WORKPLACE JUSTICE

THE PREGNANCY DISCRIMINATION AMENDMENT ACT: ONE STEP FORWARD AND TWO STEPS BACK FOR PREGNANT WORKERS

According to its sponsors, the Pregnancy Discrimination Amendment H.R. 4738, ("Amendment Act") seeks to address a critical problem of pregnant workers being forced to choose between their jobs and their health when they have a medical need for temporary accommodations.[1] The bill thus reflects the growing, bipartisan awareness of the need to strengthen legal protections for pregnant workers. Unfortunately, the Amendment Act raises more legal questions than it answers and, if enacted, could actually diminish the legal protections pregnant workers currently enjoy. By contrast, the bipartisan Pregnant Workers Fairness Act, H.R. 2694, would provide a clear, flexible rule ensuring reasonable accommodations for pregnant workers who need them.

Pregnancy Accommodations and the Current State of the Law

The Americans with Disabilities Act ("ADA") requires employers to make reasonable accommodations for employees with disabilities, including temporary disabilities, if the employer can do so without undue hardship. But courts have repeatly held that ordinary pregnancy is not a disability, which means that many pregnant workers will not be granted accommodations under the ADA.

The Pregnancy Discrimination Act ("PDA"), enacted in 1978, makes clear that employment discrimination on the basis of pregnancy, childbirth, or related medical conditions is a prohibited form of sex discrimination. The PDA further states that "women affected by pregnancy, childbirth, or similar medical conditions must be treated the same for all employment-related purposes . . . as other persons not so affected but similar in ability or inability to work."[2]

In March 2015, the Supreme Court ruled in *Young v. UPS* that this equal treatment guarantee means that when an employer accommodates workers who are similar to pregnant workers in their ability to work, it cannot refuse to accommodate pregnant workers who also need accommodations simply because it "is more expensive or less convenient" to do so.[3] The Court also held that an employer that fails to accommodate pregnant workers violates the law when its accommodation policies impose a "significant burden" on pregnant workers that outweighs any justification the employer offers for those policies.[4]

Despite the Supreme Court's affirmation that a refusal to accommodate pregnancy can run afoul of the PDA, in case after case since *Young*, workers denied pregnancy accommodations have had their cases thrown out because of a misinterpretation of the legal standard, a botched interpretation of the significant burden determination, or in some cases because courts have ignored the *Young* decision altogether. The multi-step balancing test set out in *Young* appears to have left courts, employers, and employees confused about when exactly the PDA requires pregnancy accommodations. Indeed, a recent survey of pregnancy accommodations caselaw since 2015 found that in over two-thirds of post-*Young* pregnancy accommodations cases, courts held that employers were permitted to deny pregnant workers accommodations under current federal law.[5]

The Pregnancy Discrimination Amendment Act

The Amendment Act would amend the PDA so that rather than requiring employers to treat pregnant workers the same as "other persons not so affected but similar in ability or inability to work" it would require employers to treat pregnant workers the same **"as any other applicants for employment with, or employees employed by, the same employer, in work that is performed under similar working conditions, who**

are not so affected but similar in their temporary ability or inability to work." The key elements of the bill are as follows:

- ***"any** other applicants . . . or employees"*

In 2015, the Supreme Court rejected the conclusion that the PDA categorically prohibits an employer from refusing to provide an accommodation to a pregnant worker when it provides an accommodation to someone else who is similar to a pregnant worker in ability to work. "The language of the statute does not require that unqualified reading," the Court reasoned. "It does not say that the employer must treat pregnant employees the 'same' as 'any other persons' (who are similar in their ability or inability to work)."[6] By adding the word "any" to the PDA, the Amendment Act would reject this analysis and make clear that a pregnant worker could succeed in a PDA claim by pointing to a single nonpregnant comparator who received the accommodation she seeks.

- *"performed under **similar working conditions"***

While adding the word "any" would broaden the reach of the PDA, adding the phrase "performed under similar working conditions" would narrow the PDA's reach, injecting uncertainty into the law and inviting courts to raise new obstacles for pregnant workers seeking accommodations for medical needs. For example, would a pregnant worker with a lifting restriction employed in the cosmetics department of a large department store be considered to perform her job "under similar working conditions" to a nonpregnant coworker with a lifting restriction in the sporting goods department? Would a pregnant worker on the night shift who needed a stool be considered to work "under similar working conditions" as a nonpregnant worker on the day shift allowed to use a stool? If working conditions differed in ways unrelated to the need for an accommodation—for example, if a pregnant custodian worked primarily outdoors, while a nonpregnant custodian worked primarily indoors, but the accommodation at issue involved being permitted to stay off ladders—would the fact that one employee worked outside and one inside alone be sufficient to defeat a PDA claim, without any showing that their job responsibilities meaningfully differed? The "similar working conditions" requirement opens the door to illogical and unjust distinctions of just this sort.

This amendment also threatens to restrict pregnant workers' rights outside of the workplace accommodation context. A primary motivating factor behind the PDA's requirement that pregnant workers be treated the same as those similar in ability or inability to work was ensuring that pregnant workers were eligible for the same temporary disability benefits, health insurance benefits, and sick leave benefits as their coworkers disabled by injury or illness.[7] By adding the "similar working conditions" requirement, the Amendment Act would narrow the PDA's application in these contexts as well, empowering an employer to deny a pregnant employee access to these benefits based on the argument that her working conditions are in some way dissimilar to her coworkers', thus dramatically narrowing the rights that the PDA has provided since 1978.

- *"similar in their **temporary** ability or inability to work"*

The Amendment Act would also narrow the PDA by adding the word "temporary" to the phrase "similar ability or inability to work." This amendment, too, could lead to pregnant workers being denied medically-needed accommodations based on distinctions that make little sense. For example, if an employer allowed a nonpregnant cashier with a permanent disability to sit instead of stand at the cash register, a pregnant cashier who was unable to stand for several hours at a time during her last trimester because of painful leg swelling would presumably not be entitled to a stool under the amended PDA, because while her inability to stand for several hours at a time was temporary, her coworker's was permanent. In other words, the very fact that she only needed an accommodation for a short time would leave her ineligible for any accommodation at all. This is an illogical result that would harm pregnant workers.

Moreover, even when a pregnant worker seeks an accommodation provided to a nonpregnant worker with a temporary disability, the phrase "similar in . . . temporary ability or inability to work" invites a court to reject a PDA claim if the pregnant worker and nonpregnant worker need an accommodation for different stretches of time. Would a nonpregnant worker unable to lift heavy objects for eight months be held to be dissimilar in "temporary ability or inability to work" compared to a pregnant worker unable to lift heavy objects for three months?

This change in language could also harm pregnant workers' rights outside the pregnancy accommodation context. The Supreme Court has long held that the PDA's requirement that pregnant workers be treated the same as others "similar in their ability or inability to work" means that pregnant employees cannot be shut out of particular positions for reasons unrelated to their ability to do their job. "In other words, women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job."[8] By adding the modifier "temporary" to the PDA's requirement, the Amendment Act would complicate and undermine this analysis, weakening the key protection provided by the PDA for more than a generation.

The Pregnant Workers Fairness Act

In contrast to the PDA amended by the Amendment act, the basic question under the Pregnant Workers Fairness Act is quite simple: the Pregnant Workers Fairness Act asks whether the employer can reasonably accommodate the pregnant worker without undue hardship. This inquiry, which mirrors

that required by the ADA for employees with disabilities, focuses squarely on the nature of the limitations and whether an employer can accommodate them—the most relevant questions for both the pregnant worker and the employer.

Under the PDA and the Amendment Act, the basic question in determining whether to accommodate a pregnant worker with medical needs would be whether the employer had previously accommodated another nonpregnant worker, with a similar limitation, over a similar time frame, under similar working conditions. As has become clear in the years after *Young*, the search for a nonpregnant identical twin frequently yields arbitrary results, turning not on the pregnant worker's particular limitations and the particular requirements of her job, but on which employees happened to have needed accommodations in the past for reasons other than pregnancy, as well as on whether the pregnant worker or the employer had reliable information about these past accommodations.

Unlike the Amendment Act, the Pregnant Workers Fairness Act:

- Prohibits an employer from forcing a pregnant worker onto leave if another reasonable accommodation would address her needs;
- Makes clear that an employer cannot discriminate against a pregnant worker because she needs, has asked for, or has received an accommodation; and
- Has bipartisan support in the House.

For all these reasons, the Pregnant Workers Fairness Act (H.R. 2694) provides stronger protections and a better solution for pregnant workers than the Pregnancy Discrimination Amendment Act.

1 Walberg, Wagner Introduce Legislation to Strengthen Workplace Protections for Pregnant Women (October 18, 2019), https://walberg.house.gov/media/press-releases/walberg-wagner-introduce-legislation-strengthen-workplace-protections-pregnant.
2 42 U.S.C. § 2000e(k).
3 *Young v. United Parcel Serv.*, 135 S.Ct. 1338, 1354 (2015).
4 *Id.*
5 See Dina Bakst, Elizabeth Gedmark, & Sarah Brafman, ABB, Long Overdue: It Is Time For The Federal Pregnant Workers Fairness Act 9 (May 2019), https://www.abetterbalance.org/wpcontent/uploads/2019/05/Long-Overdue.pdf.
6 *Young.* at 1350 (emphasis added).
7 E.g., S. Rep. 95- 331 (1977), at 4 ("Pregnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working.").
8 *Int'l Union v. Johnson Controls*, 499 U.S. 187, 204 (1991).