



EQUAL RIGHTS
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Raymond Windmiller
Executive Officer
Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street NE
Washington, DC 20507

Submitted via regulations.gov

RE: RIN 3046–AB30, Regulations to Implement the Pregnant Workers Fairness Act

Dear Mr. Windmiller:

Equal Rights Advocates submits these comments in support of the Equal Employment Opportunity Commission's ("EEOC" or "Commission") Notice of Proposed Rulemaking ("NPRM"), RIN 3046–AB30, Regulations to Implement the Pregnant Workers Fairness Act, published in the Federal Register on August 11, 2023.¹

As a national organization dedicated to fighting for gender justice in workplaces and schools, we are committed to ensuring no worker has to choose between their job and their health or a healthy pregnancy. For decades, Equal Rights Advocates has fought for social justice to protect and advance rights and opportunities for women, girls, and people of all gender identities through litigation, agency representation, community advocacy, and state and federal policy change. From sexual harassment in the janitorial industry, to pregnancy discrimination in retail and mass transit industries, to pay equity legislation and litigation, our lawyers have helped workers fight for gender equity and justice in the workplace for nearly 50 years. Our initiatives for workplace justice and economic security are designed to ensure women and families have the opportunity to thrive at work and beyond.

Equal Rights Advocates has spent decades fighting against pregnancy discrimination and advocating for accommodations for pregnant workers. Some of the specific issue areas we have litigated on include: denial of benefits to pregnant workers,² denial of reasonable

¹ 88 Fed. Reg. 54714 (Aug. 11, 2023).

² *Pacific Bell to Pay \$26 Million to Settle Pregnancy-Leave Suit*, L.A. Times (July 10, 1999), <https://www.latimes.com/archives/la-xpm-1999-jul-10-fi-54604-story.html>.

accommodations for pregnant workers,³ and other forms of pregnancy discrimination against low-wage workers who face pregnancy discrimination.⁴ Equal Rights Advocates' co-founder, Wendy Williams, was on the front lines of pregnancy discrimination jurisprudence when she argued *Geduldig v. Aiello* before the Supreme Court in 1974. In that case, Williams argued that the state of California could not deny disability insurance coverage to women disabled by pregnancy.⁵ The Supreme Court ruled in favor of discrimination that day, but victory came four years later, when Congress passed the Pregnancy Discrimination Act of 1978.⁶

Equal Rights Advocates has also expanded pregnancy discrimination protections through public policy advocacy. In 2011, Equal Rights Advocates' work resulted in passage of California Senate Bill 299, an amendment to the state's Fair Employment and Housing Act (FEHA) that requires employers of 5 or more to continue uninterrupted health care coverage for pregnant workers on pregnancy disability leave.

Additionally, at the federal level, Equal Rights Advocates strongly supported passage of the Pregnancy Discrimination Act of 1978. When updates to that law were necessary, Equal Rights Advocates led an action campaign in partnership with the Pregnant Workers Fairness Act ("PWFA") Coalition to pass the PWFA. That law, of course, gave rise to these proposed regulations.

We write this comment to the EEOC as an organization deeply involved in advocacy for pregnant workers in both litigation and policy work. We thank the EEOC for issuing this strong proposed rule implementing the PWFA. The proposed rule provides important clarity for both workers and employers, and will fulfill the law's purpose of ensuring people with known limitations related to pregnancy, childbirth, or related medical conditions can remain healthy and working.

This comment addresses the following topics:

1. We appreciate the EEOC's acknowledgement that workers must be able to receive reasonable accommodations without "**unnecessary delay.**" We offer further suggestions to ensure workers indeed get the relief they need, without delay.
2. We support the EEOC's emphasis that employers need not seek **supporting documentation**, and that if employers do seek documentation, there are limitations on doing so. Given the onerous nature of providing medical documentation, particularly for low-wage workers, we offer several suggestions to further limit when employers can seek documentation.

³ See Judgment and Ord. Granting Final Approval of Class Settlement and Approval of Att'y Fees, Costs, and Class Rep. Serv. Awards, *Branner et al. v. Covenant* (2021) No. 20-CIV-02164.

⁴ See *Hulteen v. AT & T Corp.*, 498 F.3d 1001 (Cal. 2007)

⁵ See *Geduldig v. Aiello*, 417 U.S. 484 (1974).

⁶ 42 U.S.C. § 2000e.

3. We support the EEOC’s thoughtful framework to determine whether an employee or applicant is **qualified** if they cannot perform one or more essential functions. We recommend the EEOC extend “in the near future” to one year postpartum, except with respect to lactation which should be extended to two years.
4. We appreciate the EEOC’s detailed discussion of **reasonable accommodations**, which reflects the range of accommodations workers impacted by pregnancy, childbirth, and related medical conditions need to remain healthy and employed. We offer several suggestions to strengthen the definition of reasonable accommodation.
5. The definition of “**pregnancy, childbirth, and related medical conditions**” is appropriately expansive. We encourage the EEOC to make some additions to the definition.
6. We support the EEOC’s assertion that the **rule of construction** in the PWFA should be interpreted the same as the Title VII language.
7. We support the proposed rule for setting out principles that reflect the realities of how employees typically communicate their needs regarding their **limitations** to an employer and suggest some further clarification to the definition.
8. We support the EEOC’s clear interpretation of **undue hardship** and its inclusion of predictable assessments that will rarely meet the undue hardship threshold. We offer suggestions for additional predictable assessments.

Each of these eight points will be addressed in turn below.

Unnecessary Delay

We commend the EEOC for making clear that employer delay in responding to accommodation requests “may result in a violation of the PWFA.”⁷ Too often employers delay providing accommodations for weeks or even months, which can often mean an untenable delay during pregnancies. Delays can often adversely impact the health of workers and/or the health of their pregnancies, a concern that the PWFA was meant to address.

To ensure workers are able to get the accommodations they need without unnecessary delay, we recommend the EEOC make several changes to the proposed rule and proposed appendix:

1. Strengthen the “Unnecessary Delay” Definition
 - a. **1636.4(a)(1)** We support the EEOC’s recognition that unnecessary delay may result in a failure-to-accommodate violation. However, we urge the EEOC to clarify that unnecessary delays at any point during the accommodation process may result in violation, not just delays in “responding to a reasonable accommodation request.” To that end, we recommend the EEOC amend 1636.4(a)(1) by striking “An unnecessary delay in responding to a reasonable accommodation request may result in a violation

⁷ 88 Fed. Reg. 54789 & n. 98 (Aug. 11, 2023).

of the PWFA” and replacing it with “An unnecessary delay in responding to a reasonable accommodation request, engaging in the interactive process, or providing a reasonable accommodation may result in a violation of the PWFA.” This will clarify that employers cannot avoid a violation simply by providing an initial response to the employee’s request, but must instead avoid delay during the entirety of the accommodation process.

- b. **1636.4(a)(1)(vi).** We agree that covered entities should provide interim accommodations during the interactive process, if the employee’s original accommodation request cannot be immediately granted. However, providing an interim accommodation should not excuse “unnecessary delay,” if employers proceed to delay the provision of the ultimate accommodation the worker requests and needs. We therefore recommend that the EEOC remove the sentence “If an interim reasonable accommodation is offered, delay by the covered entity is more likely to be excused.”
- c. **1636.4(a).** We appreciate the EEOC’s inclusion of a variety of factors to be considered when evaluating unnecessary delay. We recommend the EEOC add one additional factor to the list: “The urgency of the requested accommodation.”
 - i. In some cases, pregnant people who do not receive immediate relief can face tragic consequences, such as employees who are denied permission to seek emergency medical care, and as a result, experience complications or loss.⁸ This additional factor speaks to the importance of immediacy when it comes to providing accommodations under the PWFA and will better assist the EEOC and courts in evaluating whether an unnecessary delay has occurred.”

2. State That “Unnecessary Delay” in the Interactive Process Can Violate the PWFA.

- a. **1636.3(k).** We respectfully ask the EEOC to add a sentence to the definition of *Interactive Process* as follows: “Unnecessary delay, as defined in § 1634.4(a)(1), in the interactive process may result in a violation of the PWFA.” The proposed appendix already recognizes the importance of expediency in carrying out the interactive process, stating “a covered entity should respond *expeditiously* to a request for reasonable accommodation and act *promptly* to provide the reasonable accommodation.” (emphasis added).⁹ The regulation itself should underscore this directive by making clear that unnecessarily delaying the interactive process may result in a violation of the PWFA.
- b. **1636.3(k).** We also request that the EEOC add an example in the proposed appendix that illustrates how quickly and informally the interactive process can occur. For example, the EEOC can include a scenario where an employee makes a simple

⁸ See, e.g., A Better Balance, Long Overdue: It is Time for the Pregnant Workers Fairness Act 8, 11 (2019), <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf> (citing examples of workers who needed emergency care or experienced pregnancy loss as a result of not being accommodated).

⁹ 88 Fed. Reg. 54786 (Aug. 11, 2023).

- request of her immediate supervisor, and her immediate supervisor agrees on the spot to make the requested change.
3. Add A Definition of “Interim Accommodation” to the Reasonable Accommodation Definition.
 - a. **1636.3(h).** Providing employers with a clear understanding of the term “interim accommodation” will encourage them to rely on such accommodations to avoid delay. To that end, we suggest adding a new subsection 1636.3(h)(6) that reads: “Interim Reasonable Accommodation means any temporary or short-term measure put in place immediately or as soon as possible after the employee requests an accommodation that allows the employee to continue working safely and comfortably while the employer and employee engage in the interactive process or the employer implements a reasonable accommodation arrived at through the interactive process.”
 4. Strengthen the Supporting Documentation Framework to Ensure Documentation Demands Do Not Contribute to Unnecessary Delays.
 - a. **1636.3(l) - Supporting documentation:** We urge the EEOC to adopt the changes suggested below to ensure employers do not impose burdensome and unnecessary medical certification requirements that often contribute to substantial delays in accommodation.

Supporting Documentation

We appreciate the EEOC’s query as to whether the supporting documentation framework the agency sets out in proposed rule 1636.3(l) strikes the right balance between the needs of workers and employers. As the EEOC recognizes in the proposed appendix, many workers face barriers in obtaining appointments with health care providers in a timely way, or altogether, posing significant barriers to obtaining medical documentation.¹⁰ This is especially true for workers in rural areas, low-wage workers, or hourly workers who may not have consistent access to health care and disproportionately lack control over their work schedules.¹¹ Furthermore, women of color, particularly Black women, often face medical racism that may inhibit or delay their ability to secure supporting documentation.¹² Additionally, some medical care providers impose fees to

¹⁰ 88 Fed. Reg. 54787 & n.87 (Aug. 11, 2023).

¹¹ See, e.g., C. Brigrance et. al, March of Dimes, *Nowhere to Go: Maternity Deserts Across the U.S.* 5, 11 (2022), https://www.marchofdimes.org/sites/default/files/2022-10/2022_Maternity_Care_Report.pdf (noting that 4.7 million women live in counties with limited access to maternity care, and that half of women who live in rural communities have to travel over 30 minutes to access an obstetric hospital).

¹² See, e.g., Brittany D. Chambers et al, *Clinicians' Perspectives on Racism and Black Women's Maternal Health*, 3 *Women’s Health Rep.* 476, 479 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9148644/> (“Clinicians acknowledged that racism causes and impacts the provision of inequitable care provided to Black women, highlighting Black women are often dismissed and not included as active participants in care decisions and treatment.”); see also Black Mamas Matter Alliance and A Better Balance, *Centering the Experiences of Black Mamas in the Workplace* (2022), <https://www.abetterbalance.org/centering-black-mamas-pwfa/>.

fill out forms, which can grow to significant amounts over time, as needs change and as employers request new or different documentation.¹³

Equal Rights Advocates has represented clients who have experienced the burdens of racism in the healthcare system. For example, we represented a Black woman who had suffered prior miscarriages due to inadequate treatment.¹⁴ She faced significant trauma due to pregnancy losses and prior treatment from medical professionals, which she experienced as dismissive, disengaged, and unconcerned for her desire to carry a healthy pregnancy to term and discover the underlying causes of her previous pregnancy losses. When she became pregnant again, her employer refused to provide any accommodations, even though they had an ample array of accommodations they provided to employees injured in other ways. Her employer soon told her that she could not return to work early in her pregnancy, forcing her out on premature leave and running out her paid leave long before her baby was born. In the weeks leading up to her premature and forced leave, she endured constant twisting-and-lifting in her job for which reasonable accommodations were not being provided. Our client also struggled on the one hand with an employer who would not support her efforts to make preventative appointments to address her at-risk pregnancy and on the other hand with doctors who would not take her previous miscarriages or reports of troubling symptoms seriously and treated her as if she was overreacting. Both systems worked together to force her into repeated emergency room care whenever she had signs of miscarriage, rather than planned medical appointments supported by her employer and provided by her primary care physician. As an emergency room patient, it was difficult, and often not possible, for her to receive the detailed documentation her employer required concerning her pregnancy-related medical treatment. When she finally experienced a successful birth, her employer demanded her premature return to work, but prevented that return by concluding that she had been off of work too long and demanding that she, a California resident, travel to their training location in Georgia for weeks-long re-training without infant-care support or lactation accommodations.¹⁵

Our client's experiences are consistent with the traumatic pre-natal and post-natal experiences of many Black women throughout the United States. Black women are three times more likely to

¹³ Kimberly Danebrock, *Charging Patients for Completing Forms*, Cooperative of American Physicians (Apr. 15, 2014), <https://www.caphysicians.com/articles/charging-patients-completing-forms>; *Can Doctors Charge Employees a Fee for Completing FMLA Certifications?*, SHRM, <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/octorschargeeforfm lacertifications.aspx> (last visited Sept. 18, 2023); see also Meredith Cohn and Jessica Calefati, *Johns Hopkins Medicine Joins National Move to Charge Patients for Messaging Their Doctor*, The Baltimore Banner (July 3, 2023), <https://www.thebaltimorebanner.com/community/public-health/johns-hopkins-mychart-messaging-fees-7HJ6GX7NGNE7NPYQQ7E7C5EHXE/> (discussing health care systems charging for My Chart messages).

¹⁴ Judgment and Ord. Granting Final Approval of Class Settlement and Approval of Att'y Fees, Costs, and Class Rep. Serv. Awards, *Branner et al. v. Covenant* (2021) No. 20-CIV-02164.

¹⁵ *Id.*

die from a pregnancy-related cause than white women.¹⁶ Multiple factors contribute to these adverse health outcomes such as variations in quality healthcare, underlying conditions, structural racism, and implicit bias.

The PWFA recognizes the importance of workers obtaining accommodations in a timely fashion to protect their health. Several aspects of the proposed rule on supporting documentation would unfortunately impose an unnecessary financial, physical, and mental burden on workers, contribute to substantial delay in receiving reasonable accommodations, and deter workers from seeking the accommodations they need for their health and wellbeing.¹⁷

We urge the EEOC to modify the supporting documentation framework as follows:

1. **1636.3(l)(1)(i).** Clarify “obvious” needs. We agree with the Commission that employers should not be permitted to seek medical documentation when the need for accommodation is “obvious.” We are concerned, however, that employers could unilaterally impose restrictions based on paternalistic stereotypes about what pregnant or postpartum people “obviously” need, or that the proposed rule could have the unintended consequence of making the employee’s body the subject of invasive scrutiny as employers consider whether their pregnancy is “obvious.” For these reasons, we encourage the Commission to maintain this important concept in the final regulations, but to clarify how it is to be applied. We suggest replacing the current text of 1636.3(l)(1)(i) with the following: “(i) When the employee has confirmed, through self-attestation, that they have a limitation related to pregnancy, childbirth, or a related medical condition, and the need for accommodation is obvious.”
 - a. Additionally, we suggest providing guidance on how an employer may determine whether the need for accommodation is obvious: “A need for accommodation is obvious if the employer either knew or should have known that the employee would need or did need the accommodation.” For example, if a pregnant employee self-attests to regular vomiting and requests temporary relocation of their workstation closer to the bathroom, the need for accommodation is “obvious” because the

¹⁶ *Working Together to Reduce Black Maternal Mortality*, Ctr. for Disease Control and Prevention, (Apr. 3, 2023), <https://www.cdc.gov/healthequity/features/maternal-mortality/index.html>.

¹⁷ The legislative record is clear that the PWFA did not intend to include a supporting documentation framework that would be onerous for workers. For example, while the Minority Views of the House Report stated that “the bill presumably allows employers to require such documentation when the need for an accommodation is not obvious,” the Majority did not incorporate that analysis. H.R. Rep. No. 117-27, at 57 (2021), <https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf>; see also *Long Over Due: Exploring the Pregnant Workers’ Fairness Act (H.R. 2694) Before the Subcomm. on Civil Rights Human. & Servs. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019) (Questions for the record submitted by Dina Bakst, Co-Founder & Co-President, A Better Balance, at 13, arguing against the inclusion of a medical documentation requirement because employers often seek medical notes as a “way to prolong having to provide a very simple or reasonable accommodation”).

employer knows, or should have known, that the employee needs easy bathroom access.

- b. Finally, we encourage the Commission to warn employers in the proposed appendix against imposing accommodations not requested by the employee based on assumptions that the need for accommodation is “obvious.”
2. **1636.3(l)(1)(iii).** We commend the agency for making clear that employers cannot seek supporting documentation for certain straightforward accommodation requests.¹⁸ We urge the EEOC to expand the list to also include:¹⁹
- a. Time off, up to 8 weeks, to recover from childbirth.²⁰
 - b. Time off to attend healthcare appointments related to pregnancy, childbirth, or related medical conditions, including, at minimum, at least 16 healthcare appointments.²¹
 - c. Flexible scheduling or remote work for nausea²²
 - d. Modifications to uniforms or dress code
 - e. Allowing rest breaks, as needed
 - f. Eating or drinking at a workstation
 - g. Minor physical modifications to a workstation, such as a fan or chair
 - h. Moving a workstation, such as to be closer to a bathroom or lactation space, or away from toxins

¹⁸ 88 Fed. Reg. 54769 (Aug. 11, 2023) (stating that it is not reasonable to require supporting documentation beyond self-attestation when the accommodation is one listed as a predictable assessment or relates to lactation or pumping).

¹⁹ In New York City, employers with 4 or more employees are not permitted to ask for medical documentation for many of the accommodations on this list. Any accommodations listed here that are not on New York City’s list are similarly minor in nature. *See* NYC Commission on Human Rights Legal Enforcement, *Guidance on Discrimination on the Basis of Pregnancy, Childbirth, Related Medical Conditions, Lactation Accommodations, and Sexual or Reproductive Health Decisions 10* (2021),

https://www.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_2021.pdf.

²⁰ *See, e.g.*, NYC Commission on Human Rights Legal Enforcement, *Guidance on Discrimination on the Basis of Pregnancy, Childbirth, Related Medical Conditions, Lactation Accommodations, and Sexual or Reproductive Health Decisions 10* (2021),

https://www.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_2021.pdf.

²¹ Nearly every state paid sick time law permits employers to request a healthcare provider note only if the person needs time off for 3 or more consecutive days. *See* A Better Balance, *Know Your Rights: State and Local Paid Sick Time Laws FAQs* (last updated July 7, 2022), <https://www.abetterbalance.org/resources/know-your-rights-state-and-local-paid-sick-time-laws/>. We suggest a minimum of 16 appointments as it reflects the average number of appointments for prenatal and postnatal care for low-risk pregnancies. *See* Alex Friedman Peahl et. al, *A Comparison of International Prenatal Care Guidelines for Low-Risk Women to Inform High-Value Care*, 222 *American Journal of Obstetrics & Gynecology* 505, 505 (2020), [https://www.ajog.org/article/S0002-9378\(20\)30029-6/fulltext](https://www.ajog.org/article/S0002-9378(20)30029-6/fulltext) (stating that the median number of recommended prenatal care visits for a low-risk pregnancy in the United States is 12-14 visits); ACOG Committee Opinion No. 736: *Optimizing Postpartum Care*, 131 *Obstetrics & Gynecology* 140, 141 (2018),

https://journals.lww.com/greenjournal/fulltext/2018/05000/acog_committee_opinion_no__736__optimizing.42.aspx (recommending at least two postpartum care appointments, with ongoing care as needed).

²² *See* 29 CFR § 825.115(f) (“Absences attributable to incapacity [due to pregnancy] qualify for FMLA leave even though the employee . . . does not receive treatment from a health care provider during the absence An employee who is pregnant may be unable to report to work because of severe morning sickness.”).

- i. Providing personal protective equipment
 - j. Reprieve from lifting over 20 pounds
 - k. Access to closer parking
3. **1636.3(l)(2):** We commend the EEOC for making clear that employers may only demand “reasonable documentation.” This is critical. In the early months of PWFA implementation, some employers have imposed extremely onerous documentation requirements, similar to those under the FMLA and ADA, that far exceed “reasonable.”²³ As a result, many employees have not received the accommodations they need in a timely manner. We strongly encourage the agency to do the following to ensure employers request only “reasonable” documentation:
- a. Modify the definition of reasonable documentation found in 1636.3(l)(2). It is unnecessarily invasive for an employer to demand to know their employee’s precise condition or a description of it; rather it should be sufficient for a health care provider to (1) describe the employee’s limitation that necessitates accommodation, (2) confirm that the limitation is related to pregnancy, childbirth, or a related medical condition, and (3) state that they require an accommodation. For example, medical documentation need not state that a worker needs to attend a medical appointment related to a miscarriage, but can simply state that the employee needs to attend a medical appointment during the workday (the limitation) due to pregnancy, childbirth, or a related medical condition, and thus a modified start time (the accommodation) is recommended.
 - b. Make clear in the proposed rule or proposed appendix that employers cannot require employees to submit any particular medical certification form, so long as the health care provider documents the requisite three pieces of information, as explained immediately above. Additionally, make clear that employers cannot require employees to complete ADA or FMLA certification forms in order to receive a PWFA accommodation, as such forms seek substantially more information than is “reasonable” under the PWFA.
 - c. We urge the EEOC to clarify that under no circumstances may an employer require an employee to take any sort of test to confirm their pregnancy or to provide documentation or other proof of pregnancy. The Commission should clarify that self-attestations of pregnancy are sufficient.
4. **1636.3(l)(3) - Health care providers.**
- a. We appreciate the EEOC’s comprehensive, albeit non-exhaustive, list of health care providers from whom employees can seek documentation. However, employers should not have the discretion to second guess the judgment of licensed healthcare providers due to an assumption that they are not “appropriate” for the situation. We therefore urge the Commission to remove the terms “appropriate” and “in a particular

²³ Examples on file with the Center for WorkLife Law & A Better Balance.

- situation” from the sentence “The covered entity may request documentation from the *appropriate* health care provider *in a particular situation*” (emphasis added).
- b. We also urge the EEOC to make clear in the proposed rule or proposed appendix that employers must accept documentation from telehealth care providers.
 - c. We commend the Commission for making clear that employers cannot require employees to be examined by the employer’s healthcare provider, as this employer practice invades privacy, could lead to differential evaluations based on race, imposes unnecessary delay, and is a significant deterrent to seeking accommodation. We also agree with the EEOC’s emphasis on ensuring employers maintain employee privacy when seeking documentation.
5. We appreciate that the EEOC mentioned in the proposed appendix that it is a best practice for employers to provide interim accommodations if an employee is delayed in obtaining supporting documentation.²⁴ We suggest the agency strengthen this provision by clarifying that the interim accommodation provided must be an accommodation that meets the employee’s needs and would not constitute an adverse action, such as forced unpaid leave, against the employee.

Temporary Excusal from Essential Functions

§1636.3(f)(2) - Qualified employee or applicant. We thank the EEOC for the thoughtful framework it set out to determine whether an employee or applicant is qualified if they cannot perform one or more essential functions. We recommend that the definition of “in the near future” post-pregnancy be one year rather than forty weeks, except with respect to lactation, which we believe should be extended to 2 years. Furthermore, we support the EEOC’s approach to not combine periods of temporary suspension of an essential function during pregnancy and post-pregnancy.

- a. The definition of “in the near future” should be extended to one year postpartum, except with respect to lactation which should be extended to two years. The Commission cites to important medical findings and Medicaid extension all pointing to the importance of one year for postpartum reasonable accommodations.²⁵ Allowing a temporary excusal of an essential function for generally one year postpartum is critical for maternal and infant health. It is especially important for pregnant people who are at a higher risk, including Black women, who are three times as likely to die of pregnancy-related causes than white women.²⁶

²⁴ 88 Fed. Reg. 54787 (Aug. 11, 2023) (“[T]he Commission encourages employers who choose to require documentation, when that is permitted 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...”).

²⁵ 88 Fed. Reg. 54724-25 (Aug. 11, 2023).

²⁶ *Working Together to Reduce Black Maternal Mortality*, Centers for Disease Control and Prevention (Apr. 4, 2023), <https://www.cdc.gov/healthequity/features/maternal-mortality/index.html>.

- b. In addition to extending the definition of “in the near future” to one year following childbirth, we urge the Commission to extend it to *two* years for lactation-related accommodations. The American Association of Pediatrics recommends parents express milk for at least two years following childbirth for both maternal and infant health.²⁷ Apart from these two recommendations, we believe the general approach adopted by the Commission comports with the PWFA’s statutory language, legislative intent, and the real-life experiences of pregnant and postpartum workers.

Equal Rights Advocates has seen firsthand just how vital this extended timeframe for lactation can be. Our organization represented a second woman at the same employer as the client described above who was also denied accommodations. In her case, not only did the lack of accommodations affect her employment and pregnancy negatively pre-birth, the employer’s actions and inactions forced her to discontinue breastfeeding mere weeks after her child’s birth against her plan and desire for her child’s breastfeeding duration.²⁸ This employee, like the one described above, was also refused any reasonable accommodations while pregnant, forced out on premature leave, subsequently forced to return to work very soon after her child’s birth because her paid leave had been run out by her employer, and was then informed after returning to work that she would need retraining and recertification, on the other side of the country at their training location, due to taking leave while pregnant. Attempting to comply with her employer’s demands to keep her job, she had to endure this out-of-state recertification while still breastfeeding her newborn and suffering from postpartum depression. Our client paid out-of-pocket to fly her husband, who himself had to take off from work for this purpose, and her infant with her and for them to stay in the off-site hotel while she re-trained. She was denied accommodations, rest, or sufficient break time to breastfeed while training. While she scrambled between the training site and her newborn to try to provide breastmilk and maintain her supply, this was ultimately untenable. In spite of great personal expense and her best efforts, she could not make the situation she was placed in by her employer work. Her breastmilk production decreased and then stopped and she was no longer able to breastfeed her child at only four months old. If our client had been protected by these extended lactation-related accommodations, she likely would have been able to continue breastfeeding her child and avoid this costly, exhausting, and traumatic experience.²⁹

We recommend keeping the proposed rule’s framework of restarting the time frame for excusing an essential function, precisely for the reasons stated in the proposed appendix—that pregnant workers very often cannot possibly anticipate what needs or limitations may occur postpartum.

²⁷ Joan Younger Meek, Lawrence Noble, and the Section on Breastfeeding, *Policy Statement: Breastfeeding and the Use of Human Milk*, 150 *Pediatrics* 1, 11 (2022), <https://publications.aap.org/pediatrics/article/150/1/e2022057988/188347/Policy-Statement-Breastfeeding-and-the-Use-of?autologincheck=redirected>. Employers can still raise a defense that accommodating lactation-related needs for two years would impose an undue hardship.

²⁸ Judgment and Ord. Granting Final Approval of Class Settlement and Approval of Att’y Fees, Costs, and Class Rep. Serv. Awards, *Branner et al. v. Covenant* (2021) No. 20-CIV-02164.

²⁹ *Id.*

The same may be true during pregnancy itself, and thus, each accommodation request should be considered based on the specific “limitation” at issue. We strongly urge the EEOC to state in the regulation the principle found in the Interpretive Guidance that the timeframe restarts with each new accommodation request and following return from childbirth leave.

Reasonable Accommodation

We appreciate the EEOC’s detailed discussion of reasonable accommodations, which reflects the range of accommodations workers impacted by pregnancy, childbirth, and related medical conditions need to remain healthy and working.

1. **1636.3(i).** We suggest three ways the Commission can better emphasize that reasonable accommodation includes modifications or adjustments to alleviate pain and discomfort and to avoid health risks.
 - a. First, we urge the EEOC to add a new subsection to 1636.3(i) that provides as an additional example of reasonable accommodation: “modifications that alleviate pain or discomfort and reduce health risks for the employee or applicant or their pregnancy.” We appreciate the EEOC’s highlighting in the proposed appendix the critical nature of accommodations that alleviate increased pain and health risks.³⁰ We suggest that the EEOC make this category of accommodation more prominent in the rule itself and add additional examples to the proposed appendix.
 - b. Employers have historically denied pregnant workers accommodations due to a lack of “evidence” of a measurable and diagnosable complication, and many healthcare providers believe they are not allowed to recommend accommodations without the same evidence.³¹ Highlighting the law’s purpose as it relates to risk and pain avoidance, therefore, is critical. This is especially true for women of color, who are more likely both to work in physically demanding jobs,³² and to have their employers and healthcare providers underestimate their pain and apply higher levels of risk tolerance toward them.³³

³⁰ 88 Fed. Reg. 54779 (Aug. 11, 2023).

³¹ *ACOG Committee Opinion 733: Employment Considerations During Pregnancy and the Postpartum Period*, 131 *Obstetrics & Gynecology* 115, 119 (2018), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/04/employment-considerations-during-pregnancy-and-the-postpartum-period> (stating that it is generally safe to work during pregnancy without adverse effects to the pregnant person or fetus, but that accommodations are needed for workers whose jobs expose them to toxins, “very physically demanding” work, or “an increased risk of falls or injuries,” as well as to address pregnancy complications like gestational diabetes).

³² National Latina Institute for Reproductive Health and National Women’s Law Center, *Accommodating Pregnancy On the Job: The Stakes for Women of Color and Immigrant Women* (2014), https://nwlc.org/wp-content/uploads/2015/08/the_stakes_for_woc_final.pdf.

³³ Jamila Taylor et al., Center for American Progress, *Eliminating Racial Disparities in Maternal and Infant Mortality* 4-6 (May 2019), <https://www.americanprogress.org/article/eliminating-racial-disparities-maternal-infant-mortality/>; Molly R. Altman, et al. *Information and Power: Women of Color’s Experiences Interacting with Health Care Providers in Pregnancy and Birth*, 238 *Soc. Sci. & Med* 112491 (2019), <https://doi.org/10.1016/j.socscimed.2019.112491>; see also Saraswathi Vedam et al., *The Giving Voice to Mothers*

- c. Additionally, we strongly urge the EEOC to delete the language in 1636.3(i)(2) which qualifies that “adjustments to allow an employee or applicant to work without increased pain or increased risk” must be “due to the employee’s or applicant’s known limitation.” This language is unnecessary. No other example in the paragraph contains such a clause, and everything in the paragraph is necessarily qualified by a link to a known limitation. Treating this category of accommodation differently may create confusion about the legal standard by suggesting that the employee or applicant must make some additional showing.
 - d. Third, we suggest adding to the proposed appendix the following examples of reasonable accommodation to alleviate increased pain and discomfort or to avoid increased risk to health:
 - i. A farmworker being temporarily transferred to an indoor position to avoid the risks of falling in a slippery field and exposure to toxic pesticides.
 - ii. A secretary experiencing pelvic pain being allowed to work remotely to alleviate pain that would be exacerbated by the commute and sitting upright all day.
 - iii. A warehouse worker being given a portable cooling device to avoid pregnancy risks from excessive heat.
 - iv. A security guard being temporarily reassigned from nighttime to daytime shifts to avoid increased fatigue and the health risks (miscarriage and preterm birth) associated with working at night.
2. **1636.3(i)(3):** We commend the Commission’s thoughtful treatment of leave as a reasonable accommodation and suggest modifications. The PWFA’s purpose *could not be realized* without access to leave as an accommodation. The most at-risk workers do not have sick days and are ineligible for FMLA. For them, before the PWFA’s passage, taking a few days off to attend health care appointments put them at risk of lawful termination, not to mention losing pay they could not afford to lose. While the U.S. desperately needs a comprehensive paid leave program, leave provided as an accommodation under the PWFA will provide a lifeline to many who would have otherwise been fired for seeking basic medical care or taking time to recover from childbirth. Further, leave as a PWFA accommodation will protect the employment of the many workers who have access to state-administered paid leave, but previously had inadequate job protection.
- a. Equal Rights Advocates has long fought for state and federal paid sick leave and paid family medical leave. We have long recognized that such paid leave is necessary to balance health, while maintaining employment and financial stability. The same theory holds true for leave as a reasonable accommodation. We have represented pregnant workers in addition to the ones we describe in this comment who were not provided reasonable accommodations during their pregnancy and could have

Study: Inequity and Mistreatment During Pregnancy and Childbirth in the United States, 16:77 *Reproductive Health* (2019), <https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-019-0729-2>.

benefited from taking leave as an accommodation in order to still maintain their employment. It is important to provide pregnant workers with as many options as possible for accommodating their needs, and if other accommodations do not suffice it is crucial for workers to have the ability to take leave without fear of losing their job or facing punishment from their employer.

3. **1636.3(i)(3).** We suggest two modifications to the proposed rule regarding leave as an accommodation:
 - a. In its discussion on leave, the Commission notes one potential accommodation as “The ability to choose whether to use paid leave ... or unpaid leave *to the extent that the covered entity allows employees using leave not related to pregnancy... to choose...*” 1636.3(i)(3)(iii). Similarly, the Commission notes in the proposed appendix that “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.*” Fed. Reg. 54780-81. We respectfully suggest that, under the PWFA, whether these potential accommodations should be provided turns on the question of undue hardship, not on how other employees are treated. Accordingly, we urge the EEOC to modify its treatment of these leave-related accommodations by deleting the comparative reference to other employees.³⁴ As with all accommodations, employers may be obligated to modify standard practices to accommodate people with limitations related to pregnancy, childbirth or related medical conditions, even if a particular benefit is not routinely offered to other employees.³⁵
 - b. Additionally, we strongly urge the Commission to include “continuation of health insurance benefits during the period of leave” in 1636.3(i)(3) as another potential leave-related accommodation that must be provided absent undue hardship.
 - i. For many workers, the opportunity to access leave as a reasonable accommodation is hollow without continuation of health benefits, as access to uninterrupted healthcare is vital during pregnancy and the postpartum period.³⁶ This interpretation is supported by the intent of the PWFA,³⁷ which not only has the goal of continued employment, but also the goal of promoting maternal and child health.³⁸ Indeed, the House report on the PWFA clearly

³⁴ Of course, if other employees receive a particular accommodation, that may be evidence of no undue hardship.

³⁵ Similarly, we respectfully suggest that employers may be required to “provide reserved parking spaces” as a PWFA reasonable accommodation, even when it is not the case that “*the employee is otherwise entitled to use employer provided parking.*” 88 Fed. Reg. 54779 (Aug. 11, 2023).

³⁶ Centers for Medicare and Medicaid Services, Improving Access to Maternal Health Care in Rural Communities 6 (“A lack of access to maternal health care can result in a number of negative maternal health outcomes including premature birth, low-birth weight, maternal mortality, severe maternal morbidity, and increased risk of postpartum depression”), <https://www.cms.gov/About-CMS/Agency-Information/OMH/equity-initiatives/rural-health/09032019-Maternal-Health-Care-in-Rural-Communities.pdf>.

³⁷ H.R. Rep. No. 117-27, at 22-24 (2021), <https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf>.

³⁸ ADA guidance from 2002 states that employers must continue insurance benefits when an employee is on leave as an ADA accommodation only to the same extent they do so for other employees. See EEOC, Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, at text after n. 59 (2002),

stated that pregnant people “want, and oftentimes need, to keep working during their pregnancies, both for income and to retain health insurance.”³⁹

The reasonableness of providing continued health insurance benefits during a period of leave is also supported by the FMLA requirement that employers do so for up to 12 weeks every year,⁴⁰ as well as state laws that require continued health benefits during leave taken for pregnancy or other health reasons.⁴¹

4. **1636.3(i)(4).** We urge the Commission to expand the examples of reasonable accommodation for lactation. We appreciate the EEOC’s highlighting the reasonable accommodations often needed by lactating workers who are pumping milk. While we wholeheartedly celebrate the recent passage of the PUMP for Nursing Mothers Act, that law is limited to providing reasonable break time and private space for only one year following the birth of an employee’s child.⁴² However, many lactating employees require other reasonable accommodations, including the pumping accommodations identified by the Commission in 1636.3(i)(4)(ii), as well as accommodations that are unrelated to pumping. We encourage the Commission to highlight some of these other lactation accommodations by adding a new section 3(i)(4)(iii): “Any other job modification, including those identified in 1636.3(i)(2), that would remove barriers to producing or expressing human milk, breastfeeding, or chest feeding; avoid or alleviate lactation-related health complications; or reduce the risk of contaminating human milk produced by the employee.”
5. **1636.3(h).** We recommend the following changes to the proposed appendix regarding 1) penalizing employees for utilizing accommodations; and 2) compliance with production standards:
 - a. The Commission seeks comment on whether there are other situations where ordinary workplace policies operate to penalize employees for using reasonable

<http://www.eeoc.gov/laws/guidance/enforcementguidance-reasonable-accommodation-and-unduehardship-under-ada>. However, the statutory text of the ADA and its implementing regulations support the principle that providing continued health benefits during leave may be a reasonable accommodation, even if other employees do not receive the same benefit, where the continued benefits can be provided without undue hardship. The longstanding ADA principle that gives employees with disabilities an affirmative right to receive the same health insurance benefits as are provided to other employees stems from the ADA’s prohibition on “limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability” See 42 U.S.C. § 12112; 29 C.F.R. pt. 1630 app. 1630.5 (“this part is intended to require that employees with disabilities be accorded equal access to whatever health insurance coverage the employer provides to other employees.”). But this non-discrimination concept should not be conflated with the standard for providing reasonable accommodation, which does not turn on how other employees are treated. Even if the principle from the 2002 guidance were supported by the ADA, it would not be instructive in the PWFA context, given the clear legislative intent of the PWFA to promote healthy pregnancies and reproductive health and to allow employees to take leave following childbirth, all while maintaining their health insurance.

³⁹ H.R. Rep. No. 117-27, at 24 (2021), <https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf>.

⁴⁰ Family and Medical Leave Act, 29 U.S.C. § 2614(c); 29 C.F.R. § 825.209.

⁴¹ For example, under the California Pregnancy Disability Leave Law and the California Family Rights Act, employees have a right to take up to 7 months of leave *with continued health insurance benefits* during pregnancy and following childbirth. Cal. Code Regs., tit. 2, § 11044(c) (employer must continue to provide health insurance benefits during 4 months of pregnancy disability leave); Cal. Code Regs., tit. 2, § 11092(c) (continued health insurance benefits for up to 12 weeks for leave taken to bond with a new child).

⁴² Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) (Pub. L. 117–328 Division KK).

- accommodations. We suggest highlighting that the application to pregnant people of “no-fault” attendance/tardy control policies may cause employers to violate the PWFA as such policies are applied universally without consideration of individual circumstances. For example, an employee using a flexible scheduling accommodation due to morning sickness may be automatically penalized under a “no-fault” attendance policy.⁴³
- b. Additionally, with regard to production standards and quotas, the Commission notes that under the ADA, “a reasonable accommodation cannot excuse an employee from complying with valid production standards that are applied uniformly to all employees.”⁴⁴ We encourage the Commission to recognize that this principle is grounded in the ADA’s requirement that employees must be able to perform the essential functions of the job, with or without a reasonable accommodation, to be qualified. Indeed, the cited Enforcement Guidance on Reasonable Accommodation cites to the ADA’s definition of “essential functions” for support. In the PWFA context, because the statutory language specifically discusses how essential job functions can be temporarily suspended, so too must any production standards associated with suspended functions. Therefore, we respectfully ask the EEOC to delete this reference to the ADA citation, or alternatively, note that it differs in the PWFA context.

Related Medical Conditions

The definition of “pregnancy, childbirth, and related medical conditions” is appropriately expansive. In expressly seeking to supplement the protections currently afforded to workers under the Pregnancy Discrimination Act (PDA), the PWFA is properly read to incorporate the case law interpreting the PDA’s parallel language.⁴⁵

1. **1636.3(b) - Pregnancy.** We encourage the EEOC to clarify that the term pregnancy includes “common pregnancy symptoms,” such as increased bodily pain, discomfort, fatigue, changes

⁴³ See, e.g., A Better Balance, *Misled & Misinformed: How Some U.S. Employers Use “No Fault” Attendance Policies to Trample on Workers’ Rights (And Get Away With It)* 17 (2020), https://www.abetterbalance.org/wp-content/uploads/2020/06/Misled_and_Misinformed_A_Better_Balance-1-1.pdf (discussing story of pregnant worker who was terminated after leaving work to rush to the hospital due to bleeding and fearing she was miscarrying).

⁴⁴ 88 Fed. Reg. 54780 & n. 49 (Aug. 11, 2023) (citing Equal Employment Opportunity Commission, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, at text accompanying n. 14 (2002), <http://www.eeoc.gov/laws/guidance/enforcementguidance-reasonable-accommodation-and-unduehardship-under-ada>).

⁴⁵ See 168 Cong. Rec. H. 10528 (2022) (statement of Rep. Nadler), <https://www.congress.gov/117/crec/2022/12/23/168/201/CREC-2022-12-23.pdf> (commenting that the Pregnant Workers Fairness Act aligns with Title VII in providing protections and reasonable accommodations for ‘pregnancy, childbirth, and related medical conditions, like lactation.’).

in thirst and appetite, headaches, lightheadedness, mood changes, heartburn and indigestion, and leg cramps.

2. **1636.3(b) - Related Medical Conditions.**

a. We strongly support the inclusion of termination of pregnancy, including by abortion, in the enumerated examples of “related medical conditions” that may require accommodation. In addition to comprising an essential component of reproductive health care⁴⁶ needed by hundreds of thousands of people in the U.S. every year,⁴⁷ abortion’s place among the full range of statutorily-protected “related medical conditions” is rooted in decades of legislative, administrative, and judicial authority. Indeed, in enacting the PDA, Congress expressly confirmed its intent that the statute protect workers from discrimination for obtaining abortion care.⁴⁸ The EEOC reaffirmed abortion as a “related medical condition” in its 2015 guidance.⁴⁹ It also made it explicit that fringe benefits like paid sick days must be provided for abortions if they are provided for other medical conditions.⁵⁰ Finally, as the Commission notes in the proposed Interpretive Guidance, courts consistently have found that the PDA’s protections encompass the right to be free from discrimination on the basis of contemplating or obtaining abortion care.⁵¹

i. Additionally, we appreciate the EEOC’s comprehensive reading of the circumstances in which medical conditions are “affected by” pregnancy or childbirth. We encourage the EEOC to specifically include examples of conditions that are “affected by” pregnancy, childbirth, or related medical conditions—*i.e.* exacerbated by pregnancy or childbirth. Including additional examples will clarify that employees might need accommodations to mitigate an existing condition, chronic illness, or disability that is aggravated by pregnancy or childbirth or that is aggravated because the employee must discontinue their usual treatment or medication due to pregnancy. For example, an employee who has to stop taking their usual medication for

⁴⁶ *Facts Are Important: Abortion Is Healthcare*, The American College of Obstetricians and Gynecologists, <https://www.acog.org/advocacy/facts-are-important/abortion-is-healthcare> (last visited Sept. 18, 2023).

⁴⁷ Jeff Diamant & Besheer Mohamed, *What the Data Says About Abortion in the U.S.*, Pew Research Center (Jan. 11, 2023), <https://www.pewresearch.org/short-reads/2023/01/11/what-the-data-says-about-abortion-in-the-u-s-2/>.

⁴⁸ See H.R. Conf. Rep. No. 95-1786, at 4 (1978) (“Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion.”). See also *Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. pt. 1604 app., Introduction (1979) (“A woman is therefore protected against such practices as being fired, or refused a job or promotion, merely because she is pregnant or has had an abortion.”).

⁴⁹ Equal Employment Opportunity Commission, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (2015), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#IA4a>.

⁵⁰ *Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. pt. 1604 app., question 35 (1979).

⁵¹ 88 Fed. Reg. 54774 & n.11 (Aug. 11, 2023).

ADHD while pregnant should be eligible for accommodations related to any ADHD symptoms they experience.

- b. We also applaud the EEOC’s inclusion of “menstrual cycles” as a “related medical condition” that employers are obligated to accommodate. Our reproductive lives last for decades, and our needs will differ at various points during those years, not to mention from pregnancy to pregnancy. Consistent with that reality, we urge the agency to add perimenopause and menopause to the list of “related medical conditions.” While we recognize that the list of examples is non-exhaustive, and that both of these conditions fall within a reasonable construction of “menstrual cycles,” the documented dismissiveness perimenopausal and menopausal women face from their employers demands making those conditions’ inclusion explicit. Recent studies confirm what most of us already know: that perimenopause and menopause symptoms can last for years, and can interfere with work in myriad ways.⁵² Like menstruation, like infertility, and like the use of birth control – all of which are specifically included in the regulation – perimenopause and menopause are related to a worker’s capacity for pregnancy, and their explicit inclusion will provide valuable guidance to employers and the millions of affected workers.

Relationship to Other Laws

1636.7(b) - Rule of Construction. The EEOC correctly recognizes that, since its enactment nearly 60 years ago, Section 702 of Title VII of the Civil Rights Act allows religious employers to preference workers who share the employer’s religious beliefs without facing liability for religious discrimination, but does not insulate those employers from claims of discrimination based on other protected characteristics. Consistent with this textual scope, the inclusion of Section 702 in the PWFA likewise permits a religious employer, when faced, for instance, with the circumstance of a coreligionist and a worker of another faith seeking the same accommodation, to preference the coreligionist. It does not excuse the employer from the statutory obligation to reasonably accommodate the other worker, unless doing so would impose an undue hardship, as is true for nonreligious employers. It also does not permit the employer to deny the other worker a reasonable accommodation based on religious belief or any other characteristic protected by Title VII.

⁵² See, e.g., Stephanie S. Faubion, *et al.*, *Impact of Menopause Symptoms on Women in the Workplace*, 98 Mayo Clinic Proc. 833 (2023) (among study participants, roughly 15 percent had either missed work or reduced their hours because of menopause symptoms, with Black women and Latinas reporting the worst symptoms and adverse work outcomes); Carrot Fertility, *Menopause in the Workplace* (Sept. 27, 2022), <https://content.get-carrot.com/rs/418-PQJ-171/images/Carrot%20-%20Menopause%20in%20the%20workplace.pdf> (20 percent of study participants reported losing work hours because of menopause symptoms, and 70 percent had considered some form of work change, such as switching to a part-time schedule or retiring early, due to menopause symptoms).

Amendments that would have broadly exempted religious employers from the requirements of the PWFA were rejected in both the House and the Senate, demonstrating that Congress' intent was not to exempt religious entities from the PWFA.⁵³ The EEOC correctly recognizes that nothing in this provision categorically exempts religious employers from the requirements of 42 USC 2000gg-1.

Known Limitation

We support the proposed rule's clarification that a "limitation" can be "modest, minor, and/or episodic."⁵⁴ We also appreciate that the EEOC set out principles that reflect the realities of how employees typically communicate their needs to an employer and suggest some further clarification to the definition.

1. **1636.3(c).** The PWFA is clear that a "representative" of the employee or applicant can communicate the employee's limitation and need for accommodation on the employee's behalf.⁵⁵ We support that the proposed rule defines "employee representative" to include a family member, friend, and health care provider. We suggest the EEOC add "co-worker," "union representative," and "manager" to this list.⁵⁶ The proposed rule also states the employee's representative can include an "other representative." We suggest the EEOC replace "other representative" with a more descriptive definition that includes the worker's consent. It is critical that the EEOC make clear in the proposed rule that third parties cannot communicate the employee's limitation and need for accommodation to the covered entity without the employee's consent in order to ensure third parties are not stereotyping or making assumptions about employees' needs.
 - a. We also recommend that the EEOC include an example in the proposed appendix of a third party communicating the employee's limitation to the covered entity and illustrating how the covered entity should respond to the request. The example should make clear that once the third party has made the covered entity aware of the employee's need for accommodation, the employer must engage in the interactive process directly with the employee who is in need of accommodation (not their representative).
2. **1636.3(d)(1).** We agree with the proposed rule's specific directives that oral notice is sufficient to make a worker's pregnancy-related limitation "known" to the employer, and that an employer may not require written notice before responding to a request for

⁵³ See Markup of H.R. 1065, Pregnant Workers Fairness Act, Before the H. Comm. on Educ. & Lab., 117th Cong. (Mar. 24, 2021) (substitute amendment offered by Rep. Russ Fulcher (R-ID)), <https://docs.house.gov/meetings/ED/ED00/20210324/111413/BILLS-117-HR1065-A000370-Amdt-2.pdf>; S. Amdt. 6577, 117th Cong. (2022), <https://www.congress.gov/amendment/117th-congress/senate-amendment/6577/text>.

⁵⁴ 88 Fed. Reg. 54767.

⁵⁵ 42 U.S.C. 2000gg(4).

⁵⁶ We ask the EEOC to make clear that only a manager who is not an employee's direct supervisor can act as the employee's third-party representative.

accommodation. We further support the proposed appendix’s recognition that a worker need not use any “specific words or phrases” or legalese like “reasonable accommodation” to make their limitation “known.”

3. **1636.3(d) & 1636.3(d)(3).** Despite correctly recognizing that workers often express the need for accommodation in indirect ways – for instance, by telling a supervisor, “I’m having trouble getting to work at my scheduled time because of morning sickness”⁵⁷ – the proposed rule states that “communicated to the employer” means a worker “has made [a] *request for accommodation.*” Section 1636.3(d) (emphasis added). The proposed rule then states that to “[r]equest an accommodation,” the worker “need only communicate to the covered entity that the employee . . . (i) Has a limitation, and (ii) *Needs an adjustment or change at work.*” Section 1636.3(d)(3) (emphasis added). Framing the mandated communication as a “request” assumes a worker’s knowledge of the right to such modifications, and demanding that the worker convey a “need” for a modification similarly assumes that the worker believes they are entitled to have their “needs” met by the employer. But most workers – and especially low-wage workers, people who are new to the workforce, immigrants, and/or non-native English speakers – do not even know they are entitled to such accommodation, much less feel empowered to request one.

As such, a better approach to defining “Communicated to the employer” would be to:

- a. Revise § 1636.3(d) to read, “‘Communicated to the employer’ means an employee or applicant, or a representative of the employee or applicant, *has communicated to the covered entity that the employee or applicant: (i) Has a limitation that (ii) Necessitates an adjustment or change at work.*”
- b. Revise the list of employer representatives to whom the employee may communicate their limitations. The proposed appendix appropriately states that employees may communicate their needs to “the people who assign them daily tasks and whom they would normally consult if they had questions or concerns.” However, the language used in the proposed regulation itself— “communicating with a supervisor, manager, [or] someone who has supervisory authority for the employee” 1636.3(d)—doesn’t accurately capture as broad of a range of individuals to whom the employee may communicate their limitation. We therefore suggest replacing the phrase “who has supervisory authority” with “who plays a supervisory role.”

Undue hardship

1. **1636.3(j)(4).** We support the proposed rule’s explanation of “predictable assessments,” meaning examples of accommodations requested by employees due to pregnancy that will, in nearly all instances, not be considered to impose an undue hardship. This is based on the fact

⁵⁷ 88 Fed. Reg. 54722.

that many pregnancy- and childbirth-related limitations are temporary, common, and predictable and require only “simple and straightforward” workplace adjustments.

2. The Commission seeks comment on whether more accommodations should be included under this category. In response, we urge the EEOC to first, make clear that predictable assessments with respect to undue hardship should be extended to also include accommodations requested due to childbirth and related medical conditions; and second, add the following accommodations to the list of predictable assessments:
 - a. Modifications to uniforms or dress code
 - b. Minor physical modifications to a workstation, such as a fan or chair
 - c. Allowing rest breaks, as needed
 - d. Moving a workstation, such as to be closer to a bathroom or lactation space, or away from toxins
 - e. Providing personal protective equipment
 - f. Access to closer parking
 - g. Eating or drinking at a workstation
 - h. Time off to attend 16 healthcare appointments related to pregnancy or childbirth

The above accommodations are similar to the four accommodations the EEOC included in the proposed rule as “predictable assessments” as they, too, are simple and straightforward.

We also support the discussion in the proposed rule and proposed appendix regarding elements that *cannot* form the basis of an undue hardship defense, and make these additional suggestions:

1636.3(j)(5).

- a. We support the EEOC setting forth that an employer may not establish an undue hardship defense based on its “mere assumption or speculation that other employees might seek a reasonable accommodation, or even the same reasonable accommodation, in the future.” This language should be strengthened so as to not suggest that an employer can establish such a defense in situations where it has *more* than a “mere assumption or speculation” that other employees will request an accommodation. Regardless of its level of certainty, an employer should never be allowed to deny an accommodation requested by any individual employee based on fears that it will have to provide reasonable accommodations to other employees in the future - whether the employer’s belief is speculative or grounded in fact. Each accommodation decision must be made based on the need of the individual employee requesting the accommodation and the circumstances at hand.
- b. We commend the EEOC for making clear “that a covered entity that receives numerous requests for the same or similar accommodation at the same time...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.”⁵⁸ However, we urge the EEOC to remove the assertion that “The covered entity may

⁵⁸ 88 Fed. Reg. 54786 (Aug. 11, 2023).

- 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”⁵⁹ and replace it with the following language: “The covered entity may not point to cumulative costs of accommodations that have already been granted to other employees when claiming the hardship. The undue hardship analysis must be done on a case by case basis.”
- c. We also encourage the Commission to add that 1) other employees’ fear or prejudice regarding the employee’s pregnancy, childbirth, or related condition, or; 2) the possibility that the accommodation would negatively impact other employees’ morale, cannot constitute an undue hardship. These examples are similar to examples explicitly included in the ADA’s Interpretive Guidance.⁶⁰
 - d. Moreover, the PWFA intentionally avoided including “direct threat” language from the ADA, and the EEOC should make clear that any claims of undue hardship based on claims of direct threat are invalid.⁶¹
 - e. Finally, the fact that an employee has or has previously received an accommodation for pregnancy, disability, or both should not be a valid reason to claim undue hardship. Allowing such claims would violate the purposes of both PWFA and the ADA by penalizing qualified employees for using the accommodations they are entitled to under the law.

Equal Rights Advocates strongly supports the EEOC’s comprehensive proposed rule on the Pregnant Workers Fairness Act, which fairly balances the interest of employers with the interest of employees to protect their pregnancies and reproductive health without compromising their health or their families’ economic security. Thank you for the opportunity to comment on the proposed rule. If you have any questions please reach out to Deborah J. Vagins, National Campaign Director at Equal Rights Advocates at dvagins@equalrights.org.

Sincerely,



Deborah J. Vagins
National Campaign Director
Equal Rights Advocates

⁵⁹ 88 Fed. Reg. 54786 (Aug. 11, 2023).

⁶⁰ Equal Employment Opportunity Commission, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, at text accompanying n. 117-18 (2002), <http://www.eeoc.gov/laws/guidance/enforcementguidance-reasonable-accommodation-and-unduehardship-under-ada>).

⁶¹ See *Long Over Due: Exploring the Pregnant Workers’ Fairness Act (H.R. 2694) Before the Subcomm. on Civil Rights Human. & Servs. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019) (Questions for the record submitted by Dina Bakst, Co-Founder & Co-President, A Better Balance, at 12).