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Charlotte A. Burrows, Chair  
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 Chair Burrows:

The National Women's Law Center ("NWLC") writes to provide comments on the U.S. Equal Employment Opportunity Commission's ("EEOC") Notice of Proposed Rulemaking, "Regulations to Implement the Pregnant Workers Fairness Act," RIN 3046-AB30 ("Proposed Rule").<sup>1</sup> Since 1972, NWLC has worked to protect and advance the progress of women and their families in core aspects of their lives, including income security, employment, education, and reproductive rights and health, with an emphasis on the needs of women with low incomes and those who face multiple and intersecting forms of discrimination. NWLC has long worked to remove barriers to equal treatment of women in the workplace, and protecting against pregnancy discrimination is at the core of our work.

The Pregnant Workers Fairness Act (PWFA) requires employers to provide reasonable accommodations for workers who have limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation would impose an undue hardship. Congress passed the PWFA to fill gaps in existing federal law that led to these workers being forced to take unpaid leave or pushed out of work entirely. The PWFA helps to ensure that no worker has to choose between their job and their health or the health of their pregnancy.

By issuing this Proposed Rule, the EEOC has acted within its statutory authority to propose regulations that interpret key terms and provisions of the PWFA and illustrate the application of the statute through examples, as required by the PWFA.<sup>2</sup> The Proposed Rule is grounded in the text and intent of the statute and, where appropriate, is informed by medical evidence, state and local pregnancy accommodation laws, and guidance, regulations, and case law interpreting the Americans with Disabilities Act (ADA)<sup>3</sup> and the Pregnancy Discrimination Act (PDA).<sup>4</sup>

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<sup>1</sup> 88 Fed. Reg. 54714 (proposed Aug. 11, 2023).

<sup>2</sup> 42 U.S.C. § 2000gg-3(a).

<sup>3</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12111 et seq.

<sup>4</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (as amended by the Pregnancy Discrimination Act (PDA)).

NWLC strongly supports this thoughtful and comprehensive Proposed Rule, which will facilitate compliance with the PWFA and ensure that workers who have limitations related to pregnancy, childbirth, or related medical conditions can access the rights guaranteed to them under the statute. NWLC's recommendations to further clarify and strengthen the Proposed Rule are outlined in the comments below, which proceed in the order of the Proposed Rule.

## **A. COMMENTS ON SECTION 1636.3 “DEFINITIONS – SPECIFIC TO THE PWFA.”**

NWLC applauds the EEOC for its extensive definitions of key terms under the PWFA, which draw heavily from interpretations of similar terms under the ADA and Title VII. This section outlines NWLC's comments on Section 1636.3 of the Proposed Rule, “Definitions – Specific to the PWFA,” and the corresponding discussion in the preamble and proposed appendix. This section of the comment proceeds in the order of the Proposed Rule. The comments below express support for many elements of the definitions and provide recommendations to improve clarity and practicality.

### **I. NWLC Strongly Supports the EEOC's Definition of “Known Limitation.”**

NWLC supports the EEOC's interpretation of “known limitation” as meaning a “physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions” that has been communicated to the employer.<sup>5</sup>

We especially commend the EEOC for its definition of “limitation” in proposed 1636.3(a)(2), which is grounded in the “general principle” that “the PWFA does not require a specific level of severity.”<sup>6</sup> As the EEOC notes in the proposed appendix, the underlying statute does not require that limitations meet a certain level of severity in order for a worker to be entitled to accommodation, but instead makes explicit that pregnant workers are entitled to reasonable accommodations for limitations that would not be covered by the ADA.<sup>7</sup> The inclusion of “modest, minor, and/or episodic” conditions is consistent with the text of the statute and reflects the consistently expressed Congressional intent to protect workers whose limitations fall short of a “disability” that would render them eligible for accommodations under the ADA.<sup>8</sup>

NWLC also supports the inclusion of needs “related to maintaining [the employee's] health or the health of their pregnancy” and “seeking health care related to pregnancy, childbirth, or a related medical condition” in the proposed definition of “limitation,” as both can impose impediments on employees that affect their work.<sup>9</sup> Under the ADA, workers are similarly able to receive reasonable accommodations to maintain health or seek care.<sup>10</sup> The EEOC correctly recognizes that providing workers with

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<sup>5</sup> 88 Fed. Reg. at 54767 (Proposed 1636.3(a)).

<sup>6</sup> *Id.* at 54773.

<sup>7</sup> See 42 U.S.C. 2000gg(4).

<sup>8</sup> See H.R. REP. NO. 117-27, pt. 1, at 18-21 (2021), <https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf> (explaining that courts have interpreted the Americans with Disabilities Act Amendments Act narrowly such that there “are many cases where courts have found that even severe complications related to pregnancy do not constitute disabilities triggering ADA protection”).

<sup>9</sup> 88 Fed. Reg. at 54767 (Proposed 1636.3(a)(2)).

<sup>10</sup> *Id.* at 54773; U.S. Equal Emp. Opportunity Comm'n, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, at Question 17 (2002), <http://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>.

accommodations to maintain their health can help prevent more severe health complications.<sup>11</sup> Including the need to maintain health or seek care in the definition of “limitation” is therefore critical to the PWFA’s purpose of promoting the health of pregnant and postpartum workers and those affected by related medical conditions.<sup>12</sup> It is especially critical for workers of color—Black and Latina women are more likely to work in physically demanding jobs that can increase their health risks,<sup>13</sup> and Black women are at a higher risk of serious pregnancy-related health complications, such as preterm birth and preeclampsia, as well as maternal death.<sup>14</sup>

## **II. NWLC Strongly Supports the EEOC’s Definition of “Pregnancy, Childbirth, or Related Medical Conditions.”**

NWLC strongly supports the EEOC’s definition of “pregnancy, childbirth, or related medical conditions” in proposed 1636.3(b), which accurately reflects the range of needs and conditions that individuals may experience in relation to pregnancy and is consistent with decades of federal case law and agency guidance interpreting this language.

The term “pregnancy, childbirth, or related medical conditions,” is taken directly from the PDA,<sup>15</sup> and the EEOC correctly interprets this language in the PWFA to align with its interpretations of the same language in the PDA. Congress intended the PWFA to supplement the protections provided to workers under Title VII, as amended by the PDA.<sup>16</sup> Congress’s drafting against the backdrop of the PDA strongly suggests that Congress’s use of terms found in the PDA would be intended to have the same meaning in the PWFA, absent clear indication to the contrary. Moreover, the fact that Congress intended the term “pregnancy, childbirth, or related medical conditions” in the PWFA to have the same meaning as in the PDA is reflected in the legislative history. For example, in a statement on the House floor, lead sponsor of the PWFA, Representative Jerrold Nadler explained that the PWFA covers the same conditions that are protected under the PDA, stating, “The Pregnant Workers Fairness Act aligns with Title VII in providing protections and reasonable accommodations for ‘pregnancy, childbirth, and related medical conditions’, like lactation.”<sup>17</sup>

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<sup>11</sup> See 88 Fed. Reg. at 54773; see also *Prenatal Care*, OFFICE ON WOMEN’S HEALTH, OFFICE OF THE ASSISTANT SECRETARY FOR HEALTH AT THE U.S. DEP’T OF HEALTH & HUMAN SERVICES, <https://www.womenshealth.gov/a-z-topics/prenatal-care> (last visited Oct. 4, 2023) (noting that regular prenatal care appointments are associated with improved health outcomes and can allow for the early treatment and prevention of health problems).

<sup>12</sup> See H.R. REP. NO. 117-27, pt. 1, at 21-22 (2021), <https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf>; 42 U.S.C. 2000gg(4).

<sup>13</sup> Statement of Emily Martin, Subcommittee Hearing on the Pregnant Workers Fairness Act (H.R. 2694) at 3, NAT’L WOMEN’S LAW CTR. (Oct. 22, 201), <https://nwlc.org/wp-content/uploads/2019/10/Statement-of-Emily-Martin-Subcommittee-Hearing-on-the-Pregnant-Workers-Fairness-Act-2019-1.pdf>.

<sup>14</sup> See NAT’L PARTNERSHIP FOR WOMEN AND FAMILIES, BLACK WOMEN’S MATERNAL HEALTH (2018), <https://nationalpartnership.org/report/black-womens-maternal-health/>; Latoya Hill et al., *Racial Disparities in Maternal and Infant Health: Current Status and Efforts to Address Them*, KFF (Nov. 1, 2022), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/racial-disparities-in-maternal-and-infant-health-current-status-and-efforts-to-address-them/>.

<sup>15</sup> 42 U.S.C. § 2000e(k).

<sup>16</sup> H.R. REP. NO. 117-27, pt. 1, at 17 (2021), <https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf> (explaining the need for Congress to act to address gaps in protection for pregnant workers under the PDA).

<sup>17</sup> 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>.

The EEOC has long interpreted the PDA to prohibit discrimination on a wide range of bases, including lactation, infertility or the need for fertility treatments, use of contraception, abortion, and the decision not to have an abortion.<sup>18</sup> Employers and employees have relied on EEOC guidance to understand what constitutes a pregnancy-related condition, and applying the same definition under the PWFA provides important consistency.

The Proposed Rule's inclusion of "termination of pregnancy," including via abortion, within the term "pregnancy, childbirth, or related medical conditions" is specifically supported by legislative, administrative, and judicial authority. In enacting the PDA, Congress expressly declared that "because the [law] applies to all situations in which women are 'affected by pregnancy, childbirth, and related medical conditions,' its basic language covers decisions by women who chose to terminate their pregnancies."<sup>19</sup> The EEOC has consistently interpreted abortion to be a medical condition related to pregnancy, including in its 2015 guidance on the PDA.<sup>20</sup> As the EEOC correctly notes, federal courts have also consistently found that the PDA prohibits discrimination against an employee for obtaining or even

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<sup>18</sup> See generally U.S. Equal Emp. Opportunity Comm'n, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (2015), [https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#\\_ftnref130](https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#_ftnref130) (discussing the EEOC's interpretation of the coverage of the PDA and citing federal case law similarly holding that discrimination based on lactation, infertility treatment, use of contraception, and abortion or the decision not to have an abortion violate the PDA).

<sup>19</sup> H.R. REP. NO. 95-1786, at 4 (1978) (Conf. Rep.), as reprinted in 1978 U.S.C.C.A.N. 4765, 1978 WL 8571. The inclusion of language in the PDA expressly stating that an employer is not required to pay for health insurance benefits reaffirms this interpretation, as it makes clear that Congress understood that without this carve out, abortion would have been included in the PDA's requirement that employers who offer insurance coverage to their employees must include coverage for pregnancy, childbirth, or related medical conditions. See 42 U.S.C. § 2000e(k); U.S. Equal Emp. Opportunity Comm'n, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (2015), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues>. Congress's understanding that the PDA reaches abortion is further confirmed by the fact that the House version of the PDA as initially drafted would have exempted all fringe benefits, including "sick leave plan[s]", from the requirement of equal treatment in the context of abortion— unless the life of the woman was at risk or the woman suffered complications from the abortion. See H.R. REP. NO. 95-95-948 ((1978)), 1978 U.S.C.C.A.N. 4749, 1978 WL 8570. However, during the Conference Committee process, this was subsequently changed to the final PDA language that exempts only health insurance coverage. H.R. REP. NO. 95-1786, at 4 (1978) (Conf. Rep.), as reprinted in 1978 U.S.C.C.A.N. 4765, 1978 WL 8571.

<sup>20</sup> U.S. Equal Emp. Opportunity Comm'n, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* at I.C.4. (2015), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues>; see also U.S. Equal Emp. Opportunity Comm'n, Appendix to Part 1604 – Questions and Answers on the Pregnancy Discrimination Act, Public Law 95-555, 92 Stat. 2076 (1978), 29 C.F.R. Pt. 1604, App. (1986) ("An employer cannot discriminate in its employment practices against a woman who has had an abortion.... All fringe benefits other than health insurance, such as sick leave, which are provided for other medical conditions, must be provided for abortions.").

contemplating an abortion,<sup>21</sup> just as the PDA prohibits discrimination against individuals who refuse to submit to an employer's demand that they seek an abortion.<sup>22</sup>

Not only is the inclusion of abortion in the definition of “pregnancy, childbirth, and related medical conditions” supported by decades of legal authority, but Congress also passed the PWFA in the face of floor statements by legislators who opposed the PWFA precisely because it would require employers to provide accommodations related to abortion.<sup>23</sup> These statements illustrate that Congress understood that “pregnancy, childbirth, or related medical conditions” would be interpreted to include abortion, consistent with prior interpretations under the PDA.

Abortion is a safe, common, and essential component of reproductive health care.<sup>24</sup> By including abortion in the definition of “pregnancy, childbirth, or related medical conditions,” the EEOC recognizes both the longstanding interpretation of this term in the law,<sup>25</sup> as well as the range of health needs that pregnant workers may face that may require reasonable workplace accommodation.<sup>26</sup>

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<sup>21</sup> 88 Fed. Reg. at 54774 & n.11; see, e.g., *Doe v. C.A.R.S. Protection Plus, Ind.*, 527 F.3d 358, 363-64 (3d Cir. 2008) (holding that employer violated the PDA by discriminating against a woman who had an abortion, and that the term “related medical condition” includes abortion); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1213-14 (6th Cir. 1996) (holding that an employer violates the PDA by discriminating against a woman who has or even contemplates having an abortion); *Ducharme v. Crescent City Déjà Vu, L.L.C.*, 406 F.Supp.3d 548, 556 (E.D. La. 2019) (holding that the PDA’s prohibition on adverse employment actions based on pregnancy-related conditions applies to abortion because abortion “is a medical procedure that may be used to treat a pregnancy related medical condition”); see also *Doe v. First Nat. Bank of Chicago*, 668 F. Supp. 1110, 1111-12 (N.D. Ill. 1987), *aff’d*, 865 F.2d 864 (7th Cir. 1989) (stating an assumption that the PDA protects a woman who has an abortion based on the legislative history and EEOC interpretation); *Nat. Conference of Catholic Bishops v. Smith*, 653 F.2d 535, 537 n.2 & 538 (D.C. Cir. 1981) (stating that “related medical conditions” includes abortion in course of dismissing constitutional challenge to PDA).

<sup>22</sup> *Velez v. Novartis Pharmaceuticals Corp.*, 244 F.R.D. 243 (S.D.N.Y. 2007) (including a statement by an employee that she was encouraged by a manager to get an abortion in a list of anecdotal evidence of pregnancy discrimination).

<sup>23</sup> See, e.g., 168 Cong. Rec. S7049 (statement of Sen. Thom Tillis), <https://www.congress.gov/117/crec/2022/12/08/168/191/CREC-2022-12-08-pt1-PgS7049.pdf>; 167 Cong. Rec. H2325, H2330, H2332 (statements of Rep. Letlow, Rep. Good, and Rep. Miller), <https://www.congress.gov/117/crec/2021/05/14/167/84/CREC-2021-05-14-pt1-PgH2321-3.pdf>.

<sup>24</sup> *Facts Are Important: Abortion Is Healthcare*, THE AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/advocacy/facts-are-important/abortion-is-healthcare> (last visited Sept. 18, 2023); *Abortion Access Fact Sheet*, THE AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/advocacy/abortion-is-essential/come-prepared/abortion-access-fact-sheet> (last visited Oct. 4, 2023).

<sup>25</sup> Interpreting “pregnancy, childbirth, or related medical conditions” to exclude abortion would have been inconsistent with the history of the term and likely arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

<sup>26</sup> As noted by Senator Casey (D-PA), the PWFA does not require that employers provide any specific across-the-board accommodation related to abortion, such as leave, in all cases. See 168 Cong. Rec. S7,050 (statement of Sen. Casey), <https://www.congress.gov/117/crec/2022/12/08/168/191/CREC-2022-12-08-senate.pdf>. As with any other limitation related to pregnancy, childbirth, or related medical conditions, the PWFA does require employers to provide accommodation for abortion in circumstances where there is a need for accommodation, when the accommodation is reasonable and does not impose undue hardship.

### III. The EEOC Should Clarify Its Definition of “Employee Representative” to Protect the Agency of Pregnant Workers.

The PWFA makes clear that an employee’s representative can communicate the employee’s limitation to the employer.<sup>27</sup> Proposed 1636.3(c) incorporates the ADA’s definition of “employee representative,”<sup>28</sup> which includes family members, friends, health care providers, or other representatives.<sup>29</sup>

It is important that a third party be able to communicate an employee’s limitation to the employer in certain circumstances. For example, an employee may be hospitalized suddenly or become incapacitated and require a third party to communicate the situation to the employer. In some cases, an employee may also prefer for her health care provider to speak directly with the employer about her limitation and need for accommodation. However, third party communications can also raise concerns about ensuring the agency of the pregnant employee, especially given a long history of persistent paternalism, stereotypes, and incorrect assumptions about the capabilities of pregnant workers.<sup>30</sup>

To provide additional guidance to employers with respect to the “employee representative,” we recommend (1) changing the example in the proposed appendix to align more closely with the purpose of the employee representative, and (2) clarifying the role of the “employee representative” in the discussion of the interactive process. Such guidance will also be useful to individuals seeking to act as an employee representative under the PWFA.

We strongly suggest that the EEOC change Example 1636.3 #4 in the proposed appendix, which involves a spouse who communicates the employee’s need for light duty to the employer.<sup>31</sup> We recommend replacing this example with a fact pattern in which an employee’s spouse informs her employer that she has been hospitalized suddenly due to a serious pregnancy-related complication, and that she requires

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<sup>27</sup> 42 U.S.C. 2000gg(4).

<sup>28</sup> 88 Fed. Reg. at 54767 (Proposed 1636.3(c)).

<sup>29</sup> U.S. Equal Emp. Opportunity Comm’n, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, at Question 2 (2002), <http://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>.

<sup>30</sup> See Reginald A. Byron & Vincent R. Roscigno, *Relational Power, Legitimation, and Pregnancy Discrimination*, 28 GENDER & SOCIETY, 435, 439 (2014) (noting that pregnant workers are often viewed as less competent than other workers); Jeanine L. M. Skorinko et al., *Overlapping Stigmas of Pregnancy, Motherhood, and Weight: Policy Implications for Employment and Higher Education*, 7 POL’Y INSIGHTS FROM THE BEHAV. & BRAIN SCIS. 123, 124 (noting stereotypes of pregnant workers as needing accommodations).

<sup>31</sup> In constructing its examples, the EEOC should consider the impact of its proposed rule on survivors of gender-based violence, especially in light of its FY 2024-2028 Strategic Enforcement Plan, which identifies survivors of gender-based violence as “vulnerable workers.” U.S. EQUAL EMP. OPPORTUNITY COMM’N, STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2024-2028 6, <https://www.eeoc.gov/sites/default/files/2023-09/SEP%20FY%2020242028%20FINAL%20APPROVED.pdf>. The concept of the “employee representative,” and particularly examples in which a spouse communicates directly with a partner’s employer about limitations that may affect their work, may raise concerns related to gender-based violence as abusive partners frequently interfere with and sabotage their partners’ jobs. See Anne P. DePrince, *Why Intimate Partner Abuse Is a Workplace Issue*, PSYCH. TODAY (Sept. 28, 2022), <https://www.psychologytoday.com/us/blog/from-awareness-to-action/202209/why-intimate-partner-abuse-is-a-workplace-issue>.

time off. An example along these lines better illustrates the core purpose of the employee representative and is consistent with examples provided in the EEOC's guidance interpreting the ADA.<sup>32</sup>

In addition, we urge the EEOC to make clear in 1636.3(k) and in the final appendix that while a third-party representative can communicate an employee's limitation to the employer, the employer must engage in the interactive process directly with the employee who needs the accommodation.<sup>33</sup> This clarification is essential to guard against paternalism and unwanted accommodations requests by third parties, and to ensure that workers have agency to communicate their own needs throughout the interactive process.

Finally, we encourage the EEOC to add "co-worker," "union representative," and "manager" to the definition of "employee representative" in 1636.3(c), recognizing that other individuals in the workplace may be in a position to communicate with the employer. We also recommend that the EEOC clarify the meaning of "other representative" by replacing this term with more descriptive language—for example, "any other person who communicates to the employer the needs of the employee or applicant."

#### **IV. The EEOC Should Modify Its Definition of "Communicated to the Employer" to Make Clear That the Employee Needs Only to Communicate a Limitation That Affects Their Ability to Do Their Job.**

NWLC appreciates the EEOC's overall approach to interpreting "communicated to the employer." Proposed 1636.3(d) reflects the realities of how employees typically communicate their needs to their employers. In particular, we support the language in proposed 1636.3(d) and the proposed appendix specifying that workers can communicate a limitation and need for accommodation orally; that workers need not use specific words or legal terms; and that employers cannot require the use of a particular format for initiating an accommodation request.<sup>34</sup>

We encourage the EEOC to modify its definition of "communicated to the employer," however, to further reflect the realities of the workplace. Specifically, we urge the EEOC to clarify that to make a limitation "known," an employee (or their representative) need only state that they have a limitation related to pregnancy, childbirth, or a related medical condition that affects their ability to do their job.

The PWFA provides that a "limitation" is "known" when the employee (or their representative) has communicated the condition to the employer.<sup>35</sup> Once the limitation is known, the employer is required to provide a reasonable accommodation under the statute unless doing so would impose an undue hardship.<sup>36</sup> The statute reflects the fact that workers may not know to ask for an accommodation or have enough information to know whether an accommodation might be possible or appropriate. For example, the EEOC has recognized that "an applicant needing an accommodation may not know enough about the

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<sup>32</sup> See U.S. Equal Emp. Opportunity Comm'n, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, at Question 2 Example A (2002), <http://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> (describing an example of an employee whose spouse phones the employer and informs her that the employee needed to be hospitalized for a medical emergency due to multiple sclerosis).

<sup>33</sup> See *infra* Section A.XI.

<sup>34</sup> 88 Fed. Reg. at 54767 (Proposed 1636.3(d)(1)-(3)); *Id.* at 54775.

<sup>35</sup> 42 U.S.C. 2000gg(4).

<sup>36</sup> 42 U.S.C. 2000gg-1(1).

equipment used by the covered entity or the exact nature of the work site to suggest an appropriate accommodation.”<sup>37</sup> Within the structure of the statute, then, communicating the limitation to their employer serves to put the employer on notice that they may need to engage in the interactive process with the worker to identify reasonable accommodations.

Because the statute does not require that the employee communicate that they need an accommodation, the Proposed Rule should not explicitly or implicitly impose such a requirement. As written, proposed 1636.3(d)(3) frames the required communication as a “request” and requires that a worker communicate to the employer both that she “[h]as a limitation” and “[n]eeds an adjustment or change at work” (emphasis added).<sup>38</sup> We recommend revising Section 1636.3(d)(3) to read: “The employee or applicant, or a representative of the employee or applicant, need only communicate to the covered entity that the employee or applicant: (i) has a limitation, and (ii) that the limitation affects their ability to do their job.” This revision is consistent with the definition of “known limitation” in 42 U.S.C. 2000gg(4) and serves to put the employer on notice of their obligations under the PWFA.

This revision is also consistent with examples already included in the proposed appendix, which appropriately illustrate that a worker need not expressly communicate that an accommodation is being sought in order to trigger employer responsibilities under the PWFA. For example, Example 1636.3 #1 in the proposed appendix shows that such responsibilities are triggered when a pregnant worker tells her supervisor that she is struggling to get to work on time due to morning sickness.<sup>39</sup>

Although an employee’s communication of a known limitation puts the employer on notice that the employer may need an accommodation, it is important that an employer not assume the need for an accommodation or unilaterally impose an accommodation that the employee does not want. Therefore, we encourage the EEOC to reaffirm in the proposed appendix that when an employee communicates a limitation that affects their ability to do their job, the appropriate response is to engage with the employee in an interactive process to determine what, if any, accommodation is appropriate.

Additionally, we encourage the EEOC to modify the list of employer representatives to whom the employee may communicate. The proposed appendix correctly notes the importance of allowing workers to communicate about their limitations and need for accommodations with the individuals who regularly assign them tasks.<sup>40</sup> To better capture the range of individuals who may fill this supervisory role, we encourage the EEOC to revise the list of employer representatives in proposed 1636.3(d) to replace “someone who has supervisory authority for the employee”<sup>41</sup> with “someone who plays a supervisory role.”

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<sup>37</sup> 88 Fed. Reg. at 54787.

<sup>38</sup> *Id.* at 54767 (Proposed 1636.3(d)(3)) (“To request a reasonable accommodation, the employee or applicant...need only communicate to the covered entity that the employee or applicant: (i) Has a limitation, and (ii) Needs an adjustment or change at work.”) (emphasis added).

<sup>39</sup> *Id.* at 54775.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 54767 (Proposed 1636.3(d)).



**V. We Encourage the EEOC to Clarify the Framework for Determining Whether an Employee or Applicant Is “Qualified” and Extend Its Definition of “In the Near Future.”**

a. We Support the Overall Framework for Determining If an Employee Is “Qualified.”

The PWFA makes clear that an employee or applicant who requires the temporary suspension of an essential job function may still be a “qualified employee” under the law. Under the PWFA, an employee or applicant who is unable to perform an essential function of the position is still a “qualified employee” if: (a) the inability to perform an essential function is temporary, (b) the essential function could be performed “in the near future,” and (c) the inability to perform that function can be reasonably accommodated.<sup>42</sup> We appreciate the EEOC’s thoughtful framework for interpreting this provision. The proposed rule is generally consistent with the language and intent of the statute and reflects the practical needs of pregnant and postpartum workers—and those affected by related medical conditions—while limiting the burden on employers. We encourage the EEOC to clarify and strengthen the proposed rule as outlined below.

b. The EEOC Should Change the Timeframe for “In the Near Future” to One Year, Rather Than Forty Weeks.

The EEOC has asked for comments on “whether the definition of “in the near future” post-pregnancy should be one year rather than generally forty weeks.”<sup>43</sup> We appreciate the EEOC’s rejection of shorter timeframes for “in the near future,” recognizing that defining “in the near future” as anything shorter than the duration of a full-term pregnancy would “run counter to the central purpose of the PWFA”.<sup>44</sup> However, we strongly encourage the EEOC to revise proposed 1636.3(f)(2)(ii) to change the timeframe for “in the near future” to one year rather than forty weeks.

A one-year timeframe is supported by medical evidence. The Centers for Disease Control and Prevention’s (CDC) Pregnancy Mortality Surveillance System (PMSS) defines pregnancy-related deaths to include deaths that occur up to one year postpartum,<sup>45</sup> demonstrating the importance of the one-year timeframe postpartum. The proposed appendix also cites research demonstrating that serious physical and mental health conditions are common in the first year after childbirth.<sup>46</sup> This research illustrates that allowing a temporary excusal of an essential function for one year postpartum is critical for maternal and infant health, and especially important for pregnant people who are at a higher risk—for example, Black women are three times as likely to die of pregnancy-related causes than white women.<sup>47</sup> We strongly

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<sup>42</sup> 42 U.S.C. 2000gg(6).

<sup>43</sup> 88 Fed. Reg. at 54725.

<sup>44</sup> *Id.* at 54777.

<sup>45</sup> Susanna Trost et. al., *Pregnancy-Related Deaths: Data from Maternal Mortality Review Committees in 36 US States, 2017–2019*, CTFS. FOR DISEASE CONTROL & PREVENTION (2022), <https://www.cdc.gov/reproductivehealth/maternal-mortality/erase-mm/data-mmrc.html> (“The Pregnancy Mortality Surveillance System (PMSS) defines a pregnancy-related death as a death while pregnant or within 1 year of the end of pregnancy from any cause related to or aggravated by the pregnancy”).

<sup>46</sup> 88 Fed. Reg. at 54777 & n. 27 (citing Susanna Trost et. al., *Pregnancy-Related Deaths: Data from Maternal Mortality Review Committees in 36 U.S. States, 2017-2019*, CTFS. FOR DISEASE CONTROL & PREVENTION (2022), <https://www.cdc.gov/reproductivehealth/maternal-mortality/erase-mm/data-mmrc.html>).

<sup>47</sup> *Working Together to Reduce Black Maternal Mortality*, CTFS. FOR DISEASE CONTROL & PREVENTION (April 3, 2023), <https://www.cdc.gov/healthequity/features/maternal-mortality/index.html>.

urge the EEOC to revise its definition of “in the near future” in proposed 1636.3(f)(2)(ii) to reflect this one-year timeframe and ensure that workers receive the accommodations they need during this critical period.

The EEOC should also make clear that this one-year timeframe applies regardless of whether the employee is “post-pregnancy,” given that nothing in the text of the statute suggests that the meaning of “in the near future” varies depending on whether the employee is currently pregnant or not. Applying the one-year timeframe in all situations is consistent with the EEOC’s position that providing one standard timeframe will provide clarity, reduce litigation over the meaning of “in the near future,” and appropriately shift the focus to the undue hardship inquiry.<sup>48</sup>

c. We Recommend That the EEOC Clarify the Meaning of “Could be Performed in the Near Future.”

We recommend that the EEOC clarify its interpretation of the language “could be performed in the near future.”<sup>49</sup> “In the near future” is defined in proposed 1636.3(f)(2)(ii) to mean that “the ability to perform the essential function(s) will generally resume within forty weeks of its suspension.”<sup>50</sup>

The PWFA and proposed 1636.3(f)(2)(ii) require only that the essential function “could” be performed in the near future,<sup>51</sup> and the EEOC therefore should not require a higher level of certainty that the function “will” resume within forty weeks. We encourage the EEOC to revise 1636.3(f)(2)(ii) by replacing the language, “The essential function(s) could be performed in the near future, where ‘in the near future’ means the ability to perform the essential function(s) will generally resume within . . .” with the language, “The essential function(s) could be performed in the near future, where ‘could be performed in the near future’ means that the ability to perform the essential function(s) could generally be expected to resume” within the relevant timeframe. (See above for our discussion of the appropriate interpretation of the relevant timeframe.).

As the proposed appendix notes, the employer is not required to suspend an essential function indefinitely. The actual length of time for which the function will be suspended will ultimately depend on what the employee actually requires and what the employer can reasonably accommodate (and the employer is not obligated to suspend or continue to suspend the essential function if such suspension would impose an undue hardship),<sup>52</sup> but the employee should be considered “qualified” at the outset if the function could generally be expected to resume within the relevant timeframe, even if this is not a certainty.

Moreover, we encourage the EEOC to provide examples that more clearly illustrate the interaction between “temporary” and “in the near future,” including examples in which an employee has a temporary limitation that requires a suspension of an essential function but that may not resolve “in the near future.”<sup>53</sup>

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<sup>48</sup> 88 Fed. Reg. at 54763.

<sup>49</sup> *Id.* at 54767 (Proposed 1636.3(f)(2)(ii)); *Id.* at 54777.

<sup>50</sup> *Id.*

<sup>51</sup> 42 U.S.C. 2000gg(6); 88 Fed. Reg. at 54767 (Proposed 1636.3(f)(2)(ii)).

<sup>52</sup> 88 Fed. Reg. at 54777.

<sup>53</sup> Proposed 1636.3(f)(2)(i) defines “temporary” to mean “lasting for a limited time, not permanent, and may extend beyond ‘in the near future.’” *Id.* at 54767 (Proposed 1636.3(f)(2)(i)).

We also recommend that the EEOC add an example in the proposed appendix involving a lactating employee who needs to avoid exposure to certain chemicals and therefore requires the suspension of an essential function. In this circumstance, the employee should be deemed “qualified” at the outset because the limitation is temporary and the essential function could generally be expected to be performed within a year, even if this is not a certainty. It is important to provide an example related to lactation because, although some parents may express milk for longer than one year,<sup>54</sup> the determination of whether the employee is qualified at the outset is based on whether the essential function could generally be expected to resume within one year, and employees should not be deemed unqualified at the outset based on the possibility that the need for suspension of an essential function could extend beyond one year. As noted above, this does not mean that the employer in this example must suspend the essential function for longer than one year or when it poses an undue hardship.

d. The EEOC Should Clearly State in the Regulation That the Timeframe for “In the Near Future” Restarts with Each New Accommodation Need.

The EEOC has also asked whether periods of temporary suspension of an essential function during pregnancy and post-pregnancy should be combined.<sup>55</sup> In response, we recommend that the EEOC not combine periods of temporary suspension. Instead, the EEOC should make clear that the calculation of “in the near future” restarts each time there is a need for a new accommodation (and not just at the conclusion of the pregnancy).

The EEOC correctly recognizes that workers will often be unable to anticipate their future limitations, and therefore determinations about whether an employee is qualified should be made based on the specific situation and accommodation under consideration in a given moment.<sup>56</sup> The proposed appendix alludes to the fact that the timeframe for “in the near future” restarts with each new accommodation need when it states that “the determination of ‘in the near future’ shall be made when the employee asks for each accommodation that requires the suspension of one or more essential functions.”<sup>57</sup> We suggest that proposed 1636.3(f)(2)(ii) clearly state that the timeframe restarts whenever a new need for an accommodation arises, including but not limited to following return from childbirth leave.

**VI. The EEOC Should Modify the List of Factors and Clarify How Evidence Should Be Considered in Determining If a Function Is “Essential.”**

a. The EEOC Should Expand the List of Factors in 1636(g)(1) to Include Whether the Function Is Essential During the Limited Time for Which an Accommodation Is Needed.

In proposed 1636.3(g)(1), the EEOC defines essential functions consistent with the regulations implementing the ADA and provides a non-exhaustive list of situations where a job function may be

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<sup>54</sup> Leading medical organizations recommend that parents express milk for at least two years following childbirth. See Joan Younger Meek et. al., *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>; *Breastfeeding: Recommendations*, WORLD HEALTH ORG., [https://www.who.int/health-topics/breastfeeding#tab=tab\\_2](https://www.who.int/health-topics/breastfeeding#tab=tab_2) (last visited Oct. 4, 2023).

<sup>55</sup> 88 Fed. Reg. at 54725.

<sup>56</sup> *Id.* at 54777-78.

<sup>57</sup> *Id.* at 54777.

considered essential; this list mirrors the ADA regulations.<sup>58</sup> The EEOC seeks comment on whether additional factors should be considered in determining whether a function is essential under the PWFA, and specifically whether the factors should account for the temporary nature of most limitations under the PWFA.<sup>59</sup> In response, we encourage the EEOC to add to Section 1636.3(g)(1) a subsection (iv): “The function is essential during the limited time period for which the accommodation is needed.”

This factor reflects the fact that an employee’s job responsibilities may vary over time, and because most pregnancy-related limitations are temporary, a function that is essential to a position overall may not be essential during the limited time for which an accommodation is needed. For example, an office worker may be required to perform physical tasks, such as lifting boxes and climbing ladders, to set up for an annual conference; these duties may be an essential part of her job, but if they are required only in the days leading up to the conference each year, and she does not require an accommodation during that time period, then these duties should not be considered essential in the context of her request for accommodation under the PWFA.

b. The EEOC Should Clarify How Evidence Should Be Used to Decide Whether a Function is Essential.

In proposed 1636.3(g)(2), the EEOC adopts a non-exhaustive list of evidence to consider in determining whether a function is essential.<sup>60</sup>

We urge the EEOC to specify that no one piece of evidence included in section 1636.3(g)(2) is dispositive. The statutory text of the ADA specifies that in determining whether a job function is essential, “consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.”<sup>61</sup> The PWFA does not incorporate this statutory language from the ADA, suggesting that the employer’s judgment and written job descriptions should not have primacy under the PWFA. The Proposed Rule adopts a non-exhaustive list of evidence to consider from the regulations interpreting the ADA, but nothing in the PWFA suggests that any one of these factors should be dispositive.<sup>62</sup>

**VII. We Encourage the EEOC to Strengthen Its Discussion of Reasonable Accommodations.**

a. The EEOC Should Clarify the Proposed Rule’s Provisions Related to Leave as an Accommodation.

We appreciate the EEOC’s thorough discussion of reasonable accommodation and the inclusion of detailed examples of potential accommodations. The proposed regulation adopts the definition of “reasonable accommodation” from the regulations interpreting the ADA<sup>63</sup> and makes appropriate additions that will help ensure that important accommodations are accessible to pregnant workers.

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<sup>58</sup> *Id.* at 54779; 29 C.F.R. § 1630.2(n)(2023).

<sup>59</sup> 88 Fed. Reg. at 54726.

<sup>60</sup> *Id.* at 54768 (Proposed 1636.3(g)(2)).

<sup>61</sup> 42 U.S.C. § 12111.

<sup>62</sup> 29 CFR § 1630.2(n)(3).

<sup>63</sup> 88 Fed. Reg. at 54768 (Proposed 1636.3(h)); 29 C.F.R. § 1630.2(o) (2023).

We especially commend the EEOC for specifying that paid or unpaid leave can be a reasonable accommodation under the PWFA.<sup>64</sup> Leave has long been recognized as a potential reasonable accommodation under the ADA.<sup>65</sup> The availability of leave as an accommodation is critical to the realization of the purposes of the PWFA. Many workers in the U.S., especially workers in low-paid jobs, have limited access to sick days or medical leave.<sup>66</sup> In passing the PWFA, Congress specifically recognized that workers may use up their limited leave time early in pregnancy, and that workers who exhaust their leave are often forced out of their jobs.<sup>67</sup> By making clear that leave may be a reasonable accommodation under the PWFA, even if it is not otherwise available as an employee benefit, the Proposed Rule ensures that all workers have access to leave when they need it to accommodate limitations related to pregnancy, childbirth, or related medical conditions, absent undue hardship.

We encourage the EEOC to revise the language in proposed 1636.3(i)(2) and 1636.3(i)(3)(i), which specify the availability of leave as a potential accommodation “to recover from childbirth, miscarriage, stillbirth, or medical conditions related to pregnancy or childbirth . . . .”<sup>68</sup> We suggest changing this language to read “to recover from childbirth, termination of pregnancy, including via miscarriage, stillbirth, or abortion, or medical conditions related to pregnancy or childbirth . . . .” This language makes clear that leave is a potential accommodation to recover from termination of pregnancy by any means, and it is consistent with how termination of pregnancy is discussed throughout the proposed rule, including in the definition of “related medical conditions.”<sup>69</sup>

b. The Final Appendix Should Describe Additional Situations in Which Ordinary Workplace Policies May Operate to Penalize Employees for Using Accommodations.

We appreciate the EEOC’s thoughtful consideration and examples of the ways in which ordinary workplace policies may result in employees being penalized for using accommodations.<sup>70</sup> The EEOC has

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<sup>64</sup> 88 Fed. Reg. at 54768 (Proposed 1636.3(i)(3)).

<sup>65</sup> See 29 C.F.R. § 1630.2(o)(2)(ii) (2023); 29 C.F.R. part 1630 app. 1630.2(o); U.S. Equal Emp. Opportunity Comm’n, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, at n. 48 (2002), <http://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>.

<sup>66</sup> See JASMINE TUCKER AND JULIE VOGTMAN, NAT’L WOMEN’S LAW CTR., *WHEN HARD WORK IS NOT ENOUGH: WOMEN IN LOW-PAID JOBS* 15 (Jul. 2023), [https://nwlc.org/wp-content/uploads/2020/04/%C6%92.NWLC Reports HardWorkNotEnough LowPaid 2023.pdf](https://nwlc.org/wp-content/uploads/2020/04/%C6%92.NWLC%20Reports%20HardWorkNotEnough%20LowPaid%202023.pdf); WHY LOW-WAGE WORKERS NEED THE HEALTHY FAMILIES ACT, CLASP (Mar. 2020), [https://www.clasp.org/wp-content/uploads/2022/01/2020\\_why\\_low\\_wage\\_workers.pdf](https://www.clasp.org/wp-content/uploads/2022/01/2020_why_low_wage_workers.pdf).

<sup>67</sup> H.R. REP. NO. 117-27, pt. 1, at 24-25 (2021), <https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf>.

<sup>68</sup> 88 Fed. Reg. at 54768 (Proposed 1636.3(i)(2)-(i)(3)(i)). Section 1636.3(i)(2) uses this language in discussing leave in the context of job restructuring, while Section 1636.3(i)(3)(i) discusses the reasonable accommodation of leave.

<sup>69</sup> *Id.* at 54767 (Proposed 1636.3(b)). Referring to “termination of pregnancy” broadly is important for several reasons, including the fact that pregnancy outcomes can be complex and ambiguous. See, e.g., Gabriela Weigel et al., *Understanding Pregnancy Loss in the Context of Abortion Restrictions and Fetal Harm Laws*, KFF (Dec. 4, 2019), <https://www.kff.org/womens-health-policy/issue-brief/understanding-pregnancy-loss-in-the-context-of-abortion-restrictions-and-fetal-harm-laws/> (noting a lack of consensus around categorizations of pregnancy loss); Alicia J. VandeVusse et al., “Technically an Abortion”: *Understanding Perceptions and Definitions of Abortion in the United States*, 335 J. Soc. Sci. & Med. 116216 (2023) (noting that people’s own understanding of their pregnancy outcomes can be complex). Given such ambiguities, availability of leave should not turn on these distinctions.

<sup>70</sup> 88 Fed. Reg. at 54781.

asked for comments on other situations where this may apply. In response, we suggest noting in the final appendix that the universal application of “no-fault” attendance/tardy control policies, without consideration of individual circumstances, may result in the penalization of employees who receive accommodations under the PWFA. For example, an employee who receives an accommodation of flexible scheduling due to nausea or to attend health care appointments may be automatically penalized under a “no-fault” attendance policy after a certain number of absences.<sup>71</sup>

c. The EEOC Should Clarify Language Related to Production Standards and Quotas.

We encourage the EEOC to clarify that production standards may need to be altered when employees receive accommodations under the PWFA, and that penalizing employees for failing to meet production standards due to an accommodation violates the PWFA.<sup>72</sup>

The EEOC should clearly distinguish the treatment of production standards under the PWFA from their treatment under the ADA. The proposed appendix refers to the ADA provisions on production standards and quotas, noting that under the ADA, “a reasonable accommodation cannot excuse an employee from complying with valid production standards that are applied uniformly to all employees.”<sup>73</sup> The principle that reasonable accommodations do not excuse employees from meeting production standards under the ADA stems from the ADA’s requirement that qualified employees must be able to perform the essential functions of the position, with or without a reasonable accommodation.<sup>74</sup> By contrast, under the PWFA, the statute specifies that essential job functions can be temporarily suspended.<sup>75</sup> It follows that the production standards associated with suspended functions may also need to be temporarily suspended, and the EEOC correctly recognizes this in its discussion of temporary suspension of essential functions.<sup>76</sup> We therefore recommend that the EEOC remove or distinguish the reference to the ADA’s treatment of production standards, in order to create consistency throughout the final appendix and

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<sup>71</sup> See, e.g., DINA BAKST ET. AL., 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](https://www.abetterbalance.org/wp-content/uploads/2020/06/Misled_and_Misinformed_A_Better_Balance-1-1.pdf).

<sup>72</sup> This is particularly important given the increasing prevalence of electronic surveillance and automated management (ESAM) systems in the workplace. One common use of ESAM is to impose production quotas, which are designed to maximize productivity and may operate in a way that fails to accommodate protected workers. See generally Jenny R. Yang, *Adapting Our Anti-Discrimination Laws to Protect Workers’ Rights in the Age of Algorithmic Employment Assessments and Evolving Workplace Technology*, 35 ABA J. LABOR & EMP. L. 207, 234 (2021), [https://www.americanbar.org/content/dam/aba/publications/aba\\_journal\\_of\\_labor\\_employment\\_law/v35/no-2/adapting-our-anti-discrimination-laws.pdf](https://www.americanbar.org/content/dam/aba/publications/aba_journal_of_labor_employment_law/v35/no-2/adapting-our-anti-discrimination-laws.pdf).

<sup>73</sup> 88 Fed. Reg. at 54780 & n. 49 (citing U.S. Equal Emp. Opportunity Comm’n, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, at text accompanying n. 14 (2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>).

<sup>74</sup> See U.S. Equal Emp. Opportunity Comm’n, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, at text accompanying n. 12-14 (2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>.

<sup>75</sup> 42 U.S.C. 2000gg(6).

<sup>76</sup> 88 Fed. Reg. at 54778 (“Depending on how the temporary suspension is accomplished, the covered entity may have to prorate or change a performance or production standard so that the accommodation is effective.”).

make clear that under the PWFA, production standards may need to be temporarily altered or suspended.

Beyond the context of temporary suspension of essential functions, we appreciate the inclusion of Example 1636.3 #30 in the proposed appendix, which illustrates that an employer cannot penalize a worker for failing to meet production standards due to additional breaks the worker receives as a reasonable accommodation; penalizing her in this scenario would “render the additional breaks an ineffective accommodation” and could also be retaliation.<sup>77</sup>

In addition to providing this specific factual example, we recommend that the EEOC provide a clear statement in the final appendix that penalizing an employee for failing to meet production standards due to a reasonable accommodation can (1) constitute a failure to provide a reasonable accommodation in violation of 42 U.S.C. 2000gg-1(1) because it renders the accommodation ineffective, and (2) constitute retaliation in violation of 42 U.S.C. 2000gg-2(f).

d. The EEOC Should Clarify That the PWFA Requires Accommodations That Address Employees’ Immediate Needs.

In its discussion of reasonable accommodations, the EEOC encourages employers to provide “interim accommodations” as a “best practice” in certain situations, such as where an employee has a sudden or urgent limitation that requires accommodation,<sup>78</sup> or while the employee is obtaining documentation.<sup>79</sup> While we agree that employers should provide accommodations in these situations, we believe that these accommodations are required by the PWFA.

The term “interim accommodation” does not come from the ADA. The EEOC has recognized that “temporary accommodations may enable a worker who has made a request for reasonable accommodation under the ADA to continue working while a final determination of whether to grant or deny the accommodation is being made,” but such accommodations are not required under the ADA.<sup>80</sup> By contrast, the PWFA already requires accommodations that are nearly always temporary, so it is unnecessary and contrary to the purpose of the PWFA to create a separate category of short-term, temporary accommodations (i.e., “interim accommodations”).<sup>81</sup>

The PWFA requires an employer to provide a reasonable accommodation once the employer has been put on notice that an employee has a limitation that may necessitate an accommodation, unless doing

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<sup>77</sup> *Id.* at 54784.

<sup>78</sup> *Id.* at 54787.

<sup>79</sup> *Id.*

<sup>80</sup> U.S. Equal Emp. Opportunity Comm’n, *Final Report on Best Practices for Employment of People with Disabilities in the State Government* II.B.1 (2005), <http://www.eeoc.gov/laws/guidance/finalreport-best-practices-employment-peopledisabilities-state-government>.

<sup>81</sup> See 88 Fed. Reg. at 54717 (noting that “given the nature of the accommodations required by the PWFA, virtually all will be temporary.”). One of the problems that the PWFA was meant to address is the fact that short-term accommodations are not covered by the ADA. See H.R. REP. NO. 117-27, pt. 1, at 20-21 (2021), <https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf> (“In addition to the general reticence to equate pregnancy and disability, courts have sometimes pointed to the short duration of pregnancy complications as a reason to reject an ADA claim. The EEOC’s guidance on the ADA states that, ‘[i]mpairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe.’ Courts continue to read a durational requirement into the ADA.”).

so would pose an undue hardship.<sup>82</sup> This requirement applies even in situations where an employee has a sudden or urgent limitation or where an extended interactive process may be needed to identify an appropriate accommodation in the long term; the PWFA does not require that the employer and employee go through an interactive process before agreeing to an accommodation,<sup>83</sup> and the statute therefore does not allow the employer to simply do nothing to address the employee's known limitation until such an interactive process has been completed. Of course, an employee is not required to accept an accommodation not arrived at through the interactive process<sup>84</sup> and therefore cannot be forced to accept a short-term accommodation while the interactive process is ongoing, but this does not absolve the employer of the requirement to *offer* a reasonable accommodation to address the employee's immediate needs once the employee has communicated a known limitation. The EEOC should make clear in the final appendix that the PWFA requires employers to offer reasonable accommodations to address employees' immediate limitations.

If the EEOC chooses to preserve the concept of "interim accommodations," either as a best practice or as a required category of accommodation, we encourage the EEOC to provide additional clarity on the meaning of interim accommodation. This could be done through including the following definition in the Proposed Rule: "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 while the employer and employee engage in the interactive process or the employer implements a reasonable accommodation arrived at through the interactive process." In addition to providing a definition in the rule, the EEOC should clearly state in the final appendix that any interim accommodation provided must be an accommodation that meets the employee's needs and does not constitute an adverse action against the employee.

#### **VIII. NWLC Encourages the EEOC to Provide Additional Examples of Reasonable Accommodations.**

- a. The Proposed Appendix Should Include Additional Examples of Accommodations to Alleviate Pain or Risk.

We appreciate the EEOC's highlighting in the proposed appendix the critical nature of accommodations that alleviate increased pain and health risks.<sup>85</sup> Accommodations that alleviate increased pain and risk are consistent with the language of the PWFA, which does not require the known limitation to meet a particular level of severity.<sup>86</sup> Highlighting the law's purpose as it relates to risk and pain avoidance is critical, especially for women of color, who are more likely both to work in physically demanding jobs,<sup>87</sup> and to have their employers and healthcare providers underestimate their pain and apply higher levels of risk tolerance toward them.<sup>88</sup>

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<sup>82</sup> 42 U.S.C. 2000gg-1(1); 88 Fed. Reg. at 54770 (Proposed 1636.4(a)).

<sup>83</sup> 88 Fed. Reg. at 54789.

<sup>84</sup> 42 U.S.C. 2000gg-1(2).

<sup>85</sup> 88 Fed. Reg. at 54779.

<sup>86</sup> See 88 Fed. Reg. at 54773; 42 U.S.C. 2000gg(4).

<sup>87</sup> See NAT'L LATINA INST. FOR REPROD. HEALTH & NAT'L WOMEN'S LAW CTR., ACCOMMODATING PREGNANCY ON THE JOB: THE STAKES FOR WOMEN OF COLOR AND IMMIGRANT WOMEN 1 (May 2014), [https://nwlc.org/wp-content/uploads/2015/08/the\\_stakes\\_for\\_woc\\_final.pdf](https://nwlc.org/wp-content/uploads/2015/08/the_stakes_for_woc_final.pdf).

<sup>88</sup> Jamila Taylor et al., *Eliminating Racial Disparities in Maternal and Infant Mortality* 5, 28, 64, CTR. FOR AM. PROGRESS (May 2019), <https://www.americanprogress.org/wp-content/uploads/sites/2/2019/04/Maternal-Infant-Mortality-report.pdf>.



We encourage the EEOC to remove the language in proposed 1636.3(i)(2) specifying that accommodations to alleviate increased pain or risk must be “due to the employee’s or applicant’s known limitation.”<sup>89</sup> This qualification is unnecessary because the entire paragraph describes reasonable accommodations to address “known limitations,” and none of the other listed examples includes a similar qualification. Adding this qualification only for this category of accommodations may create confusion by implying that accommodations to alleviate pain or risk must be more closely tied to known limitations than other accommodations.

We also recommend that the EEOC include additional examples in the final appendix that illustrate reasonable accommodations to alleviate increased pain, discomfort, or risk.<sup>90</sup>

b. The Proposed Rule Should Include Additional Examples of Accommodations Related to Lactation.

We appreciate the Proposed Rule’s attention to reasonable accommodations related to lactation, including the specific reference to the PUMP for Nursing Mothers Act<sup>91</sup> and the identification of specific accommodations related to pumping.<sup>92</sup> We also recognize that lactating employees may require other reasonable accommodations that are unrelated to pumping, such as needing accommodations to avoid exposure to harmful substances.<sup>93</sup> We encourage the EEOC to highlight some of these other lactation accommodations by adding a new section 1636.3(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 chestfeeding; avoid or alleviate lactation-related health complications; or reduce the risk of contaminating human milk produced by the employee.”

The EEOC should include examples in the final appendix that illustrate lactation accommodations unrelated to pumping.

c. The EEOC Should Provide Additional Examples of Reasonable Accommodations for “Related Medical Conditions.”

Finally, the EEOC seeks comment on whether more examples of reasonable accommodations would be helpful and, if so, which conditions and accommodations should be the focus of these examples. We suggest that it would be helpful to include examples of reasonable accommodations for related medical conditions. An example could include an employee who is undergoing fertility treatment and requires additional breaks throughout the day to administer medication.

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<sup>89</sup> 88 Fed. Reg. at 54768 (Proposed 1636.3(i)(2)).

<sup>90</sup> These examples could include accommodations to avoid the risk of falling; avoid risks posed by excessive heat or by working overnight shifts; or alleviate pain caused by sitting upright.

<sup>91</sup> 29 U.S.C. § 218d.

<sup>92</sup> 88 Fed. Reg. at 54768 (Proposed 1636.3(i)(4)).

<sup>93</sup> See, e.g., WORKLIFE L. & ACLU, PUMPING AT WORK: HOW MEDICAL PROFESSIONALS CAN SUPPORT BREASTFEEDING PATIENTS 1, <https://www.pregnantatwork.org/wp-content/uploads/Breastfeeding-Workplace-Guide-for-Healthcare-providers.pdf> (last visited Oct. 5, 2023).

## IX. We Urge the EEOC to Expand the List of “Predictable Assessments” in Proposed 1636.3(j).

NWLC supports the overall approach to the definition of “undue hardship” in proposed 1636.3(j), which adopts the definition of the term from the ADA with modifications that will facilitate more efficient determinations for straightforward accommodations that are frequently needed by pregnant workers.

We especially commend the EEOC for adopting the category of predictable assessments and identifying a set of common workplace modifications that will nearly always constitute reasonable accommodations that do not impose an undue hardship. As the EEOC explains, the concept of predictable assessments stems from the regulations interpreting the ADA, which recognize that certain impairments will almost always result in coverage as disabilities.<sup>94</sup> The accommodations identified in the proposed regulation as predictable assessments—allowing employees to sit or stand as needed, to carry food and water, and to take more frequent food, water, and restroom breaks—represent modest, straightforward workplace adjustments that will rarely impose a burden on employers, and that pregnant workers frequently need to continue doing their jobs safely.<sup>95</sup>

The EEOC seeks comment on whether additional types of accommodations should be included in this category of predictable assessments. In response, we recommend that the EEOC clarify that predictable assessments should be extended to include accommodations requested due to childbirth and related medical conditions, not just accommodations “requested . . . by an employee or applicant who is pregnant.”<sup>96</sup> We also urge the EEOC to include the following accommodations in the list of predictable assessments in 1636.3(j)(4). These accommodations are simple modifications similar to those already listed as predictable assessments:

- Modifications to uniforms or dress code
- Minor physical modifications to a workstation, such as a fan or chair
- Allowing use of another appropriate workstation, such as to be closer to a bathroom or lactation space, or away from toxins
- Access to a closer parking space in an employer-provided parking facility
- Eating or drinking at a workstation or in a nearby, readily accessible location
- Time off to attend at least 16 healthcare appointments related to pregnancy, childbirth, or related medical conditions.<sup>97</sup>

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<sup>94</sup> See 29 C.F.R. § 1630.2(j)(3).

<sup>95</sup> See CHILD BIRTH CONNECTION, NAT’L PARTNERSHIP FOR WOMEN & FAMILIES, *LISTENING TO MOTHERS: THE EXPERIENCES OF EXPECTING AND NEW MOTHERS IN THE WORKPLACE 2* (Jan. 2014), <https://nationalpartnership.org/wp-content/uploads/2023/02/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf> (noting that in a 2013 survey of pregnant workers, the most common accommodation needed was more frequent breaks; a majority of the workers surveyed reported that they needed other kinds of adjustments to their job duties, such as the ability to sit more often).

<sup>96</sup> 88 Fed. Reg. at 54769 (Proposed 1636.3(j)(4)).

<sup>97</sup> We suggest a minimum of 16 appointments as it reflects an approximation of the recommended 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 AM. J. OF OBSTETRICS & GYNECOLOGY 505, 505 (2020), <https://doi.org/10.1016/j.ajog.2020.01.021> (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),

In addition to adding the above accommodations to the list of predictable assessments, we encourage the EEOC to modify 1636.3(j)(4)(iv) to include “Allowing an employee or applicant breaks as needed to eat, drink, or rest” as accommodations that will virtually always be reasonable and not impose an undue hardship.

**X. We Encourage the EEOC to Clarify the Considerations That Cannot Form the Basis of an “Undue Hardship Defense.**

First, we appreciate that proposed 1636.3(j)(5) specifies that an employer cannot establish undue hardship based on “mere assumption or speculation” that other employees will also request accommodations in the future.<sup>98</sup> We recommend removing the word “mere” from this provision. The word “mere” suggests that an employer can establish undue hardship if it has some higher degree of certainty that it will have to provide reasonable accommodations to other employees in the future. We recommend that the final appendix clearly state that the possibility of future accommodation requests should never be the basis for denying an accommodation requested by any individual employee, regardless of the level of certainty. Denying a worker an accommodation based on the possibility of future accommodations to others undermines the goal of the PWFA to provide workers with accommodations based on individualized determinations.

Second, 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.”<sup>99</sup> We urge the EEOC to remove the assertion in the proposed appendix that “The covered entity may point to past and cumulative costs or burden of accommodations that have already been granted to other employees when claiming the hardship posed by another request for the same or similar accommodation”<sup>100</sup> and replace it with the following language: “The covered entity may not solely point to cumulative costs of accommodations that have already been granted to other employees when claiming the hardship posed by another request for the same or similar accommodation. The undue hardship analysis must be done on a case-by-case basis.”

Third, we encourage the EEOC to specify in the final appendix that undue hardship cannot be established based on other employees’ fear or prejudice regarding the employee’s pregnancy, childbirth, or related medical condition, nor can it be established based on the possibility that the accommodation would negatively impact other employees’ morale. These examples are consistent with examples included in EEOC guidance interpreting the ADA.<sup>101</sup>

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[https://journals.lww.com/greenjournal/fulltext/2018/05000/acog\\_committee\\_opinion\\_no\\_736\\_optimizing.42.a\\_spx](https://journals.lww.com/greenjournal/fulltext/2018/05000/acog_committee_opinion_no_736_optimizing.42.a_spx) (recommending at least two postpartum care appointments, with ongoing care as needed). Although we recognize that the health care needs of each employee will vary based on their individual circumstances, we recommend that this standard apply to all qualified employees to provide clarity and simplicity in implementation.

<sup>98</sup> 88 Fed. Reg. at 54769 (Proposed 1636.3(j)(5)).

<sup>99</sup> *Id.* at 54786.

<sup>100</sup> *Id.*

<sup>101</sup> U.S. Equal Emp. Opportunity Comm’n, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, at text accompanying n. 14 (2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>.

Fourth, the EEOC should make clear in the final appendix that an employer cannot claim undue hardship based on the fact that an employee is currently using, or has previously received, an accommodation for pregnancy, disability, or both. To allow undue hardship on these bases would penalize qualified employees for using the accommodations to which they are entitled under the PWFA and ADA.

Finally, the proposed appendix explains that “An employer’s claim that the accommodation a worker seeks would cause a safety risk to co-workers or clients will be assessed under the PWFA’s undue hardship standard.”<sup>102</sup> We appreciate the EEOC’s clear statement that if a particular accommodation poses an undue hardship due to a safety risk to others, the employer must still consider the availability of other reasonable accommodations that do not pose an undue hardship.<sup>103</sup> We emphasize that an employer’s judgment about safety risks related to pregnancy or fetal health cannot form the basis for a claim of undue hardship under the PWFA.<sup>104</sup> We also agree with the EEOC that an employer’s claim that an employee poses a safety risk due to the pregnancy itself, rather than due to a pregnancy-related limitation, can be addressed under the bona fide occupational qualification standard in Title VII.<sup>105</sup>

#### **XI. The EEOC Should Clarify the Relationship Between “Employee Representatives” and the Interactive Process.**

We support the EEOC’s overall approach to the interactive process. Consistent with the statute, the Proposed Rule provides guidance on the interactive process that is consistent with regulations and guidance interpreting the ADA,<sup>106</sup> and with which employers will already be familiar. We especially appreciate the EEOC’s recognition that the interactive process is flexible, does not require “rigid steps”, and that the steps outlined in the proposed appendix may not be necessary in many situations.<sup>107</sup> We encourage the EEOC to make the following clarifications in relation to the interactive process.

Under the PWFA, an employee’s representative—including a family member, friend, health care provider, or other representative<sup>108</sup>—can communicate the employee’s limitation to the employer.<sup>109</sup> However, this situation is not clearly accounted for in the discussion of the interactive process in the proposed appendix. We therefore encourage the EEOC to change the language from “When an employee with a known limitation has requested a reasonable accommodation . . .”<sup>110</sup> to “When an employee, or an employee’s representative, has communicated a known limitation that affects the employee’s ability to

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<sup>102</sup> 88 Fed. Reg. at 54785.

<sup>103</sup> *Id.*

<sup>104</sup> See *UAW v. Johnson Controls*, 499 U.S. 187, 208-210 (1991) (holding that employer’s fetal protection policy violated the PDA, notwithstanding the employer’s concerns about potential tort liability or other increased costs as a result of employing “fertile women” in battery-manufacturing positions); see also *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 85-86, n. 5 (2002) (upholding ADA regulations that authorize refusal to hire an employee who poses a danger to his own health, and distinguishing individualized determinations about an employee’s safety risks from the types of employment policies struck down in *Johnson* and other cases under Title VII, which involve “paternalistic judgments based on the broad category of gender”).

<sup>105</sup> 88 Fed. Reg. at 54785 (citing *Johnson Controls*, 499 U.S. 187); *Everts v. Sushi Brokers LLC*, 247 F. Supp. 3d 1075, 1082-83 (D. Ariz. 2017); *EEOC v. New Prime, Inc.*, 42 F. Supp. 3d 1201, 1214 (W.D. Mo. 2014)).

<sup>106</sup> See 42 U.S.C. § 2000gg(7); 29 CFR § 1630.2(o)(3).

<sup>107</sup> 88 Fed. Reg. at 54786-87.

<sup>108</sup> *Id.* at 54767 (Proposed 1636.3(c)).

<sup>109</sup> 42 U.S.C. § 2000gg(4). See *supra* Section A.III for our recommendations regarding the interpretation of “employee representative.”

<sup>110</sup> 88 Fed. Reg. at 54786.

do their job . . . . “ This language captures situations in which an employee’s representative communicates the employee’s limitation, and it better reflects the definition of “communicated to the employer,” which does not require that the employee or their representative make a “request”.<sup>111</sup>

Section 1636.3(k) and the appendix should also clearly state that while a third-party representative can communicate an employee’s limitation to the employer, the employer must engage in the interactive process directly with the employee who needs the accommodation.<sup>112</sup> The final appendix should also state that an employee may bring a third party to any discussions with the employer regarding their need for an accommodation, including the initial communication and throughout the interactive process. The decision to be accompanied by a third party rests solely with the employee.

**XII. In Determining When it is Reasonable to Require Supporting Documentation, the EEOC Should Further Consider the Significant Barriers and Privacy Concerns Faced by Pregnant Workers.**

First, and most importantly, as recognized by the EEOC, the PWFA does not require a covered entity to seek supporting documentation from a worker who requests an accommodation.<sup>113</sup> Proposed 1636.3(l) specifies, however, that employers may choose to require employees to provide supporting documentation when it is “reasonable under the circumstances.”<sup>114</sup>

An employer’s choice to require documentation raises unique concerns in the context of seeking accommodations for pregnancy and related conditions—including contraception, fertility care, and termination of pregnancy—which must be considered when determining what is “reasonable under the circumstances.” These concerns, outlined below in Section XII.a., include (1) barriers to obtaining documentation from a health care provider in a timely manner, and (2) privacy concerns around the potential use of an employee’s health-related information to target, criminalize, or harass individuals for decisions around pregnancy.

We appreciate the EEOC’s acknowledgement that requiring supporting documentation is not reasonable in many circumstances; however, we encourage the EEOC to give additional weight to the unique barriers to care and privacy concerns faced by pregnant workers and workers affected by related medical conditions when setting out what is reasonable under the Proposed Rule. If the EEOC continues to conclude that, even given these considerations, it is reasonable for employers to require documentation in certain circumstances, we strongly encourage the EEOC to further clarify and limit the circumstances in which documentation may be required and narrow the scope of “reasonable” documentation, as outlined in our comments in Section XII.b.

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<sup>111</sup> See *supra* Section A.IV.

<sup>112</sup> See *supra* Section A.III.

<sup>113</sup> 88 Fed. Reg. at 54736; *Id.* at 54769 (Proposed 1636.3(l)).

<sup>114</sup> 88 Fed. Reg. at 54769 (Proposed 1636.3(l)).

a. Due to Barriers to Care and Privacy Concerns, Requirements for Supporting Medical Documentation May Prevent or Delay Workers From Accessing Accommodations for Limitations Related to Pregnancy, Childbirth, or Related Conditions.

i. *Pregnant Workers Face Barriers to Timely Access to Health Care Providers.*

Workers can face many barriers in timely accessing providers to obtain documentation in support of an accommodation request.<sup>115</sup> For one, there is a lack of providers available to provide maternal health care. Many in the United States today live in “maternal health care deserts” or “counties where there’s a lack of maternity care resources, where there are no hospitals or birth centers offering obstetric care and no obstetric providers.”<sup>116</sup> In 2022, it was reported that more than 2.2 million women of childbearing age live in maternity care deserts and 4.7 million women live in counties with limited maternity care access.<sup>117</sup> Since the Supreme Court’s decision overturning *Roe v. Wade*, these geographic barriers are increasing as providers who are trained or are training in obstetrics, gynecology, and maternal health are leaving or avoiding states with abortion bans.<sup>118</sup> The lack of available providers means that many individuals who need pregnancy or related care can face long wait times in securing appointments and/or have to travel long distances to access a provider.<sup>119</sup>

For pregnant individuals seeking accommodations for pregnancy-related mental health conditions, similar shortages in mental health care professionals could delay timely access to documentation for an

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<sup>115</sup> We note that documentation requirements in the ADA context have also served as barriers to accommodations for workers with disability. See generally Katherine A. Macfarlane, *Disability Without Documentation*, 90 FORDHAM L. REV. 59 (2021).

<sup>116</sup> CHRISTINA BRIGANCE, ET. AL, MARCH OF DIMES, NOWHERE TO GO: MATERNITY CARE DESERTS ACROSS THE U.S. 2 (2022), [https://www.marchofdimes.org/sites/default/files/2022-10/2022\\_Maternity\\_Care\\_Report.pdf](https://www.marchofdimes.org/sites/default/files/2022-10/2022_Maternity_Care_Report.pdf).

<sup>117</sup>*Id.*

<sup>118</sup> Julie Rovner, *Abortion Bans Are Driving Off Doctors and Closing Clinics, Putting Basic Health Care at Risk*, KFF HEALTH NEWS (May 24, 2023), <https://kffhealthnews.org/news/article/analysis-pro-life-movement-abortion-maternal-health-healthbent-column/>; Stacy Weiner, *The Fallout of Dobbs on the Field of OB-GYN*, AAMC NEWS (Aug. 23, 2023), <https://www.aamc.org/news/fallout-dobbs-field-ob-gyn>; ALEXANDRA WOODCOCK, ET AL., EFFECTS OF THE DOBBS V JACKSON WOMEN’S HEALTH ORGANIZATION DECISION ON OBSTETRICS AND GYNECOLOGY GRADUATING RESIDENTS’ PRACTICE PLANS, OBSTETRICS & GYNECOLOGY 3 (2023), [https://journals.lww.com/greenjournal/fulltext/9900/effects\\_of\\_the\\_dobbs\\_v\\_jackson\\_women\\_s\\_health.904.aspx](https://journals.lww.com/greenjournal/fulltext/9900/effects_of_the_dobbs_v_jackson_women_s_health.904.aspx); Lisa Baumann, *Idaho Abortion Law One Reason Hospital Won’t Deliver Babies*, AP NEWS (March 23, 2023), <https://apnews.com/article/hospital-baby-delivery-idaho-abortion-ban-040fb50e0e069967efcb3fcd72a56677>; Amanda Musa & John Bonifield, *Maternity Units are Closing Across America, Forcing Expectant Mothers to Hit the Road*, CNN (April 7, 2023), <https://www.cnn.com/2023/04/07/health/maternity-units-closing/index.html>; Eugene Declercq, *The U.S. Maternal Health Divide: The Limited Maternal Health Services and Worse Outcomes of States Proposing New Abortion Restrictions*, THE COMMONWEALTH FUND (Dec. 14, 2022), <https://www.commonwealthfund.org/publications/issue-briefs/2022/dec/us-maternal-health-divide-limited-services-worse-outcomes> (determining that 39 percent of counties in abortion-restriction states can be considered maternity care deserts, compared with 25 percent of counties in abortion-access states).

<sup>119</sup> Nicole Wetsman et. al, *Maternal Care Deserts Overlap with Lack of Abortion Access, Analysis Shows*, ABC NEWS (Aug. 1, 2023), <https://abcnews.go.com/Health/abortion-access-restrictions-affect-maternity-care-access-research/story?id=101770115>.

accommodation.<sup>120</sup> This issue could be particularly harmful for people of color and those with low incomes because they are more likely to experience mental health issues around pregnancy, such as post-partum depression, but are less likely to receive treatment. For example, “[n]ew mothers of color have rates of postpartum depression close to 38 percent, almost twice the rate of white new mothers [and] 60 percent of Black and Latina mothers do not receive any treatment or support services for prenatal and postpartum emotional complications.”<sup>121</sup> Workers already facing the stress of mental health issues related to pregnancy, low-incomes, and lack of access to health care should not also have to face the barrier of acquiring documentation in order to receive needed accommodations.

Second, even where a worker has a provider for care associated with their pregnancy or related medical conditions, they can still face barriers in visiting their provider. These barriers include lack of reliable means to travel to a provider. For example, many workers may live without access to public transportation, and may not have access to a car and/or funds for gas. A recent study found that “21 percent of U.S. adults without access to a vehicle or public transit went without needed medical care in 2022,” and “5 percent of all U.S. adults reported forgoing healthcare due to transportation barriers.”<sup>122</sup> Pregnant people are particularly impacted by this issue.<sup>123</sup> As a Department of Labor report notes:

"A healthy pregnant woman usually has 10 to 15 regular medical appointments and can have more appointments if the pregnancy is high-risk or the pregnant woman has other health issues or disabilities. . . Postpartum care is also very important. Research suggests it can often be difficult to access prenatal and postpartum care via transit. Long travel times and infrequent and/or unreliable service can lead to missed appointments or present a barrier to even seeking care."<sup>124</sup>

The report also recognized that these challenges to transportation for pregnancy-related care can fall disproportionately on specific communities, particularly “[p]regnant women of color, including women who are limited English proficient, lower-income pregnant women, women with low literacy, women with disabilities, and/or women traveling with dependents.”<sup>125</sup> For example, one study found “that 50 percent of Black women in the Boston area have been late or missed medical appointments because of public transit” issues.<sup>126</sup> For many workers, then, requiring supporting documentation to obtain an accommodation will delay their ability to address their health needs as they will not be able to get to an

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<sup>120</sup> Nathaniel Counts, *Understanding the U.S. Behavioral Health Workforce Shortage*, THE COMMONWEALTH FUND (May 18, 2023), <https://www.commonwealthfund.org/publications/explainer/2023/may/understanding-us-behavioral-health-workforce-shortage>.

<sup>121</sup> STEPHANIE GREEN, NAT’ PARTNERSHIP FOR WOMEN & FAMILIES, *THE MATERNAL MENTAL HEALTH CRISIS UNDERMINES MOMS’ AND BABIES’ HEALTH 3* (2021), <https://nationalpartnership.org/report/the-maternal-mental-health-crisis-undermines-moms-and-babies-health/>.

<sup>122</sup> LB Smith et. al, *More than One in Five Adults with Limited Public Transit Access Forgo Health Care Because of Transportation Barriers*, ROBERT WOOD JOHNSON FOUNDATION (Apr. 26, 2023), [https://www.rwjf.org/en/insights/our-research/2023/04/more-than-one-in-five-adults-with-limited-public-transit-access-forgo-healthcare-because-of-transportation-barriers.html#:~:text=Key%20Findings,skip%20needed%20care%20\(9%25\)](https://www.rwjf.org/en/insights/our-research/2023/04/more-than-one-in-five-adults-with-limited-public-transit-access-forgo-healthcare-because-of-transportation-barriers.html#:~:text=Key%20Findings,skip%20needed%20care%20(9%25)).

<sup>123</sup> See generally, ADRIANNE MALASKY ET. AL, U.S. DEP’T OF TRANSPORTATION, FED. TRANSIT AUTH., *ANALYSIS OF CHALLENGES FACING PREGNANT WOMEN RIDING TRANSIT* (Feb. 2022), <https://www.transit.dot.gov/sites/fta.dot.gov/files/2022-02/FTA-Report-No-0211.pdf>.

<sup>124</sup> *Id.* at 3.

<sup>125</sup> *Id.* at 1.

<sup>126</sup> *Id.*

appointment with a health care provider in a timely manner. Requiring supporting documentation may therefore deny these workers the protection of the PWFA altogether.

Third, many workers have limited or no paid sick leave to use for appointments. In 2022, nearly 30 million civilian workers did not have any form of paid sick days, with workers in service sector jobs the least likely to have paid sick days.<sup>127</sup> Low-paid workers in particular lack paid sick leave. For example, “while 90 percent of workers in the highest 10 percent of wage earners have paid sick leave, only 30 percent of workers in the bottom 10 percent do.”<sup>128</sup> Given that women of color make up a large portion of low-paid workers, the lack of leave to access care falls particularly hard on women of color workers.<sup>129</sup> These workers may have to assess the loss of income against their own need for an accommodation, choosing to forgo the accommodation in order not to miss a day’s pay.

Finally, workers with limited or no health care coverage may not be able to afford an appointment necessary to secure documentation for an accommodation. Although uninsurance rates have dropped significantly thanks to the Affordable Care Act (ACA), lack of health insurance remains a problem for a large population in the U.S., particularly communities of color. Reports from 2022 revealed that 8.4% or 27.6 million individuals of all ages did not have health insurance, with Hispanic and Black non-Hispanic adults representing the largest uninsured demographics.<sup>130</sup> The 2021 Census reported that 9.1 percent of full-time year-round workers were uninsured in 2021, showing an increase from reports in 2020.<sup>131</sup> And despite ACA coverage provisions including Medicaid expansion and subsidized Marketplace coverage, pregnant individuals continue to experience lapses in insurance. One 2021 study found that after ACA implementation, more than one-third of pregnant people with Medicaid for prenatal care were uninsured either before they became pregnant or in the two to six months after giving birth.<sup>132</sup> And half of women with prenatal Medicaid coverage in non-expansion states were uninsured before becoming pregnant and after giving birth, with the highest rates among Hispanic women.<sup>133</sup> The EEOC must take into account workers without health insurance who may be unable to see a doctor for medical documentation in order to receive accommodations.

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<sup>127</sup> PAID SICK DAYS AND THE HEALTHY FAMILIES ACT, NAT’L WOMEN’S LAW CTR. (May 2023), <https://nwlc.org/wp-content/uploads/2023/05/psd-2023-5.15.23-v2.pdf>.

<sup>128</sup> WHY LOW-WAGE WORKERS NEED THE HEALTHY FAMILIES ACT, *supra* note 66.

<sup>129</sup> See TUCKER & VOGTMAN, *supra* note 66 at 7, 15.

<sup>130</sup> In 2022, more than 1 in 4 Hispanic adults ages 18–64 (27.6%) lacked health insurance, followed by Black, non-Hispanic adults (13.3%). *U.S. Uninsured Rate Dropped 18% During Pandemic*, CTR. FOR DISEASE CONTROL, NAT’L CTR. FOR HEALTH STATISTICS,

[https://www.cdc.gov/nchs/pressroom/nchs\\_press\\_releases/2023/202305.htm#:~:text=Highlights%20from%20the%20report%20include,or%203.7%20million%20in%202019](https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2023/202305.htm#:~:text=Highlights%20from%20the%20report%20include,or%203.7%20million%20in%202019) (last visited Oct. 8, 2023).

<sup>131</sup> Katherine Keisler-Starkey, et al., *Public Coverage Increased for All Workers, Private Coverage Declined for Full-Time, Year-Round Workers*, U.S. CENSUS BUREAU (Sept. 12, 2023), <https://www.census.gov/library/stories/2022/09/private-health-coverage-declines-for-full-time-workers.html>.

<sup>132</sup> EMILY JOHNSTON ET. AL, POST-ACA, MORE THAN ONE-THIRD OF WOMEN WITH PRENATAL MEDICAID REMAINED UNINSURED BEFORE OR AFTER PREGNANCY, 40 HEALTH AFFAIRS 571, 576 (2021), <https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.01678>.

<sup>133</sup> *Id.* at 574, 576.



These barriers to care—among others<sup>134</sup>—may hinder or prevent workers from accessing medical documentation for accommodations. While the EEOC rightly recognizes that requiring documentation can delay access to accommodations, particularly for workers with limited or no paid sick leave, the EEOC fails to consider that provider shortages and other barriers to health care can mean that requiring documentation to prove a need for accommodation could harmfully delay or wholly deny a worker an accommodation.

ii. *Documentation Requirements Pose a Risk to the Privacy and Safety of Workers.*

While we appreciate the EEOC’s proposal to specify that rules protecting confidential medical information under the ADA also apply to medical information received under the PWFA,<sup>135</sup> we remain concerned that elements of the proposed framework raise privacy concerns for workers and providers. The Supreme Court’s decision to overturn *Roe v. Wade* has resulted in increased privacy concerns for individuals seeking the full spectrum of reproductive health care, for those who provide such care, and for those who may interact with or support patients or providers, including employers, hospitals, and other entities and individuals.

Even before the Supreme Court overturned *Roe v. Wade*, pregnant people have faced criminalization for their pregnancy outcomes.<sup>136</sup> But now, in the wake of the Supreme Court’s decision, the risks are even more far reaching. State bans on abortion have created confusion and concern around privacy for pregnancy-related care.<sup>137</sup> Some state authorities have argued for access to private health data, including for care received out-of-state, as they seek to enforce state bans.<sup>138</sup> In Texas, in ongoing litigation, a private actor is seeking detailed information on patients who have sought abortion care and information

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<sup>134</sup> Notably, a documentation requirement may be a total barrier for workers who are able to manage their care at home without a provider. In addition, the EEOC recognizes that pregnant workers may experience limitations early in pregnancy, when they have not yet had medical care, and these workers would not be able to obtain supporting documentation. 88 Fed. Reg. at 54736.

<sup>135</sup> 88 Fed. Reg. at 54770 (Proposed 1636.3(l)(4); 88 Fed. Reg. at 54734.

<sup>136</sup> See generally, PURVAJA S. KAVATTUR ET. AL, PREGNANCY JUSTICE, THE RISE OF PREGNANCY CRIMINALIZATION: A PREGNANCY JUSTICE REPORT (Sept. 2023), <https://www.pregnancyjusticeus.org/rise-of-pregnancy-criminalization-report/>.

<sup>137</sup> Juliana Kim, *Data Privacy Concerns Make the Post-Roe Era Uncharted Territory*, NPR (July 2, 2022), <https://www.npr.org/2022/07/02/1109565803/data-privacy-abortion-roe-appsl>; Johana Bhuiyan, *Health Data Privacy Post-Roe: Can Our Information be Used Against Us?*, THE GUARDIAN (June 24, 2023), <https://www.theguardian.com/us-news/2023/jun/24/health-data-privacy-protection-roe-abortion-tech-laws>.

<sup>138</sup> Eighteen state attorneys general have combined efforts to prevent the federal government from shielding the medical records of individuals crossing state lines to obtain an abortion. See, e.g., Anita Wadhvani, *Tennessee AG Asserts Right to Out-of-State Abortion, Transgender Care Medical Records*, TENNESSEE LOOKOUT (July 18, 2023), <https://tennesseelookout.com/2023/07/18/tennessee-ag-asserts-right-to-out-of-state-abortion-transgender-care-medical-records/>; Ashton Pittman, *Mississippi Attorney General Wants Info On Out-of-State Abortions, Gender-Affirming Care*, MISSISSIPPI FREE PRESS (July 14, 2023), <https://www.mississippifreepress.org/34705/mississippi-attorney-general-wants-info-on-out-of-state-abortions-gender-affirming-care>. As localities in Texas pass bans on travel, patient data could be used to identify violations of local limitations on travel. Jayme Lozano Carver, *A Texas County that Borders New Mexico is the Latest to Consider an Abortion Travel Ban*, THE TEXAS TRIBUNE (Sept. 27, 2023), <https://www.texastribune.org/2023/09/27/abortion-travel-ban-texas-new-mexico/>.

on any donors to abortion funds or those who are associated with a specific Texas provider, with concerns that the data will be used to file bounty hunter lawsuits permitted under state law.<sup>139</sup>

Given the ongoing, purposeful efforts to continue to sow legal chaos, increased risk of criminalization for pregnancy outcomes, and targeting of pregnant people, workers may be rightfully concerned about documenting care relating to pregnancy and sharing that documentation with third parties. As the health care crisis following the Supreme Court decision continues to unfold and government and private actors alike weaponize the criminal and civil justice systems to pursue prosecutions of abortion patients, supports, and providers, the reality is that the more documentation of a worker's pregnancy or related care exists, the more exposed the worker is to that information being sought by state authorities and/or private citizens. If the final rule allows employers to impose documentation requirements, workers, employers, and providers could have their medical information sought or attempted to be used against them, with harmful and potentially devastating results. Some workers may decide the risks of documentation are too high and drop their ask for an accommodation, even if their health will suffer. These significant privacy risks are specific to pregnancy and abortion, especially in the post-*Roe* context, and go beyond considerations the EEOC has weighed before in the ADA context.

Given the distinct landscape of the very real threats and risks that pregnant workers must contend with in the current post-*Roe* world, the EEOC should carefully weigh the costs and risks of allowing employers to impose a documentation requirement. If the EEOC preserves its interpretation that documentation is "reasonable" under certain circumstances, it should place additional limits on the scope of the supporting documentation that employers can require, as discussed in more detail below.

- b. We Urge the EEOC to Modify the Supporting Documentation Framework to Reduce Barriers to Accessing Accommodations and Protect Workers' Privacy.
  - i. *The EEOC Should Clarify the Meaning of "Obvious" Needs and Account for Potential Biases Regarding Physical Attributes of Workers.*

Proposed 1636.3(l)(1)(i) states that documentation cannot be required where both the limitation and the need for reasonable accommodation are "obvious" and the employee confirms the limitation and need through self-attestation.<sup>140</sup> While we agree with the concept that employers should not be able to require documentation when the need for accommodation is obvious, we nevertheless have serious concerns about the reliance on the concept of "obviousness" of pregnancy. This language invites invasive inquiries and assumptions based on an employee's physical appearance. This could result in discrimination against individuals based on their body shape or gender presentation. Some employers might rely on stereotypes and biases in determining what constitutes an "obvious" pregnancy and need for accommodations. This could come into conflict with local laws that prohibit discrimination based on size/weight, putting employers in legal jeopardy.<sup>141</sup> Inclusion of the "obvious" terminology could harm those pregnant workers who already face additional stigma and challenges in the workplace. For example, transgender individuals are more likely to face workplace discrimination and could be further

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<sup>139</sup> Maggie Q. Thompson, *Architect of "Bounty-Hunter" Abortion Ban Wants List of Abortion Seekers*, AUSTIN CHRONICLE (Sept. 29, 2023), <https://www.austinchronicle.com/daily/news/2023-09-29/architect-of-bounty-hunter-abortion-ban-wants-list-of-abortion-seekers/>.

<sup>140</sup> 88 Fed. Reg. at 54769 (Proposed 1636.3(l)(1)(i)).

<sup>141</sup> See, e.g., MICH. COMP. LAWS ANN. § 37.2102 (2023); SAN FRANCISCO, CAL. POLICE CODE § 3303 (2023).

harmed if they are not seen as “obviously” pregnant and are required by their employers to acquire documentation to receive accommodations.<sup>142</sup>

The EEOC should clarify how the “obvious” standard is to be applied and should not invite reliance on employers’ determinations as to who is and is not visibly pregnant. In the proposed appendix and examples applying 1636.3(l)(1)(i), the EEOC describes employees who are “obviously pregnant,” without explaining what makes someone’s pregnancy “obvious.” Rather than using the term “obviously pregnant,” which is not part of the proposed regulatory text and invites assumptions based on appearance, we encourage the EEOC to provide a clearer interpretation of the language in proposed 1636.3(l)(1)(i)—“the known limitation and need for reasonable accommodation are obvious”—and explain what it means for each of these elements to be obvious.

The proposed appendix should also provide examples in which the limitation is obvious based on something other than physical appearance. For example, if an employee self-attests to regular vomiting due to pregnancy and requests temporary relocation of their workstation closer to the bathroom, the limitation is obvious because vomiting is a common symptom of pregnancy; the need for accommodation is “obvious” because the employer knows, or should have known, that the employee needs easy bathroom access; and the employee has confirmed the obvious limitation and need for accommodation through self-attestation. Therefore, requiring documentation would not be reasonable under proposed 1636.3(l)(1)(i). Similarly, if an employee self-attests that she is pregnant and that her due date is in three months, requiring documentation would not be reasonable to support a request for leave starting in three months, because the need to recover from childbirth (the limitation), and the need for leave as an accommodation, are both obvious.

Further, we encourage the EEOC to warn employers in the proposed appendix against imposing accommodations not requested by the employee or arrived at through the interactive process based on assumptions that the need for accommodation is “obvious.”

ii. *The EEOC Should Make Clear that It Is Not Reasonable for the EEOC to Require Confirmation of Pregnancy Beyond Self-Attestation.*

The EEOC seeks comment on whether it is “always reasonable under the circumstances” for employers to require workers to provide confirmation of a pregnancy, beyond self-attestation, “when the pregnancy is not obvious.” It also seeks comment on whether, if such confirmation is allowed, it should be limited to “less invasive methods” like a urine test to confirm pregnancy.<sup>143</sup>

For the reasons discussed above, we strongly urge the EEOC to avoid distinctions based on whether the pregnancy itself is obvious. Within the framework that the EEOC has outlined, confirmation of the pregnancy through means such as a urine test is unnecessary whether the pregnancy is “obvious” or not. If an employee needs an accommodation for which the employer is permitted to require supporting documentation—for example, if the need for accommodation is not obvious and it is not one of the listed accommodations for which requiring supporting documentation is not reasonable—the medical documentation will identify the employee’s limitation and state that it is related to pregnancy, childbirth,

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<sup>142</sup> See *Discrimination While Pregnant*, NAT’L PARTNERSHIP FOR WOMEN & FAMILIES (Oct. 2022), <https://nationalpartnership.org/report/discrimination-while-pregnant/>.

<sup>143</sup> 88 Fed. Reg. at 54738.

or a related medical condition, which should be sufficient confirmation. If an employee needs an accommodation for which it is not reasonable to require supporting documentation, then self-attestation of the limitation and the need for accommodation is sufficient under 1636.3(l)(1)(i)-(iv).<sup>144</sup> The limitation and the need for accommodation are the relevant inquiries, and there is no need for separate confirmation of a pregnancy itself; requiring such confirmation, including via “less invasive” methods, is unnecessarily invasive, can delay the provision of accommodations, and will deter workers from seeking the accommodations they need due to concerns about privacy, stigma, discrimination, and targeting of pregnant people.<sup>145</sup>

iii. *The EEOC Should Expand the List of Circumstances in Which It Is Not Reasonable to Require Supporting Documentation.*

We applaud the EEOC for making clear that employers cannot seek supporting documentation for certain accommodation requests that are predictable based on the fact of pregnancy, childbirth, or related medical conditions.<sup>146</sup> We urge the agency to expand the list of accommodations for which it is not reasonable to require supporting documentation in 1636.3(l)(1) to also include:

- Time off, up to 8 weeks, to recover from childbirth<sup>147</sup>
- Time off to attend healthcare appointments related to pregnancy, childbirth, or related medical conditions, including, at minimum, at least 16 healthcare appointments<sup>148</sup>
- Flexible scheduling or remote work for nausea or bleeding related to pregnancy, childbirth, or related medical conditions<sup>149</sup>
- Modifications to uniforms or dress code

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<sup>144</sup> *Id.* at 54769–70 (Proposed 1636.3(l)(1)(i)-(iv)).

<sup>145</sup> Pregnant workers already fear disclosing their pregnancy to their employers, so requiring additional steps to prove their pregnancy may increase fears about privacy and discrimination. See Melissa Locker, *Many Women are Afraid to Tell Their Bosses They’re pregnant—and for Good Reason*, FAST TIMES (Jan. 28, 2019), <https://www.fastcompany.com/90297792/many-women-are-afraid-to-tell-their-bosses-theyre-pregnant-and-for-good-reason>.

<sup>146</sup> 88 Fed. Reg. at 54769–70 (Proposed 1636.3(l)(1)(iii)-(iv)).

<sup>147</sup> As in proposed 1636.3(l)(1)(i), requiring supporting documentation is not reasonable where both the limitation and the need for accommodation are obvious, and the employee confirms the limitation and the need for an accommodation is obvious. Time off to recover from childbirth is obvious. See discussion of when the limitation and need for accommodation are obvious, *supra* XII.b.i. New York City already prohibits employers from requiring documentation for time off, up to 8 weeks, to recover from childbirth, based on the average recovery time. See, e.g., NYC COMM’N ON HUM. RTS., LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF PREGNANCY, CHILDBIRTH, RELATED MEDICAL CONDITIONS, LACTATION ACCOMMODATIONS, AND SEXUAL OR REPRODUCTIVE HEALTH DECISIONS 10, n.6 (2021) (citations omitted),

[https://www.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy\\_InterpretiveGuide\\_2021.pdf](https://www.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_2021.pdf).

<sup>148</sup> We suggest a minimum of sixteen appointments as it reflects the average number of appointments for prenatal and postnatal care for low-risk pregnancies. See Pehl et. al, *supra* note 97, at 505; ACOG Committee Opinion No. 736, *supra* note 97, at 141.

<sup>149</sup> See 29 C.F.R. § 825.115(f)(2023) (noting that under the FMLA, “Absences attributable to incapacity qualify for FMLA leave even though the employee . . . does not receive treatment from a health care provider during the absence . . . . For example, an employee who is pregnant may be unable to report to work because of severe morning sickness.”).

- Allowing rest breaks from time to time<sup>150</sup>
- Eating or drinking at a workstation or in a nearby, readily accessible location
- Minor physical modifications to a workstation, such as a fan or chair
- Allowing use of another appropriate workstation, such as to be closer to a bathroom or lactation space, or away from toxins
- Reprieve from lifting over 20 pounds
- Access to a closer parking space in an employer-provided parking facility.

This list reflects accommodations that are common and/or address conditions for which people may not seek treatment by a health care provider.

- iv. *The EEOC Should Revise 1636.3(l)(iv) to Make Clear That it is Not Reasonable to Require Documentation Beyond Self-Attestation for Accommodations Related to Lactation.*

Proposed 1636.3(l)(1) provides that “The following situations are examples of when requiring supporting documentation is not reasonable under the circumstances:... (iv) When the covered entity requires documentation other than self-attestation from the employee or applicant regarding lactation or pumping.”<sup>151</sup> This wording is unclear and could be read to mean that it is not reasonable for employers to require *additional* supporting documentation when the employer already requires supporting documentation beyond self-attestation regarding lactation or pumping. To make clear that employers cannot require *any* supporting documentation beyond self-attestation regarding lactation or pumping, we suggest that the EEOC revise 1636.3(l)(iv) to read “(iv) When the reasonable accommodation is related to pumping or lactation and the employee has provided a self-attestation.”

- v. *The EEOC Should Modify the Interpretation of “Reasonable Documentation” to Make Clear That a Description of the Underlying Medical Condition Is Not Required.*

We commend the EEOC for making clear that employers may only require employees to provide “reasonable documentation.”<sup>152</sup> It is unnecessarily invasive for an employer to demand to know an employee’s specific medical condition or a description of it. Requiring workers to disclose detailed medical information to their employers—especially information related to reproductive health and mental health, which can be particularly sensitive or carry stigma—may deter workers from seeking accommodations. Moreover, as previously noted, documentation of care related to pregnancy can expose workers to serious risks regardless of the legal status of the care being received. For these reasons, employers should only be allowed to require the limited information needed to confirm the nature of the limitation and the need for accommodation.

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<sup>150</sup> As discussed in Section A.IX, we recommend that the EEOC add “rest breaks” alongside breaks to eat and drink under 1636.3(j)(4)(iv). If 1636.3(j)(4)(iv) were modified in this way, rest breaks would also be included under 1636(l)(1)(iii), under which it is not reasonable to require documentation where the accommodation is one of the predictable assessments listed in 1636.3(j)(4) if the employee has provided self-attestation.

<sup>151</sup> 88 Fed. Reg. at 54769 (Proposed 1636.3(l)(1), 1636.3(l)(1)(iv)).

<sup>152</sup> *Id.* at 54769 (Proposed 1636.3(l)(2)).

We therefore recommend that the EEOC modify the definition of reasonable documentation found in 1636.3(l)(2) to state that “Reasonable documentation means documentation that is sufficient to describe or confirm the limitation that necessitates accommodation; that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and that a change or adjustment at work is needed.” For example, supporting documentation need not state that an employee needs to attend medical appointments due to postpartum depression. Instead, it is sufficient to state that the employee needs to attend medical appointments (the limitation) due to pregnancy, childbirth, or a related medical condition, and thus a modified start time (the accommodation) is recommended.

Additionally, the final appendix should make clear that employers cannot require employees to submit any particular medical certification form, so long as the documentation includes the required information outlined above. Employers also cannot require employees to complete ADA or FMLA certification forms in order to receive a PWFA accommodation, as these forms may require significantly more medical information than is “reasonable” to demand in this context.

vi. *The EEOC Should Prohibit Employers From Requiring Workers to Be Examined by a Health Care Provider of the Employer’s Choice.*

The EEOC has asked “whether there are situations in which an employer should be permitted to require an employee seeking a reasonable accommodation to be examined by a health care provider chosen by the employer.”<sup>153</sup> In response, we urge the EEOC to make clear that employers may not require workers to be examined by a health care provider chosen by their employer in order to receive an accommodation under the PWFA, as such requirements will deter workers from seeking accommodations under the PWFA and create unnecessary delays and barriers.<sup>154</sup>

Moreover, the EEOC recognizes the importance of providing pregnancy-related accommodations under the PWFA in a timely manner, given that these limitations are generally temporary and time sensitive.<sup>155</sup> The EEOC also recognizes that it can be difficult and take time to get an appointment with a health care provider, especially early in pregnancy<sup>156</sup>—requiring employees to see a specific provider would only cause further delays. Requiring workers to see a specific provider chosen by the employer could also result in different opinions between the employee’s medical provider and the provider chosen by employer, which would further extend the process of identifying and providing appropriate

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<sup>153</sup> *Id.* at 54738.

<sup>154</sup> We recognize that under the ADA, an employer may require an employee to be examined by a health care provider of the employer’s choice in certain circumstances. Some of these circumstances are wholly inapplicable to the PWFA. For example, under the ADA, an employer may require an employee who it reasonably believes poses a “direct threat” to be examined by a medical professional chosen by the employer. See U.S. Equal Emp. Opportunity Comm’n, *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA* at B.10 and B.11 (2000). The PWFA does not incorporate the ADA’s “direct threat” provisions, and this situation is therefore irrelevant under the PWFA.

<sup>155</sup> 88 Fed. Reg. 54789 & n. 97 (Aug. 11, 2023) (citing 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, 116 Cong. 96 (2019) (statement of Rep. Suzanne Bonamici) (praising the PWFA because it would allow pregnant workers to get accommodations without waiting months or years)); 168 Cong. Rec. S10,081 <https://www.congress.gov/117/crec/2022/12/22/168/200/CREC-2022-12-22.pdf> (statement of Sen. Robert Casey, Jr.) (noting that “pregnant workers need immediate relief to remain healthy and on the job”).

<sup>156</sup> 88 Fed. Reg. at 54787.

accommodations. Moreover, unlike the employee's own health care provider, a provider selected by the employer would not be well positioned to monitor the employee's health and needs over time or recommend future modifications to the accommodation as needed.

The EEOC has also asked what effect it would have on employees' willingness to seek accommodations if employers were allowed to require examinations by health care providers of their choice. Such a requirement would likely have a chilling effect on workers seeking accommodations under the PWFA. As discussed above, workers may be hesitant to see a new provider selected by their employer due to concerns about privacy, especially in light of the increased risk of criminalization for pregnancy outcomes in the wake of the Supreme Court's decision overturning *Roe v. Wade*. Some workers may also be hesitant to see a new provider whom they did not choose and with whom they do not have an ongoing relationship. For example, women of color, particularly Black women, often face racism in the provision of healthcare<sup>157</sup> and may therefore be particularly hesitant to see a new provider selected by their employer. For these reasons, and due to the potential delays and complications discussed above, allowing employers to require that workers receive examinations by a health care provider chosen by the employer would likely deter workers from seeking accommodations.

For the reasons outlined above, employers should not be permitted to require that workers be examined by a health care provider of the employer's choice.

## **B. COMMENTS ON SECTION 1636.4 "PROHIBITED PRACTICES" AND SECTION 1636.5 "REMEDIES AND ENFORCEMENT."**

NWLC commends the EEOC for its detailed explanation of practices prohibited under the PWFA. This section outlines NWLC's comments on proposed 1636.4, "Prohibited Practices," and the corresponding discussion in the proposed appendix, proceeding in the order of the Proposed Rule. This section also outlines our comments on proposed 1636.5(f), "Prohibition on Retaliation."<sup>158</sup> These comments express our support for the EEOC's interpretation of these provisions and outline suggestions to further strengthen and clarify these sections.

### **I. NWLC Supports EEOC's Recognition That "Unnecessary Delay" May Result in a Violation of PWFA and Urges EEOC to Strengthen and Clarify the Factors to be Considered When Determining "Unnecessary Delay."**

We appreciate the EEOC's recognition in proposed 1636.4(a)(1) that an unnecessary delay in responding to a request for accommodation may result in a violation of the PWFA for failing to provide a reasonable

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<sup>157</sup> 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."); Timothy Huzar, *Medical Mistrust Linked to Race/Ethnicity and Discrimination*, *MEDICAL NEWS TODAY* (Jan. 15, 2021), <https://www.medicalnewstoday.com/articles/medical-mistrust-linked-to-race-ethnicity-and-discrimination#Mistrust-correlates-with-race/ethnicity-and-discrimination> (noting a link between experiences of perceived discrimination and mistrust of health care providers and systems).

<sup>158</sup> As the Commission notes, the anti-retaliation provisions in 42 U.S.C. 2000gg-2(f) and proposed 1636.5(f)) are likely to have significant overlap with the prohibition against taking "adverse action" under 42 U.S.C. 2000gg-1(5) and proposed 1636.4(e). 88 Fed. Reg. at 54791.

accommodation.<sup>159</sup> This interpretation is consistent with EEOC guidance interpreting the ADA,<sup>160</sup> and with the purpose of the PWFA. As the EEOC correctly notes, pregnancy-related accommodation requests are often time sensitive because they are temporary and the period for which an accommodation is required may be short.<sup>161</sup> Unnecessary delay would therefore frustrate Congress’s intent to ensure that “no worker should have to choose between their health, the health of their pregnancy, and the ability to earn a living.”<sup>162</sup>

Given the ability of delay to negatively impact the health of workers and/or their pregnancies, as well as their ability to remain on the job, NWLC urges the EEOC to strengthen and clarify the factors to be considered when determining whether there has been an “unnecessary delay.”

First, we recommend revising 1636.4(a)(1) to remove the language, “An unnecessary delay in responding to a reasonable accommodation request may result in a violation of the PWFA” and replace it with the following: “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 language makes clear that employers must act with expediency throughout the accommodations process, not just when responding to the employee’s initial communication.

Second, we urge the EEOC to remove language in proposed 1636.4(a)(1)(vi) and the corresponding discussion in the proposed appendix stating that a delay by the employer is “more likely to be excused” if the employer provides an interim accommodation.<sup>163</sup> As discussed in Section A.VII.d., we believe that the PWFA requires short-term accommodations to address employees’ immediate needs, and we recommend that the EEOC make clear that providing such accommodations is a requirement, rather than creating a separate category of “interim accommodations” as a best practice.

Whether the EEOC preserves its approach to “interim accommodation” as a best practice or clarifies that such accommodations are required under the PWFA, the fact that an employer provided a short-term “interim accommodation” should not be an excuse if the employer creates “unnecessary delay” in providing the employee’s requested accommodation. While this language may be intended to create an incentive for an employer to provide an interim accommodation, it may also, conversely, cause some employers to unjustifiably rely on the provision of an interim accommodation to prolong the interactive process. This is especially concerning since the Proposed Rule does not offer clear guidance to determine the reasonableness of an interim accommodation in the context of an interactive process. Moreover, workers who receive interim accommodations may feel pressured to accept additional delay in the process, which could negatively impact their health or the health of their pregnancies.

Third, we encourage the EEOC to add “the urgency of the requested accommodation” to its list of factors to consider in assessing “unnecessary delay,” outlined in proposed 1636.4(a). At times, pregnant workers

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<sup>159</sup> 88 Fed. Reg. at 54770 (Proposed 1636.4(a)(1)); 88 Fed. Reg. at 54789 & n. 98.

<sup>160</sup> U.S. Equal Emp. Opportunity Comm’n, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, at Question 10 (2002), <http://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> (“Unnecessary delays can result in a violation of the ADA.”).

<sup>161</sup> 88 Fed. Reg. 54789 & n. 97 (Aug. 11, 2023).

<sup>162</sup> H.R. REP. NO. 117-27, pt. 1, at 11 (2021), <https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf>.

<sup>163</sup> 88 Fed. Reg. at 54770 (Proposed 1636.4(a)(1)); 88 Fed. Reg. at 54789 (“The provision of such an interim accommodation will decrease the likelihood that an unnecessary delay will be found.”).



or workers with related medical conditions may need to seek emergency medical care or experience other urgent needs related to their health; without immediate relief, they may experience significant health complications.<sup>164</sup> It is therefore essential to consider the urgency of the situation when assessing whether a delay constitutes a violation of the PWFA.

Finally, we suggest that the EEOC provide examples of unnecessary delay in the final appendix. Because the determination of what constitutes unnecessary delay involves the application of a multi-factor test, it would be helpful to illustrate how these factors may be assessed and what situations might constitute unnecessary delay.

**II. The Proposed Rule Should Make Clear That an Employee or Applicant Who Declines a Reasonable Accommodation, and Cannot Perform an Essential Function, May Still be “Qualified” Under 1636.4(a)(2).**

The EEOC should clarify the provision in proposed 1636.4(a)(2) of the proposed rule regarding an employee or applicant who declines an accommodation and, as a result, cannot perform the essential functions of the position. Proposed 1636.4(a)(2) first states that such an employee “*will not be considered ‘qualified’*” (emphasis added) but then explains that the employer must consider if the employee could still be “qualified” under 1636(f)(2)(b).<sup>165</sup> We recommend that the EEOC revise this provision to read, “However, if such employee or applicant...cannot perform the essential functions of the position or cannot apply, the employee or applicant would not be considered qualified under 1636.3(f)(1) but may still be qualified under the second part of the PWFA's definition, set forth at 1636.3(f)(2).”

**III. The EEOC Should Clarify that an Employer May Not Choose an Accommodation that Would Negatively Affect the Worker’s Employment Opportunities.**

The EEOC seeks comments on whether the Proposed Rule should explain that “an employer may not unreasonably select an accommodation that negatively affects an employee’s or applicant’s employment opportunities or terms and conditions of employment when another available accommodation would not do so . . . .”<sup>166</sup>

Under proposed 1636.4(a)(4) and the proposed appendix, an employer has discretion to choose among potential accommodations when multiple options would meet the needs of the employee, but the employer “must choose an option that provides the employee or applicant equal employment opportunity.”<sup>167</sup> “Equal employment opportunity” means “an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a known limitation.”<sup>168</sup>

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<sup>164</sup> See, e.g., DINA BAKST ET. AL, 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 fainted and needed emergency care or experienced pregnancy loss as a result of not being accommodated).

<sup>165</sup> 88 Fed. Reg. at 54770 (Proposed 1636.4(a)(2)).

<sup>166</sup> *Id.* at 54740.

<sup>167</sup> *Id.* at 54770 (Proposed 1636.4(a)(4)); *Id.* at 54790.

<sup>168</sup> *Id.* at 54790.

We encourage the EEOC to modify this standard, which links “equal employment opportunity” to the benefits and opportunities received by other employees. Instead, the relevant inquiry should be whether the accommodation provides the employee with access to the same opportunities and benefits that they would have received prior to their limitation and need for accommodation. We therefore recommend that the EEOC revise proposed 1636.4(a)(4) to state: “The accommodation should provide the employee or applicant with equal employment opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as would be available to the employee seeking accommodation had they not identified a known limitation or sought accommodation. When choosing between accommodations that do not cause an undue hardship, a covered entity may not unreasonably select an accommodation that negatively affects an employee’s or applicant’s employment opportunities or terms and conditions of employment when another available accommodation would not do so.”

#### **IV. We Support the EEOC’s Interpretation of the Prohibition Against Requiring a Qualified Employee to Accept an Accommodation That Was Not Arrived at Through the Interactive Process.**

Proposed 1636.4(b) restates the provision of the PWFA that prohibits an employer from requiring a qualified employee from accepting an accommodation “other than any reasonable accommodation arrived at through the interactive process...”<sup>169</sup> This provision is essential to the purpose of the PWFA, which adopted the interactive process to allow for individualized determinations and avoid “perpetuat[ing] gender inequality by providing women with overly broad and unnecessary protections.”<sup>170</sup> It guards against the kind of paternalism that was struck down in *UAW v. Johnson Controls*, in which the Supreme Court held that an employer’s policy excluding all “fertile women” from battery-manufacturing roles out of concern about harm to any fetus a female employee might conceive violated the PDA.<sup>171</sup> Although this case was decided over thirty years ago, some employers continue to impose workplace modifications based on stereotypes and assumptions<sup>172</sup>—an experience that is particularly common for women working in low-paid jobs, such as in the restaurant industry, and jobs that are traditionally male-dominated.<sup>173</sup>

Accordingly, we appreciate the EEOC’s clarification in the proposed appendix that an employer can violate the PWFA by failing to engage in an interactive process and imposing an accommodation on an employee who had not requested an accommodation and who can perform the essential functions of their job without one—in other words, a qualified employee, as defined under the PWFA. We commend

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<sup>169</sup> *Id.* at 54770 (Proposed 1636.4(b)); 42 U.S.C. 2000gg–1(2).

<sup>170</sup> H.R. REP. NO. 117-27, pt. 1, at 30 (2021), <https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf>.

<sup>171</sup> See generally *UAW v. Johnson Controls*, 499 U.S. 187. Recognizing this long history of paternalism by employers, Congress declined to incorporate the ADA’s “direct threat” provisions, which specifically allow employers to require that an employee not impose a direct threat to their own safety or the safety of others in the workplace, into the PWFA. 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).

<sup>172</sup> See, e.g., Drew Friedman, *Pregnant CBP Employees Involuntarily Placed on ‘Light Duty,’ Allege Systematic Discrimination*, FED. NEWS NETWORK (May 4, 2023), <https://federalnewsnetwork.com/workforce-rights/governance/2023/05/pregnant-cbp-employees-involuntarily-placed-on-light-duty-allege-systematic-discrimination/>.

<sup>173</sup> STEPHANIE BORNSTEIN, CENTER FOR WORKLIFE LAW, POOR, PREGNANT, AND FIRED: CAREGIVER DISCRIMINATION AGAINST LOW-WAGE WORKERS 13-14, <https://worklifelaw.org/publications/PoorPregnantAndFired.pdf>.

the EEOC for including detailed examples that illustrate a broad range of actions by employers that would violate this section of the PWFA.<sup>174</sup>

**V. We Support the Proposed Rule’s Clear Prohibition on Requiring Employees to Take Leave if Another Accommodation Can Be Provided.**

We commend the EEOC for its clear rule and guidance on the provisions of the statute prohibiting employers from requiring qualified employees to take paid or unpaid leave if another reasonable accommodation can be provided.<sup>175</sup> We appreciate the EEOC’s recognition that it has long been a common practice for employers to force pregnant workers to take leave before it is medically necessary, leaving them without pay and without remaining leave when they later need it.<sup>176</sup> At the same time, the proposed appendix makes clear that the provisions prohibiting forced leave do not limit the availability of leave as a potential reasonable accommodation if requested by the employee.<sup>177</sup>

**VI. The EEOC Should Include a Definition of “Adverse Action” in the Proposed Regulation.**

The PWFA prohibits employers from taking “adverse action in terms, conditions, or privileges of employment” against an employee for requesting or using an accommodation.<sup>178</sup> Proposed 1636.4(e)(1) restates this statutory provision, and although EEOC includes a definition of “adverse action” in its proposed appendix, it provides no definition of “adverse action” in the text of the proposed regulation. We urge the EEOC to define “adverse action” directly within the text of 1636.4(e)(1).

As the term “adverse action” does not come from Title VII or the ADA,<sup>179</sup> it is important for the EEOC to provide as much clarity as possible on the meaning of the term, based on the context of the PWFA and read in light of the entirety of 42 USC 2000gg-1. We support the approach taken by the EEOC to define “adverse action” to prohibit “taking a harmful action against an employee,” based on “basic dictionary definitions.”<sup>179</sup> The EEOC’s interpretation of “adverse action” to prohibit “harmful action” supports the purpose of the PWFA: to ensure that qualified employees are able to access reasonable accommodations absent undue hardship to their employers. An employer who could take harmful action against an employee for using an accommodation would create a chilling effect, rendering the PWFA ineffectual. Similarly, the PWFA can only work if employees are empowered to communicate their need for reasonable accommodations to their employers. For these reasons, we encourage the EEOC to provide the same definition of “adverse action” in the text of 1636.4(e)(1).

We agree with the EEOC’s interpretation of the language “terms, conditions, or privileges of employment” to encompass a broad range of workplace practices, consistent with longstanding interpretations of this language under Title VII.<sup>180</sup> EEOC guidance provides that this language in Title VII

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<sup>174</sup> See 88 Fed. Reg. at 54790-91.

<sup>175</sup> *Id.* at 54770 (Proposed 1636.4(d)(1)); 42 U.S.C. 2000gg-1(4).

<sup>176</sup> 88 Fed. Reg. at 54791 & n. 109-10 (citing H.R. REP. NO. 117-27, pt. 1, at 24 (2021), <https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf>).

<sup>177</sup> 88 Fed. Reg. at 54791.

<sup>178</sup> 42 USC 2000gg-1(5).

<sup>179</sup> 88 Fed. Reg. at 54791.

<sup>180</sup> *Id.* at 54791 & n. 112 (citing U.S. Equal Emp. Opportunity Comm’n, *Compliance Manual Section 613 Terms, Conditions, and Privileges of Employment*, at 613.1(a)(1982), <https://www.eeoc.gov/laws/guidance/cm-613-terms-conditions-and-privileges-employment>.)

“is to be read in the broadest possible terms.”<sup>181</sup> The Supreme Court has stated that this language “is not limited to “economic” or “tangible” discrimination,” and that it extends beyond “‘terms’ and ‘conditions’ in the narrow contractual sense.”<sup>182</sup> The PWFA used identical language to Title VII regarding “terms, conditions, or privileges of employment,” and this phrase should be interpreted consistently with prior judicial and agency interpretations under Title VII.

## **VII. We Support the EEOC’s Interpretation of the PWFA’s Provisions Prohibiting Retaliation and Coercion.**

Proposed 1636.5(f) restates the statutory provisions against retaliation and coercion and provides important clarifications to ensure that they are given an appropriately broad interpretation. We commend the EEOC for recognizing that these provisions are intended to be interpreted broadly, as are similar provisions of the ADA and Title VII, to carry out the remedial purpose of the statute.<sup>183</sup>

Proposed 1636.5(f) clarifies that, based on the statutory language, the anti-retaliation and anti-coercion provisions apply to all employees, applicants, or former employees, not just qualified employees with a known limitation.<sup>184</sup> It also specifies that an employee need not actually be deterred from exercising their rights under the PWFA in order for the retaliation or coercion to violate the law.<sup>185</sup> We support these interpretations, which are consistent with EEOC guidance and judicial interpretations of similar provisions under Title VII and the ADA<sup>186</sup> and essential to ensure that all employees who exercise rights under the PWFA are protected from retaliation and coercion.

The Proposed Rule also includes specific actions that would constitute retaliation or coercion, including requiring medical documentation where it is not reasonable to do so or continuing to require more information or documentation after sufficient information or documentation has been provided to support a request for accommodation.<sup>187</sup> We support the inclusion of these examples, which are consistent with earlier sections of the Proposed Rule outlining limitations on when employers can require supporting documentation, and which will protect against invasive requests that violate workers’ privacy. We appreciate the statement in the proposed appendix that releasing or threatening to release

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<sup>181</sup> U.S. Equal Emp. Opportunity Comm’n, *Compliance Manual Section 613 Terms, Conditions, and Privileges of Employment*, at 613.1(a)(1982), <https://www.eeoc.gov/laws/guidance/cm-613-terms-conditions-and-privileges-employment>.

<sup>182</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (first quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) and then quoting *Oncala v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78, 118 S.Ct. 998, 1001, 140 L.Ed.2d 201 (1998)). In a recent decision, the Fifth Circuit held that officers who were subjected to a sex-based scheduling system, under which only male officers could take the full weekend off, plausibly alleged discrimination in the “terms, conditions, or privileges of employment.” *Hamilton v. Dallas County*, 79 F.4th 494, 503 (2023).

<sup>183</sup> 88 Fed. Reg. at 54792.

<sup>184</sup> *Id.* at 54771 (Proposed 1636.5(f)(1)(i), 1636.5(f)(2)(i)).

<sup>185</sup> *Id.* at (Proposed 1636.5(f)(1)(iii), 1636.5(f)(2)(iii)).

<sup>186</sup> *See, e.g.*, U.S. Equal Emp. Opportunity Comm’n, *Enforcement Guidance on Retaliation and Related Issues*, at II.B.1, III (2016), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues> (noting that retaliation does not require that the person actually be deterred from engaging in protected activity, and recognizing that under the ADA, individuals need not establish that they are “qualified” in order to be protected against retaliation); *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 67-68 (2006) (holding that Title VII’s anti-retaliation provisions extend to a broader range of actions than its substantive provisions).

<sup>187</sup> 88 Fed. Reg. at 54771 (Proposed 1636.5(f)(1)(iv)-(v), 1636.5(f)(2)(iv)-(v)).

confidential medical information, in violation of 1636.3(l)(4), may also constitute a violation of the PWFA's prohibitions against retaliation and coercion,<sup>188</sup> and we encourage the EEOC to specifically state this in 1636.5(f)(1) and 1636.5(f)(2).

### **C. COMMENTS ON SECTION 1636.7 "RELATIONSHIP TO OTHER LAWS."**

This section outlines NWLC's comments on Section 1636.7 "Relationship to Other Laws" and the corresponding discussion in the proposed appendix.

#### **I. The EEOC Appropriately Interprets the Statutory Provision on Employer-Sponsored Health Plans.**

Proposed 1636.7(a)(2) restates the provision of the statute specifying that "The PWFA and this regulation do not require an employer-sponsored health plan to pay for or cover any particular item, procedure, or treatment or affect any right or remedy available under any other Federal, State, or local law with respect to any such payment or coverage requirement."<sup>189</sup> This provision is consistent with the ADA, which has not generally been interpreted to require any particular health insurance coverage design as a reasonable accommodation.<sup>190</sup> We appreciate the clarification in the proposed appendix that the PWFA also does not prohibit an employer from paying for health insurance benefits for any particular item or procedure, including abortion.<sup>191</sup>

#### **II. The EEOC Should Provide a More Detailed Interpretation of the Rule of Construction.**

Proposed 1636.7(b) restates a rule of construction set out in the PWFA, which states that the statute "is subject to the applicability to religious employment set forth in section 702(a) of the Civil Rights Act of 1964."<sup>192</sup> Proposed 1636.7(b) adds that this rule of construction does not limit the Constitutional rights of employers or the rights of employees under other civil rights statutes.<sup>193</sup>

The EEOC has asked whether the public would benefit from a more detailed interpretation of the rule of construction that would inform its case-by-case consideration of the rule's application. In response, we strongly encourage the EEOC to provide a more detailed interpretation of the rule of construction as outlined below.

##### **a. The EEOC Must Make Clear That Religious Employers Are Subject to the Requirements of the PWFA.**

The EEOC must clarify in the appendix that although the PWFA rule of construction allows religious institutions to continue to prefer coreligionists for religious employment in the pregnancy accommodation context, it does not exempt religious institutions from the requirement to provide

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<sup>188</sup> *Id.* at 54793 (Noting that "releasing medical information, threatening to release medical information, or requiring an employee or applicant to share their medical information with individuals who have no role in processing a request for reasonable accommodation may violate the PWFA's retaliation and coercion provisions.").

<sup>189</sup> *Id.* at 54772 (Proposed 1636.7(a)(2)); 42 U.S.C. 2000gg-5(a)(2).

<sup>190</sup> See U.S. Equal Emp. Opportunity Comm'n, *The ADA: Your Responsibilities as an Employer* (2008), <https://www.eeoc.gov/publications/ada-your-responsibilities-employer>.

<sup>191</sup> 88 Fed. Reg. at 54794.

<sup>192</sup> *Id.* at 54772 (Proposed 1636.7(b)).

<sup>193</sup> *Id.* at 54772 (Proposed 1636.7(b)(1)-(2)).

reasonable accommodations that do not pose an undue hardship, as defined in 42 U.S.C. 2000gg and section 1636.3(j) of the proposed regulation. Such an interpretation is consistent with how the provision on religious employment has long been construed under Title VII, and with the legislative intent in including this provision in the PWFA.

The rule of construction in the PWFA affirms the ongoing applicability of a narrow exemption from religious discrimination prohibitions that exists for religious employment under Section 702(a) of Title VII. Section 702(a) provides that Title VII does not apply “to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”<sup>194</sup> This provision creates an exception from Title VII’s prohibition of employment discrimination on the basis of religion to allow religious institutions to prefer coreligionists in employment.

While section 702(a) allows religious institutions to make relevant hiring decisions based on an individual’s religion, it is a narrow exemption from a religious antidiscrimination rule; it does not exempt religious employers from Title VII entirely, and it does not allow them to discriminate on the basis of other protected categories.<sup>195</sup> The PWFA’s rule of construction simply makes clear that nothing in the PWFA limits Section 702(a)’s narrow allowance of a preference for coreligionists; it does not broadly exempt religious employers from the requirements of the PWFA. In other words, the rule of construction allows religious institutions to continue to prefer coreligionists in making pregnancy accommodations related to religious employment.

The legislative history of the PWFA supports this interpretation of the rule of construction. In a statement on the House floor, Representative Nadler, the lead sponsor of the PWFA in the House, explained, “By affirming the continued applicability of 702(a), the rule of construction allows religious institutions to continue to prefer coreligionists in the pregnancy accommodation context.” He clarified that the rule of construction differed from a previous amendment rejected by the House, which would have exempted certain religious employers from the requirements of the PWFA altogether.<sup>196</sup> In fact,

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<sup>194</sup> 42 U.S.C. § 2000e–1(a).

<sup>195</sup> See, e.g., *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) (stating that “While the language of § 702 makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin...”); *Kennedy v. St. Joseph’s Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011) (stating that Section 702 “does not exempt religious organizations from Title VII’s provisions barring discrimination on the basis of race, gender, or national origin.”); *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996) (stating that Section 702 “merely indicates that such institutions may choose to employ members of their own religion without fear of being charged with religious discrimination. Title VII still applies, however, to a religious institution charged with sex discrimination.”). In its recent final rule rescinding a 2020 rule on the application of the religious exemption in Executive Order 11246, the Office of Federal Contract Compliance Programs (OFCCP) reaffirmed this interpretation. OFCCP explained that “the weight of Title VII case law” and Congressional intent both reflect that religious employers may make employment decisions based on an individual’s “acceptance of and adherence to religious tenets”, but “only as long as those decisions do not violate the other nondiscrimination provisions of Title VII”. 88 Fed. Reg. 12842 (Mar. 1, 2023).

<sup>196</sup> 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>.

amendments that would have altered the definition of “covered entity” to exempt religious organizations were rejected in both the 116th and 117th Congress.<sup>197</sup>

The EEOC has asked about alternative interpretations, including “a rule that construes the PWFA as not requiring a religious entity to make any accommodation that would conflict with the entity’s religion.”<sup>198</sup> The narrow statutory text affirming merely the ongoing “applicability” of Section 702(a) and the legislative history make clear that there is no support for an alternative interpretation of the rule of construction that creates a broad carve-out for religious entities. In fact, the Senate considered and rejected an amendment that used identical language to the EEOC’s proposed alternative quoted above.<sup>199</sup> The rejection of this amendment, and of the House amendments discussed above, in favor of the narrower rule of construction, illustrates that Congress did not intend to exempt religious employers from the requirements of the PWFA.

Given the narrow scope of the rule of construction as properly construed, there are limited factual scenarios in which the rule of construction will apply. For example, a pregnant worker without a religious affiliation who was in need of light duty might otherwise be entitled to a reasonable accommodation in the form of a temporary job reassignment of sharing religious literature with worshippers, but the rule of construction makes clear that a covered religious employer could instead decide to hire a coreligionist for that role, rather than making this accommodation available to the pregnant worker, without running afoul of the PWFA. However, the employer would still be obligated to engage in an interactive process with the pregnant worker to determine whether another reasonable accommodation would address their known limitation.

Precisely because the rule of construction on religious employment applies in limited factual scenarios, it is important that the EEOC provide a clear and detailed interpretation of this provision. Countless examples illustrate how employers have engaged in sex discrimination against workers based on the employers’ religious beliefs about employees’ personal reproductive health decisions and family roles.<sup>200</sup> A detailed interpretation of the rule of construction that clarifies its narrow application is essential to ensure that the rule of construction is not misused and misapplied to inappropriately exempt religious employers from the requirements of the PWFA.

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<sup>197</sup> Markup of H.R. 2694, Pregnant Workers Fairness Act, Before the H. Comm. on Educ. & Lab., 116th Cong. (Jan. 13, 2020) (substitute amendment offered by Rep. Virginia Foxx (R-NC)), <https://docs.house.gov/meetings/ED/ED00/20200114/110385/BILLS-116-HR2694-F000450-Amdt-2.pdf>; 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>.

<sup>198</sup> 88 Fed. Reg. at 54746.

<sup>199</sup> See S. Amdt. 6577, 117th Cong. (2022), <https://www.congress.gov/amendment/117th-congress/senate-amendment/6577/text>. Senator Casey (D-PA) and Senator Cassidy (R-LA), lead sponsors of the bill, both voted to reject the amendment. 168 Cong. Rec. S10,063, S10,070, <https://www.congress.gov/117/crec/2022/12/22/168/200/CREC-2022-12-22.pdf>.

<sup>200</sup> *States Say Reproductive Health Decisions Are Not Your Boss’ Business*, NAT’L WOMEN’S LAW CTR. (Feb. 8, 2018), <https://nwl.org/resource/states-take-action-to-stop-bosses-personal-beliefs-from-trumping-womens-reproductive-health-care-decisions/> (describing examples in which religious employers fired or threatened to fire workers who used assisted reproductive technology, became pregnant outside of marriage, or used birth control).

b. The EEOC Should Clarify Its Explanation of What Entities Are Considered Religious Organizations.

We encourage the EEOC to make clear the absence of legal support for the notion that a for-profit corporation can qualify as a “religious organization” under Section 702(a) and thus under the PWFA rule of construction. No federal appellate court nor the Supreme Court has ever held that a for-profit corporation can constitute a “religious organization” under Title VII. Instead, federal courts have consistently held that the for-profit nature of an entity weighs against classification as a “religious organization.”<sup>201</sup>

The EEOC has appropriately outlined the factors that courts will consider in determining whether an employer is a religious organization, including “whether the entity operates for a profit.”<sup>202</sup> The proposed preamble’s statement that “Title VII case law has not definitively determined whether a for-profit corporation that satisfies the other factors . . . can constitute a religious corporation under Title VII”<sup>203</sup> will only cause confusion, and we encourage the EEOC to more clearly describe the relevant case law in issuing the final rule.

#### **D. COMMENTS ON THE ECONOMIC ANALYSIS OF THE PWFA.**

We appreciate the EEOC’s detailed discussion of the benefits and costs of the proposed rule and underlying statute and fully support the EEOC’s conclusion that “the benefits of the proposed rule and underlying statute justify its costs.”<sup>204</sup> We commend the EEOC for recognizing the significant nonquantifiable benefits of the proposed rule, as required by Executive Order 13563. Those benefits include improved health for workers and their babies; economic security for workers and their families; enhancement of human dignity and reduced sex discrimination; clarity in the relevant legal frameworks and decreased litigation costs; and a range of benefits to employers, including retention of employees, increased productivity, reduced training costs, and improved morale.<sup>205</sup>

We also agree that the Proposed Rule does not pose a substantial burden on employers.<sup>206</sup> As the EEOC correctly notes, accommodations under the PWFA will typically be low- or no-cost,<sup>207</sup> and because thirty states and five localities already have similar laws requiring employers to provide pregnant workers with reasonable accommodations, the rule will impose “minimal, if any” additional costs to many employers.<sup>208</sup>

The EEOC has asked for comment on the benefits to affected individuals stemming from the proposed rule and underlying statute. In response, we encourage the EEOC to consider the positive impacts of the

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<sup>201</sup> See, e.g., *E.E.O.C. v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 619 (9th Cir. 1988) (stating that the fact that the company is for profit supports a finding that the company is primarily secular).

<sup>202</sup> 88 Fed. Reg. at 54747.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 54764.

<sup>205</sup> *Id.* at 54751-54.

<sup>206</sup> *Id.* at 54750, 54764. As the EEOC explains, the primary costs associated with the proposed rule include the annual costs of providing accommodations and the one-time administrative costs associated with understanding and implementing the rule.

<sup>207</sup> 88 Fed. Reg. at 54759.

<sup>208</sup> *Id.* at 54754.



Proposed Rule on the mental and emotional health of workers, as well as the long-term health benefits the Proposed Rule will provide to children. We also suggest additional considerations related to the ways in which the Proposed Rule will enhance human dignity and economic security.

**I. The Proposed Rule Will Have Positive Effects on Mental Health During Pregnancy and Create Long-Term Health Benefits for Children.**

We commend the EEOC for recognizing in its economic analysis that pregnant workers who experience workplace discrimination or are denied reasonable accommodations can experience negative effects on their mental health, including stress, anxiety, and fear.<sup>209</sup> Even perceived pregnancy discrimination at work has been linked to increased stress and symptoms of postpartum depression.<sup>210</sup> By providing a right to reasonable workplace accommodations, the PWFA and the proposed regulations can reduce stress and improve mental health outcomes.

We also urge the EEOC to consider in its analysis how stress that results from workplace discrimination and workplace conditions during pregnancy can ultimately affect the health of the child in the short and long term. High levels of stress during pregnancy can increase the risk of preterm birth or low-birth weight, which can lead to serious health problems at birth.<sup>211</sup> Moreover, at least one study has identified a relationship between perceived pregnancy discrimination in the workplace and lower birth weights and gestational ages, linking these effects to stress.<sup>212</sup> These serious health consequences can not only affect newborns but can last throughout their entire lives. Long-term health consequences of premature birth, for example, can include intellectual and developmental disabilities, lung damage and breathing problems, hearing loss, dental and vision problems, and other health conditions.<sup>213</sup>

These health outcomes can also have significant economic costs. According to the March of Dimes, “[e]mployers pay twelve times as much in health care costs for premature/low birthweight (LBW) babies as for babies born without complications.”<sup>214</sup> These numbers do not take into account the health care costs for the long-term complications that babies born prematurely may experience throughout their lives.

The EEOC’s economic analysis should take into account how reducing stress during pregnancy by providing reasonable accommodations can reduce serious health complications at birth and in the long-term, as well as the associated economic costs of these health outcomes, by reducing stress during pregnancy.

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<sup>209</sup> *Id.* at 54752 & n.234.

<sup>210</sup> Kaylee J. Hackney et al., *Examining the Effects of Perceived Pregnancy Discrimination on Mother and Baby Health*, 106 *J. Applied Psych.* 774, 777, 781 (2021).

<sup>211</sup> *Stress and Pregnancy*, MARCH OF DIMES, <https://www.marchofdimes.org/find-support/topics/pregnancy/stress-and-pregnancy> (last visited Oct. 8, 2023).

<sup>212</sup> Hackney, *supra* note 210 at 778, 781.

<sup>213</sup> *Long-Term Health Effects of Premature Birth*, MARCH OF DIMES (Oct. 2019), <https://www.marchofdimes.org/find-support/topics/birth/long-term-health-effects-premature-birth>.

<sup>214</sup> *PREMATURE BIRTH: THE FINANCIAL IMPACT ON BUSINESS*, MARCH OF DIMES (2013), <https://onprem.marchofdimes.org/materials/premature-birth-the-financial-impact-on-business.pdf>.

## II. The Proposed Rule Enhances Human Dignity.

The EEOC seeks comment regarding the ways in which the Proposed Rule and the PWFA enhance human dignity.<sup>215</sup> We commend the EEOC for recognizing that the Proposed Rule and underlying statute promote human dignity by allowing workers to prioritize their health and the health of their babies; reducing sex discrimination; and improving equity.<sup>216</sup> We encourage the EEOC to consider the following additional points.

Research indicates that discrimination and mistreatment based on identity can threaten dignity for vulnerable workers, including women, workers of color, and LGBTQ workers.<sup>217</sup> Moreover, workers who are denied accommodations for pregnancy-related conditions describe experiences of humiliation. For example, a food service worker in Washington, D.C. reported that once she told her boss that she was pregnant, he singled her out for adverse treatment, including yelling at her in front of customers, requiring her to notify all of her coworkers before using the bathroom, denying her additional breaks to eat, and prohibiting her from drinking water during her shifts; the worker was ultimately fired in front of her coworkers for leaving a shift for a prenatal appointment after she was denied permission to leave.<sup>218</sup> The worker described feeling “frustrated”, “embarrassed” and “humiliated” as a result of this mistreatment and especially as a result of feeling “singled out and punished.”<sup>219</sup> Acts of humiliation, like the ones described by this worker, constitute violations of human dignity.<sup>220</sup> By providing an actionable, legal right to reasonable workplace accommodations, the PWFA and the Proposed Rule will reduce discrimination against pregnant workers and acts of humiliation in the workplace, which will promote human dignity.

Additionally, the PWFA and the Proposed Rule promote “intrinsic dignity,” a concept of human dignity that recognizes the value that a person has by virtue of being human, not because of their skills, achievements, status, or production.<sup>221</sup> By providing accommodations that allow workers to prioritize their health, including providing leave as an accommodation and temporarily suspending essential job functions, the PWFA acknowledges the value of the whole person, beyond their value as a worker.

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<sup>215</sup> 88 Fed. Reg. at 54749.

<sup>216</sup> *Id.* at 54753-54.

<sup>217</sup> Kristen Lucas, *Workplace Dignity* at 8, in *THE INTERNATIONAL ENCYCLOPEDIA OF ORGANIZATIONAL COMMUNICATION* (Craig R. Scott and Laurie Lewis eds, 2017), [https://www.researchgate.net/profile/Kristen-Lucas-2/publication/314756086\\_Workplace\\_Dignity/links/59b0142fa6fdcc3f8889a375/Workplace-Dignity.pdf](https://www.researchgate.net/profile/Kristen-Lucas-2/publication/314756086_Workplace_Dignity/links/59b0142fa6fdcc3f8889a375/Workplace-Dignity.pdf) (noting that discrimination and mistreatment based on identity can threaten workers’ dignity).

<sup>218</sup> NAT’L WOMEN’S LAW CTR. & A BETTER BALANCE, *IT SHOULDN’T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS 4* (2013), [https://nwlc.org/wp-content/uploads/2015/10/pregnant\\_workers.pdf](https://nwlc.org/wp-content/uploads/2015/10/pregnant_workers.pdf).

<sup>219</sup> *Id.*

<sup>220</sup> See Deepa Kansra, *Can Human Rights Law Protect Against Humiliation?*, *PSYCHOLOGY TODAY* (Jan. 5, 2023), <https://www.psychologytoday.com/us/blog/rights-well-being/202212/can-human-rights-law-protect-against-humiliation> (“A human rights perspective interprets humiliation as a form of violence that constitutes a violation of an individual’s rights and dignity.”).

<sup>221</sup> Daniel P. Sulmasy, *The Varieties of Human Dignity: A Logical and Conceptual Analysis*, 16 *MED. HEALTH CARE AND PHILOS.* 937, 938 (2013), <https://link.springer.com/content/pdf/10.1007/s11019-012-9400-1.pdf>.

### III. The Proposed Rule Promotes Economic Security.

NWLC appreciates the EEOC's recognition that providing reasonable accommodations will promote economic security by allowing workers to stay in their jobs, preserving access to income and benefits, and increasing women's participation in the labor force.<sup>222</sup>

The EEOC notes that without accommodations, pregnant workers are often pushed out of their jobs or forced to take unpaid leave.<sup>223</sup> According to a recent survey, less than half of Americans have enough emergency savings to cover three months of expenses.<sup>224</sup> Workers cannot afford to face economic insecurity and uncertainty at a moment where they are likely to face increased costs associated with childbirth,<sup>225</sup> caring for a newborn, and childcare.<sup>226</sup> Pregnant workers who are denied reasonable accommodations and forced out of their jobs or onto unpaid leave report long-term financial consequences that extend far beyond the loss of income, including losing health insurance, incurring credit card and medical debt, being unable to afford housing, and being unable to find another job.<sup>227</sup> By providing a right to reasonable accommodations, the PWFA and proposed rule will help pregnant and postpartum workers (and those affected by related conditions) remain in their jobs and preserve their economic security.

We also encourage the EEOC to consider how the PWFA will promote economic security for low-paid workers and women of color in particular. Women of color and Native women are overrepresented in low-paid jobs, and workers in these jobs are also less likely to have health insurance, access to paid sick days or paid medical leave, and other benefits.<sup>228</sup> Given the persistence of the gender wage gap, which is even more pronounced for women of color,<sup>229</sup> providing accommodations that can help workers stay in their jobs is critical to promoting economic security.

### E. CONCLUSION

NWLC strongly supports the EEOC's comprehensive Proposed Rule on the Pregnant Workers Fairness Act, which will protect the health and economic security of pregnant and postpartum workers, as well as those affected by related medical conditions, while minimizing costs to employers. We thank the EEOC

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<sup>222</sup> 88 Fed. Reg. at 54752-53.

<sup>223</sup> *Id.* at 54752.

<sup>224</sup> Lane Gillespie, *Bankrate's 2023 Annual Emergency Savings Report*, BANKRATE, <https://www.bankrate.com/banking/savings/emergency-savings-report/> (Jun. 22, 2023).

<sup>225</sup> Matthew Rae et. al, *Health Costs Associated with Pregnancy, Childbirth, and Postpartum Care*, KFF (Jul. 13, 2022), <https://www.kff.org/health-costs/issue-brief/health-costs-associated-with-pregnancy-childbirth-and-postpartum-care/> (noting that the average health care costs associated with "pregnancy, childbirth, and postpartum care" total \$18,865, and the average out-of-pocket cost is \$2,854).

<sup>226</sup> KAREN SCHULMAN, NAT'L WOMEN'S LAW CTR., ON THE PRECIPICE: STATE CHILD CARE ASSISTANCE POLICIES 2020 2 (2021), <https://nwlc.org/wp-content/uploads/2021/05/NWLC-State-Child-Care-Assistance-Policies-2020.pdf> (noting that the average annual cost of full-time childcare can range from \$3,800-\$20,000).

<sup>227</sup> See NAT'L WOMEN'S LAW CTR., PERSONAL STORIES ABOUT THE NEED FOR THE PREGNANT WORKERS' FAIRNESS ACT (on file with author) (this document collected stories from cases around the country and was shared with members of Congress when the PWFA was being debated).

<sup>228</sup> See TUCKER & VOGTMAN, *supra* note 66 at 7, 15.

<sup>229</sup> BROOK LEPAGE & JASMINE TUCKER, A WINDOW INTO THE WAGE GAP: WHAT'S BEHIND IT AND HOW TO CLOSE IT (Jan. 2023), <https://nwlc.org/resource/wage-gap-explainer/>.

for the opportunity to comment on the proposed rule and urge the EEOC to adopt our recommendations to further strengthen the final rule.

Please contact Gaylynn Burroughs, Director of Workplace Equality & Senior Counsel ([gburroughs@nwlc.org](mailto:gburroughs@nwlc.org)) or Katie Sandson, Senior Counsel for Education & Workplace Justice ([ksandson@nwlc.org](mailto:ksandson@nwlc.org)), with any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Emily Martin".

Emily Martin  
Vice President for Education & Workplace Justice

A handwritten signature in blue ink, appearing to read "Gaylynn Burroughs".

Gaylynn Burroughs  
Director of Workplace Equality & Senior Counsel

A handwritten signature in black ink, appearing to read "Katie Sandson".

Katie Sandson  
Senior Counsel for Education & Workplace Justice