# What Is the Pregnant Workers Fairness Act?

## An Overview of Benefits and Limitations

The Pregnant Workers Fairness Act (PWFA), which went into effect on June 27, 2023, is a landmark development for pregnant workers' rights and worthy of celebration. The law, which will be enforced by the Equal Employment Opportunity Commission (EEOC), gives pregnant employees a new tool to bring into negotiations with their employers and will help many achieve the flexibility they need to remain in the workforce and protect the health and safety of their pregnancies. The law, however, is not without limitations.

### What Does the PWFA Require Employers to Do?

The new law will require covered employers - including government and private employers with at least 15 employees - to provide pregnant workers with reasonable accommodations to any limitations related to pregnancy, childbirth, or related medical conditions, unless such accommodations will cause the employer an "undue hardship."

### A Landmark Development for Pregnant Workers' Rights

While several laws exist to protect pregnant workers, lawmakers recognized the opportunity to strengthen those protections. Until now, pregnant people have been protected from employment discrimination by the Americans with Disabilities Act (ADA), which prohibits discrimination on the basis of disability, and the Pregnancy Discrimination Act (PDA), which amended Title VII of the Civil Rights Act of 1964 and makes discrimination illegal against women because of pregnancy, childbirth, and related conditions. Unfortunately, pregnant workers – especially those earning low wages, who are often workers of color – continued to be fired or forced out of jobs during pregnancy rather than granted an accommodation.

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## Proposed Regulations Flesh Out the Statute

On August 11, the EEOC issued a Notice of Proposed Rulemaking to implement the PWFA.

Notably, the proposed rules include "predictable assessments," which appear to be reasonable accommodations that won't impose an undue hardship on the employer. These include: "(1) allowing an employee to carry water and drink, as needed, in the employee's work area; (2) allowing an employee additional restroom breaks; (3) allowing an employee whose work requires standing to sit and whose work requires sitting to stand; and (4) allowing an employee breaks, as needed, to eat and drink." The proposed rule also defines a "known limitation" on a worker's ability to perform their job, thereby explaining operative terms that close an important gap in coverage left by pre-existing laws.

The public can comment on the proposed rules through October 10, after which the agency's guidance will become final.

## The ADA and PDA Have Limits to Protecting Pregnant Workers

The ADA guarantees reasonable accommodations for workers with a qualifying disability. However, for most pregnant workers, conditions associated with pregnancy or childbirth do not rise to the level of a disability under the ADA, so the ADA does not require they be provided accommodations.

Also, courts' interpretations of statutes prior to passage of the PWFA have created hurdles for workers to enforce their rights. For example, in a 2015 decision, Young v. United Parcel Service, Inc., the Supreme Court addressed the application of the PDA in the case of a pregnant delivery worker who, following her doctors' advice, asked to be excused from the employer's requirement that she lift heavy objects. Rather than grant her request, the employer forced her to take an unpaid leave of absence from her job. The Supreme Court's opinion requires pregnant workers claiming discrimination under the PDA to show that they were treated differently from comparable nonpregnant workers.

## The PWFA Builds on the PDA and ADA and Fills in Important Gaps

The PWFA, which passed in December 2022 with bipartisan support, requires employers to provide reasonable accommodations to employees with a limitation stemming from pregnancy, childbirth or related conditions and prioritizes the accommodation of workers in the workplace over the alternative of forcing an employee to take leave. Under the new law, a pregnant worker does not have to have a condition that rises to the level of a disability to receive an accommodation.

So, the PWFA imports a mechanism of the ADA that allows workers to negotiate accommodations with their employers. Similarly, in the area of litigation, the law will likely be effective and beneficial for addressing individual accommodations and claims.

## Continued Benefits to the PDA

Even with passage of the PWFA, the PDA remains a powerful tool when challenging systemwide bias and discrimination. We are presently engaged in two cases alleging systemic discrimination against pregnant workers – Cynthia Allen, et al. v. AT&T Mobility Services LLC and U.S. Customs & Border Protection Agency Pregnancy Discrimination Litigation, both of which challenge policies with a widespread adverse impact on pregnant workers, including a so called "no-fault" attendance policy, and a policy that changes what work pregnant workers can engage in, without the worker having a say in the matter. Going forward, workers are likely to rely on a combination of new and existing workplace protections to bring pregnant workers into true parity with their counterparts.

The protections afforded by the PWFA for pregnant individuals is worthy of celebration. It is an important step forward, as we continue to challenge pervasive, system-wide discrimination on behalf of pregnant workers under the PDA.

# Legal Resources

- How to file an EEOC charge.
- If possible, consult with an attorney first, before filing a charge with the EEOC.
  - **Local Bar Association:** Many local bar associations have referral services that may connect you with attorneys
  - **National Employment Lawyers Association (NELA):** NELA is the largest professional organization for lawyers who represent employees in employment disputes, you can search their directory here.
  - **Cohen Milstein Sellers & Toll PLLC:** We work specifically in class actions, including gender pay discrimination. We would be happy to consult with you. Visit our website.

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