



It shouldn't be a heavy lift: fair treatment for pregnant workers

ABOUT THE CENTER

The National Women's Law Center is a non-profit organization whose mission is to expand the possibilities for women and girls by working to remove barriers based on gender, open opportunities, and help women and their families lead economically secure, healthy, and fulfilled lives—especially low-income women and their families.

ABOUT A BETTER BALANCE

A Better Balance is a legal advocacy organization dedicated to promoting fairness in the workplace and helping workers across the economic spectrum care for their families without risking their economic security. A Better Balance also hosts the Families @ Work Legal Clinic to assist low-income working New Yorkers with pregnancy discrimination, caregiver discrimination, pay discrimination, and other related issues.

ACKNOWLEDGMENTS

This report was a collaborative effort that relied upon the work of many individuals. The primary authors from the National Women's Law Center are Emily Martin and Liz Watson. The primary authors from A Better Balance are Dina Bakst and Elizabeth Gedmark. Marcia Greenberger, Cortelyou Kenney, Maria Patrick, Kate Gallagher Robbins, and Abby Lane of the National Women's Law Center also made significant contributions to this report. Beth Stover designed the report.

We would like to thank the women who so bravely shared their stories for this report. It would not have been possible without them.

This report also would not have been possible without the generous support of the Ford Foundation, the Morningstar Foundation, the New Directions Foundation, the Newman's Own Foundation, the New York Women's Foundation, the David and Lucille Packard Foundation, the Irene B. Wolt Charitable Trust, and an anonymous donor. The findings and conclusions of this report, however, are those of the authors alone, and do not necessarily reflect the opinions of these funders.

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table of contents

Introduction	1
Pregnant Women’s Importance as Workers and Breadwinners	3
The Particular Challenges Faced by Pregnant Workers in Low-Wage and Nontraditional Jobs	5
Employers’ Refusal to Accommodate Pregnancy Takes a Heavy Toll on Families	9
The Current Legal Landscape: Untapped Potential for Pregnant Workers	14
The Americans with Disabilities Act	14
The Pregnancy Discrimination Act	14
The Family and Medical Leave Act	17
State Pregnancy Accommodations Laws	17
Ensuring Fair Accommodations for Pregnant Workers	20
Federal Agencies Must Step Up and Fulfill Their Obligations to Provide Needed Guidance About Employers’ Legal Obligations to Accommodate Pregnancy.	20
The Pregnant Workers Fairness Act Would Provide Important Clarity.	21
All States Should Ensure Accommodations for Pregnant Workers.	21
Employers Should Adopt Fair Accommodation Policies for Pregnant Workers.	22
Conclusion	23
Stories	
Guadalupe Hernandez’s Story	4
Natasha Jackson’s Story	6
Amy Crosby’s Story	8
Diana Teigland’s Story	10
Yvette’s Story	11
Hilda Guzzman’s Story	13
Peggy Young’s Story	15
Svetlana Arizanovska’s Story	18

Introduction

ALMOST 35 YEARS AFTER the Pregnancy Discrimination Act made it illegal to discriminate against a woman because of her pregnancy, women still face discrimination on the job when they become pregnant. This report details what happens when some workers ask for temporary modifications of their job duties because of pregnancy, such as avoiding heavy lifting, staying off high ladders, or being permitted to sit down during a long shift. These are many of the same types of job adjustments typically provided to workers with disabilities, but pregnancy is not a disability. Despite the Pregnancy Discrimination Act's protections, pregnant workers' requests are often denied—leaving many pregnant women without a salary because they are forced to quit, are fired, or are pushed out onto unpaid leave.

MANY PREGNANT WOMEN will never need any adjustment at work, but others will be unable to continue exactly as they had prior to pregnancy. Pregnant workers in jobs that require physical activity are especially vulnerable to being forced out of work because their duties may pose challenges during some stages of pregnancy. In many cases, slight job modifications would allow these women to continue working without risk to themselves or their pregnancies. When employers refuse to make these adjustments, pregnant women are forced to make an impossible choice between protecting their jobs and protecting their health.¹ Many of the women who need these accommodations are low-wage workers, a group in which women of color and immigrant women are disproportionately represented. These workers can least afford to go without a paycheck at a time when they will soon have a new mouth to feed. In contrast, when an employer provides an accommodation, pregnant workers are able to continue working safely and provide for their growing families, while employers retain an experienced employee.

Over the past year and a half, A Better Balance and the National Women's Law Center have spoken with dozens of women across the country and across the economic spectrum who have experienced job loss, diminished income,

or pregnancy complications or loss after their employers refused to make reasonable job adjustments while they were pregnant, even as they accommodated workers with limitations arising out of disability or injury. These women are often surprised to find that their employers are unwilling to make even the smallest changes, and are shocked that many employers do not recognize they are breaking the law by denying these accommodations.

It is past time for employers to accommodate limitations arising out of pregnancy, just as they accommodate limitations arising out of disability. This report first describes the demographic changes in the workplace that make it vitally important to ensure that pregnancy is accommodated at work today. The report identifies the job characteristics, particularly common in low-wage jobs and jobs traditionally held by men, that can lead some workers to need accommodations at some point during pregnancy to continue safely working. The report then describes the legal protections available to workers who face these situations. Finally, the report offers recommendations for changes in current law, policy, and practice to make reasonable accommodations more readily available to pregnant workers.

Throughout, we highlight the stories of women who were denied the temporary accommodations they sought during pregnancy. As a result, these women lost income, lost their jobs, or continued to work at risk to their health. Their first-hand accounts shine a light on the need to ensure that pregnant women are not pushed out of work at the very moment their families' financial needs are increasing, when reasonable adjustments would allow them to continue to do their jobs. Their stories demonstrate the need for policies, enforcement efforts, and laws that ensure that pregnant women will not be treated worse than workers with disabilities, injuries, or other physical limitations.

Pregnant women's importance as workers and breadwinners

JUST A FEW DECADES AGO, pushing pregnant women out of the workplace was both legal and commonplace.² Not surprisingly, many fewer pregnant women worked at that time than today. Between 1961 and 1965, for example, 44 percent of first-time mothers worked during their pregnancies; in contrast, between 2006 and 2008, nearly two-thirds of first-time mothers worked while pregnant.³

Women are also working later into their pregnancies. Between 1961 and 1965, less than 35 percent of working first-time mothers were still on the job one month or less before giving birth.⁴ But times have changed. Now an overwhelming majority of first-time mothers are working late into their pregnancies. Almost nine out of ten (88 percent) first-time mothers who worked while pregnant worked into their last two months of pregnancy in 2006-2008, and more than eight out of ten (82 percent) worked into their last month of pregnancy.⁵

One reason women are working through their pregnancies in greater numbers is that women's income is more likely to be critically important to today's families. Working women are primary breadwinners in more than 41 percent of families and they are co-breadwinners—bringing in between 25 to 50 percent of family earnings—in another 23 percent of these families.⁶ Low-wage women workers are even more likely to bring in income that is crucial to their families: in married-couple families with children in the bottom income quintile, nearly 70 percent of working wives are breadwinners, earning as much or more than their husbands.⁷ Additionally, more than 72 percent of single mothers worked in 2011, providing critical income as heads of household.⁸

For most families today, and particularly those struggling financially, subsisting on a partner's income alone—if it is even available—is simply not an option. When pregnant workers are forced out of a job, whole families pay the price.

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Guadalupe Hernandez's story



I prepared and served food as a line worker at a Mexican fast food restaurant...

...in Washington, DC. I was a good worker and liked my job. My performance reviews described me as one of the employees who would naturally move up the ranks at the restaurant.

As soon as I found out I was pregnant, I told my boss. When he expressed concern that I might have to stop working, I told him that I felt great and wanted to stay on the job. But as soon as I started to use the bathroom more frequently because of pregnancy, I noticed a sudden change in my boss. One afternoon when I returned from the bathroom, he yelled at me in front of all the customers and my coworkers. He asked me, "Where were you?" I turned red and returned to the line, where I worked more slowly because I was frustrated and embarrassed.

Then things got worse. My boss said that from now on I'd need to get his permission whenever I wanted to use the bathroom and also tell all my coworkers. So several times a day I'd have to track him down and then let my coworkers know. I felt so humiliated. My boss sometimes said that I couldn't go to the bathroom. All of my coworkers were allowed to go to the bathroom as often as they wanted without ever asking for permission. I never had to ask permission to go to the bathroom before I got pregnant either, so I felt that I was being singled out and punished just because I was pregnant. I told my boss I thought this was wrong, but he simply ignored my complaints and continued to mistreat me.

My coworkers and I had a 15-minute break during each of our four-hour shifts. I began eating snacks during my breaks because I was hungrier than usual as a result of my pregnancy. When my boss heard about my snacks, he prevented me from taking these breaks even though I explained to him I needed to eat more frequently because I was pregnant. My boss also told me I wasn't allowed to drink water when I was in the line. I followed this new rule, but I couldn't understand why this was happening. My coworkers drank water in the line without being disciplined. I also hadn't been treated this way before I got pregnant.

One day I asked my boss for permission to leave early to go to a prenatal doctor's appointment later that week. Before I got pregnant, if there was a day I had to leave early or go to a doctor's appointment, I was always able to work it out with my boss, even if I told him about it the same day. This time when I asked, my boss never got back to me. On the morning of the appointment, I reminded my coworkers that I'd be leaving early for my appointment. My boss overheard this and threatened to fire me if I left. I apologized to him for having to leave, but this was an important appointment that I couldn't miss. I had been feeling bad the week before so I really needed to see the doctor.

That afternoon my doctor gave me a note to pass on to my boss, saying that I would need more frequent access to water and the bathroom for the rest of my pregnancy. When I returned to work the next morning, my boss fired me in front of my colleagues before I even had time to give him the note. He spoke very quickly in English—my native language is Spanish and he would normally speak to me in Spanish—and told me I didn't have the right qualities to be an employee there and that I wasn't giving "100 percent." As far as I know, I was the only person he fired publicly. I was crying. My direct supervisor said to me in Spanish, "Thank you for all you've done here."

This incident devastated me. Now I wouldn't be able to bring any money into the family. For the first time in my life, I had to ask for government assistance (food stamps and unemployment benefits). I tried to look for other work, but every time I went to a potential employer, they looked at my belly and said "no." My husband, who was not working at the time, my older child, and my baby paid the price.

**Name and identifying details changed at worker's request.*

With the assistance of counsel, Guadalupe Hernandez filed an EEOC charge, asserting that she was terminated because of her pregnancy, which is expressly prohibited under Title VII. Guadalupe's claim is pending and is under investigation at the moment. She gave birth in May of 2012 and is now studying to improve her English. She is not working.

The particular challenges faced by pregnant workers in low-wage and nontraditional jobs

MANY WOMEN are able to work throughout their entire pregnancies without any changes in their jobs. But this is not true for everyone. Pregnant workers in physically demanding, inflexible, or hazardous jobs are particularly likely to need accommodations at some point during their pregnancies to continue working safely. These are often jobs that pay low wages or jobs traditionally held by men. Low-wage or nontraditional occupations in which women have sought (and been denied) accommodations include retail salespersons, food service workers, health care workers (including home health aides and nurses), stocking and package handlers, cashiers, cleaners, police officers, corrections officers, mail carriers, office clerks, and truck drivers.⁹ Many of these occupations rank in the top fifth of jobs in terms of how frequently one must stand, walk, or run; the required ability to lift, push, pull, or carry heavy objects; or how frequently one is exposed to contaminants.¹⁰

For example, retail salespersons are required routinely to stand for long periods and walk a great deal.¹¹ Maids and housekeeping cleaners lift mattresses, push heavy vacuums, and do other physically demanding work. They

are also exposed frequently to chemicals and contaminants.¹² Women working in jobs that have traditionally been held by men, such as laborers and freight, stock, and material movers, are also frequently required to walk or run, lift or carry heavy objects, and stand for long periods of time and are also exposed to chemicals and contaminants.¹³ Accommodations are particularly important in physically demanding jobs because research shows that physically demanding work—including jobs that require prolonged standing, long work hours, irregular work schedules, heavy lifting, or high physical activity—carries a statistically-significant increased risk of preterm delivery and low birth weight.¹⁴

Some accommodations that pregnant workers in these jobs have asked for include assistance with heavy lifting, more frequent breaks, or the ability to sit, rather than stand, during a long shift. (See Hilda Guzman's story on page 13 for an example of potential consequences when accommodations are refused.)

Continued on page 7

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Natasha Jackson's story

I was the highest-ranking account executive and the only female employee...

...at a Rent-A-Center in South Carolina. I loved my job. When I told my store manager that I was pregnant, he congratulated me. And when I started experiencing morning sickness, he quickly agreed to let me arrive later in the morning and work later in the afternoon. We formalized this new arrangement when I signed an agreement that outlined my new hours. My manager liked this new schedule because he was able to leave work earlier since I'd be there to close the store.

For the first two weeks the new shift went without a hitch. But once the district manager found out that I was pregnant, he told me the schedule change that I'd worked out with my store manager could not continue. He had me join a conference call with him, the regional manager, and a representative from Human Resources. The regional manager said he did not want me to hurt myself or miscarry. I reassured him repeatedly that I was fully capable of working and that it posed no risks to my pregnancy. The Human Resources representative mentioned lifting and I told them that I only occasionally needed to lift anything on the job. I explained that on the few occasions in the past when my job required me to lift something heavy, my coworkers had always helped me out. But the district manager simply ordered me to go home and take a two-week paid vacation. I was sent home even though a coworker who sprained his foot was allowed to continue working on light duty and refrain from lifting. A manager who sprained his shoulder was also allowed to stay at work, given light duty, and permitted to avoid lifting. In fact, they had a policy of accommodating on-the-job injuries.

I was only about 13 weeks pregnant and had a long way to go before giving birth. During my forced vacation Rent-A-Center sent me a Family & Medical Leave Act (FMLA) packet and my doctor filled it out, saying that I should not lift more than 20-25 pounds. Because of this lifting restriction, Rent-A-Center placed me on 12 weeks of unpaid FMLA leave, even though I wanted to continue working and even though my job very rarely required heavy lifting. At the end of the 12-week leave, I came back ready to work, but HR said I had to wait until after I had delivered my baby. They told me that if my position was still available at that location after my baby was born I could go back to work—but there was no guarantee that it would be.

The timing could not have been worse. My husband and I had just made a down payment on a house and were about to close the deal. Without my income, we were forced to back out of the contract. So I was out of a job and no longer able to help support my family. My husband and I saw our dream of owning a home vanish. Two weeks after giving birth I tried to go back to work, but they would not let me. I tried again the following month and was again denied. Two and a half months after my baby was born I got a letter saying that I would be terminated unless I got a doctor's release indicating I could go back to work without restrictions. I turned in a doctor's note clearing me to go back to work, but was still terminated three months after giving birth. It hit me that I was now going to need to find a new job while I had a new infant at home.

Natasha Jackson brought a pregnancy discrimination claim against Rent-A-Center and took her case to arbitration. Rent-A-Center argued that it let her go because of her lifting restriction, while acknowledging that it accommodated other workers with similar limitations caused by on-the-job injuries, but the arbitrator found that accommodating limitations caused by on-the-job injuries while refusing to accommodate Natasha's similar limitation did not constitute pregnancy discrimination. The arbitration process took over two years. After a period of working any job she could find, Natasha went back to school and obtained an Associate's Degree in Early Child Care Management. She hopes to open up a child care center soon.



While women in low-wage jobs and in nontraditional jobs are particularly likely to need some type of accommodations during pregnancy, both face workplace cultures that may be hostile to such accommodations for different reasons. Workplace flexibility—such as the ability to alter start and end times or take time off for a doctor's appointment—is extremely limited for workers in low-wage jobs. Over 40 percent of full-time low-wage workers report that their employers do not permit them to decide when to take their breaks; between two-thirds and three-quarters of full-time low-wage workers report that they are unable to choose their start and quit times; and roughly half report having very little or no control over the scheduling of hours more generally.¹⁵ This general lack of flexibility motivates and reinforces some employers' refusal to make accommodations for pregnant workers in these types of jobs. This refusal falls especially heavily on immigrant women and women of color, who are more likely to work in low-wage jobs.¹⁶

Women who work in jobs traditionally held by men often face harassment, discrimination based on gender stereotypes, hostility, and suspicion.¹⁷ When a woman worker is already seen as an outsider, her pregnancy and any requests for changes in her job related to the pregnancy can be taken as further evidence that the job is inappropriate for a woman, leading employers to refuse to make accommodations. Nontraditionally female jobs pay twenty to thirty percent more than traditionally female jobs,¹⁸ but when employers fail to accommodate their pregnant employees, women workers can be pushed out of these positions. (See Natasha Jackson's story on page 6 for an example of how working in a male-dominated environment can present unique challenges for pregnant women.)

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Amy Crosby's story

From the time I started working as a teenager, I've always been a hard worker.

As a cleaner at a hospital in Florida, I clean 20 to 30 hospital rooms during a shift and lift up to 50 pounds of trash and linens every day. After I became pregnant, I started feeling intense shooting pains up my back and arms due to carpal tunnel syndrome that my pregnancy had made worse. One day, after I finished making up a bed in one of the hospital rooms, I sat down to take a break. That's when a doctor on staff spotted me and called my boss, who told me to bring in a note from my health care provider outlining any pregnancy-related restrictions.

The next day I mentioned the intense pain to my OB-GYN during a routine visit. She gave me a note stating that I was not to lift more than 20 pounds. When I gave the note to my supervisor, he told me that the hospital only accommodated workers who were injured on the job. The hospital later acknowledged that it also accommodated people with disabilities. But the hospital refused to make any accommodations for my pregnancy or my carpal tunnel syndrome.

Because of my lifting restriction, the hospital placed me on 12 weeks of unpaid FMLA leave, which would run out a month and a half before my due date. The hospital told me I would not be permitted to return to work until I had no restrictions and that it would consider me to have "voluntarily resigned" if I failed to return to work without restrictions the day after my 12 weeks of leave expired, in the middle of my last trimester. Despite the hospital's insistence that I could not return to work if I had any restrictions, I knew that the hospital had accommodated other co-workers with limitations. For example, at least three other women who were cleaners in my department were accommodated: one had a leg injury and was allowed to fold clothes in the laundry, a second had an arm injury and was permitted to perform clerical work, and a third, who was not strong enough to lift mats, had the hospital send co-workers to help her. It didn't seem right that the hospital was accommodating these other people, but wouldn't accommodate me simply because I was pregnant.

I found an attorney to help me try to get back to work. My attorney tried to get the hospital to agree to provide an accommodation to me, but the hospital refused. With my attorney's help, I filed an EEOC charge that stated that by refusing to make any accommodation, the hospital was discriminating against me on the basis of my pregnancy and my disability of pregnancy-related carpal tunnel syndrome. Soon after filing the charge, I was able to reach an amicable resolution with my employer through a confidential settlement agreement, which will allow me to return to work.

Amy Crosby gave birth to a healthy baby boy in May of 2013. She is currently taking care of her newborn and looking forward to returning to her job later this year.

Employers' refusal to accommodate pregnancy takes a heavy toll on families

WHEN PREGNANT WORKERS ARE DENIED accommodations at work, whole families pay a steep price.

Many workers are forced to go onto leave, even when they wish to continue working and could do so with temporary adjustments to their jobs. When pregnant workers have to use their limited leave time because their employers refuse to make accommodations, this valuable benefit will no longer be available when they need it most—to recover from childbirth and bond with a new baby. The Family and Medical Leave Act (FMLA) was designed to provide covered workers with a right to 12 weeks of job-protected, unpaid leave—for childbirth and bonding with a new child, to deal with one's own serious health condition, or to care for a family member who has a serious health condition. This guarantee of time off is critically important for new parents. But some employers force women onto FMLA leave while they are still pregnant by refusing to provide a needed accommodation, even when the worker never requested this leave and would be able to continue to work with an accommodation. Once the clock runs out on

her 12 weeks of leave, if a worker is unable to return to work because her employer continues to refuse to accommodate her pregnancy, she will often be fired. Even if she is not fired, she will have no remaining FMLA leave to bond with her new child or recover from childbirth. (See Amy Crosby's story on page 8 for an example of an employer's threat to fire a pregnant worker who has been forced off the job when she exhausts her FMLA leave.)

Women who do not have paid maternity leave and thus depend on accrued vacation and sick days for paid time off after giving birth, instead must use these precious paid days during pregnancy when an employer refusal to accommodate forces them off the job. These women are left without income when recovering from childbirth. (See Diana Teigland's story on page 10 for an example of what happens when pregnant workers are denied workplace accommodations and instead, forced to use up their paid leave during pregnancy.)

Continued on page 10

When pregnant workers have to use their limited leave time because their employers refuse to make accommodations, this valuable benefit will no longer be available when they need it most—to recover from childbirth and bond with a new baby.



Diana Teigland's story

I was a letter carrier for the United States Postal Service...

...for nine years in Minnesota. When I became pregnant in the summer of 2012, my doctor placed me on a heat restriction—limiting my time outside on extremely hot days. Although my employer provided indoor work for employees with on-the-job injuries and accommodated people with disabilities, I was never permitted to work inside. Even though there were a record number of extremely hot days that summer, my boss refused to allow me to work indoors. For each hot day I wasn't able to work inside I had to take a day off—using up one of my allotted paid sick days or annual leave days. This was the leave I had planned to use for my recovery after childbirth, since my employer didn't offer any paid maternity leave.

As a result, I didn't have any paid leave left when my baby was born. I was the primary breadwinner in the family, but during my maternity leave, it was all on my husband's shoulders. Going without my salary right when I had the added expense of a new baby was very difficult for me and my family.

I feel like I was punished for being pregnant. It's clear that company policies need to change.

Diana Teigland is currently caring for her son and pursuing her education.

Some pregnant workers are fired when they request an accommodation, as employers point to the request as evidence that the worker can no longer do her job, or assert that the worker's continued presence on the job poses too much of a liability risk. Other pregnant workers believe that they have no choice other than to quit their jobs when employers deny their requests for accommodations because they are not willing to jeopardize their health or the health of their pregnancy. These workers often are not eligible for unemployment insurance, as they are considered to have "voluntarily quit."

Some states provide disability insurance benefits for individuals who cannot work because of a disability, but women who are fired, quit, or placed on unpaid leave because of an employer's refusal to accommodate pregnancy are often ineligible because they are considered able to work (with an

accommodation). For the same reason, they are also often ineligible for any disability benefits offered by their employer.

Whether she is fired or forced to quit, a worker's job loss during pregnancy can propel families into poverty. When a woman loses income during pregnancy, her family is less prepared for the expenses of new parenthood. In addition, many pregnant workers who lose their jobs simultaneously lose their health insurance, forcing families to shoulder the cost of obstetric care themselves if they do not qualify for Medicaid. In 2007, the average health care cost of prenatal care and delivery was \$7,600,¹⁹ an out of pocket expense an unemployed worker often simply cannot afford. (See Peggy Young's story on page 15 and Yvette's story on page 11 for examples of the financial impact of loss of income and health insurance on pregnant workers.)

Continued on page 12

Yvette's story

I worked in various jobs at a supermarket in New York City for 11 years.



When I first became pregnant in 2005, I didn't ask for any accommodations because I was scared I would lose my job. My job included heavy lifting, and I was worried the whole time about my health and my baby's health. I'm grateful that I had a healthy pregnancy and gave birth to my first daughter.

In 2007 when I became pregnant again, I told my manager and asked not to do any heavy lifting. He actually responded by giving me more heavy lifting to do. I think he hoped I would quit.

Sadly, I miscarried and suffered a series of miscarriages before finding out I had a blood clotting disorder. After learning about this problem, the next time I got pregnant in 2010 I received treatment for the disorder and turned in a doctor's note to my boss with a lifting restriction. The note also said I should take breaks when I was tired and that I shouldn't constantly go up and down stairs. I was working as a helper in the bakery at that time. My employer told me there was no job for me with those limitations, but I know there was work I could have done, like working in the deli. Another coworker who originally worked as a cashier had a shoulder problem and they accommodated her by transferring her to a position restocking items on the floor. I wanted to get a transfer too and continue working.

Instead, they fired me. I'm lucky that my union was able to help me get disability payments for 26 weeks and eventually helped me get reinstated so I could go back to work after my baby was born. Unfortunately, the disability payments were only a fraction of my usual salary. After the 26 weeks were up, a month before my due date, I had to go on unpaid leave. I lost my health insurance and had to go on Medicaid. My family and I survived on food stamps and my savings. When I finally returned to work three months after giving birth, I had no savings left.

Yvette recently left the supermarket because of childcare issues. She is currently looking for work so she can support her family. Yvette remains hopeful that she will find a job soon.

When employers deny their requests for an accommodation, other women believe that because of their economic situation, they must ignore their doctor's advice and continue working without it, despite the risk to their health and their pregnancies, in order to provide for their families. Pregnant workers denied even minor workplace accommodations may be at risk of complications such as preterm birth, low birth weight, pregnancy-induced hypertension and preeclampsia, miscarriage, and congenital anomalies.²⁰ Low birth weight babies face increased health risks at birth such as breathing difficulties, bleeding in the brain, heart problems, intestinal issues, and potential vision problems.²¹

These negative consequences are avoided when employers make reasonable accommodations for pregnant workers who need them. As demonstrated by the stories from the real women featured in this report, accommodations are often no-cost or low-cost to the employer, such as providing more frequent restroom or food breaks, allowing a worker to carry a water bottle, permitting co-workers to assist with heavy lifting, or providing a stool to sit on or a modified uniform. (See Guadalupe Hernandez's story on page 4 for an example of the simple accommodations that are key for some pregnant workers.) Other accommodations, such as transfers to available light duty positions for which the employee is qualified, are frequently provided to other workers who have been injured on the job or who have disabilities.

**Accommodations are often no-cost
or low-cost to the employer.**

“DEHYDRATION CAN LEAD TO MISCARRIAGE, AND WHILE PREGNANT WOMEN ARE ALREADY AT INCREASED RISK

of fainting (due to high progesterone levels causing blood vessel dilatation), dehydration puts them at even further risk of collapse and injury from falling.”

—Lucy Willis, an emergency room doctor at New York Downtown Hospital, on treating a pregnant worker who fainted and collapsed at her retail job because she was not allowed to drink water while standing for hours at the register.

Hilda Guzzman's story

I had been working full-time at a Dollar Tree store...



...on Long Island for three years when I learned I was pregnant in early 2009. Shortly after I became pregnant, I began to work at the cash register, where I had to stand on my feet for my entire shift—eight to ten hours at a time. As my pregnancy progressed, this became very uncomfortable.

I asked for a stool to sit on while working at the register, but my boss denied my request and said, “You can’t get special treatment since a man can’t get pregnant.”

Unfortunately, as my pregnancy continued, I began to experience complications. The pressure from standing all day caused bleeding and premature labor pains. These physical problems landed me in the

emergency room every few days. Although I could have kept working if I had been allowed to sit on a stool, because my employer wouldn’t let me, my doctor finally put me on bed rest to get me off my feet.

During this time away from work, I had no paid leave or any other income. Living on one paycheck was a nightmare. I felt terrible about having to depend only on my husband’s income—all the pressure was on him. My other children are older and pitched in to help us too. I recently went into a different Dollar Tree store and saw a woman working while sitting on a stool. She said she wasn’t pregnant, and that was just how their store did things. I only wish my store had a similar policy when I worked there.

Hilda Guzzman is no longer working at Dollar Tree. She is hopeful she will be able to find work later this summer when her child starts school.

The current legal landscape: untapped potential for pregnant workers

THREE FEDERAL LAWS PROMISE SIGNIFICANT

PROTECTION for pregnant workers—the Americans with Disabilities Act, the Pregnancy Discrimination Act, and the Family and Medical Leave Act. Some state laws provide additional protection. In some instances, however, courts have misinterpreted the law and denied important protections. In other instances, courts have not yet had occasion to apply these laws to pregnant workers. As a result, many employers are misinterpreting and misapplying the law and denying pregnant workers their legal rights.

THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (ADA) requires employers to make reasonable accommodations for employees with disabilities if the accommodations can be made without undue hardship to the employer. Pregnancy itself is not a disability under the ADA—but “pregnancy-related impairments” can be disabilities, if they substantially limit a major life activity such as walking, lifting, or digesting.²² For example, courts have held that pre-term labor, or “spotting, leaking, cramping, dizziness, and nausea,” could be considered disabilities under the ADA, if sufficiently severe.²³ But in the past other courts held that pregnancy-related impairments, like severe nausea, did not constitute disabilities under the ADA because they were only temporary.²⁴

In 2008, however, the ADA Amendments Act (ADAAA) expanded the ADA’s definition of disability to include temporary impairments and less severe impairments.²⁵ As a result, individuals with pregnancy-related impairments such as hypertension, severe nausea, sciatica, or gestational diabetes should now be protected by the ADA, and entitled to reasonable accommodations under the ADA.

Pregnancy itself is not a disability under the ADA—but “pregnancy-related impairments” can be disabilities, if they substantially limit a major life activity such as walking, lifting, or digesting.

Unfortunately, very few courts have yet had the opportunity to apply the new ADAAA standard to pregnancy-related impairments,²⁶ and the Equal Employment Opportunity Commission (EEOC) has not specifically addressed employers’ obligation to accommodate pregnancy-related impairments under the ADAAA beyond noting that pregnancy-related impairments can constitute disabilities.²⁷ Some employers thus mistakenly conclude that pregnancy-related impairments need not be accommodated under the ADAAA, because pregnancy itself is not a disability. (See Amy Crosby’s story on page 8 for an example of an employer’s refusal to accommodate a pregnancy-related impairment under the ADAAA.)

THE PREGNANCY DISCRIMINATION ACT

The Pregnancy Discrimination Act (PDA) prohibits discrimination on the basis of pregnancy and requires employers to treat pregnant women as well as they treat other employees who are “similar in their ability or inability to work.”²⁸ A central purpose of the PDA was ensuring that employers treat pregnant workers no worse than those affected by other conditions that may affect an employee’s ability to work.²⁹

Continued on page 16

Peggy Young's story

I worked as an early morning air driver at UPS in Landover, Maryland...

...for about ten years. When I became pregnant, UPS told me I must bring in a doctor's note with my restrictions. My midwife wrote a note recommending that I lift no more than 20 pounds during my pregnancy.

I gave the note to my supervisor and the UPS health manager. I said that I would be happy to work either a light duty job or my regular job. I almost never had to lift more than a few pounds in my job as an early morning air driver.

The UPS health manager told me that UPS has a policy of no light duty for pregnancy. She told me that I needed to get a note from my doctor saying that I was fully disabled and could not work at all. That was not true. I could work. I wanted to work. My family needed my pay, and I needed my medical benefits.

UPS gives light duty to employees injured on the job, to those protected by the Americans with Disabilities Act, and to others with a wide variety of medical conditions such as high blood pressure, diabetes, vision or hearing problems, limb impairments, sleep apnea, and emotional problems. UPS gives light duty jobs to employees in these categories with ten-pound lifting restrictions.

But UPS refused to let me work either light duty or my regular job even though I begged to work. The highest manager in the UPS building where I worked told me that I could not come back in the building until I was no longer pregnant because I was too much of a liability.



For the last six and a half months of my pregnancy, by forcing me off my job UPS made me go without my pay and my benefits, causing my family financial distress. My UPS health benefits were one of the main reasons I worked there. Because UPS would not let me work, I lost my health insurance. I could no longer use the medical care I had chosen. I had to use less desirable medical care four times as far from home. I also lost my right to disability benefits related to my pregnancy and childbirth. What started as a very happy pregnancy became one of the most stressful times of my life.

I sued UPS for pregnancy discrimination and lost. I believe the courts failed to correctly apply the Pregnancy Discrimination Act, which says that employers must treat pregnant employees the same way they treat other employees similar in ability or inability to work.

Peggy Young filed a case in federal court alleging that her employer violated the Pregnancy Discrimination Act by failing to accommodate her. She lost her case in the lower court and on appeal, with the appellate court holding that UPS's policy of providing accommodations to workers with disabilities, workers injured on the job, and workers who had lost their commercial driver's license, was a pregnancy-blind rule that did not violate the Pregnancy Discrimination Act. She has asked the United States Supreme Court to review her case.

This means that under the PDA, an employer who provides accommodations to workers with temporary disabilities is required to provide the same accommodations to workers who need them because of pregnancy. As Equal Employment Opportunity Commission (EEOC) guidelines state:

An employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees, whether by providing modified tasks, alternative assignments, disability leaves, leaves without pay, etc. For example . . . if other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function.³⁰

This rule is especially important, given that the ADAAA now requires employers to accommodate a much wider range of temporary disabilities than were previously accommodated under the ADA. For example, employers must now accommodate a temporary back injury resulting in a 20-pound lifting restriction,³¹ or a leg condition that precludes standing for more than two hours without significant pain,³² or a condition that causes an individual to experience shortness of breath and fatigue when walking reasonable distances.³³ The PDA requires that pregnant workers be treated as well as employees who aren't pregnant but who are similar in their ability to work, so employers must now also provide an accommodation when pregnancy renders a worker temporarily unable to lift more than 20 pounds, stand without pain for more than two hours, or walk a reasonable distance without becoming short of breath. In other words, because under the ADAAA, employers must now accommodate a back injury that temporarily prevents an employee from lifting, the PDA requires employers to similarly accommodate pregnant workers temporarily unable to lift.

To date, courts have not addressed this interaction between the ADAAA and the PDA. But prior to passage of the ADAAA, when pregnant workers challenged the denial of workplace accommodations provided to other employees, many courts rejected their claims, despite the PDA's plain language and clear intent. For example, in *Young v. UPS*,³⁴ a federal court of appeals recently rejected the argument that the PDA required UPS to provide Peggy Young, a UPS truck driver, with a light duty position that would allow her

Other courts have ignored the language of the PDA and concluded that it is permissible for employers to offer light duty to employees with on-the-job injuries but deny accommodations to pregnant women who have comparable limitations in their ability to work.

to avoid lifting heavy packages while she was pregnant, as her doctor had instructed. The court rejected Peggy Young's claims even though UPS made light duty available for employees with on-the-job injuries, for those with disabilities covered by the ADA, and even for those who had lost their commercial drivers' licenses because of convictions for drunk driving.³⁵ The court concluded that UPS's policy was "pregnancy-blind" and that Peggy Young's situation was not comparable to workers who received these accommodations, because she did not have an on-the-job injury, or a permanent and severe disability,³⁶ and because she had not lost her commercial driver's license.³⁷ As a result, the court rejected her PDA claim.³⁸ (To learn more about Peggy Young and her case, see page 15.) Similarly, in Svetlana Arizanovska's case, the court found no violation of the PDA when her employer refused to provide her with light duty, even though the employer had a policy of providing reasonable accommodations to workers with disabilities, including job reassignment. (See Svetlana Arizanovska's story on page 18.)³⁹

Other courts have ignored the language of the PDA and concluded that it is permissible for employers to offer light duty to employees with on-the-job injuries but deny accommodations to pregnant women who have comparable limitations in their ability to work.⁴⁰ (For an example, see Natasha Jackson's story on page 6.) The effect of these rulings is to force women out of physically demanding workplaces, even when they could continue to do their job with reasonable modifications. This is in conflict with both the plain language of the PDA and one of its primary purposes—"to prohibit employer policies which force

women who become pregnant to stop working regardless of their ability to continue.”⁴¹ Because of these decisions, many employers believe that they have no obligation to accommodate limitations arising out of pregnancy, even when they accommodate employees with similar limitations. As a result, they flatly refuse to make accommodations for pregnant workers who need them.

THE FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act (FMLA) provides eligible employees—those who have worked for twelve months and at least 1,250 hours in the last twelve months for an employer with fifty or more employees⁴²—with the right to take up to 12 weeks of job-protected, unpaid leave to care for a new child. The FMLA also entitles employees to take unpaid medical leave if “a serious health condition . . . makes the employee unable to perform the functions of the position of such employee.” “Serious health condition” includes an inability to work arising out of pregnancy or for prenatal care.⁴³

A qualified employee may take “intermittent” leave under the FMLA for a serious health condition, which means taking leave on an occasional basis. FMLA regulations explicitly state that a pregnant employee “may take leave intermittently for prenatal examinations or for her own [incapacitating] condition, such as for periods of severe morning sickness.”⁴⁴ Pregnant workers who are denied time off that they need for pregnancy-related reasons, including prenatal appointments, or who are punished for taking time off, may have claims under the FMLA.⁴⁵

Unfortunately, as described above, employers sometimes require pregnant employees who need accommodations to take FMLA leave, rather than making the accommodations. Women often then use all or most of their twelve weeks of FMLA leave before their babies are even born, leaving them with no job-protected time off from work for childbirth and care for their newborns. The job protection provided by

the FMLA is crucial for employees who are unable to work for reasons related to pregnancy or childbirth, but provides little help to those who wish to continue working but need an accommodation in order to do so.

STATE PREGNANCY ACCOMMODATION LAWS

In addition to the federal laws described above, eight states require some or all employers to provide certain types of accommodations to pregnant workers: Alaska, California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, and Texas.⁴⁶

California and Hawaii’s laws require public and private sector employers to provide reasonable accommodations for those pregnant workers who need them.⁴⁷ California, Connecticut, and Louisiana all allow pregnant employees to transfer to a vacant position as an accommodation and require employers to provide reasonable unpaid leave for a temporary pregnancy-related disability.⁴⁸ Maryland requires employers to provide reasonable accommodations for pregnancy-related disabilities.⁴⁹ Alaska, Texas, and Illinois require employers to permit public employees, or certain types of public employees, to be given temporary transfers when necessary during pregnancy.⁵⁰ Texas’s law also includes a broader reasonable accommodations provision for some public sector workers.⁵¹

Some states’ laws provide very broad protections for disabilities, including pregnancy-related impairments. In addition, some state human rights agencies (the administrative body that enforces a state’s human rights or civil rights law) interpret disability protections broadly to protect pregnant workers, or a very large percentage of pregnant workers with limitations. Practitioners should consult their state and local nondiscrimination laws and local agency interpretations to determine whether the provisions relating to disability or pregnancy provide helpful protections for pregnant workers seeking workplace accommodations.

California and Hawaii’s laws require public and private sector employers to provide reasonable accommodations for those pregnant workers who need them.

Svetlana Arizanovska's story

For years I worked two jobs to support my family...

...as a stocker at Wal-Mart on the overnight shift and a packer by day for a large medical supply company. As a newly married mother of three daughters, I was very excited when I learned that I was pregnant.

At Wal-Mart I routinely lifted heavy merchandise from pallets and arranged it on shelves throughout the store. Shortly after I became pregnant, my doctor told me not to lift more than 20 pounds.

I turned in my doctor's note to both my employers. The medical supply company immediately placed me on light duty and reassigned me to an area where I packed light items for shipping. Wal-Mart initially put me on light duty, letting me work in the toothbrush aisle, lifting smaller items. Soon afterward, Wal-Mart told me that no light duty assignment was available and assigned me to the produce area and then the refrigerator aisle, where I had to lift heavy cases of food onto shelves.

One day at Wal-Mart I started bleeding while I was lifting heavy merchandise. I told my boss, and he ignored me. I finished working the overnight shift. After I went to my medical supply job that morning and told the manager I had been bleeding, the manager took me to the emergency room. The trip confirmed my worst fears—I had lost my baby.

Four months later, I became pregnant again. When I submitted a note from my doctor explaining that I should not lift more than ten pounds, Wal-Mart refused to give me a light duty assignment. It turns out that Wal-Mart has a policy that employees who aren't disabled cannot be reassigned to another position, even though the policy says this option is available to employees with disabilities. So that meant I wasn't protected.

Wal-Mart asked me to fill out some forms, which I later learned were Family and Medical Leave Act (FMLA) papers. The company wanted to put me on involuntary leave, which I didn't want to take because I needed to keep working to earn money for my family. And I had planned to use my leave after my baby was born. Since I was healthy and able to work, my doctor said I wasn't eligible for FMLA leave; I simply needed a lifting restriction. When I told Wal-Mart I couldn't fill out the FMLA paperwork because I was able to work, Wal-Mart told me I wasn't allowed to come back to work, and I was eventually fired. Shortly after I stopped working at Wal-Mart, I miscarried for a second time. My doctor identified work-related stress and depression as possible causes of my miscarriage.

I filed suit against Wal-Mart for discriminating against me when I was pregnant. Both the lower court and appeals court decided in favor of Wal-Mart, saying that I had failed to identify a non-pregnant coworker with a lifting restriction who had been accommodated, even though Wal-Mart had a policy of accommodating workers with disabilities.

The financial and emotional stress coming from all the tension at work, my two miscarriages, and suddenly being without one of my jobs led to many fights between my husband and me. We eventually divorced, which tore my family apart and devastated me. I had to see a psychologist to help get me through these emotional difficulties. On top of everything, I was struggling to make ends meet. At times, I thought my family and I would end up on the street.

Svetlana Arizanovska continues to work as a packer for the medical supply company, where she has been a loyal employee for nearly a decade.



Ensuring fair accommodations for pregnant workers: an agenda for action

FEDERAL AGENCIES MUST STEP UP AND FULFILL THEIR OBLIGATIONS TO PROVIDE NEEDED GUIDANCE ABOUT EMPLOYERS' LEGAL OBLIGATIONS TO ACCOMMODATE PREGNANCY.

Clarity about applicable legal requirements benefits workers and employers. Federal agencies charged with interpreting and enforcing antidiscrimination laws have an obligation to provide this clarity, given the widespread confusion about the scope of legal obligations to accommodate pregnant workers.

In December 2012, the Equal Employment Opportunity Commission (EEOC) identified “accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA)” as a national enforcement priority through 2016.⁵² The EEOC’s recognition of the importance of pregnancy-related accommodations is a great victory for pregnant workers and a crucial first step.

In order to follow through on this commitment, given the misapplication and misunderstanding of current legal requirements on the job and in the courts, the EEOC must now issue strong and clear guidance on employers’ legal obligation to accommodate pregnant workers. The EEOC should explain to employers, employees, practitioners, and the courts that a duty to accommodate arises based on the interaction between the amended ADA and the PDA: employers have to accommodate employees with limitations arising out of pregnancy just as they would treat those with a similar limitation arising out of disability. It should also clarify that pregnancy-related impairments that rise to the level of disability must be accommodated under the ADA. Finally, the EEOC must prioritize investigations of complaints alleging that pregnant workers have been

unlawfully denied accommodations on the job and should bring cases on behalf of these workers—especially given that the low-wage workers at particular risk of harm from denial of pregnancy accommodations have few resources to bring these cases on their own.

EEOC guidance and enforcement would help ensure that courts confronted with discrimination claims based on employers’ refusal to accommodate would follow the clear language and intent of the PDA and hold that it requires employers to provide accommodations to pregnant workers when employers make accommodations to other employees similar in their ability to work, including when the employer accommodates other employees pursuant to the ADA, or pursuant to employer policy to accommodate employees injured on the job. EEOC guidance and enforcement would also help ensure that courts understand that as a result of the amendments to the ADA, many more pregnancy-related impairments now constitute disabilities under the law and that pregnant workers with these impairments are entitled to accommodations under the ADA.

Clarification of applicable law would also strengthen agencies’ capacity to provide technical assistance to employers and employees regarding accommodations for pregnancy and highlight best practices. For example, the Job Accommodation Network (JAN), a project funded by the Department of Labor’s Office of Disability Employment Policy to provide assistance to employers and employees concerning workplace accommodations, already fields inquiries about pregnancy accommodations.⁵³ JAN reports receiving more than 9000 hits to its webpage on pregnancy accommodations per year, and nearly 300 phone calls annually relating to pregnancy accommodations.⁵⁴ JAN’s capacity to provide technical assistance would be significantly strengthened

were the EEOC to issue guidance clearly laying out employers' legal obligations.

In addition to EEOC efforts, the Department of Labor's Office of Federal Contract Compliance Programs, which is responsible for ensuring that federal contractors do not discriminate, should target this issue for enforcement and guidance, as should the Civil Rights Division of the Department of Justice, which enforces the PDA and the ADA against state and local government employers.⁵⁵ Federal contractors employ a quarter of the workforce, including many women who work in the sorts of physically demanding jobs where the need for accommodations during pregnancy is most acute.⁵⁶ Similarly, women working in state and local police departments, fire departments, prisons, and other physically demanding jobs often face significant resistance if they require temporary changes in job duties during pregnancy.

THE PREGNANT WORKERS FAIRNESS ACT WOULD PROVIDE IMPORTANT CLARITY.

Agency guidance and enforcement would ensure many more pregnant workers receive the accommodations to which they are entitled, but it is undeniable that some employers would continue to challenge these interpretations in court. Introduced in Congress in 2012 and reintroduced in 2013, the Pregnant Workers Fairness Act (PWFA) would provide a clear and unambiguous rule requiring employers to provide reasonable accommodations to pregnant workers who need them unless doing so would impose an undue hardship—the same standard that currently applies to workers with disabilities.⁵⁷ It would thereby ensure predictability and clarity for employers, employees, and courts seeking to understand pregnant workers' rights. Because it follows the familiar, proven framework of the ADA and the ADAAA, it would be easy to administer, which benefits both employers and employees.

A predictable and clear legal standard can be particularly important in this area because pregnancy is a time-limited condition, and pregnant workers' needs for accommodations are often both urgent and fleeting. Clear rules make it more likely that pregnant workers can enforce their rights without time-consuming disputes and legal process. For example, since California enacted its explicit pregnancy accommodation requirement in 1999, *fewer* pregnancy

discrimination lawsuits have been brought than prior to the law's enactment. (In contrast, during the same time period, claims of pregnancy discrimination have risen nationwide.⁵⁸) Advocates report that California employees have instead used the law to negotiate with their employers informally and successfully for reasonable accommodations.⁵⁹ As a result, pregnant workers are not faced with the impossible choice of ignoring their doctors' advice or losing their paychecks at the moment they most need them.

ALL STATES SHOULD ENSURE ACCOMMODATIONS FOR PREGNANT WORKERS.

State and local legislation can also guarantee reasonable accommodations for pregnant workers. For example, advocates in New York are currently pushing for passage of the Women's Equality Act (WEA), a 10-point plan to promote fairness and equality for women, which includes a provision that would ensure reasonable accommodations for conditions related to pregnancy or childbirth, making it unmistakably clear that pregnant workers and new mothers are entitled to the same protections as workers with disabilities under the New York State Human Rights Law. Bills have also recently been introduced in Iowa⁶⁰ and Maine⁶¹ that would provide reasonable accommodations to pregnant workers who need them.

State agencies implementing and enforcing existing laws should also develop clear regulations explaining the types of reasonable accommodations that can be required of employers. For example, in 2012, the California Fair Employment and Housing Administration issued new regulations outlining employers' legal obligations pursuant to California's pregnancy accommodations law. The regulations explained that pregnancy accommodations can include modified workplace policies and practices, modified job duties, modified schedules (including breaks), modified workplace equipment, or providing furniture.⁶²

The regulations also clarified that employers may not require women to take leave if they have not requested it and can otherwise be reasonably accommodated and that lactation accommodations must be provided to nursing mothers. Similarly, states can clarify through regulations or other guidance that state pregnancy nondiscrimination laws require employers to accommodate pregnant workers when they accommodate other workers who are similarly restricted in their ability to work.

State agencies should provide training to investigators and enforcement officials to identify and enforce pregnant workers' rights to reasonable accommodations under these laws. Finally, state agencies should also provide technical assistance to both employers and employees concerning pregnant employees' rights to reasonable accommodations.

EMPLOYERS SHOULD ADOPT FAIR ACCOMMODATION POLICIES FOR PREGNANT WORKERS.

Just as employers have policies regarding accommodations for workers with on-the-job injuries and workers with disabilities, they should also adopt policies for accommodating pregnant workers as a matter of good human resource management.⁶³ Clear and consistent policies, enforced by management, would help reduce the chance of liability for pregnancy discrimination and would provide the benefits of clarity and predictability to managers and employees.⁶⁴

In addition, the experience of employers in accommodating workers with disabilities and in providing voluntary workplace flexibility programs strongly suggests that accommodating pregnancy would be good for business.⁶⁵ Employers that provide accommodations to workers with disabilities and voluntary workplace flexibility programs report a strong return on investment. The data show that the costs of, for example, altering start and end times, providing break time, honoring lifting restrictions, or redistributing particular physical tasks among members of a workplace team are typically minimal.⁶⁶ In fact, these practices result in bottom line benefits to employers—including reduced workforce turnover, increased employee satisfaction and productivity, and savings in workers' compensation and other insurance costs. Making room for pregnancy on the job promises the same benefits.

THE BUSINESS CASE FOR PREGNANCY ACCOMMODATION

ACCOMMODATING PREGNANT WORKERS IS GOOD FOR THE BOTTOM LINE. Based on the substantial research demonstrating the positive business impact associated with providing workplace flexibility and accommodating workers with disabilities, employers that accommodate pregnant workers can anticipate:

- *increased employee commitment and satisfaction*
- *increased recruitment and retention of employees*
- *increased productivity*
- *increased safety*
- *increased diversity*
- *reduced absenteeism*

THE COST OF ACCOMMODATION IS MINIMAL. A survey by the Job Accommodation Network, a technical assistance provider to the U.S. Department of Labor's Office of Disability Employment Policy, found that the majority of employers that provided accommodations to employees with disabilities reported that the accommodations did not impose any new costs on the employer. Of those employers that reported a cost for accommodations, the majority reported a one-time cost of \$500 or less. Since accommodations for pregnant workers are temporary, costs (if any) of providing these accommodations can be anticipated to be even less.⁶⁷

Conclusion

TODAY, EMPLOYERS TYPICALLY RECOGNIZE that workers with limitations caused by disability have a legal right to reasonable accommodations. On the other hand, workers with limitations arising out of pregnancy are often told that if they cannot do the job, they should leave. Given the critical importance of women's employment to their families and to the broader economy, this double standard must end. Clear guidance, laws, and employer policies protecting the right to reasonable accommodations for those pregnant workers who need them will help end the severe economic, physical, and emotional hardship suffered by pregnant workers and their families when women are pushed off the job at the moment they can least afford it. It is long past time to make room for pregnancy on the job, and afford pregnant women the equal opportunity they deserve.

endnotes

- 1 See, e.g., Dina Bakst, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES, January 30, 2012, at A25, available at <http://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html>.
- 2 E.g., Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 595-98 (2010).
- 3 U.S. CENSUS BUREAU, MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS: 1961-2008 4 (2011), available at <http://www.census.gov/prod/2011pubs/p70-128.pdf> (Table 1).
- 4 *Id.* at 7 (Table 3). In 1961-1965, 34.6 percent of first-time mothers who worked during their pregnancy reported working until one month (or less) before birth. *Id.*
- 5 *Id.* In 2006-2008, 81.6 percent of first-time mothers who worked during pregnancy reported working until one month (or less) before birth and an additional 6.6 percent reported working until 2 months before birth.
- 6 SARAH JANE GLYNN, CENT. FOR AMERICAN PROGRESS, THE NEW BREADWINNERS: 2010 UPDATE 2, 5 (2012), available at <http://www.americanprogress.org/issues/labor/report/2012/04/16/11377/the-new-breadwinners-2010-update/>. Primary breadwinners each earn as much or more than their partners or they are their family's sole earner. *Id.* at 2. Additionally, according to a new study out of PEW, "breadwinner moms" are "made up of two very distinct groups: 5.1 million (37%) are married mothers who have a higher income than their husbands, and 8.6 million (63%) are single mothers." WENDY WANG, KIM PARKER, AND PAUL TAYLOR, PEW RESEARCH CENT., BREADWINNER MOMS: MOTHERS ARE THE SOLE OR PRIMARY PROVIDER IN FOUR-IN-TEN HOUSEHOLDS WITH CHILDREN; PUBLIC CONFLICTED ABOUT THE GROWING TREND 1 (2013), available at http://www.pewsocialtrends.org/files/2013/05/Breadwinner_moms_final.pdf
- 7 GLYNN, *supra* note 6, at 3.
- 8 NAT'L WOMEN'S L. CENT. (NWLC), calculations based on U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, 2012 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT Table FINC-03 (2012), available at http://www.census.gov/hhes/www/cpstables/032012/faminc/finc03_000.htm. Figures are for female-headed families.
- 9 Several of these occupations, including retail, food service, and health care are also projected to be among the 30 occupations projected to have the most job growth from 2010 to 2020. NWLC analysis of BUREAU OF LABOR STATISTICS, EMPLOYMENT PROJECTIONS Table 1.4 (2012), available at http://www.bls.gov/emp/ep_table_104.htm; BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, 2010 ANNUAL AVERAGES Table 11 (last modified Feb. 5, 2013), available at <http://ftp.bls.gov/pub/special.requests/lf/aa2010/pdf/cpsaat11.pdf>. Given the projected growth in these jobs, the need for pregnancy accommodations is likely to become even more acute.
- 10 NWLC analysis of *Work Context – Physical Work Conditions*, O*NET ONLINE, http://www.onetonline.org/find/descriptor/browse/Work_Context/4.C.2/ and *Abilities – Physical Abilities*, O*NET ONLINE, <http://www.onetonline.org/find/descriptor/browse/Abilities/1.A.3/> (last visited Jun. 6, 2013).
- 11 *Id.* Retail salespersons are in an occupation that requires standing "more than half of the time" and walking and running between "about half the time" and "more than half the time."
- 12 *Id.* Maids and housekeeping cleaners are required to stand almost continually, are exposed to contaminants at least once a week, and spend a substantial amount of time walking or running (scoring between "more than half the time" and "continually or almost continually").
- 13 *Id.* Full occupation title is "Laborers and Freight, Stock, and Material Movers, Hand." A nontraditional occupation for women is defined as one in which 75 percent or more of the workers are men. Workers in these occupations stand "more than half the time," are exposed to contaminants more at least once a week, score in the top ten percent of occupations for requirements of static strength, and walk and run between "about half the time" and "more than half the time." *Id.*
- 14 See Letter from Wendy Chavkin, MD, MPH, to New York City Council Member James Vacca, (Nov. 29, 2012), http://www.abetterbalance.org/web/images/stories/Chavkin_letter_FINAL.pdf.
- 15 See LIZ WATSON & JENNIFER SWANBERG, WORKPLACE FLEXIBILITY 2010: GEORGETOWN LAW, FLEXIBLE WORKPLACE SOLUTIONS FOR LOW-WAGE HOURLY WORKERS: A FRAMEWORK FOR A NATIONAL CONVERSATION 19 (2011), available at <http://workplaceflexibility2010.org/images/uploads/whatsnew/Flexible%20Workplace%20Solutions%20for%20Low-Wage%20Hourly%20Workers.pdf>.
- 16 Women of color are disproportionately represented among female minimum wage workers. Black women were just under 13 percent and Hispanic women were just under 14 percent of all employed women in 2012, but more than 15 percent of women who made minimum wage were black and more than 18 percent were Hispanic. See NWLC, FAIR PAY FOR WOMEN REQUIRES INCREASING THE MINIMUM WAGE AND TIPPED MINIMUM WAGE (2013), <http://www.nwlc.org/resource/fair-pay-women-requires-increasing-minimum-wage-and-tipped-minimum-wage>. For example, women who are foreign-born workers are disproportionately represented among service occupations – about one-third of foreign-born women workers are in these occupations compared to less than one-fifth of native-born women. This disparity is particularly striking among building and grounds cleaning and maintenance occupations (9.8 percent of foreign-born women workers are in these occupations, compared to 2.1 percent of native-born women workers), which includes maids and housekeepers). See BUREAU OF LABOR STATISTICS, LABOR FORCE CHARACTERISTICS OF FOREIGN-BORN WORKERS Table 4, <http://www.bls.gov/news.release/forbrn.t04.htm> (last modified May 22, 2013). Overall, service occupations are lower wage. Median weekly wages for women working full time in service occupations are only \$435 and for women working full-time in building and grounds cleaning and maintenance occupations this figure is only \$407. These wages are about 60 percent of the median weekly wages for full-time women workers overall (\$691). See BUREAU OF LABOR STATISTICS, CURRENT POPULATION SURVEY, 2012 ANNUAL AVERAGES Table 39, <http://www.bls.gov/cps/cpsaat39.pdf> (last visited Jun. 12, 2013).
- 17 See, e.g., Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1832-34 (1990).
- 18 *Women and Nontraditional Work*, WIDER OPPORTUNITIES FOR WOMEN 2, http://www.wowonline.org/documents/Whatisanontraditionaljob_002.pdf (last visited Jun. 7 2013).
- 19 S.R. MACHLIN & F. RHODE, AGENCY FOR HEALTHCARE RES. AND QUALITY U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH CARE EXPENDITURES FOR UNCOMPLICATED PREGNANCIES 2 (2007), http://meps.ahrq.gov/data_files/publications/rf27/rf27.pdf
- 20 RENEE BISCHOFF & WENDY CHAVKIN, THE RELATIONSHIP BETWEEN WORK-FAMILY BENEFITS AND MATERNAL, INFANT AND REPRODUCTIVE HEALTH: PUBLIC HEALTH IMPLICATIONS AND POLICY RECOMMENDATIONS 5 (2008), available at http://otrans.3cdn.net/70b6f6326c56320156a_6j5m6fupz.pdf
- 21 *Your Premature Baby*, MARCH OF DIMES, <http://www.marchofdimes.com/baby/low-birthweight.aspx> (last visited Jun. 10, 2013).
- 22 29 C.F.R. pt. 1630 app. § 1630.2(g)-(h).
- 23 See, e.g., *Hernandez v. City of Hartford*, 959 F. Supp. 125, 130 (D. Conn. 1997) (denying summary judgment in case involving pre-term labor, which the court characterized as physiological impairment); *Cerrato v. Durham*, 941 F. Supp. 388, 392-93 (S.D.N.Y. 1996) (denying motion to dismiss where

- plaintiff alleged symptoms such as “spotting, leaking, cramping, dizziness, and nausea” and holding these could rise to level of disability under the ADA); *Garrett v. Chicago Sch. Reform Bd. of Trustees*, No. 95-C-7341, 1996 WL 411319 (N.D. Ill. July 19, 1996) (denying motion to dismiss and holding that severe morning sickness that caused plaintiff to miss multiple classes, causing automatic failure of her courses, could qualify as disability under ADA).
- 24 See, e.g., *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 554 (7th Cir. 2011) (concluding that pregnancy-related lifting restriction did not constitute disability under ADA and stating that “[p]regnancy is, by its very nature, of limited duration, and any complications which arise from a pregnancy generally dissipate once a woman gives birth. Accordingly, an ADA plaintiff asserting a substantial limitation of a major life activity arising from a pregnancy-related physiological disorder faces a tough hurdle.”); *Muska v. AT&T Corp.*, No. 96-C-5952, 1998 WL 544407 (N.D. Ill. Aug. 25, 1998) (granting summary judgment because plaintiff’s inability to carry baby to term was not substantial limitation on her ability to reproduce and she could always get pregnant again, meaning her condition was temporary, not chronic); *Leahr v. Metro. Pier & Exposition Auth.*, No. 96-C-1388, 1997 WL 414104 (N.D. Ill. July 17, 1997) (stating that plaintiff’s pregnancy-related conditions of gall bladder disease, high blood pressure, and hypertension, were only “short-term, temporary restrictions” on her significant life activities, and she was thus not disabled as contemplated under the ADA.”).
- 25 29 C.F.R. § 1630.2(g)-(h); see also *Questions and Answers for Small Businesses: The Final Rule Implementing the ADA Amendments Act of 2008*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, http://www.eeoc.gov/laws/regulations/adaaa_qa_small_business.cfm (last visited Jun. 17, 2013) (“8. Do the regulations require that an impairment last a particular length of time to be considered substantially limiting? No. Even a short-term impairment may be a disability if it is substantially limiting.”); see generally 42 U.S.C. § 12102(4)(A) (“The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.”).
- 26 But see *Mayorga v. Alorica, Inc.*, No. 12-21578-CIV, 2012 WL 3043021 at *1, *4-5 (S.D. Fla. July 25, 2012) (finding that plaintiff stated plausible claim for relief under ADAAA because her pregnancy-related complications constituted a disability); see also *Alexander v. Trilogy Health Servs., LLC*, Case No. 1:11-cv-295, 2012 WL 526870, at *11 n. 10 (S.D. Ohio Oct. 23, 2012) (noting that plaintiff’s preeclampsia qualified as a disability under ADAAA).
- 27 29 C.F.R. pt. 1630 app.
- 28 42 U.S.C. § 2000e(k).
- 29 E.g., H.R. REP. NO. 95-948, at 2 (1978), reprinted in 1978 U.S.C.C.A.N. 4749-50 (Congress’ intent in enacting the PDA was to codify EEOC guidelines that required employers to “treat disabilities caused or contributed by pregnancy, miscarriage, abortion, childbirth and recovery therefrom as all other temporary disabilities.”); *id.* at 4753 (“This bill would prevent employers from treating pregnancy, childbirth, and related medical conditions in a manner different from their treatment of other disabilities.”).
- 30 29 C.F.R. pt. 1604, app. Question 5.
- 31 29 C.F.R. pt. 1630, app. § 1630.2(j)(1)(viii).
- 32 *Id.* at § 1630.2(j)(4).
- 33 *Id.*
- 34 707 F.3d 437 (2013).
- 35 *Id.* at 446-47.
- 36 Importantly, the facts of this case arose prior to the ADAAA, and the court’s explanation for why workers with disabilities were not similarly situated to pregnant workers was based on the more restrictive understanding of the term “disability” in the pre-ADAAA case law. For example, in explaining the differences between Young and employees with disabilities, the court noted that Young’s “lifting limitation was temporary and not a significant restriction on her ability to perform major life activities.” *Id.* at 450. As a result of the ADAAA, however, both temporary conditions and conditions which are less severe may now qualify as substantially limiting. See 42 U.S.C. 12102(40) (setting forth a rule of construction that the definition of disability should be construed in favor of broad coverage); 29 C.F.R. pt. 1630, app. § 1630.2(j)(1)(ii) (stating that an impairment is substantially limiting if it “substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population”); *id.* at § 1630.2(j)(1)(ix) (“The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.”).
- 37 Young, 707 F.3d at 450.
- 38 *Id.* at 437.
- 39 *Arizanovska v. Wal-Mart Stores, Inc.*, 682 F.3d 698, 701, 703 (7th Cir. 2012). Wal-Mart pointedly specifically excludes job reassignment as an accommodation available to pregnant workers even while it provides such accommodations to disabled workers. Memorandum from Wal-Mart on Accommodation in Employment – (Medical-Related) Policy to Employees (Apr. 9, 2012) (on file with NWLC).
- 40 See, e.g., *Reeves v. Swift Transportation*, 446 F.3d 637, 641 (6th Cir. 2006) (holding that the employer’s policy of providing light duty only for on-the-job injuries did not violate the PDA and that the “the Act merely requires employers to ‘ignore’ employee pregnancies.”); *Serednyj v. Beverly Healthcare LLC*, No. 2:08-CV-4RM, 2010 WL 1568606 (N.D. Ind. Apr. 16, 2010) (holding that a policy providing light duty only to employees with non-work-related injuries that qualified for reasonable accommodation under the ADA or equivalent state law, and for no other non-work-related injuries, was pregnancy-blind and did not violate the PDA), *aff’d*, 656 F.3d 540 (7th Cir. 2011). But see, e.g., *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996) (“As such, the PDA explicitly alters the analysis to be applied in pregnancy discrimination cases. While Title VII generally requires that a plaintiff demonstrate that the employee who received more favorable treatment be similarly situated ‘in all respects,’ . . . the PDA requires only that the employee be similar in his or her ‘ability or inability to work.’”); *Adams v. Nolan*, 962 F.2d 791 (8th Cir. 1992) (plaintiff established discrimination in violation of the PDA when she showed that, despite a policy limiting light duty assignments to officers with on the job injuries, some officers with off-the-job injuries or conditions other than pregnancy in fact were given such assignments); *Sumner v. Wayne Cnty*, 94 F. Supp. 2d 822 (E.D. Mich. 2000) (“Contrary to defendants’ arguments, the distinction that [the male officer’s] temporary disability was as a result of an injury sustained on the job, while Sumner’s was as a result of her pregnancy (presumably sustained while she was off-duty), is not material. The proper focus under the comparison prong is whether the employees are similar in their ability or inability to work, regardless of the source of the injury or illness.”).
- 41 S. REP. NO. 95-331 at 6 (1978).
- 42 29 U.S.C. § 2611(2), (4). Unfortunately, approximately 41% of employees are either not covered or are ineligible to take FMLA leave. NAT’L PARTNERSHIP FOR WOMEN & FAMILIES, A LOOK AT THE U.S. DEPARTMENT OF LABOR’S 2012 FAMILY AND MEDICAL LEAVE ACT EMPLOYEE AND WORKSITE SURVEYS 1 (2013), available at http://www.nationalpartnership.org/site/DocServer/DOL_FMLA_Survey_2012_Key_Findings.pdf?docID=11862 (analyzing Bureau of Labor statistics).
- 43 29 C.F.R. § 825.115(b).
- 44 *Id.* at § 825.202(b)(1).
- 45 29 U.S.C. § 2615(a)(1)-(2); 29 C.F.R. § 825.220(c).
- 46 See ALASKA STAT. § 39.20.520(a); CAL. GOV’T CODE § 12945; CONN. GEN. STAT. ANN. § 46a-60(7); 775 ILL. COMP. STAT. 5/2-102(H); HAW. CODE R. § 12-46-107; LA. REV. STAT. § 23:342; Act of May 16, 2013, ch. 547, 2013 Md. Laws 547 (S.B. 784) (effective October 1, 2013) (to be codified at MD. CODE ANN., STATE GOV’T § 20-601(a)-(d), -606(a)(4), -609); TEX. LOC. GOV’T CODE ANN. § 180.004(c). State laws providing accommodations for pregnant workers are discussed more fully in NOREEN FARRELL, JAMIE DOLKAS & MIA MUNRO, EQUAL RIGHTS ADVOCATES, EXPECTING A BABY, NOT A

LAY-OFF: WHY FEDERAL LAW SHOULD PROVIDE THE REASONABLE ACCOMMODATION OF PREGNANT WORKERS 29-31 (2012), available at <http://www.equalrights.org/media/2012/ERA-PregAccomReport.pdf>.

- 47 See HAW. CODE R. §§ 12-46-107, 108; CAL. GOV'T CODE § 12945.
- 48 CAL. GOV'T CODE § 12945(a)(3); CONN. GEN. STAT. ANN. § 46A-60(7); LA. REV. STAT. § 23:342(3). While California's law has these same provisions related to temporary transfer and unpaid leave, it is broader than Louisiana because it explicitly requires employers to provide other reasonable accommodations that employees might need. See CAL. GOV'T CODE § 12945(a)(3).
- 49 Md. Stat. Ann. S.B. 784, H.B. 804 (2013).
- 50 ALASKA STAT. § 39.20.520(a); TEX. LOC. GOV'T CODE § 180.004(c); 775 ILL. COMP. STAT. 5/2-102(H).
- 51 TEX. LOC. GOV'T CODE § 180.004(b).
- 52 See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN FOR FY 2013-1016 B3 (2012), available at <http://www.eeoc.gov/eeoc/plan/sep.cfm>.
- 53 Memorandum from the Job Accommodation Network (JAN), Summary of JAN Contacts and Web Page Views Related to Pregnancy (Jan. 29, 2013) (on file with NWLC).
- 54 *Id.*
- 55 See *Employment Section Overview*, U.S. DEP'T. OF JUSTICE CIVIL RIGHTS DIV., <http://www.justice.gov/crt/about/emp/overview.php> (last visited Jun. 10, 2013); *Information and Technical Assistance on the Americans with Disabilities Act*, U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., http://www.ada.gov/enforce_current.htm#TitleI (last visited Jun. 10, 2013) (collecting Title I cases enforced by DOJ).
- 56 See *Facts on Executive Order 11246 – Affirmative Action*, the U.S. DEP'T OF LABOR OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS (OFCCP), <http://www.dol.gov/ofccp/regs/compliance/aa.htm> (last visited Jun. 10, 2013).
- 57 S. 942, 113th Cong. §2(1) (2013); H.R. 1975 113th Cong. §2(1) (2013).
- 58 FARRELL, DOLKAS & MUNRO, *supra* note 47, at 25.
- 59 *Id.* at 14, 16, 19-20.
- 60 S.F. 308, 2013-2014 S., Reg. Sess. (La. 2013).
- 61 H.P. 581. 126th H., 2013 Sess. (Me. 2013).
- 62 See CAL. CODE REGS. tit. 2, § 7291.2(s)-(t); Sharon Terman, *New California Regulations Affirm Pregnant Workers' Right to Reasonable Accommodations*, CAL. WORK & FAM. COAL. (Dec. 14, 2012) <http://workfamilyca.org/blog/?p=703>.
- 63 Cynthia Calvert, *Do We Need The Pregnant Workers Fairness Act?*, WORKFORCE 21C (May 9, 2012), <http://workforce21c.blogspot.com/search?q=Do+We+Need+The+Pregnant+Workers+Fairness+Act>.
- 64 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *Employer Best Practices for Workers with Caregiving Responsibilities*, <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html> (last modified Jan. 19, 2011).
- 65 NWLC, THE BUSINESS CASE FOR ACCOMMODATING PREGNANT WORKERS (2012), http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers_business_case_12.04.12.pdf
- 66 *Id.*
- 67 JOB ACCOMMODATION NETWORK ("JAN"), WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT 4 (2012), available at <http://askjan.org/media/downloads/LowCostHighImpact.pdf>.



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