

**Testimony of Andrea Johnson
Equal Justice Works Fellow
National Women's Law Center**

**In Support of
HB 214—Discrimination in Employment—Conditions Related to Pregnancy or Childbirth
Before the Maryland House Economic Matters Committee
February 14, 2017**

Thank you for the opportunity to submit this testimony on behalf of the National Women's Law Center in support of House Bill 214, Discrimination in Employment—Conditions Related to Pregnancy or Childbirth. The National Women's Law Center has been working since 1972 to secure and defend women's legal rights, including their rights to equal opportunity in the workplace. We urge you to support HB 214, which would clarify and strengthen Maryland's current pregnancy accommodation law to ensure that pregnant and nursing workers in Maryland are not forced to choose between their health and their jobs.

I. Too many pregnant and nursing working women are denied the simple accommodations they need to continue doing their jobs safely.

Many women can work through their pregnancies without any changes in their jobs. However, some pregnant women do find that particular job activities – such as lifting, bending, or standing for long periods – can pose a challenge at some point during a pregnancy. These women may have a medical need for temporary adjustments of job duties or work rules so that they can continue to work safely and support their families. However, too often when pregnant workers ask for modest accommodations recommended by their doctors, like a stool to sit on or the right to drink water during a shift, they are instead forced onto unpaid leave or even fired.¹ This is a particular problem for women who work in physically demanding jobs that have been traditionally held by men, and for women in low-wage occupations where work rules can be especially inflexible.² One recent survey estimated that a quarter of a million pregnant workers are denied their requests for reasonable workplace accommodations nationally every year.³

In Maryland, approximately 58 percent of the women who give birth in any given year are working women.⁴ Indeed, it is increasingly common for women to continue working while pregnant, and through later stages of pregnancy. For example, two-thirds of women who had

¹ For stories of women pushed out of work because they were denied the temporary accommodations that they sought during pregnancy, *see generally* NATIONAL WOMEN'S LAW CENTER AND A BETTER BALANCE, IT SHOULDN'T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS (2013), *available at* http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf.

² *See id.* at 5.

³ *See* NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, LISTENING TO MOTHERS: THE EXPERIENCE OF EXPECTING AND NEW MOTHERS IN THE WORKPLACE 3 (Jan. 2014), *available at* <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf>.

⁴ NWLC calculations from US Census Bureau, American Community Survey, 2015, 1-year estimates, using IPUMS.

their first child between 2006 and 2008 worked during pregnancy, and 88 percent of these first-time mothers worked into their last trimester.⁵

When women who have physical limitations stemming from pregnancy are forced off the job instead of being accommodated, their families can suffer a devastating loss of income at the very moment financial needs are increasing. Mothers' earnings are crucial to most families' financial security and wellbeing – in 2015, 42 percent of mothers nationally were sole or primary breadwinners, and nearly another one-quarter of mothers were co-breadwinners, bringing home 25 percent to 49 percent of earnings for their families.⁶ In Maryland, 32 percent of families with children under 18 are headed by single mothers, whose families may have no income at all if they are forced out of work during pregnancy.⁷ Women in low-wage occupations are even more likely to be their family's primary breadwinners, more likely to need a pregnancy accommodation, and more likely to be refused such an accommodation; income loss during pregnancy can impose particularly severe consequences on these families.⁸ Immigrant women and women of color, who are more likely to work in low-wage jobs, are thus particularly at risk of the income loss that can flow from the denial of pregnancy accommodation.⁹

Other women continue working without the accommodations that they need because they cannot afford to follow their doctor's advice if it means losing their income; these women are often put at risk of serious health consequences, such as miscarriage, pre-term birth, pregnancy-induced hypertension and preeclampsia, congenital anomalies, and low birth weight.¹⁰ Low birth weight babies face increased health risks at birth such as breathing difficulties, bleeding in the brain, heart problems, intestinal issues, and potential vision problems.¹¹ No woman should have to choose between her job and a healthy pregnancy.

Upon returning to work after giving birth, many mothers are denied the time and space at work to express breast milk and some are harassed or fired for taking time to express milk.¹² Without the time and space to express milk, lactating women will experience pain and risk potentially serious infection; they also will likely not be able to continue breastfeeding their babies. But research shows that providing space and time for nursing mothers to express milk not only promotes infant and maternal health, it also makes good business sense by reducing

⁵ LYNDA LAUGHLIN, U.S. CENSUS BUREAU, MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS: 1961-2008 4, 6 (Oct. 2011), available at <https://www.census.gov/prod/2011pubs/p70-128.pdf>.

⁶ See CENTER FOR AMERICAN PROGRESS, BREADWINNING MOTHERS ARE INCREASINGLY THE U.S. NORM (Dec. 2016), available at <https://www.americanprogress.org/issues/women/reports/2016/12/19/295203/breadwinning-mothers-are-increasingly-the-u-s-norm/>.

⁷ NWLC calculations from US Census Bureau, American Community Survey 2015, 1-year estimates, Table B11003: Family Type by Presence and Age of Own Children Under 18 Years, available at <https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁸ IT SHOULDN'T BE A HEAVY LIFT, *supra* note 1, at 3, 7.

⁹ *Id.* at 7.

¹⁰ See *id.* at 12.

¹¹ *Id.*

¹² See Katy B. Kozhimannil et al., *Access to Workplace Accommodations to Support Breastfeeding after Passage of the Affordable Care Act*, WOMEN'S HEALTH ISSUES, Vol. 26, Issue 1, 6-13, available at [http://www.whijournal.com/article/S1049-3867\(15\)00117-6/fulltext](http://www.whijournal.com/article/S1049-3867(15)00117-6/fulltext); Courtelyou Kenney, *Fair Treatment for Breastfeeding Moms*, NAT. WOMEN'S LAW CTR. (Nov. 7, 2013), <http://nwlc.org/blog/fair-treatment-breastfeeding-moms/>.

expenditures under employer-sponsored health plans, increasing employee morale, and encouraging nursing moms as valuable employees to stay in the workforce.¹³

II. Maryland's law needs to be clarified and strengthened to ensure that pregnant and nursing workers are protected.

In 2013, Maryland enacted the Reasonable Accommodations for Disabilities Due to Pregnancy Act, Md. Code. State Gov't. § 20-609, which has helped many pregnant workers in Maryland get reasonable accommodations that allow them to continue working during their pregnancies. However, experience demonstrates the law must be clarified and strengthened in several key ways, to ensure women can work safely and support their families through their pregnancies and after giving birth.

A. Maryland's law needs to be clarified to ensure that reasonable accommodations are provided to *all* pregnant and nursing workers who need them.

Maryland's pregnancy accommodation law is currently ambiguous as to whether all pregnant workers with a medical need for an accommodation are entitled to reasonable accommodations or only those workers who have limitations arising out of pregnancy complications. But a medical need for a temporary accommodation can arise from a normally-progressing pregnancy; for example, the need to sit instead of stand during a long shift, to avoid exposure to toxic chemicals, or to avoid lifting heavy objects to ensure your pregnancy remains a healthy pregnancy. These pregnant workers are also too often forced off the job when they ask for simple, reasonable accommodations. And the failure to accommodate a healthy pregnancy can itself precipitate complications, putting the worker and her pregnancy at risk. No pregnant worker should be forced to choose between the health of her pregnancy or her job.

Maryland's current law speaks of providing reasonable accommodations for "disabilities caused or contributed to by pregnancy or child birth."¹⁴ Some courts have held under federal law that physical limitations and medical needs arising out of normal pregnancy, like those described above, do not constitute "disabilities."¹⁵ Just last week, the United States District Court for the District of Maryland specifically held that Maryland's pregnancy accommodation law "prohibit[s] discrimination on the basis of disability, but not pregnancy alone."¹⁶ The court went

¹³ See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, HEALTH RESOURCES AND SERVICES ADMINISTRATION, MATERNAL AND CHILD HEALTH BUREAU, THE BUSINESS CASE FOR BREASTFEEDING (2008), *available at* <http://www.womenshealth.gov/breastfeeding/government-programs/business-case-for-breastfeeding/breastfeedingbusinesscase-for-managers.pdf>.

¹⁴ Md. Code Ann., State Gov't § 20-609 (West 2013).

¹⁵ See, e.g., *Wonasue v. Univ. of Maryland Alumni Ass'n.*, 984 F.Supp.2d 480 (D. Md. 2013) (holding that plaintiff's allegation that she was pregnant was not enough without evidence of significant complications for plaintiff to have a "disability" under the ADA or Maryland Employment Discrimination Law which shares the ADA definition); *Turner v. Eastconn Regional Educ. Service Center*, No. 3:12-CV-00788 (VLB), 2013 WL 6230092, at *6-7 (D. Conn. Dec. 2, 2013) (holding that plaintiff was not disabled when she did not have any pregnancy complications and was not limited in the major life activity of working because her pregnancy only prevented her from doing her particular job); *Sam-Sekur v. Whitmore Group, Ltd.*, No. 11-cv-4938 (JFB)(GRB), 2012 WL 2244325, at *7-9 (E.D.N.Y. June 15, 2012) (dismissing plaintiff's complaint because she did not allege any physiological impairment resulting from her pregnancy that fell within the "extremely rare" category of pregnancy-related conditions that qualify as disabilities); *Selkow v. 7-Eleven, Inc.*, 8:11-CV-456-T-33EAJ, 2012 WL 2054872 (M.D. Fla. June 7, 2012) (granting summary judgment because plaintiff failed to produce enough evidence that her pregnancy-related back pains which "may have affected to some degree her ability to lift" substantially limited a major life activity).

¹⁶ *Saah v. Thumel*, 2017 WL 491221, at *1 (Feb. 7, 2017 D. Md.).

on to hold that even though the plaintiff, a veterinary assistant, “required help on a ‘case-by-case basis’ during the final three months of her pregnancy with certain of her responsibilities, including ‘performing x-rays, bending over, lifting large objects, and handling large animals,’” “these limitations alone fail[ed] to demonstrate that she suffered a “disability” with respect to her Maryland Fair Employment Practices Act . . . claim” and thus she was not protected under §20-609.¹⁷ Instead, the court held that she needed to show an “additional ‘pregnancy-related impairment’” in order to get protection, and cited to cases where courts denied pregnant plaintiffs’ claims to reasonable accommodations under the Americans with Disabilities Act (ADA) because the plaintiffs failed to show that their pregnancies suffered from significant complications.¹⁸

As a result, in order to ensure that all pregnant workers in Maryland who have a medical need for a reasonable accommodation receive one, it is critical that Maryland law make undeniably clear that all pregnant workers with limitations due to pregnancy or childbirth are entitled to a reasonable accommodations—not just those with pregnancy-related “disabilities.” Most of the states that have passed pregnancy accommodation laws in the last several years have required employers to provide reasonable accommodations for *conditions or limitations* related to pregnancy or childbirth.¹⁹ Likewise, the Pregnant Workers Fairness Act which has been proposed in the U.S. Congress requires reasonable accommodations for employees’ “limitations” related to pregnancy, childbirth, or related medical conditions.²⁰ There is no reason Maryland shouldn’t do the same.

B. Protections are needed against pregnant and nursing workers being forced out onto leave.

Many pregnant workers who seek an accommodation so that they can continue to do their job are instead forced onto unpaid leave by their employers. Unpaid leave can decimate a family’s finances, especially for pregnant workers in low-wage jobs, who are already bracing for their families’ financial needs to increase. In addition, when a pregnant worker is forced to use her limited leave time because an employer refuses to provide a reasonable accommodation that would allow her to continue working, this valuable benefit will no longer be available when she needs it most—to recover from childbirth and bond with a new baby.

This is what happened to Peggy Young when she worked as an early morning air driver at UPS in Landover, Maryland. Although she could have easily been provided light duty to accommodate her restriction on lifting more than 20 pounds—an amount that she rarely had to lift as part of her job—UPS pushed her off the job onto unpaid leave for the last six and a half months of her pregnancy, causing her family significant financial distress.²¹ Likewise, Tiffany Beroid, a customer service manager at Walmart in Laurel, Maryland, who occasionally had to push carts and lift boxes as part of her job, was forced onto unpaid leave after she informed Walmart of her need to take on lighter duties due to her pregnancy. Her husband had to work double shifts as a security guard so they could pay their rent and Tiffany could no longer pay her

¹⁷ *Id.* at *6-7.

¹⁸ *Id.* at *6.

¹⁹ See NAT’L. WOMEN’S LAW CTR., *Pregnancy Accommodations in the States* (Sept. 2016), available at <https://nwlc.org/wp-content/uploads/2016/09/Pregnancy-Accommodations-in-the-States-September-2016-1.pdf>.

²⁰ Pregnant Workers Fairness Act, S. 1512, H.R. 2654 (114th Congress).

²¹ IT SHOULDN’T BE A HEAVY LIFT, *supra* note 1, at 15.

tuition for nursing school at the local community college.²² These are not isolated examples. At the National Women’s Law Center, we regularly receive calls from women across the country who want and need to continue working during their pregnancies, but who are forced out onto leave when a simple accommodation could have allowed them to continue working safely.

Given that too many employers push women onto leave even when simple accommodations could have allowed them to stay on the job, it is important for Maryland’s pregnancy accommodation law to include language making it explicit that an employer cannot require an employee to take leave, whether paid or unpaid, if another reasonable accommodation for the employee’s pregnancy-related limitation can be provided. Otherwise, pregnant workers in Maryland still risk being forced to choose between a healthy pregnancy and providing for their families.

C. Maryland law needs to be clarified to ensure that reasonable accommodations are provided for expressing breastmilk.

Maryland’s current pregnancy accommodation law also does not explicitly state that lactation is among the conditions for which an employer must provide a reasonable accommodation. However, lactation is a pregnancy- and childbirth-related condition that will often necessitate temporary workplace accommodations, such as reasonable breaks, a location shielded from view to express breast milk, or being permitted to have a bottle of water at a workstation since hydration is very important while lactating. Just as no woman should have to choose between her job and the health of her pregnancy, no woman should be forced to choose between her job and the health of her baby after giving birth.

It is important for lactation to be explicitly mentioned in Maryland’s pregnancy accommodations law because some courts have erroneously held that lactation is not a pregnancy-related condition covered by pregnancy non-discrimination laws.²³ Given this confusion, and given that the text of Maryland’s current pregnancy accommodation law is silent on this point, explicitly naming “lactation” as a condition related to pregnancy for which an employee can be entitled to a reasonable accommodation eliminates any possible confusion that employers and employees might have about their obligations and rights and will promote greater compliance with the law.

It is worth noting that employers are already required under the federal Fair Labor Standards Act to provide reasonable break time and a private location to express breastmilk to employees who are not exempt from overtime protections.²⁴ But explicitly including lactation as

²² Brigid Schulte, Wal-Mart Faces New Pregnancy Discrimination Charges, The Washington Post (Dec. 17, 2014), https://www.washingtonpost.com/blogs/local/wp/2014/12/17/wal-mart-faces-new-pregnancy-discrimination-charges/?utm_term=.371b1dbe8a97.

²³ See, e.g., *Martinez v. N.B.C.*, 49 F. Supp. 2d 305, 309-10 (S.D.N.Y. 1999) ; *Wallace v. Pyro Mining*, 789 F. Supp. 867, 869-70 (W.D. Ky. 1990), aff’d, 951 F.2d 351 (6th Cir. 1991) (per curiam); *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1492 (D. Colo. 1997) (“[B]reast-feeding and child rearing concerns after pregnancy are not medical conditions related to pregnancy or childbirth within the meaning of the PDA.”); *Barrash v. Bowen*, 846 F. 2d 927, 931-32 (4th Cir. 1988) (opining without citation that the PDA only covered medical conditions that were “incapacitating” and therefore did not cover an employee’s request for extended leave in order to breastfeed). In 2013, the EEOC Guidance and the Fifth Circuit correctly found that lactation should be considered covered. See *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 430 (5th Cir. 2013) (discrimination on the basis of lactation is covered under Title VII generally and as a “related medical condition” under the PDA).

²⁴ Fair Labor Standards Act of 1938, Section 7(r), (29 U.S.C. 207(r) (2010)).

a condition requiring reasonable accommodations under Maryland's pregnancy accommodation law will ensure that *all* employees who need them can get reasonable accommodations for expressing breastmilk, and it will ensure that when necessary, employees can get important, yet simple accommodations beyond time and a space to pump, such as a bottle of water at a work station to stay well-hydrated. Clarifying that Maryland's pregnancy accommodation law covers lactation-related needs would help many working mothers get back to work while caring for their families.

III. HB 214 will clarify and strengthen Maryland's pregnancy accommodation law to ensure that working women in Maryland can raise healthy families.

HB 214 will ensure that pregnant workers are no longer unnecessarily forced off the job by making it unmistakably clear that employers have to make reasonable accommodations for pregnant and lactating women who have a medical need for them unless the accommodation would impose an undue hardship on the employer. This bill amends Title 20, Section 609 of the Maryland State Government Code, to:

- Remove throughout the law reference to “disabilities arising out of pregnancy” and replace with “limitations due to conditions related to pregnancy or childbirth;”
- Explicitly state that lactation is a condition related to pregnancy requiring reasonable accommodations;
- Prohibit employers from forcing a pregnant employee to take paid or unpaid leave when another reasonable accommodation would allow her to continue to work;
- Define “undue hardship” and the factors that should be considered when determining whether providing an accommodation causes an employer an undue hardship;
- Prohibit employers from requiring a pregnant employee to accept changes to her work when the pregnant employee does not need any modification to do her job;
- Prohibit employers from firing or otherwise penalizing a pregnant employee because she needs this sort of reasonable accommodation;
- Require the Commission on Civil Rights to undertake public education efforts to inform employers, employees, employment agencies, and applicants for employment about their rights and responsibilities under the Act.

Maryland employers have already been obligated to provide reasonable accommodations to pregnant workers since the state's current pregnancy accommodation law passed with bipartisan support in 2013. HB 214 does not significantly change the requirements with which employers should have already been complying; it simply clarifies the rights and obligations of employees and employers to ensure greater compliance with the law. Moreover, the definition of “undue hardship,” which is included in the bill because it is currently left undefined in the statute, is quite similar to the definition used in the federal Americans with Disabilities Act

(ADA).²⁵ This definition will therefore be familiar to employers, and will be easy for employers and courts alike to implement.

The types of accommodations that an employer might have to make are straightforward. For example, an employer might have to provide a stool to a pregnant employee experiencing swelling of the legs as a result of standing for an entire shift, or modify a no-food-or-drink policy so that an employee can drink water to prevent painful and potentially dangerous uterine contractions. If a pregnant employee has been advised by her health care provider not to lift more than 20 pounds, the employer might need to reassign occasional heavy lifting duties. If her current position imposes particular medical risks to her pregnancy, then the employer might need to temporarily allow a pregnant worker to fill an alternative position for which she is qualified if the employer has one available at the time.

Making reasonable accommodations for those pregnant workers who do need them will not lead to significant burdens for Maryland's employers. Only about 1.4 percent of employed people in Maryland give birth each year,²⁶ and only a fraction of those workers would require accommodations. Employer experience with both disability accommodations and workplace flexibility policies show that the costs of accommodating pregnant workers are likely to be small – and that providing accommodations can be expected to have benefits like reducing workforce turnover and increasing employee satisfaction and productivity.²⁷

IV. Minor modifications to HB 214 would further strengthen its protections.

HB 214 could be strengthened with one minor modification. As currently drafted, the bill defines “conditions related to pregnancy or childbirth” to mean “any *physical* change that directly results from pregnancy or childbirth, including lactation” (emphasis added). Limiting this definition to only “physical” changes runs the risk that employers will not make reasonable accommodations for conditions that are considered “mental” conditions, like post-partum depression, even though such conditions are common pregnancy-related conditions and employees suffering from such conditions should also not be forced to choose between their job and their health. This change would also align Maryland's pregnancy accommodation law with both the federal ADA²⁸ and Maryland disability law²⁹ which cover both physical and mental conditions.

V. Conclusion

The National Women's Law Center strongly supports HB 214. Pregnant workers in Maryland should not be forced to choose between ignoring their doctor's advice and being forced onto leave or losing their jobs at a time when both their health and the economic security of their families are absolutely crucial. HB 214 provides a commonsense solution for this important issue.

²⁵ Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990).

²⁶ NWLC calculations from US Census Bureau, American Community Survey, 2015, 1-year estimates, using IPUMS.

²⁷ See NATIONAL WOMEN'S LAW CENTER, THE BUSINESS CASE FOR ACCOMMODATING PREGNANT WORKERS (May 2015), available at <http://nwlc.org/wp-content/uploads/2015/05/NEW-Business-Case-for-Accommodating-Pregnant-Workers-May-2015.pdf>.

²⁸ Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990).

²⁹ Md. Code Ann., State Gov't §§ 20-601, 20-606 (West 2013).