasonable accommodation for an existing disability (1) develops a known limitation and needs new accommodations or modifications to their existing reasonable accommodations or (2) needs to ensure the continuation of their disability-related reasonable accommodations if the worker is moved to another position or given different duties as part of the reasonable accommodation for a known limitation. Further, the Commission seeks comment on ways to ensure that in circumstances described in this question, the respective accommodations can be provided in a timely and coordinated way.

7. Section 1636.3(j)(4): Predictable Assessments of Undue Hardship
   The Commission seeks comment on whether the adoption of the predictable assessment approach facilitates compliance with the PWFA by identifying some of the accommodations most commonly requested by workers due to pregnancy that are simple, inexpensive, and easily available. The Commission further seeks comment on whether different, fewer, or additional types of accommodations should be included in the "predictable assessment" category and whether the category should include predictable assessments for childbirth and/or related medical conditions.

8. Section 1636.3(l): Documentation
   A. The Commission seeks comment on its proposed approach to supporting documentation, including: (1) whether this approach strikes the correct balance between what an employee or applicant can provide and the interests of the covered entity; (2) whether it is always reasonable under the circumstances for covered entities to require confirmation of a pregnancy beyond self-attestation when the pregnancy is not obvious; (3) if allowed, whether the confirmation of a non-obvious pregnancy should be limited to less invasive methods, such as the confirmation of a pregnancy through a urine test; (4) the ability of employees or applicants to obtain relevant information from a health care provider, particularly early in pregnancy; and (5) whether there are other common limitations that occur early in pregnancy, such as fatigue or morning sickness, for which an employer should not be permitted to require documentation beyond self-attestation.
   B. Section 1636.3(l)(3): Non-Exhaustive List of Health Care Providers
      The Commission seeks comment on whether other types of health care providers should be included in the non-exhaustive list in the regulation.
   C. Section 1636.3(l)(3): Appropriate Health Care Provider to Provide Documentation
      The Commission seeks comment on whether there are situations in which an employer should be permitted to require an employee seeking a reasonable accommodation to be examined by a health care provider chosen by the employer; what limits that should be placed on the employer or the health care provider; and what effect allowing such an examination may have on the willingness of workers to request accommodations under the PWFA.

9. Section 1636.4(1): Choosing Between Accommodations
   The Commission seeks comment on whether it should include language in the rule explaining that an employer may not unreasonably select an accommodation that negatively effects an employee's or applicant's employment opportunities or terms and conditions of employment when another available accommodation would not do so or whether the protections in 42 U.S.C. 2000gg-1(1) and (5) and 2000gg-2(f) alone are sufficiently clear in this regard.

10. Section 1636.4(b): Requiring Employee to Accept an Accommodation
    The Commission seeks comment on whether there are other factual scenarios that would violate this provision and whether additional examples would be helpful.

11. Section 1636.4(e): Adverse Action on Account of Requesting or Using a Reasonable Accommodation
    The Commission seeks comment on whether there are other factual scenarios that would violate this provision and whether additional examples would be helpful.

12. Section 1636.7(b): Rule of Construction
    The Commission invites the public to provide examples of:
    A. What accommodations provided under PWFA, 42 U.S.C. 2000gg-1 may impact a religious organization's employment of individuals of a particular religion, and what accommodations may not impact a religious organization's employment of such individuals;
    B. How accommodations provided under PWFA, 42 U.S.C. 2000gg-1 may affect those individuals' performance of work connected with the religious organization's activities, and when they may not affect those individuals' performance of such work;
    C. When the prohibition on retaliatory or coercive actions in PWFA, 42 U.S.C. 2000gg-2(f) may impact a religious organization's employment of individuals of a particular religion, and when it may not impact a religious organization's employment of such individuals;
    D. When prohibiting retaliatory or coercive actions as described in PWFA, 42 U.S.C. 2000gg-2(f) may affect those individuals' performance of work connected with the religious organization's activities, and when it may not affect those individuals' performance of such work.
    E. The Commission also seeks comment regarding whether any of the above factual scenarios are expected to arise with such regularity that, to facilitate compliance with this provision, the public would benefit from a more detailed rule by the Commission than the case-by-case approach proposed and whether there are alternative interpretations of 42 U.S.C. 2000gg-5(b) of the PWFA that commenters believe, given their answers to questions A-D, that the Commission should consider.

13. Economic Analysis
    A. The Commission has identified five primary benefits of the proposed rule and underlying statute. The Commission seeks comment regarding these and any other benefits to individuals who may be affected by the accommodations and protections set forth in the proposed rule and the PWFA, or who may have been affected by a lack of such accommodations and protections in the past, including qualitative or quantitative research and anecdotal evidence.
    B. The Commission seeks comment regarding whether the health benefits that are expected to result from the PWFA and its implementing regulations are quantifiable; in particular, the Commission seeks comments regarding any existing data specifying

how often pregnancy-related health problems may be attributed to the unavailability of work accommodations and the resulting cost of such problems.

C. The Commission seeks comment regarding the ways in which the proposed rule and the PWFA enhance human dignity, including qualitative or quantitative research and anecdotal evidence addressing this benefit.
D. The Commission seeks comment regarding any existing data quantifying the proportion of pregnant workers who need workplace accommodations.
E. The Commission seeks comment on whether the annual cost of providing non-zero cost accommodations should be calculated based on durable goods with a useful life of five years.
F. The Commission seeks comment regarding any existing data quantifying the average cost of pregnancy-related accommodations.
G. The Commission seeks comment on whether 90 minutes accurately captures the amount of time compliance activities will take for a covered entity in States that do not already have laws substantially similar to the PWFA and for the Federal Government, and whether 30 minutes accurately captures the amount of time compliance activities will take for a covered entity in States that have existing laws similar to the PWFA.
H. The Commission invites members of the public to comment on any aspect of this IRIA, and to submit to the Commission any data that would further inform the Commission's analysis.
I. The Commission seeks comment regarding its analysis and conclusion that the regulation will not have a significant economic impact on small entities; in particular, the Commission seeks comment regarding any existing data quantifying impacts on small entities.
J. The Commission has attempted to draft this NPRM in plain language. The Commission invites comment on any aspect of this NPRM that does not meet this standard.

Executive Orders 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 14094 (Modernizing Regulatory Review)

I. Introduction

Under Executive Order (E.O.) 12866, the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) determines whether a regulatory action is significant.[203] Section 3(f) of E.O. 12866, as amended by E.O. 14094, defines a "significant regulatory action" as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more (adjusted every three years by the Administrator of OIRA for changes in gross domestic product); or adversely affect in a material

[203] 58 FR 51735, 51737-8 (Oct. 4, 1993), as amended by Executive Order (E.O.) 14094, 88 FR 21879 (Apr. 11, 2023).

way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the E.O.[204]

Executive Orders 12866 and 13563 direct agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society; that it is consistent with achieving the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits.[205] E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.[206]

II. Summary

Based on our estimates, OIRA has determined this rulemaking is significant per E.O. 12866 section 3(f)(1), as amended by E.O. 14094. Therefore, the Commission has completed an Initial Regulatory Impact Analysis (IRIA) as required under E.O. 12866 and E.O. 13563, as amended by E.O. 14094.

As detailed in the Analysis section below, the proposed rule and underlying statute are expected to provide numerous unquantifiable benefits to qualified employees and applicants with

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[204] 58 FR at 51738, as amended by E.O. 14094, 88 FR at 21879.

[205] 76 FR 3821 (Jan. 21, 2011).

[206] *Id.*

known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, especially in States that currently do not have laws substantially similar to the PWFA. It will also benefit covered entities and the U.S. economy and society as a whole. These unquantifiable benefits include improved maternal and infant health; improved economic security for pregnant workers; increased equity, human dignity, and fairness; improved clarity of enforcement standards; and efficiencies in litigation.

The quantitative section in the analysis below provides estimates of the two main expected costs associated with the proposed rule and underlying statute: (a) annual costs associated with providing reasonable accommodations to qualified applicants and employees with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions by employers in States that do not currently have such a requirement, and (b) one-time administrative costs for covered entities, which include becoming familiar with the rule, posting new equal employment opportunity posters,[207] and updating EEO policies and handbooks. The Commission expresses the quantifiable impacts in 2022 dollars and uses discount rates of 3 and 7 percent, pursuant to OMB Circular A-4.

The analysis concludes that approximately 49.4 percent of the reasonable accommodations that will be required by the rule and underlying statute will have no cost to covered entities, and that the average annual cost for the remaining 50.6 percent of such accommodations is approximately $60.00 per year per accommodation. Taking into account that many entities covered by the PWFA are already required to provide such accommodations under State and local laws, the total impact on the U.S. economy to provide reasonable accommodations under the rule and underlying statute is estimated to be between $7.1 million and $21.2 million per year.

[207] The Commission posted an updated poster on its website (https://www.eeoc.gov/poster) prior concurrent with the PWFA's effective date of June 27, 2023.

The estimated one-time costs associated with administrative tasks is quite low on a per-establishment basis—between $56.76 and $170.27, depending on the State. Despite the low per-establishment cost, the proposed rule is a "significant regulatory action" under section 3(f)(1) of E.O. 12866, as amended by E.O. 14094, because the number of regulated entities—hence the number of entities expected to incur one-time administrative costs—is extremely large (including all public and private employers with 15 or more employees and the Federal Government). As a result, the Commission has concluded that the overall cost to the U.S. economy will be in excess of $200 million.[208] Of course, this does not take into account the previous cost of gender inequality in the labor market and the fact that PWFA will improve gender equality and thus have a positive effect on the economy.

III. Preliminary Economic Analysis of Impacts

A. The Need for Regulatory Action

The PWFA and the proposed regulation respond to the previously limited Federal legal protections that provide accommodations for workers affected by pregnancy, childbirth, or related medical conditions. Although Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. (as amended by the Pregnancy Discrimination Act (PDA)) (Title VII) provided some protections for workers affected by pregnancy, childbirth or related medical conditions, court decisions regarding the ability of workers affected by pregnancy, childbirth, or related medical conditions to obtain workplace accommodations created "unworkable" standards that did not

[208] H.R. Report No. 117-27, pt.1, at 41 (2021) (the Congressional Budget Office (CBO) did not review the PWFA for intergovernmental or private-sector mandates because "[s]ection 4 of the Unfunded Mandates Reform Act excludes from the application of that act any legislative provision that would establish or enforce statutory rights prohibiting discrimination," and CBO "determined that the bill falls within that exclusion because it would extend protections against discrimination in the workplace based on sex to employees requesting reasonable accommodations for pregnancy, childbirth, or related medical conditions").

adequately protect pregnant workers.[209] Similarly, prior to the PWFA, some pregnant workers could obtain protections under the Americans with Disabilities Act of 1990, 42 U.S.C. 12111 et seq. (ADA), but these were limited.[210] Pregnant workers who could not obtain accommodations risked their economic security which had harmful effects for themselves and their families.[211] Furthermore, the loss of a job can affect a pregnant worker's economic security for decades, as they lose out on "retirement contributions…short term disability benefits, seniority, pensions, social security contributions, life insurance, and more."[212]Additionally, the lack of workplace accommodation can harm the health of the worker and their pregnancy.[213] While numerous States have laws that provide for accommodations for pregnant workers, the lack of a national standard before the passage of the PWFA meant that workers' rights varied depending on the State and that millions of workers were unprotected.[214]

The PWFA at 42 U.S.C. 2000gg-3(a) provides:

> Not later than 1 year after [the date of enactment of the 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 chapter. Such regulations shall provide examples of reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions.

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[209] H.R. Rep. No. 117-27, pt.1, at 14-16 (2021) (describing court rulings under Title VII and the Supreme Court's decision in *Young v. United Parcel Serv., Inc,* 575 U.S. 206 (2015); *see supra* Preamble of Notice of Proposed Rule Making (NPRM).

[210] *Id.* at 19-21 (describing court decisions under the ADA the failed to find coverage for workers with pregnancy-related disabilities).

[211] *Id.* at 22 ("When pregnant workers are not provided reasonable accommodations on the job, they are oftentimes forced to choose between economic security and their health or the health of their babies"); *id*. at 24 (noting that "families increasingly rely on pregnant workers' incomes.").

[212] *Id*. at 25.

[213] *Id.* at 22. ("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"); *id*. (describing how a lack of an accommodation led to a miscarriage for a worker).

[214] *See infra* Table 1 for a calculation of the number of workers who live in states without PWFA-analog laws.

Pursuant to 42 U.S.C. 2000gg-3, the EEOC is issuing this proposed rule following the procedures codified at 5 U.S.C. 553(b).

B. Baseline

The PWFA is a new law that requires covered entities to provide reasonable accommodations to the known limitations related to, arising out of, or affected by pregnancy, childbirth, or related medical conditions of qualified employees. As set out in the NPRM, the PWFA seeks to fill gaps in the Federal and State legal landscape regarding protections for workers affected by pregnancy, childbirth, or related medical conditions.

Workers affected by pregnancy, childbirth, or related medical conditions have certain rights under existing civil rights laws, such as Title VII, the ADA, the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 et seq. (FMLA), and various State and local laws.[215]

Under Title VII, a worker affected by pregnancy, childbirth, or related medical conditions may be able to obtain a workplace modification to allow them to continue to work.[216] Typically courts have only found in favor of such claims if the worker can identify another individual similar in their ability or inability to work who received such an accommodation, or if there is some direct evidence of disparate treatment (such as a biased comment or a policy that, on its face, excludes pregnant workers). However, there may not always be similarly situated employees. For this reason, some pregnant workers have not received simple, common-sense

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[215] For a list of State laws, *see infra* Table 1. In addition, Federal laws regarding Federal funding such as Title IX of the Education Amendments Act of 1972 (20 U.S.C. 1681 et seq.) and the Workforce Innovation and Opportunities Act (29 U.S.C. 3240) provide protection from sex discrimination, including discrimination based on pregnancy, childbirth, or related medical conditions.

[216] As relevant here, Title VII protects workers from discrimination based on pregnancy, childbirth, or related medical "with respect to . . . compensation, terms, conditions., or privileges of employment[] because of such individual's . . . sex." 42 U.S.C. 2000e-2(a)(1). Discrimination because of sex includes discrimination based on "pregnancy, childbirth, or related medical conditions." 42 U.S.C. 2000e(k). Title VII also provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." *Id.*

accommodations, such as a stool for a cashier[217] or bathroom breaks for a preschool teacher.[218] And even when the pregnant worker can identify other workers who are similar in their ability or inability to work, some courts have still not found a Title VII violation.[219]

Under the ADA, certain workers affected by pregnancy, childbirth, or related medical conditions may have the right to accommodations if they show that they have an ADA disability; this standard does not include pregnancy itself but instead requires the showing of a pregnancy-related disability.[220]

Under the FMLA, covered workers can receive up to 12 weeks of job-protected unpaid leave for, among other things, a serious health condition, the birth of a child, and bonding with a newborn within one year of birth.[221] However, employees must work for an employer with 50 or more employees within 75 miles of their worksite and meet certain tenure requirements in order to be entitled to FMLA leave.[222] Survey data from 2018 show that only 56 percent of employees are eligible for FMLA leave.[223] Further, the FMLA only provides unpaid leave—it does not require reasonable accommodations that would allow workers to stay on the job and continue to be paid.

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[217] *See, e.g.*, *Portillo v. IL Creations Inc.*, 2019 WL 1440129, at *5 (D.D.C. Mar. 31, 2019).

[218] *See, e.g.*, *Wadley v. Kiddie Acad. Int'l, Inc.*, 2018 WL 3035785, at *4 (E.D. Pa. June 19, 2018).

[219] *See, e.g.*, *EEOC v. Wal-mart Stores East, L.P.*, 46 F.4th 587, 597-99 (7th Cir. 2022) (concluding that the employer did not engage in discrimination when it failed to accommodate pregnant workers with light duty assignments, even though the employer provided light duty assignments for workers who were injured on the job); *but see, e.g.*, *Legg v. Ulster Cnty.*, 820 F.3d 67, 69, 75-77 (2d Cir. 2016) (vacating judgment for the employer where officers injured on the job were entitled to light duty but pregnant workers were not).

[220] 42 U.S.C. 12102(2) & (4); 29 CFR part 1630 app. 1630(h); EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* II (2015), https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues [hereinafter *Enforcement Guidance on Pregnancy Discrimination*].

[221] 29 U.S.C. 2612(a)(1); 29 CFR 825.120.

[222] 29 U.S.C. 2611(2)(A), (B).

[223] *Brown et al.*, *supra* note 14.

As set out in Table 1, thirty States currently have laws similar to the PWFA that provide for accommodations for pregnant workers. In most States, again as set out in Table 1, the State laws cover the same employers that are covered by the PWFA. Workers in the remainder of the States and Federal Government workers have the rights set out in the Federal laws described above and, until the passage of the PWFA, did not have the protections of a law like the PWFA.

C. Nonquantifiable Benefits

The proposed rule and the underlying statute create many important benefits that stem from "values that are difficult or impossible to quantify," including "equity, human dignity, [and] fairness."[224] The Commission has identified five primary benefits of the proposed rule and underlying statute. The Commission seeks comment regarding these and any other benefits to individuals who may be affected by the accommodations and protections set forth in the proposed rule and the PWFA, or who may have been affected by a lack of such accommodations and protections in the past, including qualitative or quantitative research and anecdotal evidence.

1. Improvements in Health for Pregnant Workers and Their Babies

Congress enacted the PWFA in large part to improve maternal and infant health outcomes. The legislative history emphasizes that the new law was needed because "[n]o worker should have to choose between their health, the health of their pregnancy, and the ability to earn a living."[225] Congress further concluded that "providing reasonable accommodations to pregnant workers is critical to the health of women and their children."[226] The need to improve the health of health outcome surrounding pregnancy is critical—as a recent report noted, "women in our country are dying at a higher rate from pregnancy-related causes than in any other developed

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[224] 76 FR 3821, *supra* note 205.

[225] H.R. Rep. No. 117-27, pt.1, at 11.

[226] *Id.* at 11, 22.

nation."[227] Additionally, "Black women are more than three times as likely as White women to die from pregnancy-related causes, while American Indian/Alaska Native [women] are more than twice as likely" [228] and a recent study shows that negative health outcomes during pregnancy disproportionately affect Black women compared to White women regardless of wealth. [229]

Some studies have shown increased risk of miscarriage,[230] preterm birth,[231] low birth weight, urinary tract infections, fainting, and other health problems for pregnant workers because of workplace conditions.[232] Several witnesses submitted personal stories to Congress connecting

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[227] White House, *White House Blueprint for Addressing the Maternal Health Crisis* 1 (2022), https://www.whitehouse.gov/wp-content/uploads/2022/06/Maternal-Health-Blueprint.pdf.

[228] *Id.* at 15.

[229] Kate Kennedy-Moulton et al., *Maternal and Infant Health Inequality: New Evidence from Linked Administrative Data* 5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30,693, 2022), https://www.nber.org/system/files/working_papers/w30693/w30693.pdf (finding that maternal and infant health vary with income, but infant and maternal health in Black families at the top of the income distribution is similar to or worse than that of White families at the bottom of the income distribution).

[230] H.R. Rep. No. 117-27, pt.1, at 22; Am. Coll. of Obstetricians & Gynecologists, Comm. Opinion No. 733, *Employment Considerations During Pregnancy and the Postpartum Period* e119 (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 [hereinafter *ACOG Committee Opinion*] (discussing studies that showed an increased risk of miscarriage or stillbirth associated with night work, working more than 40 hours a week, or extensive lifting, but noting that "[i]t is difficult to draw definitive conclusions from these studies.").

[231] H.R. Rep. No. 117-27, pt.1, at 22; *ACOG Committee Opinion*, *supra* note 230, at e119-20 (discussing studies that found a "slight to modest risked increase" of preterm birth with some work conditions, but also noting that it is hard to know whether these results were due to "bias and confounding or to an actual effect").

[232] H.R. Rep. No. 117-27, pt.1, at 22; *see also* Kaylee J. Hackney et al., *Examining the Effects of Perceived Pregnancy Discrimination on Mother and Baby Health*, 106 J. Applied Psych. 774, 781 (2021) [hereinafter *Hackney Study*] (describing two studies that demonstrated that perceived pregnancy discrimination serves as a threat to women's resources which leads to increased postpartum depressive symptoms for mothers, decreased birth weight and gestational age, and increased doctors' visits for their babies, via mothers' stress); Renee Mehra et al., "*Oh Gosh, Why Go? 'Cause They Are Going to Look At Me and Not Hire": Intersectional Experiences of Black Women Navigating Employment During Pregnancy and Parenting*, 23:17 BMC Pregnancy & Childbirth 2 (2023), https://bmcpregnancychildbirth.biomedcentral.com/articles/10.1186/s12884-022-05268-9 [hereinafter *Mehra Study*] (describing studies that found that policies that protect women in the workplace during pregnancy and the postpartum period are important for maternal and infant health outcomes); H. M. Salihu et al., *Pregnancy In the Workplace*, 62 Occupational Med. 88, 94 (2012), https://academic.oup.com/occmed/article/62/2/88/1480061?login=false [hereinafter *Salihu Study*] (finding

the lack of accommodations at work and dangers to the health of the employee or their pregnancy.[233] Further, both the legislative history of the PWFA and surveys of pregnant workers demonstrate that denial of reasonable accommodations at work may negatively impact not only the physical health of pregnant workers and their families, but also their mental health by contributing to emotional stress, anxiety, and fear.[234]

Moreover, workers who do not receive needed accommodations, and who quit their jobs as a result in order to maintain a healthy pregnancy, often lose employer-sponsored health insurance.[235] In a letter to Congress, a group of leading health care practitioner organizations explained that when a pregnant worker loses health insurance, "the impact on both mother and baby may be long-lasting and severe. One of the main predictors of a healthy pregnancy is early

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that while physically demanding jobs do not pose a substantial risk to fetal health, "[a] moderate temporary reduction in job physicality may promote improved maternal and foetal health"); *ACOG Committee Opinion*, *supra* note 230, at e117 (discussing modifications for physical work and how they could help the health of pregnant workers).

[233] *See, e.g.*, *Long Over Due*, *supra* note 2 (statement from the International Brotherhood of Teamsters) (discussing attached *New York Times* article concerning workers' miscarriages at a warehouse in Tennessee after the workers had been denied light duty); *id.* at 41 (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance) (describing worker denied accommodation of access to water who ended up in the ER with severe dehydration), *id.* at 94 (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance) (presenting testimony about a pregnant worker denied a lifting accommodation who suffered a miscarriage); H.R. Report No. 117-27, pt.1, at 23 (statement of Rep. Jahana Hayes) (describing how the denial of bathroom breaks during her pregnancy "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").

[234] *Long Over Due*, *supra* note 2, at 92 (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance) (describing clients "who have suffered profound emotional stress" when they were forced out of jobs due to lack of accommodations); *id.* at 14-15 (statement of Kimberlie Michelle Durham) (testifying that her pregnancy was filled with anxiety and fear due to denial of accommodation); *see also Mehra Study*, *supra* note 232, at 7-8 (describing the experience of pregnant women experiencing or planning around pregnancy discrimination and bias and lack of family-friendly workplace policies throughout their reproductive years in a way that caused immense financial burden and stress); *id.* at 11 (reporting that "Black people with the capacity for pregnancy experienced pregnancy discrimination and bias which was harmful to their . . . mental health"); *Hackney Study*, *supra* note 232, at 780 (stating that women who perceived pregnancy discrimination at work were more likely to suffer from postpartum depressive symptoms); *Salihu Study*, *supra* note 232, at 95 (noting that the impact of work culture can have profound implications for maternal psychosocial health).

[235] *Fighting for Fairness, supra* note 2 (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance) (describing workers who lose their income and, as a result, lose their health insurance, forcing them to delay or avoid critical pre- or post-natal care).

and consistent prenatal care. Loss of employment and health benefits impact family resources, threatening the ability to access vital health care when a woman needs it the most."[236]

Finally, by helping pregnant workers avoid health risks to themselves and their pregnancies, the PWFA will help contribute to improved maternal and child health and lower health care costs nationally.

The Commission did not attempt to quantify the health benefits that are expected to result from the PWFA and its implementing regulations, however, because it is unaware of any data specifying precisely how often pregnancy-related health problems may be attributed specifically to the unavailability of work accommodations and the resulting cost of such problems. The Commission seeks comment regarding whether the health benefits that are expected to result from the PWFA and its implementing regulations are quantifiable; in particular, the Commission seeks comments regarding any existing data specifying how often pregnancy-related health problems may be attributed to the unavailability of work accommodations and the resulting cost of such problems.

2. Improvements in Pregnant Workers' Economic Security

Access to reasonable accommodations at work will help workers with limitations related to pregnancy, childbirth, or related medical conditions to stay in the workforce, maintain their income, and provide for themselves and their families.[237] Based on anecdotal evidence, unavailability of accommodations often forces workers to take unpaid leave, quit their jobs, or

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[236] *Long Over Due*, *supra* note 2, at 142 (including a letter from professional medical associations, including the American Academy of Family Physicians, the American Academy of Pediatrics, the American Public Health Association, the American College of Nurse-Midwives, the American College of Obstetricians and Gynecologists, the Association of Women's Health, Obstetric and Neonatal Nurses, the National Alliance to Advance Adolescent Health, and Physicians for Reproductive Health); *Fighting for Fairness*, *supra* note 235, at 30-31 (statement of Dina Bakst, Co-Founder and Co-President, A Better Balance) (discussing Julia Barton, a pregnant corrections officer who quit her job because she did not receive an accommodation and therefore lost her health insurance).

[237] The Commission is not able to monetize or quantify this benefit because, although anecdotal evidence establishes that lack of accommodation has led workers to quit their jobs, there are no data on how frequently this happens.

seek jobs that are potentially less lucrative, threatening their economic security.[238] The lack of an accommodation may also have far-reaching economic effects. As the House Committee on Education and Labor Report for the PWFA stated, "[p]regnant 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."[239] Provision of reasonable accommodations may also have economic benefits to society as a whole by keeping people attached to the labor force and lowering the likelihood of some workers being compelled to seek public assistance after they are forced to quit their jobs.[240]

Providing needed workplace accommodations to qualified applicants and employees with limitations related to, arising out of, or affected by pregnancy, childbirth, or related medical conditions is another step toward ensuring women's continued and increased participation in the labor force.[241] Women's increasing labor force participation was one of the most notable labor market developments in the United States in the second half of the 20th century, helping drive

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[238] *Long Over Due*, *supra* note 2, at 15 (statement of Kimberlie Michelle Durham) (describing losing her job because she needed an accommodation and explaining that her new job did not provide overtime or benefits); *id.* at 150-53 (letter from the ACLU) (describing the ACLU's legal representation of pregnant workers, many of whom were forced to take unpaid leave or lost their jobs).

[239] *See* H.R. Rep. No. 117-27, pt.1, at 21-22, 25.

[240] *See Long Over Due*, *supra* note 2, at 15 (statement of Kimberlie Michelle Durham) (describing when she was forced to go on unpaid leave after she asked for an accommodation and, as a consequence, was unable to find new employment, moved back in with family, and was unable to find a job with benefits comparable to those offered by her EMT job, including health insurance; her child is on Medicaid); *id.* at 41 (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance) (discussing a pregnant cashier who needed lifting restriction but was sent home and, without income, became homeless); *id.* at 46 (statement of Dina Bakst) (discussing an armored truck company employee who requested to avoid heavy lifting at the end of pregnancy but was instead sent home; as a result, she lost health insurance and needed to rely on public benefits such as food stamps); *id.* at 70 (statement of Dina Bakst) (presenting stories from State legislatures that describe savings to government assistance programs stemming from the passage of PWFA-like laws in their states).

[241] *Id.* at 25 (statement of Iris Wilbur, Vice President of Government Affairs & Public Policy, Greater Louisville, Inc., The Metro Chamber of Commerce) ("[T]he Act will help boost our country's workforce participation rate among women. In states like Kentucky, which ranks 44th in the nation for female labor participation, we know one contributor to this abysmal statistic is a pregnant worker who is forced out or quits a job due to a lack of reasonable workplace accommodations.").

economic growth.[242] In 2022, 57 percent of all women participated in the labor force.[243] This is significantly higher than the 34 percent participation rate in 1950.[244] Among other things, women's participation in the labor force is heavily impacted by pregnancy and the demands associated with raising young children.[245] The passage of the Pregnancy Discrimination Act, 42 U.S.C. 2000e et seq. (PDA) in 1978, which prohibits employment discrimination based on pregnancy, childbirth, or related medical conditions and requires that women affected by pregnancy, childbirth, or related medical conditions be treated the same as other individuals similar in their ability or inability to work, increased the participation rate of pregnant women in the labor market.[246] As of 2021, over 66 percent of women in the United States who gave birth in the prior year were in the labor force,[247] up from about 57 percent in 2006.[248] Moreover, an increasing number of pregnant workers are working later into their pregnancies—over 65 percent of first-time mothers who worked during their pregnancy worked into the last month before their child's birth.[249] By requiring reasonable accommodations for workers with conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, the PWFA and

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[242] *Women In the Labor Force: A Databook*, BLS Reports, Bureau of Lab. Stat. (Mar. 2022), https://www.bls.gov/opub/reports/womens-databook/2021/home.htm).

[243] *Employment Status of the Civilian Noninstitutional Population by Age, Sex, and Race*, U.S. Bureau of Lab. Stat. (Jan. 25, 2023), https://www.bls.gov/cps/cpsaat03.htm.

[244] *Labor Force Participation Rate – Women*, Fed. Rsrv. Bank of St. Louis (June 9, 2023), https://fred.stlouisfed.org/series/LNS11300002.

[245] Catherine Doren, *Is Two Too Many? Parity and Mothers' Labor Force Exit*, 81 J. of Marriage & Fam. 327, 341 (April 2019) ("transition to motherhood is the primary turning point in women's labor force participation").

[246] Sankar Mukhopadhyay, *The Effects of the 1978 Pregnancy Discrimination Act on Female Labor Supply*, 53 Int'l Econ. Rev. 1133 (2012).

[247] *Births in the Past Year and Labor Force Participation*, *supra* note 23, (select "Historical Table 5"); *see also IPUMS Data*, *supra* note 23. (Data are available by request to registered IPUMS USA users; please contact ipums@umn.edu.

[248] *Births in the Past Year and Labor Force Participation*, *supra* note 23, (select "Historical Table 5").

[249] *Maternity Leave and Employment Patterns of First-Time Mothers*, *supra* note 25.

this proposed rule will further support and enhance women's labor force participation, and, in turn, grow the U.S. economy.

3. Non-Discrimination and Other Intrinsic Benefits

Providing accommodations to workers with limitations related to, arising out of, or affected by pregnancy, childbirth, or related medical conditions also has important implications for equity, human dignity, and fairness.

First, by allowing pregnant workers to care for their health and the health of their pregnancies, the PWFA enhances human dignity. Workers will be able to prioritize their health and the health of their future children, giving their children the best possible start in life while also protecting their economic security. The Commission seeks comment regarding the ways in which the proposed rule and the PWFA enhance human dignity, including qualitative or quantitative research and anecdotal evidence addressing this benefit.

Second, the PWFA will diminish the incidence of sex discrimination against qualified workers, enable them to reach their full potential, reduce exclusion, and promote self-respect. The statute and the proposed regulations provide for reasonable accommodations to workers who would otherwise not receive them and thus could be forced to leave their jobs or the workforce because of their pregnancy, childbirth, or related medical conditions. Next, the statute and the proposed regulation require a covered entity to engage an employee in an interactive process, rather than simply assigning the employee an accommodation, which combats stereotypes about the capabilities of workers affected by pregnancy, childbirth, or related medical conditions. Finally, the statute and the proposed regulations protect workers against retaliation and coercion for using the protections of the statute. These protections against discrimination promote human dignity and equity by enabling qualified workers to participate or continue to participate in the workforce.[250]

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[250] *See Salihu Study*, *supra* note 232, at 94 (finding that "[w]omen who perceive employers and superiors as supportive are more likely to return to work after childbirth. This reduces the risk to employers

Third, because the PWFA applies to so many covered entities, it will improve equity in the workforce. Currently, workers affected by pregnancy, childbirth, or related medical conditions in higher paying jobs and non-physical jobs are much more likely to be able to control their schedules, take bathroom breaks, eat, drink water, or telework when necessary.[251] These workers may not have to request accommodations from their employers to meet many of their pregnancy-related needs. Workers in low-paid jobs, however, are much less likely to be able to organize their schedules to allow them to take breaks that may be necessary due to pregnancy, childbirth, or related medical conditions.[252] Nearly one-third of Black and Latina workers are in low-paid jobs,[253] the types of jobs that are less likely to currently provide accommodations.[254] Therefore, the PWFA and this proposed rule will improve equity in the workforce by ensuring

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regarding loss in skill and training. Similarly, businesses that plan for and proactively approach pregnancy in the workplace show lower rates of quitting and greater ease of shifting workloads in the event of a pregnancy, which increases productivity and decreases losses"); *Long Over Due*, *supra* note 2, at 15 (testimony of Kimberlie Michelle Durham) ("I wanted to work. I loved my job); *see also Salihu Study*, *supra* note 232, at 93 (describing steps pregnant women take to combat the perception that they are a liability in the workforce and reinforce their role as "professionals"); *Long Over Due*, *supra note* 2, at 41 (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance) (describing a worker who was denied an accommodation but who "desperately wanted to continue working"); *Hackney Study*, *supra* note 232, at 780 (explaining that managers may make incorrect assumptions about what pregnant employees want, such as assuming a reduced workload is beneficial, whereas pregnant workers might find this accommodation demeaning or discriminatory, and noting the importance of managers "hav[ing] an open dialogue with their employees about what types of support [are] needed and desired").

[251] *Long Over Due*, *supra* note 2, at 83 (statement of Rep. Barbara Lee) (describing her own pregnancy, which required bedrest, and contrasting her experience with the experience of workers in less flexible jobs).

[252] *Fighting for Fairness*, *supra* note 2235, at 108 (statement of Fatima Goss Graves, President and CEO of the National Women's Law Center) ("[O]ver 40% of full-time workers in low-paid 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.").

[253] *Id.*

[254] *Id.* at 204 (Letter from the National Partnership for Women & Families) (stating that women of color and immigrants are "disproportionately likely to work in jobs and industries where accommodations during pregnancy are not often provided (such as working as home health aides, food service workers, package handlers, and cleaners"); *id.* at 207-08 (Letter from Physicians for Reproductive Choice) (stating that "the absence of legislation like the Pregnant Workers Fairness Act disproportionately impacts pregnant people with low-incomes and migrant workers who are more likely to work in arduous settings. These are the same communities that are also most at risk of experiencing increased maternal mortality.").

that low-paid workers, including Black and Latina workers, who may have a more difficult time securing voluntary accommodations, will have a right to them.

Fourth, providing reasonable accommodations to workers who would otherwise have been denied them yields third-party benefits that include diminishing stereotypes regarding workers who are experiencing pregnancy, childbirth, or related medical conditions;[255] promoting design, availability, and awareness of accommodations that can have benefits for the general public, including non-pregnant workers, and attitudinal benefits;[256] increasing understanding and fairness in the workplace;[257] and creating less discriminatory work environments that benefit workers, employers, and society.[258]

4. Clarity in Enforcement and Efficiencies in Litigation

Congress, in describing the goals of the PWFA, also focused on the clarity that the PWFA would bring to the question of when employers must provide accommodations for limitations related to pregnancy, childbirth, or related medical conditions: "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

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[255] *See Salihu Study*, *supra* note 232, at 93 (describing studies that have "substantiated the pervasiveness of negative perceptions of pregnant women" and the common belief that they serve as a liability in the workplace); *id.* at 94-95 (concluding that the issue of pregnancy in the workplace needs to be addressed proactively with an emphasis on combating stereotypes of pregnant women as incompetent or uncommitted).

[256] *See* Elizabeth F. Emens, *Integrating Accommodation*, 156 U. Pa. L. Rev. 839, 850-59 (2008) (describing a wide range of potential third-party benefits that may arise from workplace accommodations for individuals with disabilities, many of which are also relevant to accommodations for individuals protected by the PWFA).

[257] *See id.* at 883-96 (describing attitudinal third-party benefits that arise when co-workers work with individuals receiving accommodations in the workplace under the ADA, many of which are relevant to accommodations for individuals protected by the PWFA).

[258] *See Long Over Due*, *supra* note 2, at 3 (statement of Rep. Suzanne Bonamici) (describing the PWFA as "an opportunity for Congress to finally fulfill the promise of the Pregnancy Discrimination Act and take an important step towards workplace gender equity," among other benefits).

employers."[259] By creating a national standard, the PWFA also may increase compliance with State laws requiring accommodations for pregnant workers,[260] as coming into compliance with the PWFA may increase employers' knowledge about these laws in general.

Additionally, by clarifying the rules regarding accommodations for pregnant workers, the PWFA and the proposed rule will decrease the need for litigation regarding accommodations under the PWFA. To the extent that litigation remains unavoidable in certain circumstances, the PWFA and the proposed rule are expected to eliminate the need to litigate whether the condition in question is a "disability" under the ADA, and to limit discovery and litigation costs that arise under Title VII regarding determining if there are valid comparators, thus streamlining the issues requiring judicial attention.[261]

5. Benefits for Covered Entities

Providing accommodations needed due to pregnancy, childbirth, or related medical conditions also are likely to provide benefits to covered entities. By providing accommodations to workers affected by pregnancy, childbirth, or related medical conditions and retaining them as employees, employers will save money from having to replace and train a new employee. According to one study, 85 percent of employers that provided accommodations to individuals with disabilities reported that doing so enabled them to retain a valued employee; 53 percent reported an increase in that employee's productivity; 46 percent reported elimination of costs

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[259] H.R. Rep. No. 117-27, pt.1, at 11; *id.* at 31 ("By guaranteeing pregnant workers the right to reasonable accommodations in the workplace, the PWFA could also decrease employers' legal uncertainty."); *see also Long Over Due*, *supra* note 2, at 24 (statement of Iris Wilbur, Vice President of Government Affairs & Public Policy, Greater Louisville, Inc., Metro Chamber of Commerce) ("For our members, uncertainty means dollars. A consistent and predictable legal landscape means a business-friendly environment. 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 their obligations. And now this guidance is especially beneficial for the smaller companies we represent who cannot afford expensive legal advisors.").

[260] *See infra* Table 1 for a list of these laws.

[261] *See* H.R. Report No. 117-27, pt.1, at 14-17 (describing the need to find comparators under Title VII and the difficulties it has caused pregnant workers seeking accommodations); *id.* at 17-21 (describing the protections available for pregnant workers under the ADA and the fact that frequently even pregnancies with severe complications are found by courts not to be "disabilities").

associated with training a new employee; 48 percent reported an increase in that employee's attendance; 33 percent noted that providing the accommodation increased diversity in the company; and 23 percent reported a decrease in workers' compensation or other costs. Employers also noted several indirect benefits: 30 percent noted an increase in company morale, and 21 percent noted an increase in overall company productivity.[262]

D. Costs

1. Covered Entities and Existing Legal Landscape

Entities covered by the PWFA and the proposed regulation include all employers covered by Title VII and the Government Employee Rights Act of 1991, 42 U.S.C. 2000e-16b, 2000e-16c (GERA), including private and public sector employers with at least 15 employees, Federal agencies, employment agencies, and labor organizations.[263]

In addition to the legal protections described earlier in the preamble pertaining to Title VII, the ADA, and the FMLA, there are three other important legal considerations that impact the costs of accommodations under the PWFA and this regulation.

First, 30 States and five localities have laws substantially similar to the PWFA, requiring covered employers to provide reasonable accommodations to pregnant workers. [264] As a result, this proposed rule will impose minimal, if any, additional costs on the covered entities in these States and localities.[265]

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[262] *Costs and Benefits of Accommodation, supra* note 33.

[263] *See* 42 U.S.C. 2000gg(2)(A). The PWFA also applies to employers covered by the Congressional Accountability Act (CAA) of 1995 (42 U.S.C. 2000gg(2)(B)(ii)). The proposed regulation does not apply to employers covered under CAA, as the Commission does not have the authority to enforce the PWFA with respect to employees covered by the CAA

[264] *See infra* Table 1; *see also Employment Protections for Workers Who Are Pregnant or Nursing*, *supra* note 5.

[265] The PWFA analogs in Alaska, North Carolina and Texas only cover certain public employers. The laws in Louisiana and Minnesota apply to employers larger than the PWFA threshold of 15 employees (25 or more employees in Louisiana; 21 or more employees in Minnesota). As explained below, the analysis takes these differences into account.

Second, when it enacted the PWFA, Congress also enacted the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act), which requires employers who are covered by the Fair Labor Standards Act, 29 U.S.C. 201 et seq., (FLSA) to provide reasonable break time for an employee to express breast milk for their nursing child each time such employee has need to express milk for one year after the child's birth. The PUMP Act also requires employers to provide a place to pump at work, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public.[266] As a result, the Commission anticipates that most workers will not need to seek reasonable accommodations regarding a time and place to pump at work under the PWFA because they will already be entitled to these under the PUMP Act.

Third, the Federal Government provides 12 weeks of paid parental leave to eligible Federal employees upon the birth of a new child.[267] As a result, these Federal workers may make fewer requests for leave as a reasonable accommodation under the PWFA as they are already guaranteed a certain amount of paid leave.

2. Estimate of the Number of Reasonable Accommodations that Will Be Provided as a Result of the Proposed Rule and Underlying Statute

As set out in Tables 1 and 2 and explained in detail *infra*, the proposed rule and underlying statute cover approximately 117 million employees of private establishments with 15 or more employees, 18.8 million State and local government employees, and 2.3 million Federal employees. Only a small percentage of these employees are expected to seek and be entitled to accommodations as a result of the proposed rule and underlying statute.

Approximately 52 percent of private sector enterprises with 15 or more employees in the United States (1.4 million establishments), employing about 61.2 million workers (accounting

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[266] U.S. Dep't of Lab., *FLSA Protections to Pump at Work*, https://www.dol.gov/agencies/whd/pump-at-work (last visited Apr. 2, 2023).

[267] Federal Employee Paid Leave Act, Pub. L. No. 116-92 (2019).

for 52 percent of employment in those States) are currently subject to State or local laws that are substantially similar to the PWFA. The enactment of the PWFA and promulgation of the proposed rule, therefore, should not result in additional accommodation-related costs for these employers. Subtracting 61.2 million workers from the total number of covered workers employed by private sector enterprises (117 million) yields a total of approximately 55.5 million employees of private sector establishments who will be covered by the proposed rule and underlying statute, and who are not also covered by State or local laws that are substantially similar to the PWFA. Tables 1 and 2 display each State's share of the total national number of private sector establishments that have 15 or more employees and thus will be subject to the PWFA, and the percentage of workers in the State employed by such establishments. States with laws substantially similar to the PWFA are in Table 1; States without such a law are in Table 2.

Table 1 Share of Employers with 15 or More Employees in States Already Subject to Local Pregnancy Accommodation Laws Similar to the PWFA[268]

State			Share in U.S. Total[269]	
	Statute	Threshold[270]	Establishments	Employment
California	Cal. Gov't Code sec. 12945(a)(3)	5	10.6%	11.6%
Colorado	Colo. Rev. Stat. sec. 24-34-402.3	5	1.9%	1.8%
Connecticut	Conn. Gen. Stat. sec. 46a-60(b)(7)(A)-(K)	3	1.2%	1.2%
Delaware	Del. Code Ann. tit. 19, sec. 711(a)(3)(b)-(f)	4	0.4%	0.3%
District of Columbia	DC Code sec. 32-1231.02	1	0.4%	0.4%
Hawaii	Haw. Code R. sec. 12-46-107.	1	0.4%	0.4%
Illinois	775 Ill. Comp. Stat. 5/2-102(I)-(J)	1	3.9%	4.2%
Kentucky	Ky. Rev. Stat. sec. 344.040	15	1.4%	1.3%

[268] *The Number of Firms and Establishments, Employment, and Annual Payroll by State, Industry, and Enterprise Employment Size: 2020*, Stats. of U.S. Bus. Ann. Datasets by Establishment Indus. (2020), https://www2.census.gov/programs-surveys/susb/tables/2020/us_state_naics_detailedsizes_2020.xlsx [hereinafter *Firms and Establishments Data by State*]. Percentages in the Table reflect filtering by employer size and summing by state.

[269] This number is limited to enterprises with at least 15 employees.

[270] This denotes the minimum number of employees that an employer must have to be covered by the State law.

Louisiana[271]	La. Rev. Stat. sec. 23:341-342	25	1.3%	1.2%
Maine	Me. Rev. Stat. tit. 5, sec. 4572-A	1	0.5%	0.4%
Maryland	Md. Code, State Gov't sec. 20- 609	15	1.9%	1.8%
Massachusetts	Mass. Gen. Laws ch. 151B, sec. 4(1E)(a)	6	2.3%	2.6%
Minnesota[272]	Minn. Stat. sec. 181.939	21	1.7%	2.0%
Nebraska	Neb. Rev. Stat. sec. 48-1102(11), 1102(18)	15	0.7%	0.6%
Nevada	Nev. Rev. Stat. sec. 613.438	15	0.9%	1.0%
New Jersey	N.J. Stat. Ann. sec. 10:5-3.1	1	2.6%	2.8%
New Mexico	N.M. Code R. sec. 9.1.1.7(HH)(2)	4	0.6%	0.5%
New York	N.Y. Exec. Law sec. 292(21-e) and (21-f), 296(3)	4	5.2%	6.3%
North Dakota	N.D. Cent. Code Ann. sec. 14-02.4-03	1	0.3%	0.3%
Oregon	Or. Rev. Stat. sec. 659A.029	6	1.4%	1.2%
Pennsylvania[273]	Phila. Code sec. 9-1128	1 (Philadelphia)	0.4%	0.5%
Rhode Island	R.I. Gen. Laws sec. 28-5-7.4(a)(1)-(3)	4	0.3%	0.3%
South Carolina	S.C. Code Ann. sec. 1-13-80(A)(4)	15	1.6%	1.5%
Tennessee	Tenn. Code. Ann. sec. 50-10-103	15	2.2%	2.1%
Utah	Utah Code sec. 34A-5-106(1)(g)	15	0.9%	1.1%
Vermont	Vt. Stat. Ann. tit. 21, sec. 495k(a)(1)	1	0.2%	0.2%
Virginia	Va. Code sec. 2.2-3901	5	2.8%	2.6%
Washington	Wash. Rev. Code sec. 43.10.005(2)	15	2.3%	2.2%

[271] These numbers only account for enterprises with at least 25 employees because Louisiana's pregnancy accommodations law applies to employers with 25 or more employees. *See* La. Rev. Stat. Ann. sec. 23:341 (2021).

[272] These numbers only account for enterprises with at least 25 employees because Minnesota's pregnancy accommodation law applies to employers with 21 or more employees. Minn. Stat. sec. 181.940, 181.9414, 181.9436 (2014). Data on enterprises with 21 to 24 employees are not available.

[273] Pennsylvania does not have a state-wide pregnancy accommodation law, but Philadelphia does. *See* Phila. Code sec. 9-1128 (2014). Philadelphia accounts for approximately 9 percent of Pennsylvania establishments and approximately 12 percent of individuals employed in Pennsylvania. See *The Number of Firms and Establishments, Employment, and Annual Payroll by Congressional District, Industry, and Enterprise Employment Size: 2019*, Statistics of U.S. Bus. Ann. Datasets by Establishment Indus. (2019), https://www2.census.gov/programs-surveys/susb/tables/2019/cd_naicssector_2019.xlsx [hereinafter *Firms and Establishments Data by Congressional District*]. The calculation is based on the total number of establishments and total employment in Pennsylvania and in Philadelphia County and the shares of employment in each.

West Virginia	W. Va. Code sec. 5-11B-2	12	0.6%	0.4%
Total[274]			**51%**	**52%**
Total (in millions)			**1.4**	**61.2**

Table 2 Share of Total U.S. Employer Establishments with 15 or More Employees in States That Will Be Impacted by PWFA[275]

	Share in U.S. Total[276]	
State	**Establishments**	**Employment**
Alabama	1.5%	1.3%
Alaska[277]	0.2%	0.2%
Arizona	2.0%	2.0%
Arkansas	0.9%	0.8%
Florida	6.0%	6.8%
Georgia	3.1%	3.1%
Idaho	0.6%	0.4%
Indiana	2.2%	2.1%
Iowa	1.1%	1.0%
Kansas	1.0%	0.9%
Louisiana[278]	0.2%	0.1%
Michigan	2.9%	3.0%
Minnesota[279]	0.3%	0.1%
Mississippi	0.9%	0.7%
Missouri	2.1%	1.9%
Montana	0.4%	0.2%
New Hampshire	0.5%	0.5%
North Carolina[280]	3.2%	3.0%

[274] This total does not include Alaska, North Carolina, and Texas, where the pregnancy accommodation laws only apply to certain public employees.

[275] *Firms and Establishments Data*, *supra* note 268. Percentages in the Table reflect filtering by size and summing by state.

[276] This number is limited to enterprises with at least 15 employees.

[277] Alaska's statute, codified at Alaska Stat. sec. 39.20.520 (1992), covers public employers only.

[278] These numbers only include enterprises with 15-24 employees because Louisiana's pregnancy accommodations law applies to employers with 25 or more employees. La. Rev. Stat. Ann. sec. 23:341 (2021).

[279] These numbers only include enterprises with 15-24 employees because Minnesota's pregnancy accommodation law applies to employers with 21 or more employees. Minn. Stat. sec. 181.940, 181.9414, 181.9436 (2014). Data on enterprises with 15-20 employees are not available.

[280] N.C. E.O. No. 82 (2018) covers public employers only.

Ohio	3.8%	3.8%
Oklahoma	1.2%	1.0%
Pennsylvania[281]	3.8%	3.7%
South Dakota	0.3%	0.3%
Texas[282]	8.5%	8.5%
Wisconsin	2.0%	2.0%
Wyoming	0.2%	0.1%
Total	**49%**	**48%**
Total (in millions)	**1.3**	**55.5**

Similarly, approximately 11.5 million State and local government employees are covered by laws that are substantially similar to the PWFA.[283] Subtracting this number from the total number of covered State and local government employees (18.8 million) yields a total of 7.3 million State and local government employees who will be covered by the proposed rule and underlying statute, and who are not already covered by State or local laws substantially similar to the PWFA.

Finally, there are 2.3 million Federal workers. The Federal Government does not currently require accommodations for pregnant workers; thus, the PWFA provides a new right for these workers.

Again, however, not all employees who are now covered by the PWFA will seek and be entitled to accommodations as a result of the proposed rule and underlying statute; only a small percentage will become pregnant and need accommodations in a given year. In 2021, women of

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[281] Pennsylvania does not have a state-wide pregnancy accommodation law, but Philadelphia does. *See* Phila. Code sec. 9-1128 (2014). Philadelphia accounts for approximately 9 percent of Pennsylvania establishments and approximately 12 percent of individuals employed in Pennsylvania. *See Firms and Establishments Data by Congressional District*, *supra* note 273 . The calculation is based on the total number of establishments and total employment in Pennsylvania and in Philadelphia County and the shares of employment in each.

[282] The Texas statute, codified at Tex. Loc. Gov't Code sec.180.004 (2001), covers local public employers only.

[283] U.S. Census Bureau, *2021 ASPEP Datasets & Tables* (2021), https://www.census.gov/data/datasets/2021/econ/apes/annual-apes.html [hereinafter *ASPEP Datasets*]. The calculation is based on data from the "State Government Employment & Payroll Data" and the "Local Government Employment & Payroll" files, "Government Function" column.

reproductive age (aged 16-50 years) comprised approximately 33 percent of U.S. workers.[284] Of these, approximately 4.7 percent gave birth to at least one child the previous year.[285] Applying these percentages[286] to the numbers above yields totals (rounded to the nearest 10,000) of, in a given year, 850,000 private sector employees (55,500,000 X 0.33 X 0.047), 110,000 State and local government employees (7,300,000 X 0.33 X 0.047), and 40,000 Federal employees (2,310,000 X 0.33 X 0.047) who are both newly eligible for reasonable accommodations under the proposed rule and underlying statute, and who may be expected to become pregnant in a given year. Tables 3, 4, and 5 display these calculations.

Table 3 Computation of expected number of pregnant women eligible for PWFA accommodations at private employers[287]

Total employment in establishments covered under PWFA (i.e., those with at least 15 employees)	117 million
Total employment in establishments covered under PWFA, with existing PWFA-type accommodations under State/local laws (from Table 1)	61.2 million
Total employment in establishments covered under PWFA, without existing PWFA-type accommodations under State/local laws (from Table 2)	55.5 million
Share of 16-50 years old women	33%
Total number of women employees newly eligible for accommodations under PWFA (33% of 55.5 million)	18.1 million
Expected share of women employees to be pregnant in a year	4.7%
Expected number of pregnant employees newly eligible for accommodations under PWFA (4.7% of 18.1 million)	850,000

Table 4 Computation of expected number of pregnant women eligible for PWFA accommodations in State and local government employment[288]

Total State and local government employment	18.8 million

[284] *See IPUMS Data*, *supra* note 23. Data are available by request to registered IPUMS-USA users; please contact ipums@umn.edu.

[285] *Id.*

[286] *Id.*

[287] *Id.*

[288] *ASPEP Datasets*, *supra* note 283. The calculation is based on data as described in note 61.

Total State and local government employment in States with existing PWFA-type accommodations under State/local laws[289]	11.5 million
Total State and local government employment in States without existing PWFA-type accommodations under State/local laws[290]	7.3 million
Share of 16-50 years old women	33%
Total number of State and local government women employees newly eligible for accommodations under PWFA (33% of 7.3 million)	2.4 million
Expected share of women employees to be pregnant in a year	4.7%
Expected number of pregnant State and local government employees newly eligible for accommodations under PWFA (4.7% of 2.4 million)	110,000

Table 5 Computation of expected number of pregnant women eligible for PWFA accommodations in Federal Government employment

Total Federal Government civilian employment[291]	2.31 million
Share of 16-50 years old women	33%
Total number of women Federal Government employees newly eligible for accommodations under PWFA	0.8 million
Expected share of women employees to be pregnant in a year	4.7%
Expected number of pregnant Federal Government employees newly eligible for accommodations under PWFA	40,000

The sum of the expected number of pregnant women eligible for PWFA accommodations in the private sector (850,000), State and local government (110,000), and Federal Government (40,000) is 1,000,000.

Further, not all individuals who become pregnant will need a reasonable accommodation. Because there is very little research on the proportion of pregnant workers who need workplace accommodations, the Commission has generated a ranged estimate. The Commission seeks

[289] This number includes 12 percent of State and local government employment in Pennsylvania to account for Philadelphia's PWFA-type law, excludes local government employment in North Carolina because the existing law only applies to State employees, and excludes State government employment in Texas because the existing law only applies to local governments.

[290] This number includes State and local government employment in Pennsylvania not accounted for by Philadelphia, includes local government employment in North Carolina because the existing law only applies to State employees, and includes State government employment in Texas because the existing law only applies to local governments.

[291] *Full-Time and Part-Time Employees by Industry*, U.S. Bureau of Econ. Analysis, https://apps.bea.gov/iTable/?reqid=19&step=2&isuri=1&1921=survey#eyJhcHBpZCI6MTksInN0ZXBzIjpbMSwyLDNdLCJkYXRhIjpbWyJDYXRlZ29yaWVzIiwiU3VydmV5Il0sWyJOSVBBX1RhYmxlX0xpc3QiLCIxOTMiXV19 (last visited June 12, 2023).

comment regarding any existing data quantifying the proportion of pregnant workers who need workplace accommodations.

Survey research has shown that 71 percent of pregnant workers experience some type of pregnancy-related limitation that might require an accommodation.[292] The Commission thus adopts 71 percent as its upper-bound estimate of the percentage of pregnant workers needing accommodation. Applying this percentage yields upper-bound estimates of 600,000 private sector employees (71 percent of 850,000), 80,000 State and local government employees (71 percent of 110,000), and 30,000 Federal sector employees (71 percent of 40,000), in total 710,000, who will need, and be newly entitled to, reasonable accommodations under the proposed rule and underlying statute in a given year.

Based on this research, [293] the Commission has calculated that approximately 23 percent of pregnant workers have faced a pregnancy-related limitation but did not receive a workplace accommodation, either because they did not ask for one or because the employer did not address the need when the issue was raised. The Commission utilized the survey research to calculate the number of workers who needed a particular accommodation (for example, 71 percent of 598 respondents, or 425 respondents, needed more frequent breaks); the number of workers who asked employers to address the need (58 percent of 425 respondents, or 246 respondents); and the number of those workers whose employers did not attempt to address the need (5 percent of 246 respondents, or 12 respondents). Additionally, the Commission calculated the number of workers who needed an accommodation but did not ask their employers to address the need (42 percent of 425 respondents, or 179 respondents) and used these two numbers to identify the percentage of workers who faced a limitation and did not previously receive an accommodation but will have a right to an accommodation under the PWFA (12+179/598=32 percent). The

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[292] *Listening to Mothers III*, *supra* note 34.

[293] *See id.* at 36; *see also infra* Table 6.

Commission calculated this percentage for the four accommodations identified in the survey data and determined an average of those four percentages.

Table 6 Share of Pregnant Women Currently Without Pregnancy-Related Employer Support[294]

Employer support during pregnancy	% Faced with pregnancy-related limitation with paid job[295]	Of those who faced a limitation, % that didn't ask employer to address need[296]	Of those who faced a limitation, % that asked the employer to address need but whose employer didn't attempt to address concern	% Of pregnant women who faced a limitation, didn't receive an accommodation previously, but will have a right to it under PWFA
To take more frequent breaks, such as extra bathroom breaks	71%	42%	3%	32%
A change in schedule or more time off, for example, to see prenatal care providers	61%	26%	7%	20%
A change in duties, such as less lifting or more sitting	53%	37%	6%	23%
Some other type of workplace adjustment due to a pregnancy-related condition	40%	38%	8%	18%
Average				**23%**

Accordingly, these data suggest that the proposed rule and underlying statute will result in a new obligation on employers in only 23 percent of instances in which a worker requires reasonable accommodations related to pregnancy, childbirth, or related medical conditions. The Commission thus adopts 23 percent as its lower-bound estimate of the percentage of pregnant workers who will need, and be newly entitled to, a reasonable accommodation under the proposed rule and underlying statute. Applying this percentage yields lower-bound estimates of approximately 200,000 private sector employees (23 percent of 850,000), 30,000 State and local government employees (23 percent of 110,000), and 10,000 Federal sector employees (23 percent of 40,000), in total 240,000, who will need, and be newly entitled to, reasonable accommodations under the proposed rule and underlying statute in a given year.

3. Cost of Accommodation

[294] *Id.*

[295] *Id.*

[296] *Id.*

Accommodations that allow pregnant workers to continue to perform their job duties, thereby allowing them to receive continued pay and benefits, include permission to take additional rest or bathroom breaks, to use a stool or chair, to change duties in order to avoid strenuous physical activities, and to change schedules to attend prenatal appointments.[297] Some of these accommodations, especially additional rest or bathroom breaks and provision of a stool or chair, are expected to impose minimal or no additional costs on the employer. Certain other types of accommodations, such as allowing the employee to avoid heavy lifting or exposure to certain types of chemicals, may be easy to provide in some jobs but more difficult to provide in others, necessitating temporary restructuring of responsibilities or transfer to a different position.

The Commission was unable to find any data on the average cost of reasonable accommodations related specifically to pregnancy, childbirth, or related medical conditions. The Commission has therefore relied on the available data on the cost of accommodations for individuals with disabilities for purposes of this analysis.

A survey conducted by the Job Accommodation Network (JAN) indicates that most workplace accommodations for individuals with disabilities are low-cost.[298] Of the employers participating in this survey between 2019 and 2022, 49.4 percent reported that they provided an accommodation needed because of a disability that did not cost anything to implement. The Commission believes that the percentage of no-cost accommodation is likely to be higher for accommodations related specifically to pregnancy, childbirth, or related medical conditions, because many will be simple and no-cost like access to water, stools, or more frequent bathroom breaks, and because the vast majority will be temporary. Nevertheless, because the Commission is unable to locate any data on the percentage of accommodations needed because of pregnancy-

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[297] *Id.*; *see also Long Over Due*, *supra* note 2, at 79 (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance) (describing potential accommodations).

[298] *Costs and Benefits of Accommodation*, *supra* note 33.

related conditions that have no cost, the Commission conservatively assumes for purposes of this analysis that the percentages are the same.

The same research showed that another 43.3 percent of employers provided an accommodation that involved a one-time cost; the median one-time cost of providing such an accommodation was $300. Only 7.2 percent of employers reported that they provided an accommodation that resulted in ongoing annual costs. Because pregnancy is a temporary condition, the ongoing costs incurred by 7.2 percent of employers is unlikely to be applicable to pregnancy-related accommodations, and the Commission adopts $300 as the median one-time cost for employers that incurred a cost (50.6 percent of employers). Again, although the Commission believes that the average cost is likely lower for accommodations needed specifically for pregnancy, childbirth, or related medical conditions, it will use the data for the purposes of this analysis.

Because non-zero cost accommodations generally involve durable goods such as additional stools, infrastructure for telework, and machines to help with lifting, and because these goods generally have a useful life of five years, the Commission will assume that the annual cost of providing these accommodations is approximately $60 per year per accommodation.[299] The Commission seeks comment on whether the annual cost of providing non-zero cost accommodations should be calculated based on durable goods with a useful life of five years.

Using these cost estimates, and applying them to the upper- and lower-bound estimates for the number of additional accommodations that will likely be required by the rule and underlying statute, the estimated annual costs for private employers is between $6 million and $18 million; the estimated annual costs for State and local governments is between $0.8 million and $2.4 million, and the estimated annual costs for the Federal Government is between $0.3 million and $0.8 million. See Tables 7, 8, and 9.

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[299] The Commission made a similar assumption of a five-year life for accommodations in its cost analysis of the amendments to the ADA. 76 FR 16977, 16994 (March 25, 2011).

Table 7 Estimated reasonable accommodation costs to private employers with more than 15 employees

Cost of accommodation	Lower Bound (23%)	Upper Bound (71%)
Number of women needing accommodation	200,000	600,000
Number of non-zero cost accommodations (50.6%)	100,000	300,000
Annual cost of accommodation	$6 million	$18 million

Table 8 Estimated reasonable accommodation costs to State and local government employers

Cost of accommodation	Lower Bound (23%)	Upper Bound (71%)
Number of women needing accommodation	30,000	80,000
Number of non-zero cost accommodations (50.6%)	11,000	40,000
Annual cost of accommodation	800,000	$2.4 million

Table 9 Estimated reasonable accommodation costs to the Federal Government

Cost of accommodation	Lower Bound (23%)	Upper Bound (71%)
Number of women needing accommodation	10,000	30,000
Number of non-zero cost accommodations (50.6%)	0.004 million	13,000
Annual cost of accommodation	$300,000	$800,000

Thus, the overall economic impact on the U.S. economy of the proposed rule and underlying statute is estimated to be between $7.1 million and $21.2 million annually.

The costs in Tables 7, 8, and 9 likely overestimate the costs to covered entities in at least six respects:

- The estimates are based on costs of accommodations for individuals with disabilities generally, not only those related to pregnancy, among the JAN survey respondents. The Commission believes that the average cost of accommodations related to pregnancy, childbirth, or related medical conditions is less than the average cost of disability-related accommodations because many of the reasonable accommodations requested under the PWFA will be simple and inexpensive to provide, and the vast majority will be temporary. The Commission seeks comment regarding any existing data quantifying the

average cost of accommodations related to pregnancy, childbirth, or related medical conditions.

- The sample obtained in the JAN study may not be representative of all employers, because employers who consult with JAN are likely to be facing more difficult and costly accommodation issues than employers overall.[300]
- The estimate did not account for the fact that some workers who will be entitled to reasonable accommodations under the PWFA and the proposed rule are independently entitled to accommodations under the ADA or Title VII, to break time and a private place to pump at work under the PUMP Act, and, in some cases, leave under the FMLA or the Federal Employees Paid Leave Act.[301]
- The estimate does not account for the fact that some employers voluntarily provide accommodations to workers affected by pregnancy, childbirth, or related medical conditions and may not incur new costs.
- The Commission did not offset the costs associated with providing accommodations with the potential costs associated with not providing them. In some instances where an individual is denied an accommodation, the individual separates from the employer because they quit, or they are forced to leave. In these instances, the employer must replace the employee. Replacement costs for an employee vary based on salary; estimates range from $2,000-$7,000,[302] with $4,000 being a common average.[303] Thus, in these

[300] The Job Accommodation Network (JAN) provides free assistance regarding workplace accommodation issues. *See generally* Job Accommodation Network, https://askjan.org/ (last visited Apr. 2, 2023).

[301] Brown et al., *supra* note 14, at 6 (finding that about 56 percent of U.S. employees were eligible for FMLA in 2018, and 25 percent of the FMLA leaves taken in the prior 12 months accounted for the arrival of a new child).

[302] Arindrajit Dube et al., *Employee Replacement Costs*, 2 IRLE, Univ. of Cal. Berkeley, Working Paper No. 201-10 (2010), https://irle.berkeley.edu/files/2010/Employee-Replacement-Costs.pdf.

[303] *Id.*

situations, the accommodations will save the employer more than the accommodation will cost.

- This analysis does not account for the fact that not all workers who seek accommodations will meet the definition of "qualified," and an employer may decline to provide a reasonable accommodation if doing so creates an undue hardship.

The Commission did not include costs related to processing requests for accommodation in its estimate because it expects these costs to be extremely low. Employers that are covered by State or local laws substantially similar to the PWFA already have these procedures in place. The Commission assumes that employers not covered by such State or local laws, and the Federal Government, will adapt existing procedures for providing accommodations under Title VII and the ADA and for providing leave under the FMLA.

4. One-Time Administrative Costs for Covered Entities

Administrative costs, which include rule familiarization, posting new equal employment opportunity posters, and updating EEO policies and handbooks, represent additional, one-time direct costs to covered entities.

It is estimated that in States that do not already have laws substantially similar to the PWFA, compliance activities for a covered entity would take an average of 90 minutes by an Equal Opportunity Officer who is paid a fully loaded wage of $113.51 per hour [304] ($68.57 for a State or local government worker).[305] In States with already existing laws similar to the PWFA,

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[304] The Commission anticipates that the bulk of the workload under this proposed rule would be performed by employees in occupations similar to those associated with the Standard Occupational Classification (SOC) code of SOC 11-3121 (Human Resources Managers). According to the U.S. Bureau of Labor Statistics, the mean hourly wage rate for Human Resources Managers in May 2022 was $70.07. *See* U.S. Bureau of Lab. Stats., *Employment of Human Resources Managers, by State, May 2022* (2022), https://www.bls.gov/oes/current/oes113121.htm#st). For this analysis, the Commission used a fringe benefits rate of 45 percent and an overhead rate of 17 percent, resulting in a fully loaded hourly compensation rate for Human Resources Managers of $113.51 ($70.07 + ($70.07 × 0.45) + ($70.07 × 0.17)).

[305] U.S. Bureau of Lab. Stats., *Employer Costs for Employee Compensation for State and Local Government Workers by Occupational and Industry Group* (Mar. 17, 2023), https://www.bls.gov/news.release/ecec.t03.htm. Total employer compensation costs for State and local

an Equal Opportunity Officer will take an average of 30 minutes for compliance activities. For the Federal Government, which does not have an existing PWFA, it is estimated that compliance activities would take an average of ninety minutes by an Equal Opportunity Officer at a GS 14-5 salary.[306] These calculations are displayed in Table 10. The Commission seeks comment on whether 90 minutes accurately captures the amount of time compliance activities will take for a covered entity in States that do not already have laws substantially similar to the PWFA and for the Federal Government, and whether 30 minutes accurately captures the amount of time compliance activities will take for a covered entity in States that have existing laws similar to the PWFA.

Table 10 One-Time Administrative Costs

	Number of Establishments (a)	**Time for Rule Familiarization (b)**	**Equal Opportunity Officer Fully Loaded Wage (c)**	**Rule Familiarization Cost (a)x(b)x(c)**
Private employers in States with existing PWFA-type laws	1.4 million	0.5 hours	$113.51	$79 million
Private employers in States without existing PWFA-type laws	1.3 million	1.5 hours	$113.51	$221 million
Public employers in States with existing PWFA-laws	3,255[307]	0.5 hours	$68.57	100,000
Public employers in States without existing PWFA-type laws	2,533[308]	1.5 hours	$68.57	260,000

government averaged $57.60 per hour worked (see row 1, column 1 of the cited table). Average wages and salaries ranged from $68.57 in management, professional, and related occupations (row 3) to $40.05 (row 7) in sales and office occupation. This analysis uses the high estimate of $68.57 per hour worked, which includes average wage and salary cost of $43.87 per hour (row 3, column 3) and average benefit costs of $24.70 per hour (row 3, column 5).

[306] In 2023, a GS-14, Step 5 salary is $63.21 per hour. *See* Office of Pers. Mgmt., *Salary Table 2023-RUS* (Jan. 2023), https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/RUS_h.pdf.

[307] Based on the distinct number of State and local government filers of the 2021 EEO-4 survey where available and the 2021 Annual Survey of Public Employment & Payroll (ASPEP) when not available.

[308] *Id.*

Federal Government	209[309]	1.5 hours	$93.01[310]	30,000
Total				$300.39 million

Table 11 provides the analysis of discount rates at 3% and 7% as required by OMB Circular A-4 for the lower and upper bound costs of providing accommodations. Table 12 provides that information for the one-time administrative costs.

Table 11 Annualized reasonable accommodation costs (in $ millions) at 0% (undiscounted), 3%, 7% discount rates[311]

	Private - All	Federal Government	State and Local Government
	Lower Bound		
Estimated reasonable accommodation costs	**$30.4**	**$1.3**	**$4.0**
Assuming useful life of accommodations to be 5 years			
Annualized, 0% discount rate, 5 years	$6.07	$0.3	$0.8
Annualized, 3% discount rate, 5 years	$6.63	$0.27	$0.87
Annualized, 7% discount rate, 5 years	$7.40	$0.31	$0.97
Total, 0% discount rate, 5 years	$30.4	$1.3	$4.0
Total, 3% discount rate, 5 years	$33.1	$1.4	$4.3
Total, 7% discount rate, 5 years	$37.0	$1.5	$4.8
Assuming useful life of accommodations to be 10 years			
Annualized, 0% discount rate, 10 years	$3.04	$0.1	$0.4
Annualized, 3% discount rate, 10 years	$3.56	$0.15	$0.46
Annualized, 7% discount rate, 10 years	$4.32	$0.18	$0.56
Total, 0% discount rate, 10 years	$30.4	$1.3	$4.0
Total, 3% discount rate, 10 years	$35.6	$1.5	$4.6
Total, 7% discount rate, 10 years	$43.2	$1.8	$5.6
	Upper Bound		
Estimated reasonable accommodation costs	**$91.1**	**$3.8**	**$12.1**
Assuming useful life of accommodations to be 5 years			
Annualized, 0% discount rate, 5 years	$18.22	$0.8	$2.4
Annualized, 3% discount rate, 5 years	$19.89	$0.84	$2.65

[309] *See* U.S. Equal Emp. Opportunity Comm'n, *Department or Agency List with Second Level Reporting Components*, https://www.eeoc.gov/federal-sector/management-directive/department-or-agency-list-second-level-reporting-components (last visited Mar. 22, 2023).

[310] As described above, a GS-14, Step 5 salary is $63.21 per hour. *See* Off. of Pers. Mgmt., *Salary Table 2023-RUS* (Jan. 2023), https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/RUS_h.pdf. This is then adjusted for average hourly benefits for Federal workers. *See* Cong. Budget Off., *Comparing the Compensation of Federal and Private-Sector Employees, 2011 to 2015*, at 14 (Apr. 25, 2017) https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/52637-federalprivatepay.pdf (reporting that the average benefits for Federal employees range from $21.30 per hour to $29.80 per hour). This analysis uses the high estimate of $29.80 to compute the total hourly compensation at $93.01 ($63.21+$29.80).

[311] Off. of Mgmt. and Budget, *Circular A-4* (Sept. 17, 2003), https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/ (addressing discount rates).

Annualized, 7% discount rate, 5 years	$22.21	$0.94	$2.96
Total, 0% discount rate, 5 years	$91.1	$3.8	$12.1
Total, 3% discount rate, 5 years	$99.4	$4.2	$13.2
Total, 7% discount rate, 5 years	$111.1	$4.7	$14.8
Assuming useful life of accommodations to be 10 years			
Annualized, 0% discount rate, 10 years	$9.11	$0.38	$1.21
Annualized, 3% discount rate, 10 years	$10.68	$0.45	$1.42
Annualized, 7% discount rate, 10 years	$12.97	$0.55	$1.73
Total, 0% discount rate, 10 years	$91.1	$3.8	$12.1
Total, 3% discount rate, 10 years	$106.8	$4.5	$14.2
Total, 7% discount rate, 10 years	$129.7	$5.5	$17.3

Table 12 Annualized administrative costs

	Estimated administrative costs (in $ millions)		
Year	Private - All	Federal Government	State and Local Government
1	$301	$0.03	$0.37
2	$0	$0	$0
3	$0	$0	$0
4	$0	$0	$0
5	$0	$0	$0
6	$0	$0	$0
7	$0	$0	$0
8	$0	$0	$0
9	$0	$0	$0
10	$0	$0	$0
Annualized, 3% discount rate, 10 years	$ 35.26	$0.003	$0.04
Annualized, 7% discount rate, 10 years	$42.83	$0.004	$0.05
Total, 3% discount rate, 10 years (in $ millions)	$353	$0.03	$0.44
Total, 7% discount rate, 10 years (in $ millions)	$428	$0.04	$0.53

E. Time Horizon of Analysis

Neither the PWFA nor the proposed rule contains a sunset provision.

The cost analysis assumes a one-time administrative cost for employers, and the amount of time varies depending on whether the employer is in a State with or without its own version of the PWFA.

The cost and benefit analysis calculates the annual cost of accommodations per pregnant worker who may need them. Because different workers enter the labor market every year and may become pregnant, or a worker who was pregnant may become pregnant again, the

Commission does not believe that the need for accommodations or the costs or benefits will substantially change over time.

F. Range of Regulatory Alternatives

The range of alternatives available to the Commission consistent with the Executive Order is narrow:

- Because 42 U.S.C. 2000gg-3(a) requires the Commission to issue regulations, the Commission could not consider non-regulatory alternatives.
- Because 42 U.S.C. 2000gg determine coverage, the Commission could not consider exemptions based on firm size or geography.
- Because 42 U.S.C. 2000gg-2 of the PWFA provides how the statute will be enforced, the Commission could not consider alternative methods of enforcement, such as market-oriented approaches, performance standards, default rules, monitoring by other agencies, or reporting.
- Because section 109 of the PWFA states when the law will go into effect, the Commission could not consider alternative compliance dates.[312]

Further, because the PWFA is a Federal law that intentionally sets a national standard, the Commission could not consider deferring to State or local regulations. The one exception to this is that 42 U.S.C 2000gg-5(a)(1) provides that nothing in the PWFA invalidates or limits rights under Federal, State, or local laws that provide equal or greater protection for individuals affected by pregnancy, childbirth, or related medical conditions. The proposed rule includes this language. Thus, the proposed rule does not preempt State or local regulations that provide equal or greater protection relative to the PWFA.

The Commission considered two regulatory alternatives, discussed below. The Commission does not believe that either alternative would decrease the costs for covered entities.

1. Definition of "In the Near Future"

[312] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Division II, 136 Stat. 4459, 6089 (2022).

42 U.S.C 2000gg(6) of the PWFA defines a "qualified" employee to include employees whose inability to perform one or more essential functions of the job is temporary, who will be able to perform the essential functions "in the near future," and whose inability to perform essential function(s) can be reasonably accommodated without undue hardship.

The proposed rule defines "in the near future" to mean "generally within forty weeks." The Commission considered, but rejected, shorter periods such as six months or less[313] for several reasons. First, pregnancy generally lasts forty weeks; a rule that a worker is only "qualified" if they are able to perform all the essential functions of the job within six months of the function(s) being temporarily excused as a reasonable accommodation could classify many workers who need a temporary suspension of an essential function(s) for a longer period as "unqualified" and therefore ineligible for reasonable accommodations. The Commission believes that this outcome would frustrate the purpose of the statute, which is to enable employees who need temporary accommodations related to pregnancy, childbirth, or related medical conditions to continue working.

Second, defining "in the near future" to mean "generally forty weeks" does not mean that the employer will be required to actually provide a reasonable accommodation for that length of time. The definition of "in the near future" is one step in the definition of qualified; even if an employee can meet this part of the definition, an employer still may refuse to provide an accommodation if the employer cannot reasonably accommodate the temporary suspension of the essential function or if doing so would impose undue hardship (defined as significant difficulty or expense, relative to the employer's overall resources). It is the Commission's hope that setting a single standard for the meaning of "in the near future" will benefit both employers

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[313] H.R. Report No. 117-27, pt.1 at 28 (citing *Robert v. Bd. of Cnty. Comm'rs of Brown Cnty.*, 691 F.3d 1211, 1218 (10th Cir. 2012)). Although it does not define "in the near future," *Robert* cites to *Epps v. City of Pine Lawn*, 353 F.3d 588, 593 (8th Cir. 2003), which found that under the ADA, a request for leave that would last six months was too long to be "in the near future" to qualify as a possible reasonable accommodation.

and employees by reducing litigation over the meaning of the term and placing the focus on the central issue of whether the accommodation would impose an undue hardship.

If the definition of "qualified" is "generally forty weeks" rather than "less than six months," more workers will be able to meet the definition of qualified. It is not possible to estimate how many. The Commission anticipates that there will be little or no additional cost to covered entities because it is the act of providing an accommodation—not classifying an individual as meeting part of the definition of qualified—that imposes actual costs on the employer. A covered entity can still argue that the accommodation would impose an undue hardship. Further, even if it provides the accommodation, the covered entity is likely to experience a cost saving from not having to recruit, hire, or train a new worker.

The Commission also considered not defining the term "in the near future," but determined that doing so would harm employers by increasing uncertainty and harm employees by failing to ensure equal treatment.

2. Predictable Assessments

In the section defining "undue hardship," the proposed rule lists four job modifications often sought by pregnant workers that, in virtually all cases, will be found to be reasonable accommodations that do not impose undue hardship: (1) carrying water and drinking water as needed; (2) allowing additional restroom breaks; (3) allowing sitting for those whose work requires standing and standing for those whose work requires sitting; and (4) allowing breaks as needed to eat and drink.

As explained in the preamble, these accommodations are repeatedly discussed in the PWFA's legislative history as common sense, low-cost accommodations that most pregnant workers will need[314]. To increase efficiency and to decrease the time that it takes for workers to

[314] See H.R. Rep.117- 27, pt. 1, at 11, 22, 29, 113; *Fighting for Fairness*, *supra* note 2, at 4 (statement of Rep. Suzanne Bonamici); *Long Over Due*, *supra* note 2, at 7 (statement of Rep. Jerrold Nadler); 25 (statement of Iris Wilbur, Vice President of Government Affairs and Public Policy, Greater Louisville, Inc.); 83 (statement of Rep. Barbara Lee); 168 Cong. Rec. H10,527 (daily ed. Dec. 23, 2022) (statement

receive these accommodations, the Commission has determined that these modifications will in virtually all cases be determined to be reasonable accommodations that do not impose an undue hardship.

As an alternative to providing that these simple, common-sense modifications will virtually always be determined to be reasonable accommodations that do not impose undue hardship, the Commission considered taking the position that such modifications would always be reasonable accommodations and never impose undue hardship. The Commission decided against this approach because some employers may encounter circumstances that would lead to a determination that these modifications are not reasonable accommodations and/or would impose an undue hardship.

The Commission also considered the option of not including information regarding "predictable assessments" in the proposed rule. The Commission determined that providing this information will be helpful to the public because doing so explains to covered entities and employees how the Commission intends to enforce the PWFA, potentially increases voluntary compliance, and increases certainty for covered entities, which will decrease costs.

The Commission does not anticipate that the proposed rule's "predictable assessments" section would increase costs for covered entities. The examples given are low- to no-cost accommodations, and under the proposed rule, the employer may still claim that these modifications would impose an undue hardship.

G. Uncertainty in Benefits, Costs, and Net Benefits

The Commission has based its estimates of the costs and benefits of the proposed rule on the best data available to it at the current time. Nevertheless, the Commission recognizes these estimates are somewhat uncertain in several respects.

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of Rep. Jerrold Nadler); 168 Cong. Rec. S10,081 (daily ed. Dec. 22, 2022) (statement of Sen. Robert P. Casey, Jr.); 168 Cong. Rec. S7,079 (daily ed. Dec. 8, 2022) (statement of Sen. Robert P. Casey, Jr.); 168 Cong. Rec. H2,324 (daily ed. May 14, 2021) (statement of Rep. Suzanne Bonamici).

First, the data used to estimate the cost of providing accommodations as required by the PWFA come entirely from research on the cost of accommodations for individuals with disabilities; the Commission is not aware of any data concerning the cost of accommodations that relate specifically to pregnancy, childbirth, or related medical conditions.

Second, the estimated cost for accommodations is based on the probable number of pregnant workers in the workplace. Due to lack of available data, the estimates do not attempt to account specifically for the cost of accommodations related to childbirth (such as leave for recovery) or related medical conditions. The Commission nevertheless believes the cost of these accommodations will not significantly change its estimates. For example, leave needed for recovery from childbirth is likely to be for a relatively short period of time—usually 6 to 10 weeks—and the PFWA does not require such leave to be paid. Further, according to the Bureau of Labor Statistics, 88 percent of workers have access to unpaid family leave independent of the PFWA, either through the FMLA or otherwise.[315] With respect to these individuals, any costs attributable specifically to the PFWA for leave related to childbirth would be limited to the short period of time during which such leave is required, but unavailable from those other sources.

H. Conclusion

As detailed above, the estimated annual cost of providing accommodations required by the proposed rule and underlying statute—but not independently required by a State or local law substantially similar to the PWFA—is estimated to be up to $18 million for private employers, $2.4 million for State and local governments, and $800,000 for the Federal Government. In addition, employers are expected to face one-time costs associated with complying with the rule and underlying statute. These are estimated to be $300 million for private employers, $360,000 million for State and local governments, and $30,000 for the Federal Government.

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[315] U.S. Bureau of Lab. Stats., *Access to Paid and Unpaid Family Leave in 2018* (Feb. 27, 2019), https://www.bls.gov/opub/ted/2019/access-to-paid-and-unpaid-family-leave-in-2018.htm.

These figures are almost certainly overestimates of the costs imposed by the rule, in part because some of the accommodations required by the proposed rule and underlying statute are already required under the ADA and Title VII and some employers voluntarily provide accommodations. Due to a lack of data, however, the Commission was unable to account for this overlap in the above analysis.

The Commission has nevertheless determined that the benefits of the proposed rule and underlying statute justify its costs.[316] The annual costs associated with the main requirement of the rule—to give reasonable accommodations to individuals who need them because of pregnancy, childbirth, or related medical conditions—are not "economically significant" under E.O. 12866. And although the aggregate one-time compliance costs are in excess of $200 million, and therefore "economically significant," the estimated cost on a per-establishment basis is very low—$56.76 and $170.27, depending on whether or not the State in which the entity is located has a law substantially similar to the PWFA.

The benefits of the proposed rule and underlying statute to workers affected by pregnancy, childbirth, or related medical conditions, however, are significant, including improved health, improved economic security, and increased equity, human dignity, and fairness. The number of individuals who may experience such benefits is relatively large—the number of workers who will be newly entitled to reasonable accommodations for pregnancy is estimated to be between 240,000 and 710,000 per year. This number does not include the children, family members, and members of society at large who also will potentially enjoy some of the benefits listed above.

The Commission further concludes that the proposed rule is tailored to impose the least burden on society consistent with achieving the regulatory objectives, and that the agency has selected the approach that maximizes net benefits. The range of alternatives available to the

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[316] 76 FR 3821, *supra* note 205.

Commission was extremely limited. The alternatives that were consistent with the PWFA's statutory language would not, in the Commission's opinion, reduce costs on employers.

The Commission invites members of the public to comment on any aspect of this IRIA, and to submit to the Commission any data that would further inform the Commission's analysis.

Regulatory Flexibility Act and Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking)

The Regulatory Flexibility Act (RFA), 5 U.S.C. chapter 6, requires the Commission to evaluate the economic impact of this proposed rule on small entities. The RFA defines small entities to include small businesses, small organizations, including not-for-profit organizations, and small governmental jurisdictions. The Commission must determine whether the proposed rule would impose a significant economic impact on a substantial number of such small entities.

When an agency issues a rulemaking proposal, the RFA requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis" which will "describe the impact of the proposed rule on small entities."[317] Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. For the reasons outlined below, the Chair of the Commission hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Small businesses range in size, based on the industry, between 1-1,500 employees[318]; the PWFA and the proposed rule apply to all employers in the United States with at least 15

[317] 5 U.S.C. 603(a).

[318] U.S. Small Bus. Admin., *Table of Size Standards* (Mar. 17, 2023), https://www.sba.gov/document/support-table-size-standards.

employees. Thus, for purposes of the RFA the Commission has determined that the proposed regulation will have an impact on a substantial number of small entities.[319]

However, the Commission has determined that the impact on entities affected by the PWFA and the proposed rule will not be significant. As detailed in the IRIA above, the impact on small entities in States and localities that have laws substantially similar to the PWFA will be limited to a one-time administrative cost of approximately $56.76.

Small entities that are not already subject to State or local laws substantially similar to the PWFA will face a one-time administrative cost of approximately $170.27, plus annual costs associated with providing reasonable accommodations consistent with the rule and underlying statute. To calculate the cost of providing such accommodations, the Commission has constructed cost estimates for a range of small business sizes.

Table 13 Annual costs for reasonable accommodations for small businesses based on size

Number of Employees	33% Women aged 16-50	4.7% Pregnant In a Given Year	Needing Accommodations: 23% (Lower Bound Estimate) – 71% (Upper Bound Estimate)	50.6% non-zero cost accommodations: Lower Bound Estimate – Higher Bound Estimate (Rounded Up)	Total expected Cost: Lower Bound Estimate – Higher Bound Estimate
15	4.95	0.233	0.054 – 0.165	1	$60
50	16.5	0.7755	0.178 – 0.55	1	$60
100	33	1.551	0.357 – 1.01	1	$60
150	49.5	2.3265	0.535 – 1.652	1	$60
200	66	3.102	0.713 – 2.202	1 – 2	$60 – $120
250	82.5	3.878	0.892 – 2.75	1 – 2	$60 – $120
500	165	7.755	1.78 – 5.5	1 – 3	$60 – $180
750	247.5	11.633	2.676 – 8.259	2 – 5	$120 – $300
1000	330	15.51	3.567 – 11.012	2 – 6	$120 – $360
1250	412.5	19.388	4.459 – 13.765	3 – 7	$180 – $420
1500	495	23.265	5.351 – 16.518	3 – 9	$180 – $540

Using the amounts for a small entity with 500 employees as an example, the calculation was conducted as follows:

- Based on data outlined in the IRIA above, the Commission estimates that approximately 33 percent, or 165, of these workers are women of reproductive age (aged 16-50 years),

[319] For example, there are over 1 million businesses with between 20 and 500 employees. U.S. Census Bureau, *Small Business Week: April 30-May 6, 2023* (April 30, 2023) https://www.census.gov/newsroom/stories/small-business-week.html.

and that approximately 4.7 percent of these, or 7.755 workers, will give birth to at least one child during a given year.

- The Commission again adopts 71 percent as its upper-bound estimate and 23 percent as its lower-bound estimate of the percentage of pregnant workers who will need a reasonable accommodation related to pregnancy.
- Thus, the Commission estimates that between 1.78 (23 percent of 7.755) and 5.5 (71 percent of 7.755) employees of a small entity with 500 employees will require annually a reasonable accommodation under the PWFA.
- The Commission further assumes, based on data regarding the average cost of reasonable accommodations for individuals with disabilities presented in the IRIA above, that 50.6 percent of the required accommodations will have a non-zero cost.
- This yields lower- and upper-bound estimates of the number of non-zero cost accommodations of 0.90 (50.6 percent of 1.78) and 2.79 (50.6 percent of 5.5) respectively. Rounding up these numbers, the Commission estimates that a small entity with 500 employees will be required to provide between 1 and 3 additional non-zero cost accommodations per year as a result of the proposed rule and underlying statute. Multiplying by an average cost of $60 per year for each accommodation, the estimated total cost for accommodations required under the PWFA per small entity with 500 employees is between $60 and $180.

To calculate total costs, the cost of compliance is added together with the cost of accommodation. For entities that are already subject to laws substantially similar to the PWFA, compliance costs are estimated to be $56.75 in the first year. Since these entities are already required to provide accommodations consistent with the PWFA, they will face no additional costs for accommodations. The total costs faced by these entities are thus estimated to be $56.75.

For entities that are not already subject to laws substantially similar to the PWFA, the estimated cost of compliance is $170.27 during the first year. Added to this is the annual cost of

providing reasonable accommodations, estimated to be between $60 (lower bound estimate, for businesses with 15 employees) and $540 (upper bound estimate, for businesses with 1,500 employees). This yields a total estimated cost per small entity not already subject to a law substantially similar to the PWFA of between $230.27 and $710.27 in the first year, and between $60 and $540 annually thereafter.

This is not likely to represent a "significant" economic impact for many small entities, if any. Further, the Commission notes that all businesses in the United States with 15 or more employees already must comply with Title VII and the ADA, both of which could, in certain circumstances, require accommodations for workers affected by pregnancy, childbirth, or related medical conditions. Further, Title VII, the ADA, and State laws requiring accommodations for pregnancy apply to all industries; given that, the Commission does not believe that the PWFA will have a greater effect in any industry. The Commission seeks comment regarding its analysis and conclusion that the regulation will not have a significant economic impact on small entities; in particular, the Commission seeks comment regarding any existing data quantifying impacts on small entities.

Accordingly, the Chair of the Commission hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities. As addressed above, the Commission invites comment from members of the public who believe there will be a significant impact on small entities.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 et seq., requires the EEOC to consider the impact of information collection burdens imposed on the public. The PRA typically requires an agency to provide notice and seek public comments on any "collection of information" contained in a rule.[320]

[320] *See* 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8.

The Commission has determined that there is no new requirement for information collection associated with this proposed rule.

Consequently, this proposed rule does not require review by the Office of Management and Budget under the authority of the PRA.

Executive Order 13132 (Federalism)

The EEOC has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism and has determined that it does not have "federalism implications." 42 U.S.C. 2000gg(2) provides that the PWFA applies to employers as that term is defined in Title VII. States and local governments are subject to Title VII, including its prohibition on sex discrimination, which includes discrimination based on pregnancy, childbirth, or related medical conditions. 42 U.S.C. 2000gg-4 provides that a State will not be immune under the 11th Amendment to actions brought under the PWFA in a court of competent jurisdiction and that in any action against a State for a violation of the PWFA, remedies, including remedies both at law and in equity, are available for such violation to the same extent that they are available against any other public or private entity. The proposed rule does not limit or expand these statutory definitions. Additionally, the regulation will not have substantial direct effects "on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Unfunded Mandates Reform Act of 1995

Section 202(a) of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that the Commission determine whether a regulation proposes a Federal mandate that may result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in a single year (adjusted annually for inflation). However, 2 U.S.C. 1503 excludes from UMRA's ambit any provision in a proposed or final regulation that, among other

things, enforces constitutional rights of individuals or establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability; thus, UMRA does not apply to the PWFA.[321]

Plain Language

The Commission has attempted to draft this NPRM in plain language. The Commission invites comment on any aspect of this NPRM that does not meet this standard.

Assessment of Federal Regulations and Policies on Families

The undersigned hereby certifies that the proposed rule would not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act of 1999. To the contrary, by providing reasonable accommodation to workers with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, absent undue hardship, the proposed rule would have a positive effect on the economic well-being and security of families.

Executive Order 13175 (Indian Tribal Governments)

This rule does not have tribal implications under Executive Order 13175 that require a tribal summary impact statement. The rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. The definition of "covered entity" in the PWFA follows that of Title VII; Title VII exempts "a corporation wholly owned by an Indian tribe."[322]

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[321] H.R. Report No. 117-27, pt.1, at 41 (containing a report by the Congressional Budget Office stating that the PWFA was not reviewed "for intergovernmental or private-sector mandates" because it falls within the exception to the Unfunded Mandates Reform Act as it "would extend protections against discrimination in the workplace based on sex to employees requesting reasonable accommodation for pregnancy, childbirth, or related medical conditions").

[322] 42 U.S.C. 2000e(b).

Executive Order 12988 (Civil Justice Reform)

This proposed rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The proposed rule was: (1) reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

For the Commission:

Charlotte A. Burrows,
Chair.

List of Subjects in 29 CFR Part 1636

Administrative practice and procedure, Equal employment opportunity, Reasonable accommodation, Pregnancy.

For the reasons set forth in the preamble, the EEOC proposes to amend 29 CFR chapter XIV by adding part 1636 to read as follows:

PART 1636 – PREGNANT WORKERS FAIRNESS ACT

Sec.
1636.1 Purpose.
1636.2 Definitions - general.
1636.3 Definitions - specific to PWFA.
1636.4 Prohibited practices.
1636.5 Remedies and enforcement.
1636.6 Waiver of State immunity.
1636.7 Relationship to other laws.
1636.8 Severability.
Appendix A to Part 1636—Interpretive Guidance on the Pregnant Workers Fairness Act.

Authority: 42 U.S.C. 2000gg et seq.

§ 1636.1 Purpose.

(a) The purpose of this part is to implement the Pregnant Workers Fairness Act, 42 U.S.C. 2000gg et seq.

(b) The PWFA:

(1) Requires a covered entity to provide a reasonable accommodation for a known limitation of a qualified employee or applicant related to pregnancy, childbirth, or related medical conditions, absent undue hardship;

(2) Prohibits a covered entity from requiring a qualified employee or applicant to accept an accommodation other than a reasonable accommodation arrived at through the interactive process;

(3) Prohibits the denial of employment opportunities based on the need of the covered entity to make a reasonable accommodation for the known limitation of a qualified employee or applicant;

(4) Prohibits a covered entity from requiring a qualified employee to take leave if another reasonable accommodation can be provided;

(5) Prohibits a covered entity from taking adverse actions in terms, conditions, or privileges of employment against a qualified employee, applicant, or former employee for requesting or using a reasonable accommodation for known limitations related to pregnancy, childbirth, or related medical conditions;

(6) Prohibits a covered entity from retaliating against an employee, applicant, or former employee for opposing unlawful discrimination under the PWFA or participating in a proceeding under the PWFA;

(7) Prohibits a covered entity from interfering with any individual's rights under the PWFA; and

(8) Provides remedies for individuals whose rights under the PWFA are violated.

§ 1636.2 Definitions – general.

(a) *Commission* means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-4.

(b) *Covered entity* means *Respondent* as defined in section 701(n) of the Civil Rights Act of 1964, 42 U.S.C. 2000e(n) and includes:

(1) *Employer*, which is a person engaged in an industry affecting commerce who has 15 or more employees, as defined in 701(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(b);

(2) *Employing Office*, as defined in section 101 of the Congressional Accountability Act of 1995, 2 U.S.C. 1301, and 3 U.S.C. 411(c);

(3) An entity employing a State employee or employing an employee of a State subdivision described in section 304(a) of the Government Employee Rights Act of 1991, 42 U.S.C. 2000e-16c(a); and

(4) An entity to which section 717(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a) applies.

(c) *Employee* means:

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

(2) A covered employee (including an applicant) as defined in section 101 of the Congressional Accountability Act of 1995, 2 U.S.C. 1301, and an individual described in section 201(d) of that Act, 2 U.S.C. 1311(d);

(3) A covered employee (including an applicant) as defined in 3 U.S.C. 411(c);

(4) A State employee (including an applicant) or an employee or applicant of a State subdivision described in section 304(a) of the Government Employee Rights Act of 1991, 42 U.S.C. 2000e-16c(a); and

(5) 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.

(d) *Person* means "person" as defined by section 701(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e(a).

§ 1636.3 Definitions - specific to 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 employee or applicant or the representative of the employee or applicant has communicated to the covered entity, 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.

(1) *Known* in terms of limitation means the employee or applicant, or a representative of the employee or applicant, has communicated the limitation to the employer.

(2) *Limitation* means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. "Physical or mental condition" is

an impediment or problem that may be modest, minor, and/or episodic. The physical or mental condition may also be that an employee or applicant affected by pregnancy, childbirth, or related medical conditions has a need or a problem related to maintaining their health or the health of the pregnancy. The definition also includes when the worker is seeking health care related to pregnancy, childbirth, or a related medical condition itself. A "physical or mental condition" does not need to meet the definition of disability from the Americans with Disabilities Act (42 U.S.C. 12111 et seq.).

(b) *Pregnancy, childbirth, or related medical conditions*: "Pregnancy" and "childbirth" include, but are not limited to, current pregnancy; past pregnancy; potential or intended pregnancy; labor; and childbirth (including vaginal and cesarean delivery). "Related medical conditions" are medical conditions which relate to, are affected by, or arise out of pregnancy or childbirth, as applied to the specific employee or applicant in question, including, but not limited to, termination of pregnancy, including via miscarriage, stillbirth, or abortion; infertility; fertility treatment; ectopic pregnancy; preterm labor; pelvic prolapse; nerve injuries; cesarean or perineal wound infection; maternal cardiometabolic disease; gestational diabetes; preeclampsia; HELLP (hemolysis, elevated liver enzymes and low platelets) syndrome; hyperemesis gravidarum; anemia; endometriosis; sciatica; lumbar lordosis; carpal tunnel syndrome; chronic migraines; dehydration; hemorrhoids; nausea or vomiting; edema of the legs, ankles, feet, or fingers; high blood pressure; infection; antenatal (during pregnancy) anxiety, depression, or psychosis; postpartum depression, anxiety, or psychosis; frequent urination; incontinence; loss of balance; vision changes; varicose veins; changes in hormone levels; vaginal bleeding; menstrual cycles; use of birth control; and lactation and conditions related to lactation, such as low milk supply, engorgement, plugged ducts, mastitis, or fungal infections. This list is non-exhaustive, and an employee or applicant does not have to specify a condition on this list or use medical terms to describe a condition in order to be eligible for a reasonable accommodation.

(c) *Employee representative* means a family member, friend, health care provider, or other representative of the employee or applicant.

(d) *Communicated to the employer* means an employee or applicant, or a representative of the employee or applicant, has made the request for an accommodation to the covered entity by communicating with a supervisor, manager, someone who has supervisory authority for the employee (or the equivalent for the applicant), or human resources personnel, or by following the steps in the covered entity's policy to request an accommodation.

(1) The communication may be made orally, in writing, or by another effective means.

(2) A covered entity may not require that the communication be in writing, in any specific format, or on any particular form in order to be considered "communicated to the employer."

(3) To request a reasonable accommodation, the employee or applicant, or a representative of the employee or applicant, need only communicate to the covered entity that the employee or applicant:

(i) Has a limitation, and

(ii) Needs an adjustment or change at work.

(e) *Consideration of mitigating measures —*

(1) The determination of whether an employee or applicant has a known limitation shall be made without regard to the ameliorative effects of mitigating measures.

(2) The non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an employee or applicant has a limitation.

(f) *Qualified employee or applicant* with respect to an employee or applicant with a known limitation under the PWFA means:

(1) An employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position.

(i) With respect to leave as an accommodation, the relevant inquiry is whether the employee is reasonably expected to be able to perform the essential functions, with or without a reasonable accommodation, at the end of the leave, if time off is granted, or if the employee is qualified as set out in paragraph (f)(2) of this section after returning from leave.

(2) Additionally, an employee or applicant shall be considered qualified if they cannot perform one or more essential functions if:

(i) Any inability to perform an essential function is for a temporary period, where "temporary" means lasting for a limited time, not permanent, and may extend beyond "in the near future";

(ii) The essential function(s) could be performed in the near future, where "in the near future" means the ability to perform the essential function(s) will generally resume within forty weeks of its suspension; and

(iii) The inability to perform the essential function can be reasonably accommodated. This may be accomplished by temporary suspension of the essential function(s) and the employee performing the remaining functions of their position or, depending on the position, other arrangements, including, but not limited to: the employee performing the remaining functions of their position and other functions assigned by the covered entity; the employee performing the functions of a different job to which the covered entity temporarily transfers or assigns the employee; or the employee being assigned to light duty or modified duty or participating in the covered entity's light or modified duty program.

(g) *Essential functions* mean the fundamental job duties of the employment position the employee or applicant holds or desires. The term "essential functions" does not include the marginal functions of the position.

(1) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for their expertise or ability to perform the particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(h) *Reasonable accommodation—generally.* With respect to an employee or applicant with a known limitation under the PWFA, reasonable accommodation includes:

(1) Modifications or adjustments to a job application process that enable an applicant with a known limitation under the PWFA to be considered for the position such applicant desires; or

(2) 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 a qualified employee or applicant with a known limitation under the PWFA to perform the essential functions of that position; or

(3) Modifications or adjustments that enable a qualified employee or applicant with a known limitation under the PWFA to enjoy equal benefits and privileges of employment; or

(4) Temporary suspension of essential function(s) and/or modifications or adjustments that permit the temporary suspension of essential function(s).

(5) To determine the appropriate reasonable accommodation, it may be necessary for the covered entity to initiate an informal, interactive process as explained in paragraph (k) of this section.

(i) *Reasonable accommodation—examples.* Reasonable accommodation may include, but is not limited to:

(1) Making existing facilities used by employees readily accessible to and usable by employees and applicants with known limitations under the PWFA;

(2) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; breaks for use of the restroom, drinking, eating, and/or resting; acquisition or modification of equipment, uniforms, or devices, including devices that assist with lifting or carrying for jobs that involve lifting and/or carrying; modifying the work environment; providing seating for jobs that require standing, or standing for jobs that require sitting; appropriate adjustment or modifications of examinations or policies; permitting the use of paid leave (whether accrued, as part of a short-term disability program, or any other employer benefit) or providing additional unpaid leave for reasons, including, but not limited to, recovery from childbirth, miscarriage, stillbirth, or medical conditions related to pregnancy or childbirth, to attend health care appointments or receive health care treatment related to pregnancy, childbirth, or related medical conditions; placement in the covered entity's light or modified duty program or assignment to light duty or modified

work; telework; adjustments to allow an employee or applicant to work without increased pain or increased risk to the employee's or applicant's health or the health of the employee's or applicant's pregnancy due to the employee's or applicant's known limitation; temporarily suspending one or more essential functions of the position; providing reserved parking spaces if the employee is otherwise entitled to use employer-provided parking; and other similar accommodations for employees or applicants with known limitations.

(3) The reasonable accommodation of leave includes, but is not limited to:

(i) The ability to use paid leave (whether accrued, short-term disability, or another employer benefit) or receive unpaid leave, including, but not limited to, leave during pregnancy; to recover from childbirth, miscarriage, or stillbirth; and to attend health care appointments or receive health care treatments related to pregnancy, childbirth, or related medical conditions;

(ii) The ability to use paid leave (accrued, short-term disability, or another employer benefit) or unpaid leave for a known limitation under the PWFA;

(iii) The ability to choose whether to use paid leave (accrued, short-term disability or another employer benefit) or unpaid leave to the extent that the covered entity allows employees using leave not related to pregnancy, childbirth, or related medical conditions to choose between the use of paid leave (accrued, short-term disability, or another employer benefit) and unpaid leave; and

(iv) A covered entity's concerns about the length, frequency, or unpredictable nature of leave requested as a reasonable accommodation are questions of undue hardship.

(4) The provision of reasonable accommodations related to lactation, including, but not limited to:

(i) Breaks, a space for lactation, and other related modifications as required under the PUMP Act (Pub .L. 117-328, Div. KK, 29 U.S.C. 218d), if not already provided under the PUMP Act;

(ii) Whether the space for lactation is provided under the PUMP Act or paragraph (i)(4)(i) of this section, accommodations related to pumping, such as, but not limited to, ensuring that the area for lactation is in reasonable proximity to the employee's usual work area; that it is regularly cleaned; that it has electricity, appropriate seating, and a surface sufficient to place a breast pump; and that it is in reasonable proximity to a sink, running water, and a refrigerator for storing milk.

(5) The temporary suspension of one or more essential function(s) of the position in question, as defined in paragraph (g) of this section, is a reasonable accommodation if an applicant or employee with a known limitation is unable to perform one or more essential functions with or without a reasonable accommodation and the conditions in paragraph (f)(2) of this section are met.

(j) *Undue hardship—*

(1) *In general*. *Undue hardship* means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (j)(2) of this section.

(2) *Factors to be considered.* In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered, with no one factor to be dispositive, include:

(i) The nature and net cost of the accommodation needed under the PWFA;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(3) If an employee or applicant with a known limitation under the PWFA meets the definition of "qualified employee" under paragraph (f)(2) of this section and needs one or more essential functions of the relevant position to be temporarily suspended, the covered entity must provide the accommodation unless doing so imposes an undue hardship when considered in light of the factors provided in paragraphs (j)(2)(i) through (v) of this section as well as the following additional factors where they are relevant and with no one factor being dispositive:

(i) The length of time that the employee or applicant will be unable to perform the essential function(s);

(ii) Whether, through the factors listed in paragraph (f)(2)(iii) of this section or otherwise, there is work for the employee or applicant to accomplish;

(iii) The nature of the essential function(s), including its frequency;

(iv) Whether the covered entity has provided other employees or applicants in similar positions who are unable to perform the essential function(s) of their position with temporary suspensions of essential functions;

(v) If necessary, whether there are other employees, temporary employees, or third parties who can perform or be hired to perform the essential function(s); and

(vi) Whether the essential function(s) can be postponed or remain unperformed for any length of time and, if so, for how long.

(4) Predictable assessments: Although a covered entity must assess on a case-by-case basis whether a requested modification is a reasonable accommodation that would cause undue hardship, the individualized assessment of whether the modifications listed in paragraphs (j)(4)(i) through (iv) of this section would cause undue hardship will, in virtually all cases, result in a determination that they are reasonable accommodations that will not impose an undue hardship under the PWFA when they are requested as workplace accommodations by an employee or applicant who is pregnant. Given the simple and straightforward nature of these modifications, they will, as a factual matter, virtually always be found to be reasonable accommodations that do not impose significant difficulty or expense (i.e., undue hardship). Therefore, with respect to these modifications, the necessary individualized assessment should be particularly simple and straightforward. It should easily be concluded that the following modifications will virtually always be reasonable accommodations that do not impose an undue hardship:

(i) Allowing an employee or applicant to carry water and drink as needed during the workday;

(ii) Allowing an employee or applicant additional restroom breaks;

(iii) Allowing an employee or applicant whose work requires standing to sit and whose work requires sitting to stand; and

(iv) Allowing an employee or applicant breaks as needed to eat and drink.

(5) A covered entity may not establish that a reasonable accommodation imposes an undue hardship based on a mere assumption or speculation that other employees might

seek a reasonable accommodation, or even the same reasonable accommodation, in the future.

(k) *Interactive process* means an informal, interactive process between the covered entity and the employee or applicant seeking an accommodation under the PWFA. This process should identify the known limitation and the change or adjustment at work that is needed, if either of these are not clear from the request, and potential reasonable accommodations. There are no rigid steps that must be followed.

(l) *Supporting documentation.* (1) A covered entity that decides to seek supporting documentation from a worker who seeks an accommodation under the PWFA is limited to requiring documentation that is reasonable under the circumstances for the covered entity to determine whether to grant the accommodation. The following situations are examples of when requiring supporting documentation is not reasonable under the circumstances:

(i) When the known limitation and need for reasonable accommodation are obvious and the employee confirms the obvious limitation and need for reasonable accommodation through self-attestation;

(ii) When the employee or applicant already has provided the covered entity with sufficient information to substantiate that the employee or applicant has a known limitation and that a change or adjustment at work is needed;

(iii) When the employee or applicant is pregnant and the reasonable accommodation is one of those listed in paragraphs (j)(4)(i) through (iv) of this section and the employee has provided a self-attestation; or

(iv) When the covered entity requires documentation other than self-attestation from the employee or applicant regarding lactation or pumping.

(2) When requiring supporting documentation is reasonable under the circumstances, the covered entity is limited to requiring reasonable documentation. Reasonable documentation means documentation that is sufficient to describe or confirm the physical or mental condition; that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and that a change or adjustment at work is needed.

(3) A covered entity may require that documentation comes from the appropriate health care provider in a particular situation, which may include, but is not limited to, doctors, doulas, midwives, psychologists, nurses, nurse practitioners, physical therapists, lactation consultants, occupational therapists, vocational rehabilitation specialists, therapists, and licensed mental health providers. The covered entity may not require that the employee or applicant seeking the accommodation be examined by a health care provider selected by the covered entity.

(4) The rules protecting confidential medical information in the Americans with Disabilities Act, 42 U.S.C. 12111 et seq., apply to medical information received by a covered entity under the PWFA.

§ 1636.4 Prohibited practices.

(a) It is an unlawful employment practice for a covered entity not to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee or applicant, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

(1) An unnecessary delay in responding to a reasonable accommodation request may result in a violation of the PWFA, 42 U.S.C. 2000gg-1(1), even if the covered entity eventually provides the reasonable accommodation. In determining whether there has

been an unnecessary delay, factors to be considered, with no one factor to be dispositive, include:

(i) The reason for the delay;

(ii) The length of the delay;

(iii) How much the employee or applicant and the covered entity each contributed to the delay;

(iv) Whether the covered entity was engaged in actions related to the reasonable accommodation request during the delay;

(v) Whether the accommodation was simple or complex to provide. There are certain accommodations, set forth in § 1636.3(j)(4), that are common and easy to provide. Delay in providing these accommodations will virtually always result in a finding of unnecessary delay; and

(vi) Whether the covered entity offered the employee or applicant an interim reasonable accommodation during the interactive process or while waiting for the covered entity's response. If an interim reasonable accommodation is offered, delay by the covered entity is more likely to be excused. For the purposes of this factor, leave will not be considered an appropriate interim reasonable accommodation if there is another interim reasonable accommodation that would not cause an undue hardship for the covered entity and would allow the employee or applicant to continue to work, unless the employee or applicant selects or requests leave as an interim accommodation.

(2) An employee or applicant with a known limitation under the PWFA is not required to accept an accommodation. However, if such employee or applicant rejects a reasonable accommodation that is necessary to enable the employee or applicant to perform the essential functions of the position held or desired or to apply for the position, and as a result of that rejection, cannot perform the essential functions of the position or cannot

apply, the employee or applicant will not be considered "qualified." In this situation, the covered entity also must consider whether the employee could be "qualified" under the second part of the PWFA's definition, set forth at § 1636.3(f)(2).

(3) A covered entity cannot justify the denial or delay of a reasonable accommodation based on an employee or applicant failing to provide supporting documentation, unless requiring the supporting documentation is reasonable under the circumstances for the covered entity to determine whether to provide the accommodation.

(4) The accommodation should provide the employee or applicant with equal employment opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges as are available to the average similarly situated employee without a known limitation. When choosing between accommodations that do not cause an undue hardship, the covered entity must choose an option that provides the employee or applicant equal employment opportunity.

(b) It is unlawful for a covered entity to require a qualified employee or applicant 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 42 U.S.C. 2000gg(7) and described at § 1636.3(k).

(c) It is unlawful for a covered entity to deny employment opportunities to a qualified employee or applicant if such denial is based on the need or potential need of the covered entity to make reasonable accommodations to the known limitations related to the pregnancy, childbirth or related medical conditions of the qualified employee or applicant.

(d) It is unlawful for a covered entity:

(1) To 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 the qualified employee that does not result in an undue hardship for the covered entity; but

(2) Nothing in this provision limits the provision of leave as a reasonable accommodation if that is the reasonable accommodation requested or selected by the employee, or if it is the only reasonable accommodation that does not cause an undue hardship.

(e) It is unlawful for a covered entity:

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

(2) Nothing in paragraph (e)(1) of this section limits the rights available under 42 U.S.C. 2000gg-2(f) of the PWFA or § 1636.5(f).

§ 1636.5 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 section provides to the Commission, the Attorney General, or any person, respectively, alleging an unlawful employment practice in violation of this section against an employee described in 42 U.S.C. 2000gg(3)(A), except as provided in paragraphs (a)(2) and (3) of this section.

(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 section 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 section 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, 42 U.S.C. 1981a(a)(1)).

(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., for the purposes of addressing allegations of violations of section 201(a)(1) of such Act, 2 U.S.C. 1311(a)(1), shall be the powers, remedies, and procedures this section provides to address an allegation of an unlawful employment practice in violation of this section against an employee described in 42 U.S.C. 2000gg(3)(B), except as provided in paragraphs (b)(2) and (3) of this section.

(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, for the purposes of addressing allegations of such a violation shall be the powers, remedies, and procedures this section provides to address allegations of 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, for purposes of addressing allegations of such a violation, shall be the powers, remedies, and procedures this section provides to address any allegation of such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes, 42 U.S.C. 1981a(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 section provides to the President, the Commission, the Board, or any person, respectively, alleging an unlawful employment practice in violation of this section against an employee described in 42 U.S.C. 2000gg(3)(C), except as provided in paragraphs (c)(2) and (3) of this section

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(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 section 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 section 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, 42 U.S.C. 1981a(a)(1)).

(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 section provides to the Commission or any person, respectively, alleging an unlawful employment practice in violation of this section against an employee described in 42 U.S.C. 2000gg(3)(D), except as provided in paragraphs (d)(2) and (3) of this section.

(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 section 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 section 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, 42 U.S.C. 1981a(a)(1)).

(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 section provides to the Commission, the Attorney General, the Librarian of Congress, or any person, respectively, alleging an unlawful employment practice in violation of this chapter against an employee described in 42 U.S.C. 2000gg(3)(E), except as provided in paragraphs (e)(2) and (3) of this section.

(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 section 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 section

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, 42 U.S.C. 1981a(a)(1)).

(f) *Prohibition against retaliation*—(1) *In general.* No person shall discriminate against any employee, applicant, or former employee because such individual has opposed any act or practice made unlawful by the PWFA or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the PWFA.

(i) An employee, applicant, or former employee need not be a qualified employee, applicant, or former employee with a known limitation to bring an action under this paragraph (f)(1).

(ii) A request for reasonable accommodation for a known limitation under the PWFA constitutes protected activity under this paragraph (f)(1).

(iii) An employee, applicant, or former employee does not actually have to be deterred from exercising or enjoying rights under the PWFA in order for the retaliation to be actionable.

(iv) A covered entity requiring supporting documentation when it is not reasonable under the circumstances for the covered entity to determine whether to provide the accommodation is a violation of this paragraph (f)(1).

(v) When an employee or applicant (or a representative of an employee or applicant) provides sufficient information or documentation to describe or confirm the known limitation and to substantiate the need for a reasonable accommodation, continued efforts by the covered entity to require that the employee or applicant (or the representative of such individual) provide more information or documentation is a violation of this paragraph, unless the covered

entity has a good faith belief that the submitted information or documentation is insufficient.

(2) *Prohibition against coercion.* It is unlawful to coerce, intimidate, threaten, harass, or interfere with any individual in the exercise or enjoyment of, or on account of such individual having exercised or enjoyed, or because that individual aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the PWFA.

(i) An individual need not meet the definition of a "qualified employee" or have a "known limitation" under the PWFA to bring an action under this paragraph (f)(2).

(ii) A request for reasonable accommodation for a known limitation under the PWFA constitutes protected activity under this paragraph (f)(2).

(iii) An individual does not actually have to be deterred from exercising or enjoying rights under the PWFA for the coercion, intimidation, threats, harassment, or interference to be actionable.

(iv) A covered entity requiring supporting documentation when it is not reasonable under the circumstances for the covered entity to determine whether to provide the accommodation is a violation of this paragraph (f)(2).

(v) When an employee or applicant (or a representative of an employee or applicant) provides sufficient information or documentation to describe or confirm the known limitation and to substantiate the need for a reasonable accommodation, continued efforts by the covered entity to require that the employee or applicant (or a representative of such individual) provide more information or documentation is a violation of this paragraph, unless the covered

entity has a good faith belief that the submitted information or documentation is insufficient.

(3) *Remedy*. The remedies and procedures otherwise provided for under this section shall be available to aggrieved individuals with respect to violations of this section regarding retaliation, coercion, interference, or intimidation, threats, or harassment.

(g) *Limitation on monetary damages*. Notwithstanding paragraphs (a)(3), (b)(3), (c)(3), (d)(3), and (e)(3) of this section, if an unlawful employment practice involves the provision of a reasonable accommodation pursuant to this section, 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 or applicant with known limitations related to, affected by, or arising out of 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 or applicant with an equally effective opportunity and would not cause an undue hardship on the operation of the covered entity.

§ 1636.6 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 the PWFA. In any action against a State for a violation of the PWFA, remedies (including remedies both at law and in equity) are available for such a violation to the same extent such remedies are available for such a violation in an action against any public or private entity other than a State.

§ 1636.7 Relationship to other laws.

(a) *In general.* (1) The PWFA and this regulation do not invalidate or limit the powers, remedies, and procedures under any Federal law, State law, or the law of any political

subdivision of any State or jurisdiction that provides greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions.

(2) The PWFA and this regulation do not require an employer-sponsored health plan to pay for or cover any particular item, procedure, or treatment or affect any right or remedy available under any other Federal, State, or local law with respect to any such payment or coverage requirement.

(b) *Rule of construction.* This statute is subject to the applicability to religious employment set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1(a).

(1) Nothing in this provision limits the rights under the U.S. Constitution of a covered entity.

(2) Nothing in 42 U.S.C. 2000gg-5(b) of the PWFA or this regulation should be interpreted to limit an employee's, applicant's, or former employee's rights under other civil rights statutes.

§ 1636.8 Severability.

(a) If any provision of the PWFA or the application of that provision to particular persons or circumstances is held invalid or found to be unconstitutional, the remainder of the statute and the application of that provision to other persons or circumstances shall not be affected.

(b) If any provision of the regulation that uses the same language as in the statute or the application of that provision to particular persons or circumstances is held invalid or found to be unconstitutional, the remainder of the regulation and the application of that provision to other persons or circumstances shall not be affected.

(c) If any provision of the regulation that provides additional guidance to carry out the PWFA, including examples of reasonable accommodations, or the application of that provision to particular persons or circumstances is held invalid or found to be unconstitutional, the

remainder of the regulation and the application of that provision to other persons or circumstances shall not be affected.

Appendix A to Part 1636—Interpretive Guidance on the Pregnant Workers Fairness Act

On December 29, 2022, President Biden signed the Pregnant Workers Fairness Act (PWFA) into law.[1] The PWFA requires a covered entity to provide reasonable accommodations to a qualified employee's or applicant's known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, absent undue hardship on the operation of the business of the covered entity. 42 U.S.C. 2000gg-3 requires the Equal Employment Opportunity Commission (EEOC or Commission) to promulgate regulations to implement the PWFA.

The PWFA prohibits a covered entity from (1) denying a qualified employee or applicant with a known limitation a reasonable accommodation, absent undue hardship; (2) requiring a qualified employee or applicant to accept an accommodation other than one arrived at through the interactive process; (3) denying an employment opportunity to a qualified employee or applicant if the denial is based on the employer's need or potential need to make a reasonable accommodation for the known limitation of the employee or applicant; (4) requiring a qualified employee with a known limitation to take leave, either paid or unpaid, if another effective reasonable accommodation exists that does not cause an undue hardship; and (5) taking an adverse action in terms, conditions, or privileges of employment against a qualified employee, applicant, or former employee on account of the employee, applicant, or former employee requesting or using a reasonable accommodation for a known limitation. The PWFA also prohibits retaliation against applicants, employees, or former employees for opposing unlawful discrimination, making a charge, testifying, assisting, or participating in any manner in a PWFA

[1] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Division II, 136 Stat. 4459, 6084 (2022) (codified at 42 U.S.C. 2000gg–2000gg-6).

investigation, hearing, or proceeding. Finally, the PWFA prohibits coercing, intimidating, threatening, or interfering with any individual related to the exercise or enjoyment of any right, including aiding or encouraging another individual in such exercise or enjoyment, under the statute.

The U.S. Equal Employment Opportunity Commission ("the Commission" or "the EEOC") is responsible for enforcing the PWFA with respect to employees covered by Title VII of the Civil Rights Act of 1964 and employees covered by the Government Employee Rights Act of 1991 (GERA). Employees covered by section 706 of Title VII may file charges with the EEOC and the EEOC will investigate them using the same process as set out in Title VII. Similarly, employees covered by section 717 of Title VII may file complaints with the relevant Federal agency which will investigate them, and the EEOC will process appeals using the same process as set out in Title VII for Federal employees.

This Interpretive Guidance addresses the major provisions of the PWFA and its regulation and explains the major concepts pertaining to non-discrimination with respect to reasonable accommodations for known limitations related to pregnancy, childbirth, or related medical conditions under the statute. The Interpretive Guidance represents the Commission's interpretation of the issues addressed within it, and the Commission will be guided by the regulation and the Interpretive Guidance when enforcing the PWFA.

Section 1636.2 Definitions—General

42 U.S.C. 2000gg(3) uses "employee (including an applicant)" in its definition of "employee." Because the PWFA relies on Title VII for its definition of "employee," the rule clarifies that the term also includes "former employee," where relevant.[2] The regulation, and this

[2] 42 U.S.C. 2000e(f). Under Title VII, the term "employee" includes former employees. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding that including former employees within sec. 704(a) of Title VII's coverage of "employee" was "consistent with the broader context of Title VII and the primary purpose of sec. 704(a)); *see also* EEOC, *Compliance Manual Section 2: Threshold Issues* 2-III.A (2009), http://www.eeoc.gov/policy/docs/threshold.html#2-III-A. This appendix uses the term "worker"

appendix use the term "covered entity" and the term "employer" interchangeably. The regulation and this appendix use the term "employee or applicant" and "employee"; where appropriate, "employee" or "employee or applicant" means "employee, applicant, or former employee."

Section 1636.3 Definitions Specific to PWFA

1636.3(a)(1) Known

Paragraph (1) adopts the definition of "known" based on the PWFA and thus defines it to mean that the employee or applicant, or a representative of the employee or applicant, has communicated the limitation to the covered entity.

1636.3(a)(2) Limitation

Paragraph (2) adopts the definition of "limitation" based on the PWFA and thus defines it to mean a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The "physical or mental condition" that is the limitation may be a modest, minor, and/or episodic impediment or problem. The definition encompasses when a worker affected by pregnancy, childbirth, or related medical conditions has a need or problem related to maintaining their health or the health of their pregnancy.[3] The definition also includes when the worker is seeking health care related to the pregnancy, childbirth, or a related medical condition itself. This is consistent with the ADA which permits reasonable accommodations for obtaining medical treatment[4] and recognizes that for pregnancy, childbirth,

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interchangeably with "employee or applicant." For purposes of the PWFA, the term "worker" does not apply to independent contractors.

[3] The regulation and the appendix use the term "maintain health or the health of the pregnancy." This includes avoiding risk to the employee's or applicant's health or to the health of their pregnancy.

[4] EEOC, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, at text after n. 49 (2002), http://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-

or related medical conditions the proper course of care can include regular appointments and monitoring by a health care professional.[5]

The general principle informing the rule's definition is that the physical or mental condition (the limitation) required to trigger the obligation to provide a reasonable accommodation under the PWFA does not require a specific level of severity. This is clear from the text of the statute, which does not contain a level of severity, other than stating that the limitation does not need to meet the definition of a "disability" under the ADA.[6] The lack of a level of severity is also necessary given the need the statute seeks to fill. Workers who can show that their pregnancy-related condition meets the definition of a disability may be eligible to receive an accommodation under the ADA; workers whose limitations do not reach that threshold are ineligible for such accommodations, and the PWFA is intended to cover those workers.[7] Additionally, the definition covers situations where a worker seeks an accommodation in order to maintain their health or the health of their pregnancy and avoid more serious consequences and when a worker seeks health care for their pregnancy, childbirth, or related

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accommodation-and-undue-hardship-under-ada [hereinafter *Enforcement Guidance on Reasonable Accommodation*].

[5] *See, e.g.*, Office of Women's Health, U.S. Dep't of Health and Human Servs., *Prenatal Care* (last visited July 18, 2023) (stating that during pregnancy usually visits are once a month until week 28, twice a month from weeks 28-36 and once a week from weeks 36 to birth) https://www.womenshealth.gov/a-z-topics/prenatal-care; Am. Coll. of Obstetricians & Gynecologists, Comm. Opinion No. 736, *Optimizing Post-Partum Care* (stating the importance of regular post-partum care) (2021) (https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/05/optimizing-postpartum-care) & Opinion No. 826, *Protecting and Expanding Medicaid to Improve Women's Health* (encouraging the expansion of Medicaid to improve post-partum care) (2021) (https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/06/protecting-and-expanding-medicaid-to-improve-womens-health).

[6] 42 U.S.C. 2000gg(4).

[7] 42 U.S.C. 2000gg(4). *See, e.g.*, H.R. Rep. No. 117-27, pt. 1, at 12 (workers whose pregnancy-related impairments do not substantially limit a major life activity and who are not covered by the ADA can be covered by the PWFA); *id.* at 22-23 (accommodations are frequently needed by, and should be provided to, people with healthy pregnancies); *id.* (example of an "uneventful pregnancy" in which a woman needed more bathroom breaks); *id.* at 14-22 (outlining the gaps left by Title VII and the ADA that the PWFA is intended to fill so that pregnant workers can receive reasonable accommodations); *id.* at 56 (noting that "minor limitations" can be covered because they presumably only require minor accommodations).

medical conditions.[8] Practically, allowing for accommodations to maintain health and attend medical appointments also increases the chances that the accommodation is minor and may decrease the need for a more extensive accommodation because the worker may be able to avoid more serious complications.

Because the standard for known limitation in the statute does not include a specific level of severity and accommodations are available for non-severe physical or mental conditions, whether a worker has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions shall be construed broadly to the maximum extent permitted by the PWFA.

Related to, Affected by, or Arising Out of

Whether a physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions usually will be obvious. For example, if an employee is pregnant and as a result has pain when standing for long periods of time, the employee's physical or mental condition (pain when standing for a protracted period) is related to the employee's pregnancy. An employee who is pregnant and because of the pregnancy cannot lift more than 20 pounds has a physical condition related to pregnancy. An employee who is pregnant and is seeking time off for prenatal health care appointments is attending a medical appointment related to the pregnancy. An employee who requests an accommodation to attend

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[8] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at text above Question 17 (providing reasons for which an employee may receive an accommodation, including to obtain medical treatment and to avoid temporary adverse conditions in the work environment because of the effect on the worker's health). *See, e.g.*, *Markup of the Paycheck Fairness Act*; *Pregnant Workers Fairness Act*; Workplace Violence Prevention for Health Care and Social Service Workers Act 54:46 (2021), https://www.youtube.com/watch?v=p6Ie2S9sTxs, at 54:46 (statement of Rep. Kathy E. Manning) (goal of the PWFA is to help pregnant workers "to deliver healthy babies while maintaining jobs"); *id.* at 21:50 (statement of Rep. Robert C. Scott) ("[W]ithout these protections, too many workers are forced to choose between a healthy pregnancy and their paychecks"); *id.* at 1:35 (statement of Rep. Lucy McBath) ("[N]o mother should ever have to choose between the heath of themselves and their child or paycheck."); *id.* at 1:44 (statement of Rep. Suzanne Bonamici) ("[P]regnant workers should not have to choose between a healthy pregnancy and a paycheck.").

therapy appointments for postpartum depression has a medical condition related to pregnancy (postpartum depression) and is obtaining health care for the related medical condition. A pregnant employee who is seeking an accommodation to limit exposure to secondhand smoke to protect the health of their pregnancy has a physical or mental condition (trying to maintain the employee's health or the health of their pregnancy or increased sensitivity to secondhand smoke) related to pregnancy. A pregnant worker seeking time off in order to get an amniocentesis is attending a medical appointment related to the pregnancy. An employee who requests leave for IVF treatment for the worker to get pregnant has a related medical condition (difficulty in becoming pregnant or infertility) and is seeking health care related to it. An employee whose pregnancy is causing fatigue has a physical condition (fatigue) related to pregnancy. An employee whose pregnancy is causing back pain has a physical condition (back pain) related to pregnancy. This is not an exhaustive list of physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.

The Commission recognizes, however, that some physical or mental conditions or limitations, including some of those in the examples above, may occur even if a person is not pregnant (e.g., depression, hypertension, constraints on lifting). To the extent that a covered entity has reasonable concerns about whether a physical or mental condition or limitation is "related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions," the employer may request information from the employee regarding the connection, using the principles set out in section 1636.3(l) about the interactive process and supporting documentation. For the most part, the Commission anticipates that determining whether a limitation or physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions will be a straightforward determination that can be accomplished through a conversation between the employer and the employee as part of the interactive process and without the need for the employee to obtain documentation or verification, such as documentation from a health care provider. Of course, even if a covered

entity concludes that a limitation is not covered by the PWFA, the covered entity should consider whether the limitation constitutes a disability that is covered by the ADA.

There may be situations where a physical or mental condition begins as something that is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, and, once the pregnancy, childbirth, or related medical condition is over, the limitation remains. If an employer has questions regarding whether the limitation is still related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, the employer may use the principles set out in the sections regarding the interactive process and supporting documentation. Additionally, there may be situations where that limitation qualifies as a disability under the ADA. In those situations, an employer may use the principles set out in the sections on the interactive process and supporting documentation for the ADA.

1636.3(b) Pregnancy, Childbirth, or Related Medical Conditions

The PWFA uses the term "pregnancy, childbirth, or related medical conditions," which appears in Title VII's definition of sex.[9] Because Congress chose to write the PWFA using the same language as Title VII, in the rule the Commission gives the term "pregnancy, childbirth, or related medical conditions" the same meaning under the PWFA as under Title VII.[10]

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[9] 42 U.S.C. 2000e(k).

[10] *See, e.g.*, *Texas Dep't of Housing & Cmty. Affs. v. Inclusive Cmtys. Project*, 576 U.S. 519, 536 (2015) ("If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation." (omissions in original) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* 323 (2012)); *Bragdon v. Abbott*, 524 U.S. 624, 644-45 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."); *Hall v. U.S. Dep't of Agric.*, 984 F.3d 825, 840 (9th Cir. 2020) ("Congress is presumed to be aware of an agency's interpretation of a statute. We most commonly apply that presumption when an agency's interpretation of a statute has been officially published and consistently followed. If Congress thereafter reenacts the same language, we conclude that it has adopted the agency's interpretation.") (citations and internal quotations omitted); Antonin Scalia & Bryan A. Garner, *Reading Law* 323 (2012) ("[W]hen a statute uses the very same terminology as an

To assist workers and covered entities, the regulation includes a non-exhaustive list of examples of pregnancy, childbirth, or related medical conditions that the Commission has concluded generally fall within the statutory definition. These include conditions that Federal courts and the EEOC have already concluded are part of the definition under Title VII as well as other conditions that are based on the expertise of medical professionals. The list in the regulation for the definition of "pregnancy, childbirth, or related medical conditions" includes current pregnancy, past pregnancy, potential pregnancy, lactation (including breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, or having or choosing not to have an abortion, among other conditions.[11]

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earlier statute—especially in the very same field, such as securities law or civil-rights law—it is reasonable to believe that the terminology bears a consistent meaning.").

[11] EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* I.A. (2015), https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues [hereinafter *Enforcement Guidance on Pregnancy Discrimination*] ("pregnancy, childbirth, or related medical conditions" include current pregnancy, past pregnancy, potential or intended pregnancy, infertility treatment, use of contraception, lactation, breastfeeding, and the decision to have or not to have an abortion, among other conditions); *see, e.g.*, *Hicks v. City of Tuscaloosa*, 870 F.3d 1253, 1259–60 (11th Cir. 2017) (finding lactation and breastfeeding covered under the PDA, and asserting that "[t]he PDA would be rendered a nullity if women were protected during a pregnancy but then could be readily terminated for breastfeeding—an important pregnancy-related physiological process") (internal citation and quotation omitted); *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 429–30 (5th Cir. 2013) ("[A]s both menstruation and lactation are aspects of female physiology that are affected by pregnancy, each seems readily to fit into a reasonable definition of 'pregnancy, childbirth, or related medical conditions'"); *Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008) (holding that the PDA prohibits an employer from discriminating against a female employee because she has exercised her right to have an abortion); *Kocak v. Cmty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 470 (6th Cir. 2005) (stating that the plaintiff "cannot be refused employment on the basis of her potential pregnancy"); *Turic v. Holland Hosp., Inc*., 85 F.3d 1211, 1214 (6th Cir. 1996) (finding the termination of a pregnant employee because she contemplated having an abortion violated the PDA); *Piraino v. Int'l Orientation Res., Inc.*, 84 F.3d 270, 274 (7th Cir. 1996) (rejecting "surprising claim" by the defendant that no pregnancy discrimination can be shown where the challenged action occurred after the birth of the plaintiff's baby); *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 648 (8th Cir. 1987) (referencing the PDA's legislative history and noting commentator agreement that "[b]y broadly defining pregnancy discrimination, Congress clearly intended to extend protection beyond the simple fact of an employee's pregnancy to include 'related medical conditions' such as nausea or potential miscarriage") (citations and internal quotations omitted); *Ducharme v. Crescent City Déjà Vu, L.L.C.*, 406 F. Supp. 3d 548, 556 (E.D. La. 2019) (finding that "abortion is encompassed within the statutory text prohibiting adverse employment actions 'because of or on the basis of pregnancy, childbirth, or related medical conditions'"); *Donaldson v. Am. Banco Corp., Inc.*, 945 F. Supp. 1456, 1464 (D. Colo. 1996) ("It would make little sense to prohibit an employer from firing a woman during her pregnancy but permit the employer to terminate her the day after delivery if the reason for termination was that the woman became pregnant in the first place. The plain language of the statute does not require it, and common sense precludes it."); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1402-03 (N.D. Ill. 1994) (PDA gives women "the right . . . to be financially and legally

The Commission emphasizes that the list in the regulation is non-exhaustive, and to receive an accommodation an employee or applicant does not have to specify a condition on this list or use medical terms to describe a condition.

However, to be a "related medical condition" as applied to the specific employee or applicant in question, the condition must relate to pregnancy or childbirth. Some of the "related medical conditions" listed in the regulation are conditions that commonly, but not necessarily, relate to pregnancy or childbirth. If a worker has a condition that is listed in the regulation but, in their situation, it does not relate to pregnancy or childbirth, the condition shall not be covered under the PWFA. For example, if a worker has high blood pressure but that medical condition is not related to pregnancy or childbirth, a physical or mental condition related to the worker's high blood pressure is not eligible for an accommodation under the PWFA. Other civil rights statutes, such as the ADA, separately may entitle the worker to reasonable accommodation. If an employer has questions regarding whether a condition is related to pregnancy or childbirth, the employer may use the principles set out in the sections regarding the interactive process and supporting documentation.

"Related medical conditions" include conditions that existed before pregnancy or childbirth (and for which an individual was perhaps receiving reasonable accommodation under the ADA) but that may be or have been exacerbated by pregnancy or childbirth, such that

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protected before, during, and after her pregnancy" and stating "[a]s a general matter, a woman's medical condition rendering her unable to become pregnant naturally is a medical condition related to pregnancy and childbirth for purposes of the Pregnancy Discrimination Act.") (internal citations and quotations omitted); *Neessen v. Arona Corp.*, 2010 WL 1731652, at *7 (N.D. Iowa Apr. 30, 2010) (finding the plaintiff covered by the PDA where the defendant allegedly refused to hire her because she had recently been pregnant and given birth); 29 CFR 1604 app. Questions 34–37 (1979); H.R. Rep. No. 95-1786, at 4 (1978), *as reprinted in* 95th Cong., 2d Sess. 4, 1978 U.S.C.C.A.N. 4749, 4766 ("Because the bill applies to all situations in which women are 'affected by pregnancy, childbirth, and related medical conditions,' its basic language covers decisions by women who chose to terminate their pregnancies. Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion."); EEOC, *Commission Decision on Coverage of Contraception* (2000), https://www.eeoc.gov/commission-decision-coverage-contraception ("The PDA's prohibition on discrimination against women based on their ability to become pregnant thus necessarily includes a prohibition on discrimination related to a woman's use of contraceptives.").

additional or different accommodations are needed. For example, a worker who was using unpaid leave as an accommodation to attend treatment for anxiety may experience a worsening of anxiety due to pregnancy or childbirth and request an additional accommodation. A worker who received extra breaks to eat or drink due to Type 2 diabetes before pregnancy may need additional accommodations during pregnancy to monitor and manage the diabetes more closely and avoid or minimize adverse health consequences to the worker or their pregnancy. A worker may have high blood pressure that can be managed prior to the pregnancy, but once the worker is pregnant, the high blood pressure poses a risk to the pregnancy and the worker needs bed rest. In these situations, an employee could request an additional accommodation under the ADA or an accommodation under the PWFA.

1636.3(c) Employee's Representative

Paragraph (c) of this section of the rule defines "employee's representative" because the known limitation may be communicated to the covered entity by the employee or the employee's representative. Under the ADA, a representative may also make the request for an accommodation. [12] Thus, the rule uses the same definition from the ADA and states that this term encompasses any representative of the employee or applicant, including a family member, friend, health care provider, or other representative.

1636.3(d) Communicated to the Employer

Paragraph (d) of this section of the rule states that the PWFA's requirement that the known limitation be "communicate[d] to the employer" means to make known to the covered entity either by communicating with a supervisor, manager, someone who has supervisory authority for the employee (or the equivalent for an applicant), or human resources personnel, or

[12] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, Question 2.

by following the covered entity's policy to request an accommodation. This should not be a difficult task, and the employer should permit an employee or applicant to request an accommodation through multiple avenues and means. Given that many accommodations requested under the PWFA will be straightforward—like additional bathroom breaks or water—the Commission emphasizes the importance of employees being able to obtain accommodations by communicating with the people who assign them daily tasks and whom they would normally consult if they had questions or concerns. Employees should not be made to wait for a reasonable accommodation that is simple and imposes negligible cost, and is often likely temporary, because they asked the wrong supervisor.

Paragraphs (d)(1) and (2) explain that a request for a reasonable accommodation under the PWFA, as with the ADA, does not need to be in writing or use any specific words or phrases. Instead, employees or applicants may request accommodations in conversation or may use another mode of communication to inform the employer. [13] A covered entity may choose to write a memorandum or letter confirming a request or may ask the employee or applicant to fill out a form or submit the request in written form. However, the covered entity cannot ignore or close the initial request because that initial request is sufficient to place the employer on notice.[14] Additionally, even though it is not required, an employee may choose email or other similar written means to submit a request for an accommodation to ensure clarity and create a record.

Paragraph (d)(3) of this section of the regulation sets out what an employee or applicant must communicate to the employer to request an accommodation under the PWFA. Such a request has two parts. First, the employee or applicant (or their representative) must identify the limitation that is the physical or mental condition and that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. Second, the employee or applicant

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[13] *Id.* at Question 3.

[14] *Id*.

(or their representative) must indicate that they need an adjustment or change at work. As with the ADA, to request an accommodation, an employee or applicant may use plain language and need not mention the PWFA; use the phrases "reasonable accommodation," "known limitation," "qualified," "essential function;" use any medical terminology; or use any other specific words or phrases.

Examples

Example 1636.3 #1: A pregnant employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of morning sickness."

Morning sickness is a physical condition related to pregnancy that impedes a person's ability to eat and drink and requires access to a bathroom. The employee has identified a change needed at work (change in work schedule). This is a request for a reasonable accommodation under the PWFA.

Example 1636.3 #2: An employee who gave birth three months ago tells the person who assigns her work at the employment agency, "I need an hour off once a week for treatments to help with my back problem that started during my pregnancy."

The back problem is a physical condition related to pregnancy, and the employee has identified a change needed at work (leave for medical appointments). This is a request for a reasonable accommodation under the PWFA.

Example 1636.3 #3: An employee tells a human resources specialist that they are worried about continuing to lift heavy boxes because they are concerned that it will harm their pregnancy.

The employee has a limitation because they have a need or a problem related to maintaining their health or the health of their pregnancy, the employee identified a change needed at work (assistance with lifting), and the employee communicated this information to the employer. This is a request for a reasonable accommodation under the PWFA.

Example 1636.3 #4: An employee's spouse, on the employee's behalf, requests light duty for the employee because the employee has a lifting restriction related to pregnancy; the employee's spouse uses the employer's established process for requesting a reasonable accommodation or light duty for the employee.

The lifting restriction is a physical condition related to the employee's pregnancy, and the employee's representative (their spouse) has identified a change needed at work (light duty). This is a request for a reasonable accommodation under the PWFA.

Example 1636.3 #5: An employee verbally informs a manager of her need for more frequent bathroom breaks, explains that the breaks are needed because the employee is

pregnant, but does not complete the employer's online form for requesting accommodation.

The need to urinate more frequently is a physical condition related to pregnancy, and the employee has identified a change needed at work (additional bathroom breaks). An employee need not use specific words or any specific form or template to make a request for accommodation. This is a request for a reasonable accommodation under the PWFA.

Example 1636.3 #6: An employee tells a supervisor that she needs time off to recover from childbirth.

The need or a problem is related to maintaining the employee's health after childbirth, and the employee has identified a change needed at work (time off). This is a request for a reasonable accommodation under the PWFA.[15]

1636.3(e) Mitigating Measures

There may be steps that a worker can take to mitigate, or lessen, the effect of a known limitation. Paragraph (e) of this section of the rule explains that, as with the ADA, the ameliorative, or positive, effects of mitigating measures, as that term is defined in the Commission's ADA regulations, shall not be considered when determining if the employee has a limitation under the PWFA. However, again as under the ADA, the detrimental or non-ameliorative effects of mitigating measures, such as negative side effects of medication, the burden of following a particular treatment regimen, and complications that arise from surgery, may be considered when determining if an employee has a limitation under the PWFA.[16]

1636.3(f) Qualified Employee or Applicant

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[15] *See infra* § 1636.3(h) *Particular Matters Regarding Leave as a Reasonable Accommodation* for a discussion of how requests for leave interact with situations where an employee has a right to leave under an employer's policy or another law; *see also* EEOC, *Employer-Provided Leave and the Americans with Disabilities Act*, Communication After an Employee Requests Leave (2016), https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act [hereinafter *Technical Assistance on Employer-Provided Leave*], for an explanation of this interaction and other helpful information about the interaction between the ADA and other laws requiring employers to provide leave to employees.

[16] 29 CFR 1630.2(j)(1)(vi), (j)(4)(ii); *see also* 29 CFR part 1630 app. 1630.2(j)(1)(vi).

An employee or applicant must meet the definition of "qualified" in the PWFA in one of two ways.[17]

As with the ADA, the determination of whether an employee with a known limitation is qualified should be based on the capabilities of the employee at the time of the relevant employment decision and should not be based on speculation that the employee may become unable in the future to perform certain tasks, may require leave, or may cause increased health insurance premiums or workers' compensation costs.[18]

1636.3(f)(1) The First Part of PWFA's Definition of Qualified Employee or Applicant—With or Without Reasonable Accommodation

Under 42 U.S.C. 2000gg(6), employees are qualified if they can perform the essential functions of their jobs with or without reasonable accommodation, which is the same language as in the ADA and is interpreted accordingly in the rule. "Reasonable" has the same meaning as under the ADA on this topic—an accommodation that "seems reasonable on its face, i.e., ordinarily or in the run of cases," "feasible," or "plausible."[19] Many workers seeking reasonable accommodations under the PWFA will meet this part of the definition. For example, a pregnant attorney who uses the firm's established telework program to work at home during morning sickness does not need an accommodation to perform the essential functions of the job and

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[17] The PWFA does not address prerequisites for a position; thus, whether an employee or applicant is qualified for the position in question is determined based on whether the employee or applicant can perform the essential functions of the position, with or without a reasonable accommodation, or based on the second part of the PWFA's definition of "qualified." 42 U.S.C. 2000gg(6).

[18] 29 CFR part 1630 app. 1630.2(m).

[19] *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401-02 (2002); *see, e.g., Shapiro v. Twp. of Lakewood*, 292 F.3d 356, 360 (3d Cir. 2002) (citing the definition from *Barnett*); *Osborne v. Baxter Healthcare Corp.*, 798 F.3d 1260, 1267 (10th Cir. 2015) (citing the definition from *Barnett*); *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 762 (7th Cir. 2012) (citing the definition from *Barnett*); *see also Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at text accompanying nn.8-9 (citing the definition from *Barnett*).

therefore is qualified without a reasonable accommodation. A pregnant cashier who needs a stool to perform the job will be qualified with the reasonable accommodation of a stool. A teacher recovering from childbirth who needs additional bathroom breaks will be qualified with a reasonable accommodation that allows such breaks.

Determining "Qualified" for the Reasonable Accommodation of Leave

When determining whether an employee who needs leave[20] as a reasonable accommodation meets the definition of "qualified," the relevant inquiry is whether the employee would be able to perform the essential functions of the position, with or without reasonable accommodation (or, if not, if the inability to perform the essential function(s) is for a temporary period, the essential function(s) could be performed in the near future, and the inability to perform the essential function(s) can be reasonably accommodated), with the benefit of a period of intermittent leave, after a period of part-time work, or at the end of a period of leave or time off.[21] Thus, an employee who needs some form of leave to recover from a known limitation caused, for example, by childbirth or a miscarriage, can meet the definition of "qualified" because it is reasonable to conclude that once they return from the period of leave (or during the time they are working if it is intermittent leave) they will be able to perform the essential functions of the job, with or without additional reasonable accommodations or will be qualified under the second part of the PWFA definition that is described in the next subsection. Of course, if an employer can demonstrate that leave would pose an undue hardship, for example, due to the

[20] Different types of employers use different terms for time away from work, including leave, paid time off (PTO), time off, sick time, vacation, and administrative leave, among others. Throughout the preamble, the regulation, and the appendix, the Commission uses the term "leave" or "time off" and intends those terms to cover leave however it is identified by the specific employer.

[21] If the employee will not be able to perform all of the essential functions at the end of the leave period, with or without accommodation, the employee may still be qualified under the second part of the PWFA's definition of qualified employee or applicant. 42 U.S.C. 2000gg(6).

length, frequency, or unpredictable nature of the time off that was requested, it may lawfully deny the request.[22]

1636.3(f)(2) The Second Part of PWFA's Definition of Qualified Employee or Applicant—Temporary Inability to Perform an Essential Function

The PWFA provides that an employee or applicant can meet the definition of "qualified" even if they cannot perform one or more essential functions of the position in question, provided three conditions are met: (1) the inability to perform an essential function(s) is for a temporary period; (2) the essential function(s) could be performed in the near future; and (3) the inability to perform the essential function(s) can be reasonably accommodated.[23]

Based on the overall structure and wording of the statute, the second part of the definition of "qualified" is relevant only when an employee or applicant cannot perform one or more essential functions of the job in question because of a known limitation under the PWFA. It is not relevant in any other circumstance. If the employee or applicant can perform the essential functions of the position with or without a reasonable accommodation, the first definition of "qualified" applies (able to do the job with or without a reasonable accommodation). For example, if a pregnant worker requests additional restroom breaks, the question of whether they are qualified is simply whether they can perform the essential functions of their job with the reasonable accommodation of additional restroom breaks, and there is no need to apply the definitions of "temporary" or "in the near future," or to determine whether the inability to perform an essential function can be reasonably accommodated (as no such inability exists).

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[22] As with the ADA, in determining whether leave under the PWFA causes an undue hardship, an employer may consider leave that the employee has already used under, for example, the FMLA. *See Technical Assistance on Employer-Provided Leave*, *supra* note 15, at Examples 17 and 18. For more information regarding leave as a reasonable accommodation, *see infra* § 1636.3(h) *Particular Matters Regarding Leave as a Reasonable Accommodation.*

[23] 42 U.S.C. 2000gg(6).

By contrast, some examples of situations where the second definition may be relevant include: (1) a pregnant construction worker is told by their health care provider to avoid lifting more than 20 pounds during the second through ninth months of pregnancy, an essential function of the worker's job requires lifting more than 20 pounds, and there is not a reasonable accommodation that will allow the worker to perform that function without lifting more than 20 pounds; and (2) a pregnant police officer is unable to perform patrol duties during the third through ninth months of the pregnancy, patrol duties are an essential function of the job, and there is not a reasonable accommodation that will allow the worker to perform the essential functions of the patrol position.

> Example 1636.3 #7/Qualified Employee: Launa has been working as a landscaper for two years, and her job regularly involves moving bags of soil that weigh 35-40 pounds. Launa becomes pregnant and lets her supervisor know that she has a lifting restriction of 20 pounds because of her pregnancy.
>
> 3. Known Limitation: Launa's lifting restriction is a physical condition related to pregnancy; Launa needs a change or adjustment at work; Launa has communicated this information to the employer.
> 4. Qualified:
>   a. Launa may be qualified with a reasonable accommodation of a device that helps with lifting.
>   b. If there is no device or other reasonable accommodation (or the device or other reasonable accommodation is too expensive or otherwise causes undue hardship for the employer) the employer must consider whether Launa meets the second definition of qualified: whether (1) the inability to perform the essential function is temporary, (2) Launa could perform the essential function in the near future, and (3) the inability to perform the essential function can be reasonably accommodated.

If the employer establishes that all possible accommodations that would allow the employee to temporarily suspend one or more essential functions would impose an undue hardship, then the employee will not be qualified under the PWFA's second definition of

qualified (because the inability to perform the essential function cannot be reasonably accommodated).[24]

1636.3(f)(2)(i) Temporary

The rule defines the term "temporary" to mean that the need to suspend one or more essential functions is "lasting for a limited time,[25] not permanent, and may extend beyond 'in the near future.'" As explained below, how long it may take before the essential function can be performed is further limited by the definition of "in the near future."

1636.3(f)(2)(ii) In the Near Future

The rule defines "in the near future" to mean generally forty weeks from the start of the temporary suspension of an essential function. This is based on the time of a full-term pregnancy (forty weeks). In the Commission's view, to define "in the near future" as less than generally forty weeks—i.e., the duration of a full-term pregnancy—would run counter to a central purpose of the PWFA of keeping pregnant workers in the workforce even when pregnancy, childbirth, or related medical conditions necessitate the reasonable accommodation of temporarily suspending the performance of one or more essential functions of a job.[26] Of course, if an accommodation is

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[24] If there is no reasonable accommodation that allows the worker to continue to work, absent undue hardship, the employee may be qualified for leave as a reasonable accommodation if leave does not cause an undue hardship.

[25] *Temporary, Merriam-Webster.com* Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/temporary ("lasting for a limited time") (last visited June 13, 2023). This definition is consistent with *Robert v. Bd. of Cnty. Comm'rs' of Brown Cnty., Kan.*, 691 F.3d 1211, 1218 (10th Cir. 2012) which was cited in the House Report in the discussion of this term. H.R. Rep. No. 117-27, at n.109) (when determining whether a request for leave could be "reasonable" under the ADA, defining "temporary" as that the essential function can be resumed).

[26] *See* H.R. Rep. No. 117-27, pt. 1, at 5 ("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."); *id.* at 22 ("When pregnant workers are not provided reasonable accommodations on the job, they are oftentimes forced to choose between economic security and their health or the health of their babies."); *id.* at 24

sought that requires the temporary suspension of an essential function, regardless of the amount of time sought, the employer may raise the undue hardship defense.

The Commission also recognizes there may be physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions for which workers may seek the temporary suspension of an essential function when the worker is not currently pregnant. These conditions include pre-pregnancy limitations such as infertility, and post-pregnancy limitations such as acute cardio-vascular problems that are a consequence of the pregnancy. Although the length of pre- and post- partum physical or mental conditions will vary, the Commission proposes using "generally forty weeks" to measure whether the worker meets the "in the near future" requirement in the second definition of "qualified" in every situation where the reasonable accommodation sought under the PWFA is the temporary suspension of one or more essential functions.

The Commission's decision is based on several factors. First, in the first year after childbirth, severe health conditions, including ones that may require the temporary suspension of an essential function, are common.[27] According to a Centers for Disease Control and Prevention (CDC) study, 53% of pregnancy-related deaths occurred from one week to one year after delivery, and 30% occurred one and one half months to one year post-partum.[28] Likely for

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("Ensuring pregnant workers have reasonable accommodations helps ensure that pregnant workers remain healthy and earn an income when they need it the most."); *id.* at 33 ("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 . . . . 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.").

[27] Susan Trost et. al., *Pregnancy-Related Deaths: Data from Maternal Mortality Review Committees in 36 U.S. States, 2017-2019*, Ctrs. for Disease Control & Prevention, U.S. Dep't of Health and Human Servs. (2022), https://www.cdc.gov/reproductivehealth/maternal-mortality/erase-mm/data-mmrc.html.

[28] *Id.* More deaths occurred seven to 365 days after delivery than occurred during delivery itself (53.3% v. 21.6%). The leading causes of death were mental health conditions, hemorrhage, cardiac and coronary conditions, infection, thrombotic embolism, and cardiomyopathy. The leading causes of death varied by race and ethnicity. For Black individuals, cardiac and coronary conditions were the leading causes of death; for White individuals and Hispanic individuals, the leading cause was mental health conditions; for

similar reasons, thirty-five States and the District of Columbia provide twelve months of comprehensive Medicaid coverage after delivery, rather than sixty days.[29] Thus, allowing a worker to meet the second definition of "qualified" if they need an essential function temporarily suspended for generally forty weeks after return to work from childbirth (or for other reasons related to a known limitation) is a reasonable approximation of the period of time needed "in the near future" for conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions and therefore is consistent with the purpose of the PWFA. Finally, in the Commission's view, one definition for "in the near future" will allow for simplified administration.

The Commission emphasizes that the definition in this section does not mean that the essential function(s) must always be suspended for forty weeks, or that if an employee seeks the temporary suspension of an essential function(s) for forty weeks it must be automatically granted. The actual length of the temporary suspension of the essential function(s) will depend upon what the employee requires, and the covered entity always has available the defense that it would create an undue hardship. However, the mere fact that the temporary suspension of one or more essential functions is needed for any time period up to and including generally forty weeks will not, on its own, render a worker unqualified under the PWFA.

Further, the Commission recognizes that workers may need an essential function temporarily suspended because of pregnancy; may take leave to recover from childbirth; and, upon returning to work, may need the same essential function or a different one temporarily suspended due to a new or different physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. In keeping with the

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Asian individuals, the leading cause of death was hemorrhage. The leading cause of death for Native American individuals was not reported due to small sample size.

[29] Centers for Medicare & Medicaid Services, U.S. Dep't of Health and Human Servs., *States that have Expanded Postpartum Coverage*, (last visited July 19, 2023) https://www.medicaid.gov/medicaid/quality-of-care/downloads/image-maternity-care-expansion.png.

requirement that the determinations as to whether an individual is qualified under the PWFA should be made based on the situation at hand and the accommodation currently at issue,[30] the determination of "in the near future" shall be made when the employee asks for each accommodation that requires the suspension of one or more essential functions. Thus, a worker who is three months pregnant seeking an accommodation of the temporary suspension of an essential function will meet the definition of "qualified" for "in the near future" because the pregnancy will be over in less than forty weeks. When the worker returns from leave after childbirth, if the worker needs an essential function temporarily suspended, they will meet the definition of "qualified" for "in the near future" if they could perform the essential function within forty weeks of the suspension. In other words, for "in the near future," the forty weeks would restart once the pregnancy is over and the worker returns to work after leave.

In the Commission's view, restarting the calculation of "generally forty weeks" in the definition of "qualified" for "in the near future" is necessary because it would often be difficult, if not impossible, for a pregnant employee to predict what their limitations (if any) will be after pregnancy. Before childbirth, they may not know whether, and if so, for how long, they will have a known limitation or need an accommodation after giving birth. They also may not know whether the accommodation after childbirth will require the temporary suspension of an essential function, and, if so, for how long. All of these questions may be relevant under the PWFA's second definition of "qualified."

Further, a rule that allows a covered entity to combine periods of the temporary suspension of essential function(s) during pregnancy and the post-partum period in order to determine if a worker is "qualified" would raise questions about, for example, whether the requests were close enough in time to be combined and whether the forty weeks should restart if

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[30] *See* 29 CFR part 1630 app. 1630.1 ("The determination of whether an individual with a disability is qualified is to be made at the time of the employment decision. The determination should be based on the capabilities of the individual with the disability at the time of the employment decision, and not be based on speculation that the employee may become unable in the future").

a different essential function needs to be temporarily suspended. Determining where and how those lines should be drawn would require litigation regarding the term "qualified" and create confusion around implementation of the statute.

The Commission notes that leave related to recovery from pregnancy, childbirth, or related medical conditions does not count as time when an essential function is suspended and thus is not relevant for the second prong of the definition of qualified. If an individual needs leave as a reasonable accommodation under the PWFA or, indeed, any reasonable accommodation other than the temporary suspension of an essential function, only the first definition of "qualified" is relevant. In the case of leave, the question would be whether the individual, after returning from the requested period of leave, would be able to perform the essential functions of the position with or without reasonable accommodation (or, if not, if the inability to perform the essential function(s) is for a temporary period, the essential function(s) could be performed in the near future, and the inability to perform the essential function(s) can be reasonably accommodated). Furthermore, for some workers, leave to recover from childbirth will not require a reasonable accommodation because they have a right to leave under Federal, State, or local law or as part of an employer policy. Thus, for the purpose of determining whether the employee is qualified under the second prong of "qualified" regarding the suspension of an essential function, the Commission does not intend for employers or workers to count time on leave for recovery from childbirth.[31]

The Commission does not believe that its definition of "in the near future" will cause excessive difficulties for covered entities because the "generally forty weeks" time period is only to determine if the worker can be considered qualified under this definition. If the temporary suspension of the essential function causes undue hardship or (as explained in the next section)

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[31] For additional information on how leave should be addressed under the PWFA, *see supra With or Without Reasonable Accommodation – Leave* and *infra Particular Matters Regarding Leave as a Reasonable Accommodation.*

the temporary suspension of the essential function cannot be reasonably accommodated, the employer does not have to provide the reasonable accommodation.

1636.3(f)(2)(iii) Can Be Reasonably Accommodated

To satisfy the PWFA's second definition of "qualified," the covered entity must be able to reasonably accommodate the inability to perform one or more essential functions without undue hardship. For some positions, this may mean that one or more essential functions are temporarily suspended, with or without reassignment to someone else, and the employee continues to perform the remaining functions of the job. For other jobs, some of the essential functions may be temporarily suspended, with or without reassignment to someone else, and the employee may be assigned other tasks to replace them. In yet other situations, one or more essential functions may be temporarily suspended, with or without reassignment to someone else, and the employee may perform the functions of a different job to which the employer temporarily transfers or assigns them, or the employee may participate in the employer's light or modified duty program.[32] Throughout this process, as with other reasonable accommodation requests, an employer may need to consider more than one alternative to identify a reasonable accommodation that does not pose an undue hardship. Depending on how the temporary

[32] *See* H.R. Rep. No. 117-27, pt. 1, at 27 ("the temporary inability to perform essential functions due to pregnancy, childbirth, or related medical conditions does not render a worker "unqualified…. there may be a need for a pregnant worker to temporarily perform other tasks or otherwise be excused from performing essential functions before fully returning to her position once she is able.") "Light duty" programs, or other programs providing modified duties, can vary depending on the covered entity. EEOC, *Enforcement Guidance: Workers' Compensation and the ADA*, text above Question 27 (1996), https://www.eeoc.gov/laws/guidance/enforcement-guidance-workers-compensation-and-ada [hereinafter *Enforcement Guidance: Workers' Compensation*]. In the context of the regulation, the Commission intends "light duty" to include the types of programs included in Questions 27 & 28 of the *Enforcement Guidance on Workers' Compensation* and any other policy, practice, or system that a covered entity has for accommodating employees, including when one or more essential functions of a position are temporarily excused.

suspension is accomplished, the covered entity may have to prorate or change a performance or production standard so that the accommodation is effective.[33]

Example 1636.3 #8: One month into a pregnancy, Akira, a worker in a paint manufacturing plant, is told by her health care provider that she should avoid certain chemicals for the remainder of the pregnancy. One of the essential functions of this job involves regular exposure to these chemicals. Akira talks to her supervisor, explains her limitation, and asks that she be allowed to switch duties with another worker whose job does not require the same exposure but otherwise involves the same functions. There are numerous other tasks that Akira could accomplish while not being exposed to the chemicals.

3. Known limitation: Akira has a need or a problem relating to maintaining the health of her pregnancy, which is a physical condition related to pregnancy; Akira needs a change or adjustment at work; Akira has communicated this information to her employer.
4. Qualified: Akira needs the temporary suspension of an essential function.
    a. Akira's inability to perform the essential function is temporary.
    b. Akira could perform the essential functions of her job in the near future because Akira needs an essential function suspended for less than forty weeks.
    c. Akira's inability to perform the essential function may be reasonably accommodated. The employer can suspend the essential function that requires her to work with the chemicals and have her do the remainder of her job. Alternatively, Akira can perform the other tasks that are referenced or switch duties with another worker. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #9: Two months into a pregnancy, Lydia, a delivery driver, is told by her health care provider that she should not lift more than 20 pounds. Lydia routinely has to lift 30-40 pounds as part of the job. She discusses the limitation with her employer. The employer is unable to provide Lydia with assistance in lifting packages, and Lydia requests placement in the employer's light duty program, which is used for drivers who have on-the-job injuries.

3. Known limitation: Lydia's lifting restriction is a physical condition related to pregnancy; she needs a change in work conditions; and she has communicated this information to the employer.
4. Qualified: Lydia needs the temporary suspension of an essential function.
    d. Lydia's inability to perform the essential function is temporary.
    e. Lydia could perform the essential functions of her job in the near future because Lydia needs an essential function suspended for less than forty weeks.
    f. Lydia's need to temporarily suspend an essential function of her job may be reasonably accommodated through the existing light duty program. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

[33] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at Question 19.

1636.3(g) Essential Functions

The rule adopts the Commission's definition of "essential function" contained in the regulations implementing the ADA regulations: "the fundamental job duties of the employment position the individual . . . holds or desires," excluding "the marginal functions of the position."[34] Thus, in determining whether something is an essential function, the first consideration is whether employees in the position actually are required to perform the function, and relevant evidence includes both the position description and information from incumbents (including the employee requesting the accommodation) about what they actually do on the job.[35]

1636.3(h) Reasonable Accommodation—Generally

42 U.S.C. 2000gg(7) states that the term "reasonable accommodation" has the meaning given to it in section 101 of the ADA and shall be construed as it is construed under the ADA and the Commission's regulations implementing the PWFA. As stated in the Appendix to the ADA Regulations, "[t]he obligation to make reasonable accommodation is a form of non-discrimination" and is therefore "best understood as a means by which barriers to the equal employment opportunity [of an employee or applicant with a known limitation under the PWFA] are removed or alleviated."[36] A modification or adjustment is reasonable if it "seems reasonable on its face, i.e., ordinarily or in the run of cases;" this means it is "reasonable" if it appears to be "feasible" or "plausible."[37] An accommodation also must be effective in meeting the needs of the

[34] 29 CFR 1630.2(n).

[35] 29 CFR 1630.2(n); 29 CFR part 1630 app. 1630.2(n).

[36] 29 CFR part 1630 app. 1630.9.

[37] *See supra* note 19.

employee or applicant, meaning it removes a workplace barrier and provides the individual with equal opportunity.[38]

Under the PWFA, a reasonable accommodation has the same definition as under the ADA.[39] Therefore, like the ADA, reasonable accommodations under the PWFA include modifications or adjustments to the job application process that enable a qualified applicant with a known limitation to be considered for the position; modifications or adjustments to the work environment, or to the manner or circumstances under which the position is done to allow a person with a known limitation to perform the essential functions of the job; and modifications or adjustments that enable an employee with a known limitation to enjoy equal benefits and privileges of employment.[40] Because the PWFA also provides for reasonable accommodations when a worker temporarily cannot perform one or more essential functions of a position but could do so in the near future, reasonable accommodation under the PWFA also includes

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[38] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at Question 9 and 29 CFR part 1630 app. 1630.9 (providing that a reasonable accommodation "should provide the individual with a disability with an equal employment opportunity. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability.").

[39] 42 U.S.C. 2000gg(7).

[40] 29 CFR 1630.2(o)(1)(i)-(iii). The requirement for reasonable accommodations that provide for equal benefits and privileges is shorthand for the requirement that an accommodation should provide the individual with an equal employment opportunity (29 CFR part 1630 app. 1630.9). This requirement stems from the ADA's prohibition on discrimination in "terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). The PWFA prohibits adverse action in the terms, conditions, or privileges of employment against a qualified employee for using or requesting an accommodation and Title VII—which applies to workers affected by pregnancy, childbirth, or related medical conditions—prohibits discrimination in the terms, conditions, and privileges of employment. 42 U.S.C. 2000e-2(a)(1). Based on the text of the PWFA, Title VII, and the requirement under the PWFA that reasonable accommodation has the same definition as in the ADA, the same requirement applies. Thus, a reasonable accommodation under the PWFA includes a change to allow employees affected by pregnancy, childbirth, or related medical conditions. nondiscrimination in the terms, conditions, or privileges of employment or, in shorthand, to enjoy equal benefits and privileges. S*ee also* EEOC Compliance Manual Section 613 *Terms, Conditions, and Privileges of Employment,* 613.1(a) (1982) ("terms, conditions, and privileges of employment" are "to be read in the broadest possible terms" and "a distinction is rarely made between terms of employment, conditions of employment, or privileges of employment"), https://www.eeoc.gov/laws/guidance/cm-613-terms-conditions-and-privileges-employment#:~:text=The%20following%20employment%20practices%20or%20activities%20which%20are,or%20activity%20is%20considered%20in%20its%20broad%20sense [hereinafter *Compliance Manual on Terms, Conditions, and Privileges of Employment*].

modifications or adjustments that allow an employee with a known limitation to temporarily suspend one or more essential functions of the position.

Additions to the Definition of Reasonable Accommodation

Because 42 U.S.C. 2000gg(7) states that "reasonable accommodation" should have the meaning of the term under the ADA and the regulations set forth in for the PWFA, the rule takes the definition of "reasonable accommodation" provided in the regulations implementing the ADA[41] and makes five additions to apply it in the context of the PWFA.

First, the rule replaces references to "individual with a disability" and similar terms with "employee with a known limitation" and similar terms.[42]

Second, the rule includes an addition to the ADA's definition of reasonable accommodation that is required by the PWFA. As explained in the discussion of the term qualified employee above, the PWFA provides that the temporary suspension of one or more essential functions is a potential reasonable accommodation by defining "qualified employee" to include an employee who cannot perform one or more essential functions of the position for a temporary period, provided they could do so in the near future, and the inability to perform the essential function(s) can be reasonably accommodated without undue hardship. The rule illustrates the implications, meaning, and application of this requirement.

Third, the rule incorporates certain examples of accommodations long recognized by the EEOC as reasonable accommodations for individuals with disabilities but not explicitly included

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[41] 29 CFR 1630.2(o).

[42] The rule also deletes examples of reasonable accommodation that are unlikely to be relevant to the PWFA, i.e., "provision of qualified readers or interpreters." A person covered by the PWFA who is blind or deaf who needs these reasonable accommodations because of their disability may be entitled to them under the ADA. Nothing added or deleted from the PWFA's list of reasonable accommodations is intended to alter the ADA's standards. Nor does the exclusion of these reasonable accommodations mean that they could not be required under the PWFA in appropriate circumstances, such as when pregnancy exacerbates a pre-existing medical condition.

in the non-exhaustive examples of reasonable accommodation in the ADA regulation. These are discussed below in § 1636.3(i).

Fourth, in addition to noting paid leave (whether accrued, short-term disability, or another type of employer benefit) and unpaid leave as examples of reasonable accommodations, the rule states that either type of leave to recover from childbirth is an example of a potential reasonable accommodation for pregnancy, childbirth, or related medical conditions. This is explained in more detail below.

Finally, the rule provides details about potential reasonable accommodations related to lactation.

Alleviating Increased Pain or Risk to Health Due to the Known Limitation

Under the PWFA and the rule, a worker may seek a reasonable accommodation in order to alleviate increased pain or increased risk to health that is attributable to the physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that has been communicated to the employer (the known limitation).[43] When dealing with requests for accommodation concerning the alleviation of increased pain or increased risk to health associated with a known limitation, the goal is to provide an accommodation that allows the worker to alleviate the identified increase in pain or risk to health.

> Example 1636.3 #10: Celia is a factory worker whose job requires her to move boxes that weigh 50 pounds regularly. Prior to her pregnancy, Celia occasionally felt pain in her knee when she walked for extended periods of time. After returning to work after having a cesarean section, Celia's health care provider says she should limit the tasks that require moving boxes to no more than 30 pounds for three months because heavier lifting could increase the risk to her health and recovery. Celia can seek an accommodation that would help her lift between 30 and 50 pounds because it is needed for her known limitation related to childbirth. However, the PWFA would not require the employer to provide an accommodation regarding Celia's knee pain because that situation is not attributable to Celia's known limitation, unless there is evidence that the pain in walking was exacerbated by Celia's pregnancy, childbirth, or related medical conditions. The

[43] Depending on the facts of the case, the accommodation sought will allow the employee to apply for the position, to perform the essential functions of the job, to enjoy equal benefits and privileges of employment, or allow the temporary suspension of an essential function of the job.

employer may have accommodation responsibilities regarding Celia's knee pain under the ADA.

Example 1636.3 #11: Lucille has opioid use disorder that she controls with medication. After giving birth, she experiences postpartum depression. As a result, she is put on an additional medication that she must take with food, and she starts therapy with a new provider. Under the PWFA, Lucille requests that she be allowed to take breaks to eat when she needs to take her medication and that she be allowed to use intermittent leave to attend her therapy appointments. Under the PWFA, the employer is required to provide the requested accommodations (or other reasonable ones) absent undue hardship. The employer does not have to provide an accommodation for Lucille's underlying opioid use disorder under the PWFA, although it may have accommodation responsibilities under the ADA.

Example 1636.3 #12: Jackie's position at a fabrication plant involves working with certain chemicals, which Jackie thinks is the reason she has a nagging cough and chapped skin on her hands. Once she becomes pregnant, Jackie seeks the accommodation of a temporary suspension of an essential function of working with the chemicals because the chemicals create an increased risk to her pregnancy. The employer provides the accommodation. After Jackie gives birth and returns to work, she no longer has any known limitations. Thus, she can be assigned to work with the chemicals again even if she would rather not do that work, because the PWFA only requires an employer to provide an accommodation that is needed due to the known limitation related to pregnancy, childbirth, or related medical conditions. Jackie's employer may also have accommodation responsibilities under the ADA.

Example 1636.3 #13: Margaret is a retail worker who is pregnant. Because of her pregnancy, Margaret feels pain in her back and legs when she has to move stacks of clothing from one area to the other, which is one of the essential functions of her position. She can still manage to move the clothes, but, because of the pain, she requests a cart to use when she is moving the garments. Under the PWFA, the employer is required to provide the requested accommodation (or another reasonable accommodation), absent undue hardship, because doing so accommodates Margaret's limitation arising out of her pregnancy. If Margaret also has wrist pain that is not caused or exacerbated by the pregnancy, Margaret's employer is under no obligation under the PWFA to provide an accommodation for the wrist pain because it is not related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. However, the employer may have accommodation responsibilities regarding Margaret's wrist pain under the ADA.

Particular Matters Regarding Leave as a Reasonable Accommodation

The Commission has long recognized the use of all forms of paid and unpaid leave as a potential reasonable accommodation under the ADA, including for part-time schedules.[44] Given Congress' extensive use of ADA terms and provisions in the PWFA— including specifically the

[44] *See* 29 CFR 1630.2(o)(2)(ii); 29 CFR part 1630 app. 1630.2(o); *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at text accompanying nn.48-49.

definition of "reasonable accommodation"— the Commission proposes to include these potential reasonable accommodations in this proposal's definition of reasonable accommodation.

Leave, including intermittent leave, may be a reasonable accommodation even if the covered entity does not offer it as an employee benefit.[45] If an employee requests leave as an accommodation or if there is no other reasonable accommodation that does not cause an undue hardship, the covered entity must consider providing leave as a reasonable accommodation under the PWFA, even if the employee is not eligible for leave under the employer's leave policy or the employee has exhausted the leave the covered entity provides as a benefit (including leave exhausted under a workers' compensation program, the FMLA, or similar State or local laws).[46]

The rule also provides that leave to recover from childbirth, miscarriage, stillbirth, or other related conditions is a potential reasonable accommodation (absent undue hardship).[47] The rule further explains that workers protected by the PWFA must be permitted to choose whether to use paid leave (whether accrued, as part of a short-term disability program, or as part of any other employee benefit) or unpaid leave to the same extent that the covered entity allows employees using leave for reasons unrelated to pregnancy, childbirth, or related medical conditions to choose between these various types of leave.[48] However, as under the ADA, an employer is not required to provide additional paid leave under the PWFA beyond the amount to which the employee is otherwise entitled.

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[45] *See Technical Assistance on Employer-Provided Leave*, *supra* note 15, at text above Example 4.

[46] *Id.* Of course, if an employee has a right to leave under the FMLA, an employer policy, or a State or local law, the employee is entitled to leave regardless of whether they request leave as a reasonable accommodation. An employee who needs leave beyond what they are entitled to under those laws or policies will need to request leave as a reasonable accommodation.

[47] H.R. Rep. No. 117-27, pt. 1, at 29 (noting that "leave is one possible accommodation under the PWFA, including time off to recover from delivery").

[48] A failure to allow a worker affected by pregnancy, childbirth, or related medical conditions to use paid or unpaid leave to the same extent that the covered entity allows employees using leave for reasons unrelated to pregnancy, childbirth, or related medical conditions to do so may be a violation of Title VII as well.

The Commission recognizes that there may be situations where an employer accommodates a pregnant employee with a stool or additional breaks or temporarily suspends one or more essential functions under the PWFA, and then the employee requests leave to recover from childbirth. In these situations, the covered entity should consider the request for the reasonable accommodation of leave to recover from childbirth in the same manner that it would any other request for leave as a reasonable accommodation. This requires first considering whether the employee will be able to perform the essential functions of the position with or without a reasonable accommodation after the period of leave, or, if not, whether, after the period of leave, the employee will meet the second definition of "qualified" under the PWFA.

Under the ADA regulations, a reasonable accommodation cannot excuse an employee from complying with valid production standards that are applied uniformly to all employees.[49] However, for example, when the reasonable accommodation is leave, the employee may not be able to meet a production standard during the period of leave or, depending on the length of the leave, meet that standard for a defined period of time (e.g., the production standard measures production in one year and the employee was on leave for four months). Thus, if the reasonable accommodation is leave, the production standard may need to be prorated to account for the reduced amount of time the employee worked.[50] For example, if a call center employee with a known limitation requests and is granted two hours of leave in the afternoon for rest, the employee's required number of calls may need to be reduced proportionately, as could the employee's pay. Alternatively, the accommodation could allow for the employee to make up the time at a different time during the day so that the employee's production standards and pay would not be reduced.

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[49] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at text accompanying n.14.

[50] *Id.* at Question 19.

As under the ADA, an employee with a known limitation who is granted leave as a reasonable accommodation under the PWFA is entitled to return to their same position unless the employer demonstrates that holding open the position would impose an undue hardship.[51] Likewise, an employer must continue an employee's health insurance benefits during their leave period to the extent that it does so for other employees in a similar leave status. When the employee is ready to return to work, the employer must allow the individual to return to the same position (assuming that there was no undue hardship in holding it open) if the employee is still qualified (i.e., the employee can perform the essential functions of the position with or without reasonable accommodation or if the employee meets the PWFA's second definition of qualified).[52]

Under the PWFA, an employer may deny a reasonable accommodation if it causes an undue hardship—a significant difficulty or expense. Thus, if an employer can demonstrate that the leave requested as a reasonable accommodation poses an undue hardship—for example, because of its length, frequency, or unpredictable nature, or because of another factor—it may lawfully deny the requested leave under the PWFA.

Ensuring that Workers are not Penalized for Using Reasonable Accommodations

Covered entities making reasonable accommodations must ensure that their ordinary workplace policies or practices do not operate to penalize employees for utilizing such accommodations. For example, when a reasonable accommodation involves a pause in work — such as a break, a part-time or other reduced work schedule, or leave — an employee cannot be

[51] *See id.* at Question 18. As under the ADA, if an employer cannot hold a position open during the entire leave period without incurring undue hardship, the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue their leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position.

[52] *Id.* at Question 21.

penalized for failing to perform work during such a non-work period. Similarly, policies that monitor workers for time on task (whether through automated means or otherwise) and penalize them for being off task may need to be modified to avoid imposing penalties for non-work periods that the employee was granted as a reasonable accommodation. Likewise, if an accommodation under the PWFA involves the temporary suspension of an essential function of the position, a covered entity may not penalize an employee for not performing the essential function that has been temporarily suspended.

Penalizing an employee in these situations would be retaliation for the employee's use of a reasonable accommodation to which they are entitled under the law.[53] It would also render the accommodation ineffective, thus making the covered entity liable for failing to provide a reasonable accommodation.[54] The Commission seeks comment on whether there are other situations where this may apply and whether examples would be helpful to illustrate this point.

Personal Use

The obligation to provide reasonable accommodation under the PWFA, like the ADA, does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a known limitation. However, adjustments or modifications that might otherwise be considered personal may be required as reasonable accommodations "where such items are specifically designed or required to meet job-related rather than personal needs."[55]

For example, if a warehouse employee is pregnant and is having difficulty sleeping, the PWFA would not require as a reasonable accommodation for the employer to provide a

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[53] *Id.* at Question 19; *see* also 2000gg-1(5), 2000gg-2(f) and the accompanying regulations.

[54] *Id.* at Question 19.

[55] 29 CFR part 1630 app. 1630.9.

pregnancy pillow and a white noise machine to help with sleeping because they are strictly for an employee's personal use. However, allowing the employee some flexibility in start times for the workday may be a reasonable accommodation because it modifies an employment-related policy. In a different context, if the employee who is having trouble sleeping works at a job that involves sleeping between shifts on-site, such as a job as a firefighter, sailor, emergency responder, health care worker, or truck driver, a pregnancy pillow may be a reasonable accommodation because the employee is having a difficult time sleeping because of the pregnancy, the employer is providing the place and items necessary for sleeping, and the employee needs a modification of the items and place.

All Services and Programs

Under the PWFA, as under the ADA, the obligation to make reasonable accommodation applies to all services and programs and to all non-work facilities provided or maintained by an employer for use by its employees so that employees or applicants with known limitations can enjoy equal benefits and privileges of employment.[56] Accordingly, the obligation to provide reasonable accommodation, barring undue hardship, includes providing access to employer-sponsored placement or counseling services, such as employee assistance programs, and to employer-provided cafeterias, lounges, gymnasiums, auditoriums, transportation, and to similar facilities, services, or programs.[57]

Interim Reasonable Accommodation

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[56] *Id.*

[57] *Id.*

Providing an interim reasonable accommodation is a best practice under the PWFA in certain circumstances.[58] An employee may have an urgent need for a reasonable accommodation due to the nature or sudden onset of a known limitation under the PWFA. For example, a pregnant employee may experience vaginal bleeding, which may indicate a more serious problem. Upon discovering the bleeding, the employee may ask for immediate leave to go see their health care provider. The employee then may need additional leave, telework, rest breaks, or a later start time, beginning immediately. In this situation, a covered entity, as a best practice, should consider providing an interim reasonable accommodation that meets the employee's needs while the interactive process is conducted. Similarly, an employee recovering from childbirth may ask for the reasonable accommodation of more frequent or longer bathroom breaks, and the covered entity should consider meeting that need, as an interim reasonable accommodation, before the conclusion of the interactive process. Covered entities that do not provide interim reasonable accommodations are reminded that an unnecessary delay in the interactive process or providing a reasonable accommodation may lead to liability under 42 U.S.C. 2000gg-1(1) even if the reasonable accommodation is eventually granted, as explained in detail in § 1636.4(a) of the regulation.

1636.3(i) Reasonable Accommodation—Examples

The definition of "reasonable accommodation" in the PWFA rule incorporates certain accommodations long recognized by the EEOC as reasonable accommodations but not explicitly included in the non-exhaustive examples of reasonable accommodations in the ADA regulation.

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[58] The same is true under the ADA. EEOC, *Final Report on Best Practices for Employment of People with Disabilities in the State Government* II.B.1 (2005), http://www.eeoc.gov/laws/guidance/final-report-best-practices-employment-people-disabilities-state-government [hereinafter *Best Practices State Government*] (noting that "[t]emporary accommodations may enable a worker who has made a request for reasonable accommodation under the ADA to continue working while a final determination of whether to grant or deny the accommodation is being made").

The Commission notes that an employee or applicant may need more than one of these accommodations at the same time or as a pregnancy progresses.

- Frequent breaks. The EEOC has long construed the ADA to require additional breaks as a reasonable accommodation, absent undue hardship.[59] For example, a pregnant employee might need more frequent breaks due to shortness of breath; an employee recovering from childbirth might need more frequent restroom breaks or breaks due to fatigue because of recovery from childbirth; or an employee who is lactating might need more frequent breaks for water or food.[60]
- Sitting/Standing. The Commission has recognized the provision of seating for jobs that require standing and standing for those that require sitting as a potential reasonable accommodation under the ADA.[61] Reasonable accommodation of these needs might include, but is not limited to, policy modifications and the provision of equipment, such as seating, a sit/stand desk, or anti-fatigue floor matting, among other possibilities.
- Schedule changes, part-time work, and paid and unpaid leave. The Appendix to the ADA Regulations explains that permitting the use of paid leave (whether accrued, as part of a short-term disability program, or as part of any other employee benefit) or providing additional unpaid leave is a potential reasonable accommodation under the ADA.[62] Additionally, the Appendix recognizes that leave for medical treatment can be a

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[59] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at Question 22; *see also See* H. R. Rep. 117-27, pt. 1, at 22; 168 Cong. Rec. S7,048 (daily ed. Dec. 8, 2022) (statement of Sen. Robert P. Casey, Jr.); 168 Cong. Rec. S10,081 (daily ed. Dec. 22, 2022) (statement of Sen. Robert P. Casey, Jr.).

[60] Breaks may be paid or unpaid depending on the employer's normal policies and other applicable laws. Breaks may exceed the number that an employer normally provides because reasonable accommodations may require an employer to alter its policies, barring undue hardship.

[61] *See Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at General Principles, Example B; *see also* H.R. Rep. No. 117-27, pt. 1, at 11, 22, 29.

[62] 29 CFR part 1630 app. 1630.2(o); *see also Technical Assistance on Employer-Provided Leave*, *supra* note 15. Additionally, an employer prohibiting a worker from using accrued leave for pregnancy- related reasons or while allowing other workers to use leave for similar reasons may also violate Title VII.

reasonable accommodation.[63] By way of example, an employee could need a schedule change to attend a round of IVF appointments to get pregnant; a part-time schedule to address fatigue during pregnancy; or additional unpaid leave for recovery from childbirth, medical treatment, post-partum treatment or recuperation related to a cesarean section, episiotomy, infection, depression, thyroiditis, or preeclampsia.

- Telework. Telework or "work from home" has been recognized by the EEOC as a potential reasonable accommodation.[64] Telework could be used to accommodate, for example, a period of bed rest or a mobility impairment.
- Parking. Providing reserved parking spaces if the employee is otherwise entitled to use employer-provided parking may be reasonable accommodation to assist a worker who is experiencing fatigue or limited mobility because of pregnancy, childbirth, or related medical conditions.
- Light duty. Assignment to light duty or placement in a light duty program has been recognized by the EEOC as a potential reasonable accommodation under the ADA, even if the employer's light duty positions are normally reserved for those injured on-the-job and the person with a disability seeking a light duty position does not have a disability stemming from an on-the-job injury.[65]
- Making existing facilities accessible or modifying the work environment.[66] Examples of reasonable accommodations might include allowing access to an elevator not normally

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[63] 29 CFR part 1630 app. 1630.2(o).

[64] *See*, *e.g.*, *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at Question 34.

[65] EEOC, *Enforcement Guidance: Workers' Compensation*, *supra* note 32, at Question 28; *see also* 168 Cong. Rec. S7,048 (daily ed. Dec. 8, 2022) (statement of Sen. Robert P. Casey, Jr.) ("What are other types of reasonable accommodations that pregnant workers may request? Light duty is a common example."); *id.* at S7,049 (statement of Sen. Patty Murray) (noting that workers need accommodations because "their doctors say they need to avoid heavy lifting"); H.R. Rep.117- 27, pt. 1, at 14-17 (discussing *Young v. United Parcel Serv., Inc.*, 575 U.S. 206 (2015), a case involving light duty for pregnant workers).

[66] 29 CFR 1630.2(o)(1)(ii); (o)(2)(i).

used by employees; moving the employee's workspace closer to a bathroom; providing a fan to regulate temperature; or moving a pregnant or lactating employee to a different workspace to avoid exposure to chemical fumes. As noted in the regulation, this also may include modifications of the work environment to allow an employee to pump breast milk at work.[67]

- Job restructuring.[68] Job restructuring might involve, for example, removing a marginal function that required a pregnant employee to climb a ladder or occasionally retrieve boxes from a supply closet.
- Temporarily suspending one or more essential functions. For some positions, this may mean that one or more essential functions are temporarily suspended, and the employee continues to perform the remaining functions of the job. For others, the essential function(s) will be temporarily suspended, and the employee may be assigned other tasks. For others, the essential function(s) will be temporarily suspended, and the employee may perform the functions of a different job to which the employer temporarily transfers or assigns them. For yet others, the essential function(s) will be temporarily suspended, and the employee will participate in the employer's light or modified duty program.

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[67] On December 29, 2022, President Biden signed the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) (Pub. L. 117-328 Division KK). The law extended coverage of the Fair Labor Standards Act's (FLSA) protections for nursing employees to apply to most workers. The FLSA provides most workers with the right to break time and a place to pump breast milk at work. 29 U.S.C. 218d; U.S. Dep't of Lab., Fact Sheet #73: FLSA Protections for Employees to Pump Breast Milk at Work (Jan. 2023), https://www.dol.gov/agencies/whd/pump-at-work.2023), https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers. Employees who are not covered by the PUMP Act or employees who seek to pump longer than one year may seek reasonable accommodations regarding pumping under the PWFA. Further, employees who are covered by the PUMP Act may seek additional related accommodations, such as access to a sink, a refrigerator, and electricity. *See, e.g.*, U.S. Dep't of Lab., *Notice on Reasonable Break Time for Nursing Mothers*, 75 FR 80073, 80075-76 (Dec. 21, 2010) (discussing space requirements and noting factors such as the location of the area for pumping compared to the employee's workspace, the availability of a sink and running water, the location of a refrigerator to store milk, and electricity may affect the amount break time needed). The PUMP Act is enforced by the Department of Labor, not the EEOC.

[68] 29 CFR 1630.2 (o)(2)(ii).

- Acquiring or modifying equipment, uniforms, or devices.[69] Examples of reasonable accommodations might include providing uniforms and equipment, including safety equipment, that account for changes in body size during and after pregnancy, including during lactation; providing devices to assist with mobility, lifting, carrying, reaching, and bending; or providing an ergonomic keyboard to accommodate pregnancy-related hand swelling or tendonitis.
- Adjusting or modifying examinations or policies.[70] Examples of reasonable accommodations include allowing workers with a known limitation to postpone an examination that requires physical exertion. Adjustments to policies also could include increasing the time or frequency of breaks to eat or drink or to use the restroom.

Examples of Types of Reasonable Accommodations

Example 1636.3 #14/Telework: Gabriela, a billing specialist in a doctor's office, experiences nausea and vomiting beginning in her first trimester of pregnancy. Her doctor believes the nausea and vomiting will pass within a couple of months. Because the nausea makes commuting extremely difficult, Gabriela makes a verbal request to her manager stating she has nausea and vomiting due to her pregnancy and requests that she be permitted to work from home for the next two months so that she can avoid the difficulty of commuting. The billing work can be done from her home or in the office.

4. Known limitation: Gabriela's nausea and vomiting is a physical condition related to pregnancy; Gabriela needs an adjustment or change at work; Gabriela has communicated the information to the employer.
5. Qualified: Gabriela can do the billing work with the reasonable accommodation of telework.
6. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #15/Temporary Suspension of an Essential Function: Nisha, a nurse assistant working in a large elder care facility, is advised in the fourth month of pregnancy to stop lifting more than 25 pounds for the rest of the pregnancy. One of the essential functions of the job is to assist patients in dressing and bathing, and moving them from or to their beds, tasks that typically require lifting more than 25 pounds. Nisha sends an email to human resources asking that she not be required to lift more than 25 pounds for the remainder of her pregnancy and requesting a place in the established light duty program under which workers who are hurt on the job take on different duties while coworkers take on their temporarily suspended duties.

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[69] *Id.*

[70] *Id.*

4. Known limitation: Nisha's lifting restriction is a physical condition related to pregnancy; Nisha needs an adjustment or change at work; Nisha has communicated that information to the employer.
5. Qualified: Nisha is asking for the suspension of an essential function. The suspension is temporary, and Nisha could perform the essential functions of the job "in the near future" (generally within forty weeks). It appears that the inability to perform the function can be reasonably accommodated through its temporary suspension and Nisha's placement in the established light duty program.
6. The employer must grant the reasonable accommodation of temporarily suspending the essential function, or another reasonable accommodation, absent undue hardship. As part of the temporary suspension, the employer may assign Nisha to the light duty program.

Example 1636.3 #16: Same facts as above but the employer establishes the light duty program is limited to 10 slots and that all 10 slots are filled for the next 6 months. In these circumstances, the employer must consider other possible reasonable accommodations, such as the temporary suspension of an essential function without assigning Nisha to the light duty program, or job restructuring outside of the established light duty program. If such accommodations cannot be provided without undue hardship, then the employer must consider a temporary reassignment to a vacant position for which Nisha is qualified, with or without reasonable accommodation. For example, if the employer has a vacant position that does not require lifting patients which Nisha could perform with or without a reasonable accommodation, the employer must offer her the temporary reassignment as a reasonable accommodation, absent undue hardship.

Example 1636.3 #17/Assistance with Performing an Essential Function: Mei, a warehouse worker, requests via her employer's online accommodation process that a dolly be provided to assist her in moving items that are bulky to accommodate her post-cesarean section medical restrictions for three months.

4. Known Limitation: Mei's need for assistance in moving bulky items is a physical condition related to childbirth; Mei needs an adjustment or change at work; Mei has communicated this information to the employer.
5. Qualified: Mei could perform the essential functions of her position with the reasonable accommodation of a dolly.
6. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #18/Appropriate Uniform and Safety Gear: Ava, a pregnant police officer, asks their union representative for help getting a larger size uniform and larger size bullet proof vest in order to cover their growing pregnancy. The union representative asks management for an appropriately sized uniform and vest for Ava.

4. Known Limitation: Ava's inability to wear the standard uniform and safety gear is a physical condition related to pregnancy; Ava needs an adjustment or change at work; Ava's representative has communicated this information to the employer.
5. Qualified: Ava is qualified with the reasonable accommodation of appropriate gear.
6. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #19/Temporary Suspension of Essential Function(s): Darina, a pregnant police officer in the third month of pregnancy, talks to human resources about being taken off of patrol and put on light duty for the remainder of her pregnancy to avoid physical altercations such as subduing suspects that may harm her pregnancy. The department has an established light duty program that it uses for officers with injuries that occurred on the job.

4. Known Limitation: Darina has a need or a problem related to maintaining the health of her pregnancy; Darina needs an adjustment or change at work; Darina has communicated this information to the employer.
5. Qualified: The suspension of the essential functions of patrol duties is temporary and could end "in the near future" (within generally forty weeks) And it appears that the temporary suspension of the essential function can be accommodated through the light duty program.
6. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship. In determining if there is an undue hardship, the employer cannot rely on the fact that this type of modification is normally reserved for those with on-the-job injuries. The fact that the employer provides this type of modification for other employees points to this not being an undue hardship.

Example 1636.3 #20/Temporary Suspension of Essential Function(s): Rory works in a fulfillment center where she is usually assigned to a line where she has to move packages that weigh 20 pounds. After returning from work after giving birth, Rory has a lifting restriction of 10 pounds due to sciatica during her pregnancy. The restriction is for 12 weeks. The employer does not have an established light duty program. There are other lines in the warehouse that do not require lifting more than 10 pounds and some of the packages on Rory's usual line weigh less than 10 pounds.

4. Known Limitation: Rory has a known limitation related to pregnancy, childbirth, or a related medical condition.
5. Qualified: The suspension of the essential function of lifting packages that weigh up to 20 pounds is temporary and Rory could be able to perform the essential function in the near future. It appears that the temporary suspension of the essential function could be accommodated by temporarily suspending the requirement that Rory lift more than 10 pounds or by assigning her to a different line.
6. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #21/Unpaid Leave: Tallah, a newly hired cashier at a small bookstore, has a miscarriage in the third month of pregnancy and asks a supervisor for ten days of leave to recover. As a new employee, Tallah has only earned 2 days of paid leave. The employer is not covered by the FMLA and does not have a company policy regarding the provision of unpaid leave, but Tallah is covered by the PWFA.

4. Known limitation: Tallah's need to recover from the miscarriage is a physical or mental condition related to pregnancy or arising out of a medical condition related to pregnancy; Tallah needs an adjustment or change at work; Tallah has communicated this information to the employer.
5. Qualified: After the reasonable accommodation of leave, Tallah will be able to do the essential functions of the position with or without accommodation.

6. The employer must grant the accommodation of unpaid leave (or another reasonable accommodation) absent an undue hardship.

Example 1636.3 #22/Unpaid Leave for Prenatal Appointments: Margot started working at a retail store shortly after she became pregnant. She has an uncomplicated pregnancy. Because she has not worked at the store very long, she has earned very little leave and is not covered by the FMLA. In her fifth month of pregnancy, she asks her supervisor for the reasonable accommodation of unpaid time off beyond the leave she has earned to attend her regularly scheduled prenatal appointments.

4. Known limitation: Margot's need to attend health care appointments is a need or a problem related to maintaining her health or the health of her pregnancy; Margot needs an adjustment or change at work; Margot has communicated the information to the employer.
5. Qualified: Margot can do her job with the reasonable accommodation of leave to attend health care appointments.
6. The employer must grant the accommodation of unpaid time off (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #23/Unpaid Leave for Recovery from Childbirth: Sofia, a custodian, is pregnant and will need six to eight weeks of leave to recover from childbirth. Sofia is nervous about asking for leave so Sofia asks her mother, who knows the owner, to do it for her. The employer has a sick leave policy but no policy for longer periods of leave. Sofia does not qualify for FMLA leave.

4. Known limitation: Sofia's need to recover from childbirth is a physical condition; Sofia needs an adjustment or change at work; Sofia's representative has communicated this information to the employer.
5. Qualified: After the reasonable accommodation of leave, Sofia will be able to do the essential functions of the position.
6. The employer must grant the accommodation of unpaid leave (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #24/Unpaid Leave for Medical Appointments: Taylor, a newly hired member of the waitstaff, requests time off to attend therapy appointments for postpartum depression. As a new employee, Taylor has not yet accrued sick or personal leave and is not covered by the FMLA. Taylor asks her manager if there is some way that she can take time off.

4. Known limitation: Taylor's postpartum depression is a medical condition related to pregnancy, and she is seeking health care; Taylor needs an adjustment or change at work; Taylor has communicated this information to the employer.
5. Qualified: Taylor can do the essential functions of the job with a reasonable accommodation of time off to attend the therapy appointments.
6. The employer must grant the accommodation of unpaid leave (or another reasonable accommodation) absent an undue hardship.

Example 1636.3 #25/Unpaid Leave or Schedule Change: Claudine is six months pregnant and needs to have regular check-ups. The clinic where Claudine gets her health care is an hour drive away, and they frequently get backed up and she has to wait for her appointment. Depending on the time of day, between commuting to the appointment, waiting for the appointment, and seeing her provider, Claudine may miss all or most of an assigned day at work. Claudine is not covered by the FMLA and does not have any

sick leave left. Claudine asks human resources for a reasonable accommodation such as time off or changes in scheduling so she can attend her medical appointments.

4. Known limitation: Claudine needs health care related to her pregnancy; Claudine needs an adjustment or change at work; Claudine has communicated that information to the employer.
5. Qualified: Claudine can do the essential functions of the job with a reasonable accommodation of time off or a schedule change to attend medical appointments.
6. The employer must grant the accommodation of time off or a schedule change (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #26/Telework: Raim, a social worker, is in the seventh month of pregnancy and is very fatigued as a result. She asks her supervisor if she can telework and see clients virtually so she can rest between appointments.

4. Known limitation: Raim's fatigue is a physical condition related to pregnancy; Raim needs an adjustment or change at work; Raim has communicated that information to the employer.
5. Qualified: Assuming the appointments can be conducted virtually, Raim can perform the essential functions of her job with the reasonable accommodation of working virtually. If there are certain appointments that must be done in person, the reasonable accommodation could be a few days of telework a week and then other accommodations that would give Raim time to rest, such as assigning Raim in-person appointments at times when traffic will be light so that they are easy to get to or setting up Raim's assignments so that on the days when she has in-person appointments she has breaks between them. Or the reasonable accommodation could be the temporary suspension of the essential function of in-person appointments.
6. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #27/Temporary Workspace/Possible Temporary Suspension of an Essential Function: Brooke, a pregnant research assistant in her first trimester of pregnancy, asks the lead researcher on the project for a temporary workspace that would allow her to work in a well-ventilated area because her work involves hazardous chemicals that her health care provider has told her to avoid. She also points out that there are several research projects she can work on that do not involve exposure to hazardous chemicals.

4. Known limitation: Brooke's need to avoid the chemicals is a physical or mental condition related to maintaining the health of her pregnancy; Brooke needs a change or adjustment at work; Brooke has communicated this information to the employer.
5. Qualified: If working with hazardous chemicals is an essential function of the job, Brooke may be able to perform that function with the accommodation of a well-ventilated work area. If providing a well-ventilated work area would be an undue hardship, Brooke could still be qualified with the temporary suspension of the essential function of working with the hazardous chemicals because Brooke's inability to work with hazardous chemicals is temporary, and Brooke could perform the essential functions in the near future (within generally forty weeks). And it appears that her need to avoid exposure to hazardous chemicals could also be accommodated by allowing her to focus on the other research projects.

6. The employer must provide an accommodation such as a well-ventilated space or another reasonable one, absent undue hardship. If the employer cannot accommodate Brooke in a way that allows Brooke to continue to perform the essential functions of the position, the employer must consider alternative reasonable accommodations, including temporarily suspending one or more essential function(s), absent undue hardship.

Example 1636.3 #28/Temporary Transfer to Different Location: Katherine, a budget analyst who has cancer, is also pregnant, which creates complications for her treatment. She asks the manager for a temporary transfer to an office in a larger city that has a medical center that can address her medical needs due to the combination of cancer and pregnancy.

1. Known limitation: Katherine has a need or problem related to maintaining her health or the health of her pregnancy; Katherine needs a change or adjustment at work: Katherine has communicated that information to the employer.
2. Qualified: Katherine is able to do the essential functions of her position with the reasonable accommodation of a temporary transfer to a different location.
3. As under the ADA, a PWFA reasonable accommodation can include a workplace change to facilitate medical treatment, including accommodations such as leave, a schedule change, or a temporary transfer to a different work location needed in order to obtain treatment. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #29/Pumping Breast Milk: Salma gave birth thirteen months ago and wants to be able to pump breast milk at work. Salma works at an employment agency that sends her to different jobs for a day or week at a time. Salma asks the person at the agency who makes her assignments to only assign her to employers who will allow her to take a break to pump breast milk at work.

1. Known limitation: Salma's need to express breast milk is a physical condition related to lactation which is a related medical condition; Salma needs a change or adjustment at work; Salma has communicated this information to the covered entity.
2. Qualified: Salma is able to perform the functions of the jobs to which she is assigned with the reasonable accommodation of being assigned to workplaces that will allow her to pump at work.
3. The agency must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #30/Additional Breaks: Afefa, a pregnant customer service agent, requests two additional 10-minute rest breaks and additional bathroom breaks as needed during the workday. The employer determines that these breaks would not pose an undue hardship and grants the request. Because of the additional breaks, Afefa responds to three fewer calls during a shift. Afefa's supervisor should evaluate her performance taking into account her productivity while on duty, excluding breaks. Penalizing an employee for failing to meet production standards due to receipt of additional breaks as a reasonable accommodation would render the additional breaks an ineffective accommodation. It also may constitute retaliation for use of a reasonable accommodation. However, if there is evidence that Afefa's lower production was due not to the additional breaks, but rather to misconduct (for example, if she has frequent and unexcused absences to make or receive

personal phone calls) or other performance issues, the employer may consider the lower production levels consistent with the employer's production and performance standards.

1636.3(j) Undue Hardship

The PWFA at 42 U.S.C. 2000gg(7) uses the definition of "undue hardship" from section 101 of the ADA. The PWFA provides that the term shall be construed under the PWFA as it is under the ADA and as set forth in these regulations. The rule, at (j)(1) of this paragraph, reiterates the definition of undue hardship provided in the ADA regulations, which explains that undue hardship means significant difficulty or expense incurred by a covered entity. The rule then, at (j)(2) of this paragraph, outlines some factors to be considered when determining if undue hardship exists.[71]

Consistent with the ADA, a covered entity that claims that a reasonable accommodation will cause an undue hardship must consider whether there are other reasonable accommodations it can provide, absent undue hardship.[72] Additionally, if the employer can only provide a part of the reasonable accommodation absent undue hardship—for example, the employer can provide six weeks of leave absent undue hardship but the eight weeks that the employee is seeking would cause undue hardship—the employer must provide the reasonable accommodation up to the point of creating an undue hardship. Thus, in the example, the employer would have to provide the six weeks of leave and then consider if there are other reasonable accommodations it could provide that would not cause an undue hardship.

> Example 1636.3 #31/Undue Hardship: Patricia, a convenience store clerk, requests that she be allowed to go from working full-time to part-time for the last 3 months of her pregnancy due to extreme fatigue. The store assigns two clerks per shift, and if Patricia's hours are reduced, the other clerk's workload will increase significantly beyond his ability to handle his responsibilities. The store determines that such an arrangement will result in inadequate coverage to serve customers in a timely manner, keep the shelves stocked, and maintain store security. Based on these facts, the employer likely can show undue hardship based on the significant disruption to its operations and, therefore, can refuse to reduce Patricia's hours. The employer, however, should explore whether any

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[71] 29 CFR 1630.2(p).

[72] *Enforcement Guidance on Reasonable Accommodations*, *supra* note 4, at text after n.116.

other reasonable accommodation will assist Patricia without causing undue hardship, such as providing a stool and allowing rest breaks throughout the shift.

Example 1636.3 #32/Undue Hardship: Shirin, a dental hygienist who is undergoing IVF treatments, is fatigued and needs to attend medical appointments near her house every other day. She asks her supervisor if she can telework for the next 3 months. Full-time telework may be an undue hardship for the employer because Shirin's essential functions include treating patients at the dental office. However, the employer must consider other reasonable accommodations, such as part-time telework while Shirin can perform the billing functions of her job, a schedule that would allow Shirin breaks between patients, part-time work, or a reduced schedule.

An employer's claim that the accommodation a worker seeks would cause a safety risk to co-workers or clients will be assessed under the PWFA's undue hardship standard. For example, consider a pregnant worker in a busy fulfillment center that has narrow aisles between the shelves of products. The worker asks for the reasonable accommodation of a cart to use while they are walking through the aisles filling orders. The employer's claim that the aisles are too narrow and its concern for the safety of other workers being bumped by the cart would be a defense based on undue hardship, specifically § 1636.3(j)(2)(v) ("the impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business."). As with other requested reasonable accommodations, if a particular reasonable accommodation causes an undue hardship because of safety, the employer must consider if there are other reasonable accommodations that would not do so. Importantly, claims by employers that workers create a safety risk merely by being pregnant (as opposed to a safety risk that stems from a pregnancy-related limitation) should be addressed under Title VII's bona fide occupational qualification (BFOQ) standard and not under the PWFA.[73]

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[73] *See, e.g.*, *UAW v. Johnson Controls*, 499 U.S. 187 (1991) (striking down employer's fetal protection policy that limited the opportunities of women); *Everts v. Sushi Brokers LLC*, 247 F. Supp. 3d 1075, 1082–83 (D. Ariz. 2017) (relying on *Johnson Controls* and denying BFOQ in a case regarding a pregnant worker as a restaurant server noting that "[u]nlike cases involving prisoners and dangers to customers where a BFOQ defense may be colorable, the present situation is exactly the type of case that Title VII guards against"); *EEOC v. New Prime, Inc.*, 42 F. Supp. 3d 1201, 1214 (W.D. Mo. 2014) (relying on *Johnson Controls* and denying a BFOQ allegedly in place for the "privacy" and "safety" of women workers); *Enforcement Guidance on Pregnancy Discrimination*, *supra* note 11, at I(B)(1)(c).

1636.3(j)(3) Undue Hardship—Temporary Suspension of an Essential Function

To address that under the PWFA an employer may have to accommodate an employee's temporary inability to perform an essential function, the rule adds additional factors that may be considered when determining if the temporary suspension of an essential function causes an undue hardship. These additional factors include consideration of the length of time that the employee or applicant will be unable to perform the essential function(s); whether, through the methods listed in § 1636.3(f)(2)(iii) (describing potential reasonable accommodations related to the temporary suspension of essential functions) or otherwise, there is work for the employee or applicant to accomplish; the nature of the essential function, including its frequency; whether the covered entity has provided other employees or applicants in similar positions who are unable to perform essential function(s) of their positions with temporary suspensions of those functions and other duties; if necessary, whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function(s) in question; and whether the essential function(s) can be postponed or remain unperformed for any length of time and, if so, for how long.

As with other reasonable accommodations, if the covered entity can establish that accommodating a worker's temporary suspension of an essential function(s) would impose an undue hardship if extended beyond a certain period of time, the covered entity would only be required to provide that accommodation for the period of time that it does not impose an undue hardship. For example, consider the situation where an employee seeks to have an essential function suspended for six months. The employer can go without the function being done for four months, but after that, it will be an undue hardship. The employer must accommodate the

worker's inability to perform the essential function for the four months and then consider whether there are other reasonable accommodations that it can provide, absent undue hardship.

1636.3(j)(4) Undue Hardship—Predictable Assessments

The rule adds to the definition of "undue hardship" a paragraph titled "predictable assessments." The Commission anticipates that many accommodations sought under the PWFA will be for modest or minor changes in the workplace for limitations that will be temporary. Without the accommodation, a pregnant worker may quit their job or risk their health, thereby frustrating the purpose of the Act. Thus, in the regulation, the Commission identifies a limited number of simple modifications that will, in virtually all cases, be found to be reasonable accommodations that do not impose an undue hardship when requested by an employee due to pregnancy.

Under the ADA, the Commission has determined that certain conditions will, in virtually all cases, result in a determination of coverage as disabilities.[74] In a similar manner, the Commission seeks to improve how quickly employees will be able to receive certain simple, common accommodations for pregnancy under the PWFA and to reduce litigation. The identification of certain modifications as "predictable assessments" does not alter the definition of undue hardship or deprive a covered entity of the opportunity to bring forward facts to demonstrate a proposed accommodation imposes an undue hardship for its business under its own particular circumstances. Instead, it explains that in virtually all cases a limited number of

[74] *See* 29 CFR 1630.2(j)(3). There, as here, the Commission did not supplant or alter the individualized inquiry required by the statute but provided common examples to illustrate its application in frequently occurring circumstances.

simple modifications are reasonable accommodations that do not impose undue hardship when requested by an employee due to pregnancy.

These modifications are: (1) allowing an employee to carry water and drink, as needed, in the employee's work area; (2) allowing an employee additional restroom breaks; (3) allowing an employee whose work requires standing to sit and whose work requires sitting to stand, and (4) allowing an employee breaks, as needed, to eat and drink.[75]

The rule includes this addition after reviewing the information provided by legislators and congressional witnesses that these changes are regularly requested by pregnant workers and that in practice these modifications are virtually always reasonable accommodations that do not impose an undue hardship.[76] Additionally, certain State laws that are analogous to the PWFA

[75] The first and fourth categories of predictable accommodations are related but separate. The first category of accommodations addresses a worker's ability to carry water on the worker's person to where the worker carries out job duties, facilitating ready access to water without requiring the worker to take a break to access and drink it. The Commission recognizes that there may be work locations where, unlike the presence of water in most (if not all) work locations, the presence of food or non-water beverages could contribute to an undue hardship due to safety or other issues, such that a worker must take a break from the location in which the worker performs her duties in order to access and consume those items. The fourth category of accommodations addresses a worker's ability to take additional, short breaks in performing work (either at the worker's work location or a break location) to eat and drink (including beverages which are not water).

[76] *See* H.R. Rep.117- 27, pt. 1, at 11, 22, 29, 113; *Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination, Joint Hearing Before the Subcomm. on Civ. Rts. and Hum. Servs. & the Subcomm. on Workforce Prots. of the H. Comm. on Educ. and Lab.*, 117th Cong. 4 (2021) (statement of Rep. Suzanne Bonamici); *Long Over Due: Exploring the Pregnant Workers Fairness Act (H.R. 2694), Hearing Before the Subcomm. on Civ. Rts. & Hum. Servs. of the H. Comm. on Educ. and Lab.*, 116th Cong. 7 (2019) [hereinafter *Long Over Due*] (statement of Rep. Jerrold Nadler); 25 (statement of Iris Wilbur, Vice President of Government Affairs and Public Policy, Greater Louisville, Inc.); 83 (statement of Rep. Barbara Lee); 168 Cong. Rec. H10,527 (daily ed. Dec. 23, 2022) (statement of Rep. Jerrold Nadler); 168 Cong. Rec. S10,081 (daily ed. Dec. 22, 2022) (statement of Sen. Robert P. Casey, Jr.); 168 Cong. Rec. S7,079 (daily ed. Dec. 8, 2022) (statement of Sen. Robert P. Casey, Jr.); 168 Cong. Rec. H2,324 (daily ed. May 14, 2021) (statement of Rep. Suzanne Bonamici).

single out these modifications as ones that cannot be challenged as an undue hardship or where different rules regarding documentation may apply.[77]

Finally, the Commission emphasizes that adoption of the predictable assessments provision does not alter the meaning of the terms "reasonable accommodation" or "undue hardship." Likewise, it does not change the requirement that, as under the regulation implementing the ADA, employers must conduct an individualized assessment when determining whether a modification is a reasonable accommodation that will impose an undue hardship. Instead, the paragraph informs covered entities that for these specific and simple modifications, in virtually all cases, the Commission expects that individualized assessments will result in a finding that the modification is a reasonable accommodation that does not impose an undue hardship.

Examples Regarding Predictable Assessments

> Example 1636.3 #33/Predictable Assessments: Amara, a quality inspector for a manufacturing company, experiences painful swelling in her legs, ankles, and feet during the final three months of her pregnancy. Her job requires standing for long periods of time. Amara asks the person who assigns her daily work for a stool so that she can sit while she performs her job. Amara's swelling in her legs and ankles is a physical condition related to pregnancy. Amara's request is for a modification that will virtually always be a reasonable accommodation that does not impose an undue hardship. The employer argues that it has never provided a stool to any other worker who complained of difficulty standing but points to nothing that suggests that this modification is not reasonable or that it would impose an undue hardship in this particular case on the operation of the employer's business. The request must be granted.
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> Example 1636.3 #34/ Predictable Assessments: Jazmin, a pregnant teacher who typically is only able to use the bathroom when her class is at lunch, requests additional bathroom breaks during her 6th month of pregnancy. Additional bathroom breaks are one of the modifications that will virtually always be found to be a reasonable accommodation that does not impose an undue hardship. The employer argues that finding an adult to watch over the teacher's class when she needs to take a bathroom break imposes an undue hardship, but Jazmin points out that there are several teachers with nearby classrooms, some classrooms have aides, and there is an administrative assistant who works in the front office, and that with a few minutes' notice, one of them would be able to either

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[77] *See* Wash. Rev. Code 43.10.005(1)(d) (prohibiting the undue hardship defense if the accommodation is frequent, longer, or flexible restroom breaks; modifying a no food or drink policy; providing seating or allowing employee to sit more frequently if the job requires standing; and certain lifting restrictions); Mass. Gen. Laws ch. 151B(4)(1E)(c) (limiting medical documentation if the accommodation is more frequent restroom, food, or water breaks, and certain lifting restrictions).

stand in the hallway between classes to allow Jazmin a trip to the bathroom or, in the case of the administrative assistant, sit in the teacher's classroom for a few minutes several times a day. The employer has not established that providing Jazmin with additional bathroom breaks imposes an undue hardship.

Example 1636.3 #35/Predictable Assessments: Addison, a clerk responsible for receiving and filing construction plans for development proposals, needs to maintain a regular intake of water throughout the day to maintain a healthy pregnancy. They ask their manager if an exception can be made to the office policy prohibiting liquids at workstations. The ability to access water during the day is one of the modifications that will virtually always be found to be a reasonable accommodation that does not impose an undue hardship. Here, although the manager decides against allowing Addison to bring water into their workstation, he proposes that a table be placed just outside the workstation where water can be easily accessed and gives permission for Addison to access this water as needed. The employer has satisfied its obligation to provide reasonable accommodation.

1636.3(j)(5) Undue Hardship—Cannot Be Demonstrated by Assumption or Speculation

Lastly, the rule provides that a covered entity cannot demonstrate that a reasonable accommodation imposes an undue hardship based on an assumption or speculation that other employees might seek a reasonable accommodation—even the same reasonable accommodation—or the same employee might seek another reasonable accommodation in the future.[78] Relatedly, a covered entity that receives numerous requests for the same or similar accommodation at the same time (for example, parking spaces closer to the factory) cannot deny all of them simply because processing the volume of current or anticipated requests is, or would be, burdensome or because it cannot grant all of them as requested. Rather, the covered entity must evaluate and provide reasonable accommodations unless or until doing so imposes an undue hardship. The covered entity may point to past and cumulative costs or burden of accommodations that have already been granted to other employees when claiming the hardship posed by another request for the same or similar accommodation.

1636.3(k) Interactive Process

General Definition and Additions

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[78] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at n.113.

The PWFA at 42 U.S.C. 2000gg(7) refers to the definitions from the ADA that apply to the PWFA and states that this includes the "interactive process," a term from the ADA, and how it "will typically be used to determine an appropriate reasonable accommodation." The rule largely adopts the explanation of the interactive process in the regulations implementing the ADA so that the interactive process under the PWFA generally mirrors the same process under the ADA.[79] The rule also notes that there are no rigid steps that must be followed when engaging in the interactive process under the PWFA. The regulation makes the following adjustments to the definition of interactive process from the ADA in order to apply it to the PWFA.

First, the definition replaces references to "individual with disability" and similar terms with "employee with known limitations" and similar terms.

Second, the rule does not include the words "precise limitations resulting from the disability" from the ADA's explanation of "interactive process." As a result, the second sentence is: "This process should identify the known limitations and potential reasonable accommodations that could overcome those limitations." Under the ADA, the interactive process may begin with the individual identifying the "precise limitations" of the disability as well as identifying potential reasonable accommodations that could overcome those limitations.[80] It is not necessary under the PWFA that the "precise limitation" be identified because the statute makes clear that an individual is entitled to an accommodation if the "limitation" is known.

Step-by-Step Process

The Appendix to the ADA Regulations provides an example of the steps in a reasonable accommodation process and, for ease of reference, the Commission includes it below with minor changes reflecting the PWFA's requirement to provide reasonable accommodations for known

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[79] 29 CFR 1630.2(o)(3).

[80] *Id*.

limitations.[81] A covered entity may use these steps and its established ADA-related processes to address requests for reasonable accommodations for workers under PWFA. As with the ADA, a covered entity should respond expeditiously to a request for reasonable accommodation and act promptly to provide the reasonable accommodation.[82]

When an employee with a known limitation has requested a reasonable accommodation regarding the performance of the job, the covered entity, using a problem-solving approach, should:

a. Analyze the particular job involved and determine its purpose and essential functions;

b. Consult with the employee with a known limitation to ascertain what kind of accommodation is necessary given the known limitation;

c. In consultation with the employee with the known limitation, identify potential accommodations and assess the effectiveness each would have in enabling the employee to perform the essential functions of the position. If the employee's limitation means that they are temporarily unable to perform one or more essential functions of the position, the parties must also consider whether suspending the performance of one or more essential functions may be a part of the reasonable accommodation if the known limitation is temporary in nature and the employee could perform the essential function(s) in the near future (within generally forty weeks); and

[81] 29 CFR part 1630 app. 1630.9.

[82] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at Question 10. Following the steps laid out for the interactive process is not a defense to liability if the employer fails to provide a reasonable accommodation that it could have provided absent undue hardship.

d. Consider the preference of the employee to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the covered entity.[83]

Steps (b) - (d) outlined above can be adapted and applied to requests for reasonable accommodations related to the application process and to benefits and privileges of employment. In those situations, in step (c), the consideration should be how to enable the applicant with a known limitation to be considered for the position in question or how to provide an employee with a known limitation with the ability to enjoy equal benefits and privileges of employment.

In many instances, the appropriate reasonable accommodation may be obvious to either or both the employer and the employee with the known limitation, such that it may not be necessary to proceed in this step-by-step fashion. Although covered entities are cautioned that under 42 U.S.C. 2000gg-1(2) and § 1636.4(b) they cannot unilaterally require a worker with a limitation to accept a specific accommodation, the step-by-step approach may not be necessary when, for example, a pregnant worker requests certain modifications such as allowing the employee to drink water regularly during the workday, additional restroom breaks, modifications in policies regarding sitting or standing, or modifications in polices regarding eating or drinking. These requested modifications will virtually always be found to be reasonable accommodations that do not impose an undue hardship and are therefore unlikely to require significant discussion in the interactive process, and there may be other accommodations that are equally easy to provide. However, in some instances, neither the employee or applicant requesting the accommodation, nor the covered entity, may be able to readily identify an appropriate accommodation. For example, an applicant needing an accommodation may not know enough about the equipment used by the covered entity or the exact nature of the work site to suggest an appropriate accommodation. Likewise, the covered entity may not know enough about the employee's known limitation and its effect on the performance of the job to suggest an

[83] *See* 29 CFR part 1630 app. 1630.9.

appropriate accommodation. In these situations, the steps above may be helpful. In addition, parties may consult outside resources such State or local entities, non-profit organizations, or the Job Accommodation Network (JAN) for ideas regarding potential reasonable accommodations.[84]

Failure to Engage in Interactive Process

Failing to engage in the interactive process, in and of itself, is not a violation of the PWFA just as it is not a violation of the ADA. However, a covered entity's failure to initiate or participate in the interactive process with the employee or applicant after receiving a request for reasonable accommodation could result in liability if the employee or applicant does not receive a reasonable accommodation even though one is available that would not have posed an undue hardship.[85] Relatedly, an employee's unilateral withdrawal from or refusal to participate in the interactive process can constitute sufficient grounds for denying the reasonable accommodation.

1636.3(l) Supporting Documentation

In determining when and what types of documentation a covered entity may request of an employee or applicant to support their request for a reasonable accommodation, the Commission is guided by existing rules under the ADA, differences between the relevant statutory provisions of the ADA and the PWFA, and the recognition that accommodations under the PWFA may be small, temporary modifications that may not always lend themselves to medical documentation.

First, and most importantly, a covered entity is not required to seek supporting documentation from a worker who seeks an accommodation under the PWFA. For example, under the ADA, an employer may simply discuss with the employee or applicant the nature of

[84] The Job Accommodation Network (JAN) provides free assistance regarding workplace accommodation issues. *See generally* Job Accommodation Network, https://askjan.org/ (last visited July 28, 2023).

[85] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at Question 10.

the limitation and the need for an accommodation;[86] the same is true under the PWFA, and this approach is entirely consistent with the PWFA's emphasis on the importance of the interactive process as described in § 1636.3(k).

Additionally, the Commission notes that pregnant workers may experience limitations and, therefore, require accommodations, before they have had any medical appointments. For example, some workers may experience morning sickness and nausea early in their pregnancies and need accommodations such as later start times, breaks, or telework.

The Commission further recognizes that it may be difficult for a pregnant employee to obtain an immediate appointment with a health care provider early in a pregnancy. For example, according to one study, almost a quarter of women did not receive prenatal care during their first trimester, and 12% of births take place in counties with limited or no access to maternity care. [87] Further, even for those who have access to medical care, known limitations may develop between scheduled medical appointments, such that requiring documentation in those situations would increase the cost to the worker and may require them to take additional leave in order to obtain the documentation. Therefore, consistent with the purposes of the PWFA, the Commission encourages employers who choose to require documentation, when that is permitted

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[86] *Id.* at Question 6.

[87] Medical care often is not available or immediately obtained early in a pregnancy. *See, e.g.*, Joyce A. Martin et al., Ctrs. for Disease Control, *Births in the United States, 2019* 2 (2020), https://www.cdc.gov/nchs/data/databriefs/db387-H.pdf (indicating that in 2019, almost 23% of women who gave birth did not receive prenatal care during the first trimester); Christina Brigance et al., March of Dimes, *Nowhere to Go: Maternity Care Deserts Across the U.S.* 4 (2022), https://www.marchofdimes.org/research/maternity-care-deserts-report.aspx (reporting that approximately 12 percent of births in the United States occur in counties with limited or no access to maternity care); American Pregnancy Association, *Your First Prenatal Visit*, https://americanpregnancy.org/healthy-pregnancy/planning/first-prenatal-visit/ (last visited Apr. 3, 2023) (stating that the first prenatal visit for individuals who did not meet with their health care provider pre-pregnancy is generally around 8 weeks after their last menstrual period); University of Utah Health, *Pregnancy - First Trimester, Weeks 1–13*, https://healthcare.utah.edu/womenshealth/pregnancy-birth/1st-trimester (last visited Apr. 3, 2023) (stating that doctors recommend scheduling the first obstetric appointment between the 8th and 10th week of pregnancy); Boston Medical Center, *Newly Pregnant?*, https://www.bmc.org/newly-pregnant (last visited Apr. 3, 2023) (stating that the first prenatal appointment will be scheduled between the 8th and 12th weeks of pregnancy).

under this regulation, to grant interim accommodations as a best practice if an employee indicates that they have tried to obtain documentation but there is a delay in obtaining it, and the documentation will be provided at a later date. For example, if a pregnant employee requests an accommodation for a pregnancy-related limitation in lifting, which may involve the temporary suspension of an essential function, but the employee will not be able to provide a note from a health care practitioner for several weeks, the employer should consider providing an interim reasonable accommodation.[88]

If a covered entity decides to require supporting documentation, it is only permitted to do so under the rule if it is reasonable to require documentation under the circumstances for the covered entity to determine whether to grant the accommodation. When requiring documentation is reasonable, the employer is also limited to requiring documentation that itself is reasonable. The preamble, rule, and appendix set out examples of when it would not be reasonable for the employer to require documentation. The rule also defines "reasonable documentation" as documentation that describes or confirms (1) the physical or mental condition; (2) that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and (3) that a change or adjustment at work is needed for that reason.

As explained below, and set forth at § 1636.4(a)(3), an employer may not defend the denial of an accommodation under 42 U.S.C. 2000gg-1(1) based on the lack of documentation if its request for documentation does not comport with the rule. In these situations, the worker will have met the requirements of § 1636.3(d)(3), and the employer will have sufficient information regarding the known limitation and the need for accommodation. Further, requests for documentation that violate the rule may be a violation of the prohibition on retaliation and coercion in 42 U.S.C. 2000gg-2(f), as set forth in §§ 1636.5(f)(1)(iv), (v) and (f)(2)(iv), (v) because they may deter workers from seeking accommodations.

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[88] *See Best Practices State Government*, *supra* note 58. *See also infra* discussion on Interim Reasonable Accommodations.

1636.3(l)(1) Reasonable to Require Documentation Under the Circumstances

Under the rule, a covered entity may require documentation only if it is reasonable to do so under the circumstances for the covered entity to decide whether to grant the accommodation. The regulation provides several examples of when it would not be reasonable for the employer to require documentation.

First, it is not reasonable for the employer to require documentation when both the limitation and the need for reasonable accommodation are obvious. [89] For example, when an obviously pregnant[90] worker states or confirms they are pregnant and asks for a different size uniform or related safety gear, both the limitation and the need for the accommodation are obvious, and "known" under the statute, and the employer may not require supporting documentation. If the pregnancy is obvious, and the worker states or confirms that they are pregnant, but the limitation related to the pregnancy or parameters of a potential accommodation are not, the employer may only request documentation relevant to the accommodation. For example, if a worker who is obviously pregnant, states or confirms that they are pregnant, and asks to avoid lifting heavy objects, it may be reasonable for the employer to request documentation about the limitation such as the extent of the lifting restriction and its expected duration, but not about the pregnancy itself. Similarly, if an obviously pregnant employee requests the reasonable accommodation of leave related to childbirth and recovery and states or confirms that they are pregnant it may be reasonable for the employer to require documentation

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[89] This is similar to the ADA under which requesting documentation when the disability and the need for the accommodation are obvious or otherwise already known would violate the prohibition on disability-related inquires without a business justification. *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA*, Question 5 (2000), http://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees [hereinafter *Enforcement Guidance on Disability-Related Inquires*].

[90] Early or initial physical indications of pregnancy may not be sufficient to make it obvious to an employer that an employee is pregnant.

regarding the amount of time the worker anticipates needing to recover from childbirth, but not reasonable to require documentation of the pregnancy itself.

Second, when the employee or applicant has already provided the employer with sufficient information to substantiate that the worker has a known limitation and needs a change or adjustment at work, it is not reasonable for the employer to require documentation. If a worker has already provided documentation stating that because of their recent cesarean section, they should not lift over 20 pounds for two months, the employer may not require further documentation during those two months because the employee has already provided the employer with sufficient information to substantiate that they have a limitation and need a change at work.

A third example of when it is not reasonable for an employer to require documentation is when a worker at any time during their pregnancy states or confirms that they are pregnant and seeks one of the following accommodations: (1) carrying water and drinking, as needed; (2) taking additional restroom breaks; (3) sitting, for those whose work requires standing, and standing, for those whose work requires sitting; and (4) breaks, as needed, to eat and drink. It is not reasonable to require documentation, beyond self-attestation, when a worker is pregnant and seeks one of the four listed modifications because these are a small set of commonly sought accommodations that are widely known to be needed during an uncomplicated pregnancy and where documentation would not be easily obtainable or necessary. As noted above, particularly early in pregnancy, employees and applicants are less likely to have sought or been able to obtain an appointment with a health care provider for their pregnancy. Further, they may not be able to obtain an appointment with a health care provider repeatedly on short notice for every limitation, as each becomes apparent. The Commission notes that this position is consistent with the overarching goal of the PWFA to assist workers affected by pregnancy to remain on the job by providing them with simple accommodations quickly.

A fourth example of when it is not reasonable to require documentation is when the limitation for which an accommodation is needed involves lactation. Usually, beginning around or shortly after birth, lactation occurs. As the initiation of lactation around birth is nearly universal, the Commission considers the fact of breastfeeding obvious, such that it will not be reasonable for an employer to require documentation regarding lactation or pumping. Pragmatically, the Commission notes that health care providers may not be able to provide documentation regarding whether a worker is pumping, nor the types of accommodations needed in order to pump breast milk.[91] Of course, not all workers can or choose to breastfeed; those who do elect to breastfeed do so for widely varying lengths of time. Although the rule states that it is generally not reasonable for an employer to require supporting documentation for lactation or pumping, an employer will not violate the rule simply by asking the employee whether they require an appropriate place to express breastmilk while at a worksite. Employee confirmation—or a simple request to pump at work—is sufficient confirmation.

If the request for supporting documentation was not reasonable under the circumstances for the covered entity to determine whether to grant the accommodation, a covered entity cannot defend the denial of an accommodation based on the lack of documentation provided by the worker, as set forth in § 1636.4(a)(3). Further, § 1636.5(f) states that it could violate the retaliation and coercion provisions of the PWFA if a covered entity requires the submission of supporting documentation that is not reasonable under the circumstances to determine whether to grant the accommodation because, for example, (1) both the limitation and the need for reasonable accommodation are obvious; (2) the employee or applicant already has provided the employer with sufficient information to substantiate that the individual has a known limitation

[91] *See supra* note 67, for discussion of the PUMP Act and the types of accommodations that may be requested with regard to pumping.

and needs a change or adjustment at work; (3) a pregnant worker is seeking one of the modifications listed at 1636.3(j)(4); or (4) the accommodation requested involves lactation.

> Example 1636.3 #36/Documentation: An employer adopts a policy requiring everyone who requests a reasonable accommodation to provide medical documentation in support of the request. Cora, a production worker who is 8 months pregnant, requests additional bathroom breaks, and the employer applies the policy to her, refusing to provide the accommodation until she submits medical documentation. Cora therefore makes a medical appointment that she does not need and brings in documentation to establish that she is pregnant and has a physical condition that requires additional bathroom breaks. The employer grants the requested accommodation shortly before Cora gives birth. Despite the fact that the accommodation was granted, this employer may have violated the PWFA, 42 U.S.C. 2000gg-1(a) and/or 2000gg-2(f).
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> Example 1636.3 #37/Documentation: An employer adopts a policy requiring everyone who requests a reasonable accommodation to provide medical documentation in support of the request. Fourteen months after giving birth, Alex wants to continue to pump breastmilk at work, explains that to her supervisor, and asks, as a reasonable accommodation, for breaks to pump and that the room that is provided have a chair, a table, and access to electricity and running water. Alex's employer refuses to provide the accommodations unless Alex provides supporting documentation from her health care provider. Alex cannot provide the information, so she stops pumping. The employer cannot use the lack of documentation as a defense to the denial of the accommodation because documentation was not reasonable under the circumstances for the employer to determine whether to grant to accommodation, as set forth in § 1636.4(a)(3).

1636.3(l)(2) Reasonable Documentation

When it is reasonable to require documentation under the circumstances for the covered entity to determine whether to grant the accommodation, the covered entity is permitted to require reasonable documentation, including from a health care provider. The rule defines "reasonable documentation" as documentation that describes or confirms: (1) the physical or mental condition; (2) that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and (3) that a change or adjustment at work is needed for that reason. For example, if an employee asks for leave as a reasonable accommodation to attend therapy appointments due to anxiety early in the employee's pregnancy, the employer could, but is not required to, ask for documentation confirming that there is a physical or mental condition that is

related to, affected by, or arising out of pregnancy, and information about how frequent and long the leave would need to be.

Adopting the longstanding approach under the ADA, § 1636.4(f)(1)(v) and (f)(2)(v) explain that if an employee or applicant provides documentation that is sufficient, continued efforts by the covered entity to require that the individual provide more documentation could be a violation of the PWFA's prohibitions on retaliation and coercion. However, if a covered entity requests additional information based on a good faith belief that the documentation the employee submitted is insufficient, it would not be liable for retaliation or coercion.[92]

1636.3(l)(3) Appropriate Health Care Provider to Provide Documentation

If the covered entity meets the requirements laid out above to request documentation and does so, the covered entity may request documentation from an appropriate health care provider in the particular situation. An appropriate provider may vary depending on the situation; paragraph (l)(3) contains a non-exhaustive list of possible health care providers that is based on the non-exhaustive list for the ADA.[93]

The Commission does not believe that it will be practical or necessary for a covered entity to request or require that an employee be examined by a health care provider of the covered entity's choosing based on the PWFA's lower threshold for requiring reasonable accommodations, the temporary duration of PWFA accommodations, and the minimal nature of at least some of the most common reasonable accommodations associated with general limitations of pregnancy, childbirth, or related medical conditions.

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[92] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at n.33; *Enforcement Guidance on Disability-Related Inquiries*, *supra* note 89, at Question 11.

[93] *See Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at Question 6.

1636.3(l)(4) Confidentiality

The PWFA does not include a provision specifically requiring covered entities to maintain the confidentiality of medical information obtained in support of accommodation requests under the PWFA. However, applicants, employees, and former employees covered by the PWFA also are covered by the ADA.[94] Under the ADA, covered entities are required to keep medical documentation of applicants, employees, and former employees confidential, with limited exceptions.[95] These ADA rules on keeping medical information confidential apply to all medical information, including medical information voluntarily provided as part of the reasonable accommodation process, and, therefore, include medical information obtained under the PWFA. Moreover, as explained in § 1636.5(f), an employer's intentional disclosure of medical information obtained through PWFA's reasonable accommodation process may violate the PWFA's prohibition on retaliation and/or coercion.

Section 1636.4 Prohibited Practices

42 U.S.C. 2000gg-1 sets out five possible violations involving the provision of reasonable accommodations.

1636.4(a) Failing to Provide Reasonable Accommodation

42 U.S.C. 2000gg-1(1) prohibits a covered entity from failing to make a reasonable accommodation for a qualified employee or applicant with a known limitation unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the

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[94] *See* 42 U.S.C. 12111(5)(a) & 4 (ADA); 42 U.S.C. 2000gg(1)(B)(i) & (3)(A).

[95] 29 CFR 1630.14(b) & (c); *Enforcement Guidance on Disability-Related Inquiries, supra* note 89, at text accompanying nn.9-10; EEOC, *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, at text accompanying n.6 (1995), https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical.

operation of its business. This provision of the PWFA uses the same language as the ADA, and the rule likewise uses the language from the corresponding ADA regulation, replacing references to "individual with a disability" and similar terms with "employee with a known limitation" and similar terms.[96] Because 42 U.S.C. 2000gg-1(1) uses the same operative language as the ADA, the Commission proposes interpreting it in a similar manner.

This section is violated when a covered entity denies a reasonable accommodation to a qualified employee or applicant with a known limitation, absent undue hardship. As under the ADA, however, a covered entity does not violate 42 U.S.C. 2000gg-1(1) merely by refusing to engage in the interactive process; for a violation, there also must have been a reasonable accommodation that the employer could have provided absent undue hardship.

1636.4(a)(1) Unnecessary Delay in Responding to a Request for a Reasonable Accommodation

Given that pregnancy-related limitations are frequently temporary, a delay in providing an accommodation may mean that the period necessitating the accommodation could pass without action simply because of the delay.[97] As with the ADA, an unnecessary delay in responding to a request for a reasonable accommodation may result in a violation of the PWFA if the delay results in a failure to provide a reasonable accommodation.[98] This can be true even if the reasonable accommodation is eventually provided, when the delay was unnecessary.

The factors set out in § 1636.4(a)(1) include the same factors that are used when determining if a delay in the provision of a reasonable accommodation violates the ADA,[99] and

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[96] 42 U.S.C. 12112(b)(5)(A); 29 CFR 1630.9(a).

[97] *See, e.g.*, *Long Over Due*, *supra* note 76, at 96 (statement of Rep. Suzanne Bonamici) (praising the PWFA because it would allow pregnant workers to get accommodations without waiting months or years; 168 Cong. Rec. S10,081 (daily ed. Dec. 22, 2022) (statement of Sen. Robert Casey, Jr.) (noting that "pregnant workers need immediate relief to remain healthy and on the job").

[98] *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at Question 10, n.38.

[99] *Id.*

the regulation adds two new factors. First, in determining whether a delay in providing a reasonable accommodation was unnecessary, the question of whether providing the accommodation was simple or complex is a factor to be considered. There are certain modifications, set forth in § 1636.3(j)(4), that will virtually always be found to be reasonable accommodations that do not impose an undue hardship: (1) allowing a pregnant employee to carry and drink water, as needed; (2) allowing a pregnant employee additional restroom breaks; (3) allowing a pregnant employee whose work requires standing to sit and whose work requires sitting to stand; and (4) allowing a pregnant employee breaks to eat and drink, as needed. If there is a delay in providing these accommodations, it will virtually always be found to be unnecessary because of the presumption that these modifications will be reasonable accommodations that do not impose an undue hardship. Second, another factor to be considered when determining if a delay in providing a reasonable accommodation was unnecessary is whether the covered entity offered the employee or applicant an interim reasonable accommodation during the interactive process or while waiting for the covered entity's response. The provision of such an interim accommodation will decrease the likelihood that an unnecessary delay will be found. Under this factor, leave is not considered an appropriate interim reasonable accommodation if there is another interim reasonable accommodation that would not cause an undue hardship and would allow the employee to continue working, unless the employee selects or requests leave as an interim reasonable accommodation.[100]

1636.4(a)(2) Employee or Applicant Declining a Reasonable Accommodation

The rule provides, as in the ADA, that if an employee declines a reasonable accommodation, and without it the employee cannot perform one or more essential functions of

[100] The restriction on using leave as an interim accommodation is based on 42 U.S.C. 2000gg-1(4).

the position, then the employee will no longer be considered qualified.[101] However, because the PWFA allows for the temporary suspension of one or more essential functions in certain circumstances, an employer must also consider whether one or more essential functions can be temporarily suspended pursuant to the PWFA before a determination is made pursuant to this section that the employee is not qualified.

1636.4(a)(3) Covered Entity Denying a Reasonable Accommodation Due to Lack of Supporting Documentation

If the request for documentation was not reasonable under the circumstances for the covered entity to determine whether to grant the accommodation, a covered entity cannot defend the denial of an accommodation based on the lack of documentation provided by the worker.

1636.4(a)(4) Choosing Among Possible Accommodations

Similar to the ADA, if there is more than one effective accommodation, the employee's or applicant's preference should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between potential reasonable accommodations and may choose, for example, the less expensive accommodation or the accommodation that is easier for it to provide, or generally the accommodation that imposes the least hardship.[102] In the situation where the employer is choosing between reasonable accommodations and does not provide the accommodation that is the worker's preferred accommodation, the employer does not have to show that it is an undue hardship to provide the worker's preferred accommodation.

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[101] *See* 29 CFR 1630.9(d).

[102] 29 CFR part 1630 app. 1630.9.

A covered entity's "ultimate discretion" to choose a reasonable accommodation is limited by certain other considerations. First, the accommodation must provide the individual with a known limitation with an equal employment opportunity, meaning an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a known limitation.[103] Thus, if there is more than one accommodation that does not impose an undue hardship, but one of them does not provide the employee with an equal employment opportunity, the employer must choose the one that provides the worker with equal employment opportunity.[104] Depending on the facts, selecting the accommodation that does not provide equal opportunity could violate 42 U.S.C. 2000gg-1(1), 2000gg-(1)(5) or 2000gg-2(f).[105]

Second, 42 U.S.C. 2000gg-1(2) prohibits a covered entity from requiring a qualified employee or applicant affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than a reasonable accommodation arrived at through the interactive process. Third, 42 U.S.C. 2000gg-1(4) prohibits a covered entity from requiring a qualified employee with a known limitation to take leave if there is a reasonable accommodation that will allow the employee to continue to work, absent undue hardship. Fourth, 42 U.S.C. 2000gg-1(5)

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[103] 29 CFR part 1630 app. 1630.9 (providing that a reasonable accommodation "should provide the individual with a disability with an equal employment opportunity. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability."); 29 CFR part 1630 app. 1630.2(o) (explaining that reassignment should be to a position with equivalent pay, status, etc., if possible); *see also Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at text following n.80 ("However, if both the employer and the employee voluntarily agree that transfer is preferable to remaining in the current position with some form of reasonable accommodation, then the employer may transfer the employee."); *Cf.* EEOC, *Compliance Manual on Religious Discrimination*, 12-IV.3 (2021) (stating that in the context of a religious accommodation, an accommodation would not be reasonable "if it requires the employee to accept a reduction in pay rate or some other loss of a benefit or privilege of employment and there is an alternative accommodation that does not do so.") https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination [hereinafter *Religious Discrimination Compliance Manual*].

[104] *Enforcement Guidance on Reasonable Accommodations*, *supra* note 4, Question 9 Example B.

[105] Depending on the facts, this could be a violation of Title VII's prohibition on sex discrimination as well.

prohibits a covered entity that is, for example, selecting from an array of accommodations, all of which are effective and do not impose an undue hardship, from picking one that results in the covered entity taking adverse action in terms, conditions, or privileges of employment of the employee or applicant. Fifth, 42 U.S.C. 2000gg-2(f) prohibits retaliation and coercion by covered entities.

> Example 1636.4 #38/Failing to Provide an Accommodation: Yasmin's job requires her to travel to meet with clients. Because of her pregnancy, she is not able to travel for three months. She asks that she be allowed to conduct her client meetings via video conferencing. Although this accommodation would allow her to perform her essential job functions and does not impose an undue hardship, her employer reassigns her to smaller, local accounts. Being assigned only to these accounts limits Yasmin's ability to compete for promotions and bonuses as she had in the past.
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> This could be a violation of 42 U.S.C. 2000gg-1(1), because Yasmin is denied an equal opportunity to compete for promotions and is thus denied a reasonable accommodation. The employer's actions could also violate 42 U.S.C. 2000gg-1(5) and 42 U.S.C. 2000gg-2(f), or Title VII's prohibition against pregnancy discrimination.

1636.4(b) Requiring Employee or Applicant to Accept an Accommodation

42 U.S.C. 2000gg-1(2) prohibits a covered entity from requiring an employee or applicant to accept an accommodation other than any reasonable accommodation arrived at through the interactive process. This provision responds to concerns that some employers may unilaterally curtail what a pregnant worker can do in the mistaken belief that the worker needs some type of help.[106] Pursuant to this provision in the PWFA and the rule, a covered entity cannot force an employee or applicant to accept an accommodation such as light duty or a temporary transfer, or delay of an examination that is part of the application process, without

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[106] *Cf.* EEOC, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* II.A.3 (2007), https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities (describing situations in which employers incorrectly assume based on stereotypes that workers with caregiving responsibilities need a change to their workload or work environment); s*ee also UAW v. Johnson Controls*, 499 U.S. 187 (1991) (striking down employer's fetal protection policy that limited the opportunities of women); *Long Over Due*, *supra* note 76, at 192 (written answers of Dina Bakst, Co-Founder & Co-President, A Better Balance) (explaining that employers have been known to unilaterally cut a worker's hours or stop a worker from working late in an attempt to "help" the employee or because the employer felt sorry for the worker, even though an employee did not ask for such accommodation and did not need it).

engaging in the interactive process, even if the covered entity's motivation is concern for the applicant's or employee's health or pregnancy.

42 U.S.C. 2000gg-1(2) does not require that the employee or applicant have a limitation, known or not; thus, a violation of 42 U.S.C. 2000gg-1(2) could occur if a covered entity notices that an employee or applicant is pregnant and decides, without engaging in the interactive process with the employee or applicant, that the employee or applicant needs a particular accommodation, and unilaterally requires the employee or applicant to accept that accommodation, even though the employee or applicant has not requested it and can perform the essential functions of the job without it. For example, this provision could be violated if an employment agency, without discussing the situation with the candidate, decided that a candidate recovering from a miscarriage needed an accommodation in the form of not being sent to certain jobs that the agency viewed as too physical, or if an employer decided to excuse a pregnant worker from overtime as an accommodation, without discussing it with them.[107]

Additionally, a violation could occur if a covered entity receives a request for a reasonable accommodation and unilaterally imposes an accommodation that was not requested without engaging in the interactive process.

> Example 1636.4 #39: Kia, a restaurant server, is pregnant. She asks for additional breaks during her shifts as her pregnancy progresses because she feels tired, and her feet are swelling. Her employer, without engaging in the interactive process with Kia, directs Kia to take host shifts for the remainder of her pregnancy, because she can sit for long periods during the shift. The employer has violated 42 U.S.C. 2000gg-1(2) and § 1636.4(b) of the rule, because it required Kia to accept an accommodation other than one arrived at through the interactive process, even if Kia's earnings did not decrease and her terms, conditions, and privileges of employment were not harmed. The Commission recognizes that the relief in this situation may be limited to requiring the employer to engage in the interactive process with the employee.
>
> By contrast, if the host shift does not provide Kia with equal terms, conditions, and privileges of employment (e.g., Kia's wages decrease or Kia no longer can earn tips), the covered entity also may have violated 42 U.S.C. 2000gg-1(1) (requiring reasonable accommodation absent undue hardship); 42 U.S.C. 2000gg-1(5) (prohibiting adverse action in terms, benefits, or privileges of employment); or 42 U.S.C. 2000gg-2(f)

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[107] These actions also could violate Title VII's prohibition of disparate treatment based on sex. *See Enforcement Guidance on Pregnancy Discrimination*, *supra* note 11, at I.B.1.

(prohibiting retaliation and coercion) (implemented in the rule at § 1636.4(a), (e) and § 1636.5(f)).

Finally, this provision also could be violated if a covered entity has a rule that requires all pregnant workers to stop a certain function—such as traveling—automatically, without any evidence that the particular worker is unable to perform that function.

1636.4(c) Denying Opportunities

42 U.S.C. 2000gg-1(3) prohibits a covered entity from denying employment opportunities to a qualified employee or applicant with a known limitation if the denial is based on the need of the covered entity to make reasonable accommodations to the known limitations of the employee or applicant. Thus, an employee's or applicant's known limitation and need for a reasonable accommodation cannot be part of the covered entity's decision regarding hiring, discharge, promotion, or other employment decisions, unless the reasonable accommodation would impose an undue hardship on the covered entity. This provision in the PWFA uses language similar to that of the ADA, and the rule likewise uses the language similar to the corresponding ADA regulation.[108] Additionally, the rule includes situations where the covered entity's decision is based on the future possibility that a reasonable accommodation will be needed, i.e., 42 U.S.C. 2000gg-1(3) prohibits a covered entity from making a decision based on its belief that an individual may need a reasonable accommodation in the future even if the individual has not asked for one. Thus, under the rule, this prohibition would include situations where a covered entity refuses to hire a pregnant applicant because the covered entity believes that the applicant will need leave to recover from childbirth, even if the covered entity does not know the exact amount of leave the applicant will require, or the applicant has not mentioned the need for leave as a reasonable accommodation to the covered entity. The Commission proposes

[108] 42 U.S.C. 12112(b)(5)(B); 29 CFR 1630.9(b).

this addition to ensure that workers are protected in situations where the employer's actions are based on avoiding the provision of a reasonable accommodation, even if one is not requested.

1636.4(d) Requiring Employee to Take Leave

Sometimes, when employees notify their employers that they are pregnant, employers place them on leave or direct them to use leave.[109] Workers on unpaid leave risk their economic security, and workers who use their leave—whether paid or unpaid—prior to giving birth may not have leave when they need it to recover from childbirth.[110]

42 U.S.C. 2000gg-1(4) seeks to limit this practice. Under this provision, a covered entity may not require a qualified employee with a known limitation to take leave, whether paid or unpaid, if another reasonable accommodation can be provided, absent undue hardship. In other words, under the PWFA, an employee cannot be forced to take leave if another reasonable accommodation can be provided that would not impose an undue hardship and would allow the employee to continue to work.

Of course, this limitation does not prohibit the provision of leave as a reasonable accommodation if leave is the reasonable accommodation requested or selected by the employee, or if it is the only reasonable accommodation that does not cause an undue hardship. As explained above in the preamble's discussion of § 1636.3(h) and (i), both paid leave (accrued, short-term disability, or another employer benefit) and unpaid leave are potential reasonable accommodations under the PWFA. 42 U.S.C. 2000gg-1-(4) and the rule merely prohibits an employer from requiring an employee to take leave if there is another reasonable accommodation that would not impose an undue hardship and would allow the employee to remain on the job.

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[109] H.R. Rep. No. 117-27, pt. 1, at 24.

[110] *Long Over Due*, *supra* note 76, at 81 (statement of Rep. Jahana Hayes) (explaining that she kept working while pregnant in order to save her leave for after childbirth).

1636.4(e) Adverse Action on Account of Requesting or Using a Reasonable Accommodation

The PWFA contains overlapping provisions that protect workers seeking or using reasonable accommodations. Importantly, nothing in the PWFA limits which provision a worker may use to protect their rights.

One of these provisions is 42 U.S.C. 2000gg-1(5), which prohibits a covered entity from "tak[ing] 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 pregnancy, childbirth, or related medical conditions of the employee." 42 U.S.C. 2000gg-1(5) only applies to situations involving a qualified employee who asks for or uses a reasonable accommodation. The protections provided by 42 U.S.C. 2000gg-1(5) are likely to have significant overlap with 42 U.S.C. 2000gg-2(f), which prohibits retaliation. As explained in the discussion of 42 U.S.C. 2000gg-2(f) (§ 1636.5(f)), however, the PWFA's anti-retaliation provisions apply to a broader group of employees and actions than 42 U.S.C. 2000gg-1(5) does.

The term "take adverse action" in 42 U.S.C. 2000gg-1(5) is not taken from Title VII or the ADA. From the context of this provision and the basic dictionary definitions of the terms, this prohibits an employer from taking a harmful action against an employee.[111]

"Terms, conditions, or privileges of employment" is a term from Title VII, and the EEOC has interpreted it to encompass a wide range of activities or practices that occur in the workplace including, but not limited to, discriminatory work environment or atmosphere; duration of work (such as the length of an employment contract, hours of work, or attendance); work rules; job assignments and duties; and job advancement (such as training, support, and performance

[111] *Adverse*, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/adverse ("hostile," "unfavorable" and "harmful.") (last visited June 13, 2023).

evaluations).[112] In addition, for the purposes of 42 U.S.C. 2000gg-1(5), "terms, conditions, and privileges of employment" can include hiring, discharge, or compensation.[113]

Thus, this provision may be violated when, for example, a covered entity grants a reasonable accommodation but then penalizes the employee.

> Example 1636.4 #40: Nava took leave to recover from childbirth as a reasonable accommodation under the PWFA, and, as a result, failed to meet the sales quota for that quarter, which led to a negative performance appraisal. The negative appraisal could be a violation of 42 U.S.C. 2000gg-1(5) because Nava received it due to the use of a reasonable accommodation.

Also, an employer may violate this provision if there is more than one accommodation that does not impose an undue hardship, and the employer, after the interactive process, chooses the accommodation that causes an adverse action with respect to the terms, conditions, or privileges of employment, despite the existence of an alternative accommodation that would not do so.

> Example 1636.4 #41: Ivy asks for additional bathroom breaks during work because of pregnancy, including during overtime shifts. After talking to Ivy, rather than providing the breaks during overtime, Ivy's supervisor decides Ivy should simply not work overtime, because during the overtime shift there are fewer employees, and the supervisor does not want to bother figuring out coverage for Ivy, although it would not be an undue hardship to do so. As a result, Ivy is not assigned overtime and loses earnings.
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> This conduct could violate 42 U.S.C. 2000gg-1(5) in two ways. First, Ivy's request for a reasonable accommodation led to an adverse action in terms, conditions, or privileges of employment. Second, Ivy's use of the accommodation of not working overtime led to a reduction in pay, i.e., an adverse action in terms, conditions, or privileges of Ivy's employment, and there was an alternative accommodation (assigning coverage for Ivy as needed) that would not have done so.
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> Example 1636.4 #42: Leyla asks for telework due to morning sickness. Through the interactive process, it is determined that both telework and a later schedule combined with an hour rest break in the afternoon would allow Leyla to perform the essential functions of her job and would not impose an undue hardship. Although Leyla prefers

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[112] 42 U.S.C. 2000e-2(a)(1); *Compliance Manual on Terms, Conditions, and Privileges of Employment*, *supra* note 40, at 613.1(a) (stating that the language is to be read in the broadest possible terms and providing a list of examples).

[113] The PWFA's use of the phrase "terms, conditions, and privileges of employment" includes hiring, discharge, and compensation, which are also included within the scope of Title VII. 42 U.S.C. 2000e-2(a)(1).

telework, the employer would rather Leyla be in the office. It would not be a violation of 42 U.S.C. 2000gg-1(5) to offer Leyla the schedule change/rest break instead of telework as a reasonable accommodation.

The facts set out in examples 40 and 41 could also violate 42 U.S.C. 2000gg-1(1) and 2000gg-2(f).

As stated at the beginning of this section, the PWFA has overlapping protections for workers who request or use reasonable accommodations. The Commission emphasizes that qualified employees with known limitations may bring actions under any of these provisions.

Section 1636.5 Remedies and Enforcement

In crafting the PWFA remedies and enforcement section, Congress recognized the advisability of using the existing mechanisms in place for redress of other forms of employment discrimination. Thus, the enforcement and remedies sections of the PWFA mirror those of the statutes that provide its definitions of covered entity and employee (Title VII, GERA, and the Congressional Accountability Act).

1636.5(f) Prohibition Against Retaliation

The anti-retaliation provisions of the PWFA should be interpreted broadly, like those of Title VII and the ADA, to effectuate Congress's broad remedial purpose in enacting these laws.[114] The protections of these provisions extend beyond qualified employees and applicants with known limitations and cover activity that may not yet have occurred, such as a circumstance in which a covered entity threatens an employee or applicant with termination if they file a

[114] EEOC, *Enforcement Guidance on Retaliation and Related Issues* II.A, A.1 (2016), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues [hereinafter *Enforcement Guidance on Retaliation*] (describing the broad protection of the participation clause); *id.* at A.2, A.2.a (describing the broad protection of the opposition clause).

charge or requires an employee or applicant to sign an agreement that prohibits such individual from filing a charge with the EEOC.[115]

1636.5(f)(1) Prohibition Against Retaliation

The regulation reiterates the statutory prohibition against retaliation from 42 U.S.C. 2000gg-2(f)(1), which uses the same language as Title VII and the ADA.[116] Thus, the types of conduct prohibited and the standard for determining what constitutes retaliatory conduct under the PWFA are the same as they are under Title VII. Accordingly, this provision prohibits discrimination against individuals who engage in protected activity, which includes "'participating' in an EEO process or 'opposing' discrimination."[117] Title VII's anti-retaliation provision is broad and protects an individual from conduct, whether related to employment or not, that a reasonable person would have found "materially adverse," meaning that the action "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[118] The same interpretation applies to the PWFA's anti-retaliation provision.[119]

The rule contains five other provisions based on the statutory language and established anti-retaliation concepts under Title VII and the ADA.

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[115] EEOC, *Enforcement Guidance on Non-Waivable Employee Rights under EEOC Enforced Statutes* II (1997), https://www.eeoc.gov/laws/guidance/enforcement-guidance-non-waivable-employee-rights-under-eeoc-enforced-statutes ("[P]romises not to file a charge or participate in an EEOC proceeding are null and void as a matter of public policy. Agreements extracting such promises from employees may also amount to separate and discrete violations of the anti-retaliation provisions of the civil rights statutes.").

[116] 42 U.S.C. 2000e-3(a); 42 U.S.C. 12203(a).

[117] *Enforcement Guidance on Retaliation*, *supra* note 114, at II.A; *see also id.* at II.A.1-A.2 (describing protected activity under Title VII's anti-retaliation clause).

[118] *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (internal citations and quotations omitted).

[119] All retaliatory conduct under Title VII (and the ADA), including retaliation that takes the form of harassment, is evaluated under the legal standard for retaliation. *See Enforcement Guidance on Retaliation*, *supra* note 114, at II.B.3.

First, like Title VII and the ADA, the rule protects employees, applicants, and former employees because 42 U.S.C. 2000gg-2(f)(1) protects "employees," not "qualified employees with a known limitation." Therefore, the rule states that an employee, applicant, or former employee need not establish that they have a known limitation or are qualified under the PWFA to bring a claim under 42 U.S.C. 2000gg-2(f)(1).[120] Second, the rule explains that, consistent with the ADA and Title VII, a request for a reasonable accommodation under the PWFA constitutes protected activity, and therefore retaliation for such a request is prohibited.[121] Third, the rule provides that an employee, applicant, or former employee does not have to actually be deterred from exercising or enjoying rights under this section for the retaliation to be actionable.[122] Fourth, as explained in the discussion of the documentation that can be required in support of a request for reasonable accommodation, the rule notes that it may violate this section for a covered entity to require documentation when it is not reasonable under the circumstances to determine whether to provide the accommodation. Finally, the rule explains that when an employee or applicant provides sufficient documentation to describe the relevant limitation and need for accommodation, continued efforts on the covered entity's part to obtain documentation violates the retaliation prohibition unless the covered entity has a good faith belief that the submitted documentation is insufficient.

1636.5(f)(2) Prohibition Against Coercion

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[120] *See Enforcement Guidance on Retaliation*, *supra* note 114, at III (recognizing that under the ADA, individuals need not establish that they are covered under the statute's substantive discrimination provisions in order to be protected against retaliation); *id.* at II.A.3; *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding that Title VII protects former employees from retaliation).

[121] *Enforcement Guidance on Retaliation*, *supra* note 114, at II.A.2.e and Example 10.

[122] *Id.* at II.B.1, B.2 (stating that the retaliation "standard can be satisfied even if the individual was not in fact deterred" and that "[i]f the employer's action would be reasonably likely to deter protected activity, it can be challenged as retaliation even if it falls short of its goal").

The PWFA's anti-coercion provision uses the same language as the ADA's interference provision, with one minor variation in the title of the section.[123] Similar to the ADA, the scope of the PWFA coercion provision is broader than the anti-retaliation provision; it reaches those instances "when conduct does not meet the 'materially adverse' standard required for retaliation."[124]

The rule follows the language of 42 U.S.C. 2000gg-2(f)(2) and protects "individuals," not "qualified employees with a known limitation under the PWFA." Thus, the rule specifies that, consistent with the ADA's interference provisions, the individual need not be an employee, applicant, or former employee and need not establish that they have a known limitation or that they are qualified (as those terms are defined in the PWFA) to bring a claim for coercion under the PWFA.[125]

The purpose of this provision is to ensure that workers are free to avail themselves of the protections of the statute. Thus, consistent with the ADA regulations for the same provision, the rule adds "harass" to the list of prohibitions, as harassment may be a method to coerce a worker into not availing themselves of their PWFA rights.[126] The rule also states that an individual does not, in fact, have to be deterred from exercising or enjoying rights under this section for the coercion to be actionable. [127]

The rule contains three examples of actions that could be violations. First, the rule states that it prohibits coercion, intimidation, threats, harassment, or interference because an individual,

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[123] The ADA uses the term "Interference, coercion, or intimidation" to preface the prohibition against interference (42 U.S.C. 12203(b)), whereas the PWFA uses "Prohibition against coercion." The language of the prohibitions is otherwise identical.

[124] *Enforcement Guidance on Retaliation*, *supra* note 114, at III.

[125] *Id.*

[126] 29 CFR 1630.12(b).

[127] *Enforcement Guidance on Retaliation*, *supra* note 114, at II.B.1-B.2 (noting that actions can be challenged as retaliatory even if the person was not deterred from engaging in protected activity).

including an employee, applicant, or former employee, has asked for a reasonable accommodation under the PWFA.

Second, the rule provides that coercion could include situations in which the covered entity requires documentation in support of a request for reasonable accommodation when it is not reasonable under the circumstances to determine whether to provide the accommodation.

Third, the rule states that a covered entity that has sufficient information regarding the known limitation and the need for reasonable accommodation but continues to require additional information or documentation violates the anti-coercion provision unless the covered entity has a good faith belief that the documentation is insufficient.

Some other examples of coercion include:

- coercing an individual to relinquish or forgo an accommodation to which they are otherwise entitled;
- intimidating an applicant from requesting an accommodation for the application process by indicating that such a request will result in the applicant not being hired;
- issuing a policy or requirement that purports to limit an employee's or applicant's rights to invoke PWFA protections (e.g., a fixed leave policy that states "no exceptions will be made for any reason");
- interfering with a former employee's right to file a PWFA lawsuit against a former employer by stating that a negative job reference will be given to prospective employers if the suit is filed; and
- subjecting an employee to unwarranted discipline, demotion, or other adverse treatment because they assisted a coworker in requesting a reasonable accommodation.[128]

Examples of Retaliation and/or Coercion

[128] *Id.* at III.

Actions that the courts or the Commission have previously determined may qualify as retaliation or coercion under Title VII or the ADA may qualify under the PWFA as well. Depending on the facts, a covered entity's retaliatory action for activity protected under the PWFA may violate 42 U.S.C. 2000gg-1(5), 2000gg-2(f)(1) and/or 2000gg-2(f)(2), as implemented by §§ 1636.4(e) and 1636.5(f). The following examples would likely violate 42 U.S.C. 2000gg-2(f) and may also violate 42 U.S.C. 2000gg-1(5).

Example 1636.5 #43: Perrin requests a stool due to pregnancy. Lucy, Perrin's supervisor, denies Perrin's request. The corporate human resources department instructs Lucy to grant the request because there is no undue hardship. Angry about being overruled, Lucy thereafter gives Perrin an unjustified poor performance rating and denies Perrin's request to attend training that Lucy approves for Perrin's coworkers.

Example 1636.5 #44: Marisol files an EEOC charge after Cyrus, her supervisor, refused to provide her with the reasonable accommodation of help with lifting after her cesarean section. Marisol also alleges that after she asked for the accommodation, Cyrus asked two coworkers to conduct surveillance on Marisol, including watching her at work, noting with whom she associated in the workplace, suggesting to other employees that they should avoid her, and reporting her breaks to Cyrus.

Example 1636.5 #45: Mara provides her employer with a note from her health care provider explaining that she is pregnant, has morning sickness, and needs to start work later on certain days. Mara's supervisor requires that Mara confirm the pregnancy through an ultrasound, even though the employer already has sufficient information regarding Mara's pregnancy.

Example 1636.5 #46: During an interview at an employment agency, Arden tells the human resources staffer, Stanley, that Arden is dealing with complications from their recent childbirth and may need time off for doctor's appointments during their first few weeks at work. Stanley counsels Arden that needing leave so soon after starting will be a "black mark" on their application.

Example 1636.5 #47: Merritt, a client of an employment agency, is discharged from an employer after requesting an accommodation under the PWFA. The employment agency refuses to refer Merritt to other employers, telling Merritt that they only refer workers who will not cause any trouble.

Example 1636.5 #48: Jessie, a factory union steward, ensures that workers know about their rights under the PWFA and encourages workers with known limitations to ask for reasonable accommodations. Jessie helps employees navigate the reasonable accommodation process and provides suggestions of possible reasonable accommodations. Factory supervisors are annoyed at the number of PWFA reasonable accommodation requests and write up Jessie for petty safety violations and other actions that had not been worthy of discipline before.

Example 1636.5 #49: While she was pregnant, Laila requested and received the reasonable accommodation of a temporary suspension of the essential function of moving

heavy boxes and placement in the light duty program. After giving birth, Laila tells her employer that she has decided to resign and stay home for a year. Her employer responds by saying that if Laila follows through and resigns now, the employer will have no choice but to give her a negative reference because Laila demanded an accommodation but did not have the loyalty to come back after having her baby.

Example 1636.5 #50: Robbie, a retail worker, is visibly pregnant and would like to sit while working at the cash register. Robbie explains the situation to the manager, who requires Robbie to produce a signed doctor's note saying that Robbie is pregnant and needs to sit. Because Robbie is obviously pregnant, has confirmed the pregnancy, and requests one of the simple modifications that will virtually always be found to be a reasonable accommodation that does not impose an undue hardship, the covered entity is not permitted to require additional medical documentation.

Protection of Confidential Medical Information

As explained in the discussion of § 1636.3(l) *Documentation,* the established ADA rules requiring covered entities to keep medical information of applicants, employees, and former employees confidential apply to medical information obtained in connection with a reasonable accommodation request under the PWFA.[129] Medical information obtained by the employer in the process of a worker seeking a reasonable accommodation under the PWFA must be protected as set out in the ADA and failing to do so would violate the ADA. For example, the fact that someone is pregnant or has recently been pregnant, is medical information about that person, as is the fact that they have a medical condition related to pregnancy or childbirth. Thus, disclosing that someone is pregnant, has recently been pregnant, or has a related medical condition violates the ADA, unless an exception applies, as does disclosing that someone is receiving or has requested an accommodation under the PWFA or has limitations for which they requested or are receiving a reasonable accommodation under the PWFA (because revealing this information

[129] *Enforcement Guidance on Disability-Related Inquiries, supra* note 89, at text accompanying n.9; EEOC, *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, at text accompanying n.6 and nn.23-25 (1995), https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical.

discloses that the person is pregnant, has recently been pregnant, or has a related medical condition).[130]

In addition, releasing medical information, threatening to release medical information, or requiring an employee or applicant to share their medical information with individuals who have no role in processing a request for reasonable accommodation may violate the PWFA's retaliation and coercion provisions.[131]

Section 1636.7 Relationship to Other Laws

The PWFA at 42 U.S.C. 2000gg-5 and this section of the regulation address the PWFA's relationship to other Federal, State, and local laws.

1636.7(a) Relationship to Other Laws Generally

42 U.S.C. 2000gg-5(a)(1) addresses the relationship of the PWFA to other Federal, State, and local laws governing protections for individuals affected by pregnancy, childbirth, or related medical conditions and makes clear that the PWFA does not limit the rights of individuals affected by pregnancy, childbirth, or related medical conditions under a Federal, State, or local law that provides greater or equal protection. It is equally true that Federal, State, or local laws that provide less protection for individuals affected by pregnancy, childbirth, or related medical conditions than the PWFA do not limit the rights provided by the PWFA. The regulation reiterates the statutory provision addressing the relationship of the PWFA to other Federal, State, and local laws governing protections for individuals affected by pregnancy, childbirth, or related medical conditions.

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[130] 29 CFR 1630.14(c); *Enforcement Guidance on Disability-Related Inquiries*, *supra* note 89, at A.

[131] *See* § 1636.5(f)(1) and (2).

Thirty States and five localities have laws that provide accommodations for pregnant workers.[132] Federal laws, including, but not limited to, Title VII, the ADA, the FMLA, the Rehabilitation Act, and the PUMP Act, also provide protections for certain workers affected by pregnancy, childbirth, or related medical conditions.[133] All of the protections regarding discrimination based on pregnancy, childbirth, or related medical conditions in these laws are unaffected by the PWFA. Additionally, if there are greater protections in other laws, those would apply. For example, the State of Washington's Healthy Starts Act provides that certain accommodations, including lifting restrictions of 17 pounds or more, cannot be the subject of an undue hardship analysis.[134] If a worker in Washington is seeking a lifting restriction as a reasonable accommodation for a pregnancy-related reason under the Healthy Starts Act, an employer in Washington cannot argue that a lifting restriction of 20 pounds is an undue hardship, even though that defense could be raised if the claim were brought under the PWFA.

Furthermore, employees and applicants may bring claims under multiple State or Federal laws. Thus, a pregnant applicant denied a position because they are pregnant and will need leave for recovery from childbirth may bring a claim under both Title VII for sex discrimination and the PWFA for the denial of an employment opportunity based on the applicant's need for an accommodation. Similarly, a worker with postpartum depression who, for that reason, is denied an equal employment opportunity may bring a claim under both the PWFA and the ADA, and possibly Title VII.

Under Title VII, employees affected by pregnancy, childbirth, or related medical conditions may be able to receive accommodations if they can identify a comparator "similar in

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[132] U.S. Dep't of Lab., *Employment Protections for Workers Who Are Pregnant or Nursing*, https://www.dol.gov/agencies/wb/pregnant-nursing-employment-protections (last visited Apr. 4, 2023).

[133] For an explanation of the interaction between the FMLA and the ADA, *see* 29 CFR 825.702.

[134] Wash. Rev. Code 43.10.005(1)(d).

their ability or inability to work."[135] Under the PWFA, employees affected by pregnancy, childbirth, or related medical conditions will be able to seek reasonable accommodations whether or not other employees have those accommodations and whether or not the affected employees are similar in their ability or inability to work as employees not so affected. Additionally, if the covered entity offers a neutral reason or policy to explain why employees affected by pregnancy, childbirth or related medical conditions cannot access a specific benefit, the employee with a known limitation under the PWFA still may ask for a waiver of that policy as a reasonable accommodation. Under the PWFA, the employer must grant the waiver, or another reasonable accommodation, absent undue hardship. If, for example, an employer denies a pregnant worker's request to join its light duty program as a reasonable accommodation, arguing that the program is for workers with on-the-job injuries, it may be difficult for the employer to prove that allowing the worker with a known limitation under the PWFA to use that program is an undue hardship. Finally, employers in this situation should remember that if there are others to whom the benefit is extended, the *Young v. United Parcel Serv., Inc.,* Court stated that "[the employer's] reason [for refusing to accommodate a pregnant employee] normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those . . . whom the employer accommodates."[136] Thus, if the undue hardship defense of the employer under the PWFA is based solely on cost or convenience, that defense could, under certain fact patterns, lead to liability under Title VII.

42 U.S.C. 2000gg-5(a)(2) makes clear that an employer-sponsored health plan is not required under the PWFA to pay for or cover any item, procedure, or treatment and that the PWFA does not affect any right or remedy available under any other Federal, State, or local law

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[135] 42 U.S.C. 2000e(k).

[136] *Young*, 575 U.S. at 229.

with respect to any such payment or coverage requirement. For example, nothing in the PWFA requires or forbids an employer to pay for health insurance benefits for an abortion.

1636.7(b) Rule of Construction

42 U.S.C. 2000gg-5(b) provides a "[r]ule of construction"[137] stating that the law is "subject to the applicability to religious employment" set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1(a). The relevant portion of section 702(a) provides that "[Title VII] shall 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."[138]

As with assertions of section 702(a) in Title VII matters, when 42 U.S.C. 2000gg-5(b) is asserted by a respondent employer, the Commission will consider the application of the provision on a case-by-case basis.[139]

Section 1636.8 Severability

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[137] 42 U.S.C. 2000gg-5(b) (heading).

[138] The PWFA makes no mention of section 703(e)(2) of the Civil Rights Act of 1964, which provides a second statutory exemption for religious educational institutions in certain circumstances.

[139] The EEOC's procedures ensure that employers have an opportunity to raise religious defenses and that any religious defense to a charge of discrimination is carefully considered. *See Religious Discrimination Compliance Manual*, *supra* note 103, at 12-I(C)(3) (discussing the "nuanced balancing" required and instructing investigators to "take great care"); 29 CFR 1601 et seq. (setting out the EEOC's charge procedures). The EEOC recognizes employers' valid religious defenses and dismisses charges at the administrative stage accordingly. *See Newsome v. EEOC*, 301 F.3d 227, 229-230 (5th Cir. 2002) (per curiam) (EEOC dismissed a charge where the employer offered evidence it fell under the religious organization exemption). The EEOC has no authority to impose penalties on private employers, *see Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 363 (1977); thus, if the EEOC rejects a private employer's asserted religious defense, the EEOC cannot force the employer to resolve the charge or pay any type of damages. To obtain any type of relief if the EEOC is unsuccessful at obtaining voluntary compliance, the EEOC would have to bring a case in Federal court, where the validity of the employer's religious defense would be determined.

Following Congress's rule for the statute, in places where the regulation uses the same language as the statute, if any of those identical regulatory provisions, or the application of those provisions to particular persons or circumstances, is held invalid or found to be unconstitutional, the remainder of the regulation and the application of that provision of the regulation to other persons or circumstances shall not be affected. For example, if § 1636.4(b) of the regulation is held to be invalid or unconstitutional, it is the intent of the Commission that the remainder of the regulation shall not be affected.

In other places, where the regulation provides additional guidance to carry out the PWFA, including examples of reasonable accommodations, following Congress's intent regarding the severability of the provisions of the statute, it is the Commission's intent that if any of those regulatory provisions or the application of those provisions to particular persons or circumstances is held invalid or found to be unconstitutional, the remainder of the regulation and the application of that provision of the regulation to other persons or circumstances shall not be affected. For example, if § 1636.3(j)(4) is held to be invalid or unconstitutional, it is the Commission's intent that the remainder of the regulation shall not be affected.

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