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Via Federal eRulemaking Portal
Charlotte A. Burrows
Chair, U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, D.C. 20507

RE: Comment by State of New York et al. / Regulations to Implement the Pregnant Workers Fairness Act NPRM (RIN 3046-AB30)

Dear Chair Burrows:

The undersigned State Attorneys General of Arizona, California, Colorado, Connecticut, Delaware, the District of Columbia, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin ("the States") write in response to the Notice of Proposed Rulemaking ("Proposed Rule") issued by the U.S. Equal Employment Opportunity Commission ("EEOC" or "Commission") entitled "Regulations to Implement the Pregnant Workers Fairness Act," pursuant to section 2000gg-3 of the Pregnant Workers Fairness Act ("the PWFA").[1]

The States commend the Commission's efforts to protect workers who are pregnant or postpartum by implementing the PWFA. The PWFA addresses an urgent need for federal protections aimed specifically at pregnant and postpartum workers who previously could be forced to choose between keeping their jobs and protecting their health, their pregnancy, or their ability to breastfeed. These groundbreaking protections are especially crucial for low-wage workers and those in physically demanding roles.

The PWFA is the first federal law affirmatively requiring covered employers to provide pregnant and postpartum workers with reasonable accommodations in order to retain their employment and avoid health risks—absent undue hardship to the employer.[2] Before the PWFA, pregnant and postpartum workers were protected by a patchwork of laws, including the

[1] 42 U.S.C. § 2000gg-3.

[2] THE PREGNANT WORKERS FAIRNESS ACT EXPLAINER, A BETTER BALANCE 1 (Jan. 2023), https://www.abetterbalance.org/wp-content/uploads/2023/01/PWFA-Explainer-_-Final.pdf.

Pregnancy Discrimination Act ("PDA"), the Americans with Disabilities Act ("ADA"), the Family and Medical Leave Act ("FMLA"), and the Reasonable Break Time for Nursing Mothers provision of the Patient Protection and Affordable Care Act ("Break Time law"), but each of these protections had significant gaps. The PDA requires employers to provide temporary accommodations to pregnant workers only if the worker can identify other workers who are not pregnant but nonetheless "similar in their ability or inability to work" who have already received accommodations.[3] And, because pregnancy itself is not a disability recognized under the ADA, only those pregnant workers who have a pregnancy-related disability are protected.[4] The FMLA requires employers to offer unpaid time off for qualifying conditions, including for pregnancy and childbirth, but 44% of workers, disproportionately workers of color, are not eligible for its protections, and many are simply unable to afford taking advantage of them.[5] Finally, the Break Time law, until this year, only applied to workers covered under the wage-and-hour protections of the Fair Labor Standards Act and covered only specific types of accommodations. In addition, even following amendments under the Providing Urgent Maternal Protection for Nursing Mothers Act ("PUMP Act"),[6] the Break Time law fails to offer protection to workers in certain industries. Thus, until PWFA was enacted, many pregnant and postpartum workers in need of accommodations have fallen through the cracks.

The Proposed Rule also comes at a time of significant turmoil throughout the country regarding the legal status of reproductive health care. The States commend the Commission for clarifying that the PWFA entitles workers to reasonable accommodations related to a broad range of pregnancy-related conditions, including pregnancy loss and abortion, the use of contraception, infertility treatment, and lactation.

For the reasons set forth below, the signatory States strongly support the overall substantive protections outlined in the Proposed Rule. The Proposed Rule makes clear that, for the first time, employers must grant reasonable accommodations to workers with limitations resulting from normal pregnancy, including during the postpartum period. The States further welcome the Interpretive Guidance on the PWFA and its incorporation into the Final Rule, which will guide the interpretation and enforcement of all aspects of the PWFA.[7] Among other things, the Guidance provides concrete, extensive, and clearly illustrated examples of circumstances in which employers should provide reasonable accommodations, which will greatly facilitate implementation of the law. And, critically, the Proposed Rule makes clear that the PWFA sets a nationwide baseline, while recognizing that state and local laws offering greater protection will remain in effect. The States therefore strongly urge the Commission to move with

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[3] 42 U.S.C. § 2000e(k); *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 229 (2015).

[4] 42 U.S.C. § 12102; *Border v. Nat'l Real Est. Advisors, LLC*, 453 F. Supp. 3d 249, 256 (D.D.C. 2020) ("This Court has previously held that '[p]regnancy itself is generally not considered a disability. But a pregnancy that results in an impairment that substantially limits a major life activity can be considered a disability.'") (internal citations omitted); *see also Pregnancy Discrimination and Pregnancy-Related Disability Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (last visited Sept. 5, 2023), https://www.eeoc.gov/pregnancy-discrimination.

[5] *See* Nat'l Partnership for Women and Families, *Key Facts: The Family and Medical Leave Act* (Feb. 2023), https://nationalpartnership.org/wp-content/uploads/2023/02/key-facts-the-family-and-medical-leave-act.pdf.

[6] Providing Urgent Maternal Protections for Nursing Mothers Act, Pub. L. No. 117-328, Div. KK, 136 Stat. 6093-97 (2022), *codified at* 29 U.S.C. § 218d.

[7] 88 Fed. Reg. 54719 (Aug. 11, 2023).

purpose to issue the Final Rule and apply the standard compliance date of 180 days after the effective date of its issuance.

Drawing on common experiences among the States, we also address below several specific points on which the Commission requests comment,[8] and offer recommendations to further strengthen and clarify the Proposed Rule.

I. The Proposed Rule's Implementation of the PWFA Achieves the Essential Aims of the Law with Minimal Cost.

a. The PWFA and implementing regulations provide critical and overdue protections for workers and their families, with broader benefits to the community and to the States.

The commonsense measures described in the Proposed Rule achieve the urgent aims of the PWFA. First and foremost, the Proposed Rule enhances economic security for pregnant and postpartum workers and their families by helping workers stay in the workforce, with broader economic benefits to the community. As the Commission explains, not only can job loss caused by the lack of reasonable accommodations immediately impoverish workers, but it can affect economic security for decades, as workers lose access to various benefits such as retirement contributions, disability benefits, seniority, pensions, social security contributions, and life insurance at a time when they need these benefits most.[9] Implementing reasonable accommodations allows pregnant workers to maintain their income and benefits and provide for themselves and their families. Improving rates of employment and wage earning in turn eases strain on public coffers by reducing need for public benefits and benefitting the economy overall—which furthers the best interest of the States.

The Proposed Rule also improves workers' health. Workers will no longer be forced to choose between maintaining employment and a healthy pregnancy or forced out of their jobs postpartum. Birth-related morbidity and mortality caused or exacerbated by employment conditions will be reduced. As the Commission recognizes, pregnant workers in the U.S. currently fare much worse than workers in other developed nations; the U.S. is the developed nation with the highest rate of deaths from pregnancy-related causes.[10] And workers of color are especially affected, suffering far more negative health outcomes during pregnancy than white workers.[11] The majority of pregnancy-related deaths occur from one week to one year after delivery, with almost one third of deaths occurring one- and one-half months to one year postpartum.[12] Requiring reasonable accommodations during pregnancy and—as urged by the States—during this critical postpartum time period will improve these devastating outcomes.

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[8] *Id*. at 54758.

[9] *Id*. at 54750.

[10] *Id*. at 54751.

[11] *Id*.

[12] *Id*. at 54777.

The Proposed Rule further advances the goal of achieving a more equitable workplace. By preventing workers from being forced off the job in connection with pregnancy, the Proposed Rule addresses a major and persistent barrier to gender equality for women in the workforce and will contribute to reducing the gender wage gap.[13] And it promises to address a root cause of the phenomenon known as the "motherhood penalty"—the fact that having a child tends to reduce women's earnings, while increasing earnings for men, particularly in peak childbearing years.[14] The Proposed Rule also benefits workers in fields that are traditionally male-dominated, such as manufacturing, the trades, transportation, and uniformed services.[15] Such jobs tend to be physically demanding and often require prolonged standing, long hours, heavy lifting, or high physical activity—which in turn carries a risk of preterm delivery or low birth weight.[16] Offering reasonable, pregnancy-related accommodations to workers in these fields is a ready fix to protect their health and keep them in the workforce, furthering opportunities to succeed in these industries and ameliorating entrenched occupational segregation by gender that is a major driver of the ongoing pay gap.[17]

Moreover, the Proposed Rule stands to benefit workers in low-paying jobs and workers of color in particular, who are overrepresented in lower paying jobs and often face more challenges in securing appropriate accommodations.[18] Nearly one in six pregnant workers are employed in low-paying jobs, with Black and Latinx pregnant workers disproportionately represented.[19] Low-paying jobs are also more likely to be physically demanding and often have a higher need for accommodations.[20] Yet such jobs also offer far less flexibility in scheduling work shifts to accommodate pregnancy-related limitations, such as need for breaks, and are less likely to offer paid leave in connection with childbirth.[21] The resultant inequities are far-reaching. Currently, workers of color experience negative health outcomes and die from pregnancy-related causes far more frequently than white workers. These negative outcomes—including preterm birth, low birth weight, infection, and fainting—disproportionately affect women of color regardless of wealth.[22] Once reasonable accommodations are extended more

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[13] *See* Carolina Aragão, *Gender Pay Gap in U.S. Hasn't Changed Much in Two Decades*, Pew Research Ctr. (Mar. 1, 2023), https://www.pewresearch.org/short-reads/2023/03/01/gender-pay-gap-facts/.

[14] *Id.*; Wei-Hsin Yu & Yuko Hara, *Motherhood Penalties and Fatherhood Premiums: Effects of Parenthood on Earning Growth Within and Across Firms*, Demography (Feb. 1, 2021), https://pubmed.ncbi.nlm.nih.gov/33834238/.

[15] *See, e.g.*, Ariane Hegewisch & Heidi Hartmann, *Occupational Segregation and the Gender Wage Gap*, Institute for Women's Policy Research (Jan. 2014), https://iwpr.org/wp-content/uploads/2020/08/C419.pdf.

[16] National Women's Law Center, *Pregnant Workers Need Accommodations for Safe and Health Workplaces* (Oct. 2021), https://nwlc.org/wp-content/uploads/2021/11/Pregnant-Workers-by-the-Numbers-2021-v4.pdf (hereinafter NWLC Report) (citations omitted); *see also* Catalyst, *Women in Male-Dominated Industries and Occupations* (May 31, 2023), https://www.catalyst.org/research/women-in-male-dominated-industries-and-occupations/ (hereinafter Catalyst Report).

[17] *See* Wendy Chun-Hoon, *5 Fast Facts: The Gender Wage Gap*, United States Dep't of Labor (Mar. 14, 2023), https://blog.dol.gov/2023/03/14/5-fast-facts-the-gender-wage-gap#:~:text=Stats.,for%20Black%20and%20Hispanic%20women.

[18] NWLC Report; *see also* 88 Fed. Reg 54753-54.

[19] *Id.*

[20] NWLC Report (citations omitted); *see also* Catalyst Report.

[21] NWLC Report; 88 Fed. Reg. 54753-54.

[22] 88 Fed. Reg. 54751.

equitably, improvements in the health and economic security of marginalized workers will follow.

b. The States' experiences with their own PWFA-type laws affirm the ease of implementation, along with the benefit of having clear guidelines and a national baseline of protection.

As the Commission notes, 30 states already have state-level PWFA and Break Time law analogues or similar protections against pregnancy-based discrimination. These states' experiences provide important insights into PWFA implementation. The experience of the signatory States that have these laws in place ("PWFA-analogue States") is exceedingly positive, and illustrates that the benefits to employees, their families, and the public of affording protections to workers affected by pregnancy far outweigh any marginal costs.

Indeed, costs to PWFA-analogue States have been minimal. In the PWFA-analogue States, increased costs to employers or other adverse economic outcomes either have not been reported or are so insignificant that they are not readily measurable or knowable. These states' experiences are consistent with studies demonstrating that when employers provide reasonable accommodations, those accommodations tend to be no- or low-cost. For example, the most common accommodation needed by pregnant workers surveyed nationally was additional breaks, such as bathroom breaks, which typically cost nothing to implement.[23] Moreover, employers are rewarded by increased employee satisfaction, productivity, and retention, along with reduction in costs associated with employee turnover.[24] Thus, in the PWFA-analogue States' experience, rather than being burdened, employers benefit from these types of laws.

Nor have the PWFA-analogue States experienced a marked increase in litigation following enactment of their PWFA/Break Time law analogues. In Washington State, all but 2 of the 650 pregnancy accommodation intakes received by the Attorney General's Office resolved without the need to file a lawsuit. In New York State, which enacted its PWFA analogue in 2016, the vast majority of discrimination complaints filed with the New York Division of Human Rights involve allegations of employment discrimination, yet complaints relating to reasonable accommodations for pregnancy-related conditions account for at most .03% of all employment discrimination filings. Moreover, 86% of the employment discrimination cases that involve reasonable accommodations for a pregnancy-related condition resolve prior to an agency hearing. The pre-hearing resolution numbers are similar in Connecticut. In Oregon, only about 1.5% of cases filed with the Civil Rights Division of the state's Bureau of Labor and Industries involve pregnancy or post-partum accommodation issues, a good portion of which are

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[23] 88 Fed. Reg. 54717; Eugene R. Declercq et al., *Listening to Mothers III: New Mothers Speak Out*, Childbirth Connection (June 2013), https://nationalpartnership.org/wp-content/uploads/2023/02/listening-to-mothers-iii-new-mothers-speak-out-2013.pdf.

[24] *See* Job Accommodation Network, *Accommodation and Compliance: Low Cost, High Impact* (May 4, 2023), https://askjan.org/topics/costs.cfm; Oregon Bureau of Labor and Industries, *The Business Case for Accommodating Pregnant Employees: Best Practices to Reduce Pay Inequality in Oregon*, https://www.oregon.gov/boli/employers/Documents/pregnancy-accommodation-102715.pdf (last visited Sept. 18, 2023); U.S. Dep't of Health & Human Servs., Office on Women's Health, *The Business Case for Breastfeeding*, https://www.womenshealth.gov/breastfeeding/breastfeeding-home-work-and-public/breastfeeding-and-going-back-work/business-case (last visited Sept. 18, 2023).

voluntarily resolved. In Arizona, approximately 16 charges of discrimination based on pregnancy or breastfeeding were filed with the Civil Rights Division during the last fiscal year.[25] And in Illinois, only 1% of charges filed with the Department of Human Rights involved pregnancy-related charges seeking an accommodation. A study in California, which enacted its state PWFA in 2000, showed the total number of pregnancy discrimination charges filed with the state human rights agency actually *decreased* after the law was enacted.[26] These beneficial trends will likely be experienced at the federal level as well. By setting forth clear guidelines, the PWFA and Proposed Rule will promote voluntary compliance, and thus obviate the need for litigation.[27]

Crucially, the Proposed Rule provides a clear and uniform baseline of nationwide protections, while at the same time maintaining states' ability to extend additional protections to their workers above those offered at the federal level. Prior to the passage of the PWFA, these protections varied state-by-state, and millions of workers were unprotected. States with PWFA analogues differed in number or types of workers covered, as well as the scope of protections offered. Employers were faced with managing compliance with a patchwork of widely varying laws. The PWFA and Proposed Rule simplify this regulatory landscape by setting out an overarching national standard. And because many state laws overlap significantly with the PWFA, the guidance offered by the Proposed Rule will promote compliance with those state laws as well.[28] In sum, the States appreciate that the Proposed Rule offers a clear floor at the national level, while continuing to allow all states the flexibility to afford additional protections to their residents.[29]

c. The costs incurred in implementing the PWFA will likely be significantly lower than the Commission's cost estimates.

As the Commission acknowledged, its evaluation of costs associated with implementation of the PWFA "almost certainly" overestimates the costs imposed by the Rule.[30] The accommodations available under the ADA, Title VII, and the Break Time law, along with

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[25] Although Arizona does not have as direct an equivalent to the PWFA as other states do, the Arizona Civil Rights Act does protect against discrimination based on sex, pregnancy, and disability. Other states, including New York, reported similar interpretations of their antidiscrimination statutes even prior to enactment of their state PWFA analogue. Thus, even in states with no exact PWFA equivalent, laws and systems may already be in place that enforce similar standards, such that implementation of the rule will not add a significant burden.

[26] *See* Noreen Farrell et al., Equal Rights Advocates, *Expecting a Baby, Not a Layoff*, https://web.archive.org/web/20120518145028/http://equalrights.org/media/2012/ERA-PregAccomReport.pdf (archived) (last visited Sept. 18, 2023).

[27] 88 Fed. Reg. 54763, 54717.

[28] *Id*. at 54754.

[29] For instance, several State PWFAs have codified the principle that the prior award of a requested accommodation creates a rebuttable presumption that the accommodation is reasonable. *See, e.g.*, Nev. Rev. Stat. 613.4374(3) ("Evidence that the employer provides or would be required to provide a similar accommodation to a similarly situated employee or applicant for employment creates a rebuttable presumption that the accommodation does not impose an undue hardship on the employer."); Colo. Rev. Stat. Ann. § 24-34-402.3(4)(c)(II) ("The employer's provision of, or a requirement that the employer provide, a similar accommodation to other classes of employees creates a rebuttable presumption that the accommodation does not impose an undue hardship.").

[30] 88 Fed. Reg. 54764.

accommodations offered voluntarily by employers, overlap with the provisions of the PWFA, and therefore many employers already have in place applicable policies and internal systems for engaging in the interactive process, affording workers reasonable accommodations, and investigating claims of violations. Likewise, the rule vastly underestimates and undervalues the benefits that employers reap by retaining their skilled and trained workers and the benefits to taxpayers of keeping would-be workers off of public benefits and reducing the burden on the public.

Both the numbers of workers affected and the resulting costs are likely to be extremely low. As the Commission correctly recognizes, the most common accommodations needed by workers with pregnancy-related conditions are no- or low-cost.[31] The survey by the Job Accommodation Network cited by the Commission, for example, shows that 49.4% of requested accommodations were granted at no cost whatsoever, while 43.3% were a one-time cost. Only 7.2% of employers said the accommodation resulted in an ongoing annual cost to the company.[32] Finally, it bears emphasizing that the number of workers overall potentially needing accommodation at any given time is extremely low, as only 1.5% of workers are pregnant in a given year, and accommodations will only be needed for a "fraction" of those workers.[33]

The PWFA-analogue States' experiences track these findings. In Arizona, for example, commonly requested accommodations included breaks, private space for breastfeeding, temporary reduction in hours, shift changes, ability to sit while working, and remote work options. In Washington State, out of 650+ pregnancy accommodation intakes, there have been zero instances where an accommodation was shown by an employer to be an undue hardship (defined at Wash. Rev. Code § 43.10.005(1)(d) as "an action requiring significant difficulty or expense").

Finally, as discussed above, because the Proposed Rule will further the goal of keeping pregnant and postpartum workers in the workforce, any cost incurred to provide a reasonable accommodation may result in benefits that more than account for the cost.[34]

II. The Proposed Rule's Core Prohibitions on Failure to Accommodate and Discrimination Based on Known Limitations, Along with its Detailed Definitions, Appropriately Implement the PWFA's Broad Remedial Goals.

The States generally support the Proposed Rule's substantive protections and definitions as appropriate interpretations to further the PWFA's overarching goals. We offer these comments to highlight issues of particular importance to the States, along with recommendations to further strengthen and clarify the Rule and Interpretive Guidance.

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[31] 88 Fed. Reg. 54716-17; *see also* Eugene R. Declercq et al., *Listening to Mothers III: New Mothers Speak Out*, Childbirth Connection (June 2013), https://nationalpartnership.org/wp-content/uploads/2023/02/listening-to-mothers-iii-new-mothers-speak-out-2013.pdf.

[32] Job Accommodation Network, *Accommodation and Compliance: Low Cost, High Impact* (May 4, 2023), https://askjan.org/topics/costs.cfm.

[33] NWLC report.

[34] 88 Fed. Reg. 54717.

The Proposed Rule is itself quite straightforward, with much of the work and explanation provided by the definitions. At the outset, the Proposed Rule appropriately imports terms and definitions from existing civil rights laws, including Title VII and the ADA, such as "employer," "covered entity," "reasonable accommodation," "undue hardship," and "interactive process."[35] Use of these familiar definitions will facilitate employers' understanding, promote consistency, and permit employers to easily adapt their existing policies and procedures to incorporate the PWFA's protections. At the same time, the Proposed Rule and Interpretive Guidance provide detailed explanations of the application of these terms, along with terms specific to the PWFA, in the context of requests for pregnancy accommodations.

The operative provisions of the Proposed Rule faithfully effectuate the PWFA's central goal by making it unlawful for an employer to refuse "reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee or applicant" absent undue hardship, or to deny employment opportunities based on such known limitations.[36] Similarly, the Proposed Rule's explicit prohibitions on requiring employees to accept an accommodation and on forcing them onto leave are monumental. [37] Before the PWFA's passage, in states without their own statutory protections, employers were empowered to force workers to accept accommodations like leaves of absence, light duty, or temporary job transfer, even if a less disruptive accommodation would have enabled them to keep working.[38] As a result, many workers were forced onto unpaid leave or left their jobs or the workforce altogether, often with devastating economic consequences for those forced to forgo months of income or pushed off their employer-sponsored insurance.[39] These core provisions therefore lie at the heart of what the PWFA promises to accomplish.

a. "Reasonable accommodations"

The PWFA uses the same definition of "reasonable accommodation" as the ADA and its implementing regulations. The States commend the Commission for including additions to the definition and examples of the term's application specific to the needs of workers with pregnancy-related conditions, including alleviating pain, avoiding risks, and enabling lactation. The States are also pleased by the Commission's inclusion of leave, including intermittent leave, as an example of a reasonable accommodation. The Commission's special attention to the provision of interim accommodations is also crucially important; as the Commission is undoubtedly aware, workers with pregnancy-related conditions often have time-sensitive or even immediate needs for accommodation due to rapidly changing health conditions, and unjustified

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[35] 88 Fed. Reg. 54719, 54726, 54733, 54735.

[36] *Id*. at 54770.

[37] *Id*. at 54719 (§ 1636.4 (a)(2), (b), (d)).

[38] *See, e.g.*, *Durham v. Rural/Metro Corp.*, 955 F.3d 1279, 1283 (11th Cir. 2020) (describing a pregnant EMT's experience of being offered unpaid leave or no accommodation at all).

[39] *Durham*, 955 F.3d at 1283; A Better Balance et al., *Why We Need the Pregnant Workers Fairness Act*, https://nationalpartnership.org/wp-content/uploads/2023/02/why-we-need-the-pwfa-stories-of-real-women.pdf (last visited Sept. 15, 2023).

delays in granting reasonable accommodations may lead workers to leave their jobs, causing harm to the worker, the employer, and the economy as a whole.[40]

The States offer two recommendations for additions to the examples provided in the Proposed Rule's definition of reasonable accommodations in § 1636.3(h)(i). First, although the Interpretive Guidance and examples include discussion of certain modifications necessary to prevent health risks, such as exposure to toxins or chemicals, *the States recommend that the definition in the Final Rule add "modifications needed to avoid causing or exacerbating pain or discomfort, or to prevent exposure to health risks" in the list of potential accommodations*. Second, because in many cases pregnant and lactating workers have been penalized under strict, no-fault, attendance policies,[41] and because modification of or excuse from such policies for pregnancy-related absences have been recognized as reasonable accommodations in other contexts,[42] *the States recommend adding to the list excusing pregnancy-related absences from "no-fault" attendance policies*. The Interpretive Guidance should further make clear in its discussion of retaliation that, consistent with Department of Labor Guidance under the FMLA,[43] failure to excuse pregnancy-related absences from such attendance policies may constitute prohibited retaliation under the PWFA.

The States further recommend that the Commission add examples in three additional contexts: lactation, telework,[44] and work-related travel. The Commission's examples of reasonable accommodations for lactation focus on so-called "time and space" accommodations.[45] However, lactating workers may need other kinds of accommodations too, such as a temporary job transfer to avoid exposure to toxins or other health risks, adjustments to uniforms or equipment, or time off to recover from lactation complications like mastitis. The States urge the Commission to consider adding examples to reflect this wider range of reasonable accommodations for lactation. The Commission correctly recognizes that telework may be an appropriate reasonable accommodation. However, given recent changes in many white-collar

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[40] *See, e.g.*, *Ames v. Nationwide*, 760 F.3d 763, 766 (8th Cir. 2014) (describing plaintiff's urgent need for a reasonable accommodation to express breast milk).

[41] *See, e.g.*, *Hodgkins v. Frontier Airlines, Inc*., No. 1:19-CV-03469, 2021 WL 2948810, at *13 (D. Colo. July 14, 2021) (sustaining pregnancy discrimination claim that no-fault attendance policy penalizing pregnancy-related absences violated Title VII); *Gorman v. Wells Mfg. Corp*., 209 F. Supp. 2d 970, 980 (S.D. Iowa 2002), *aff'd*, 340 F.3d 543 (8th Cir. 2003) (dismissing claims on ground that employees' pregnancy-related absences rendered her not "qualified" to perform essential functions of the job, and that no-fault attendance policy constituted a legitimate, non-discriminatory reason for her termination); *see also* Dina Bakst et al., *Pointing Out: How Walmart Unlawfully Punishes Workers for Medical Absences*, A Better Balance (June 2017) (collecting stories), https://www.abetterbalance.org/wp-content/uploads/2017/05/Pointing-Out-Walmart-Report-FINAL.pdf.

[42] *See* U.S. Equal Emp. Opportunity Comm'n, *Applying Performance and Conduct Standards to Employees with Disabilities* (Sept. 3, 2008), https://www.eeoc.gov/laws/guidance/applying-performance-and-conduct-standards-employees-disabilities.

[43] U.S. Dep't of Labor, Wage & Hour Div., Field Assistance Bulletin No. 2022-01, *Protecting Workers from Retaliation* (Mar. 10, 2022); U.S. Equal Emp. Opportunity Comm'n, *Verizon to Pay $20 Million to Settle Nationwide EEOC Disability Suit* (July 6, 2011), https://www.eeoc.gov/newsroom/verizon-pay-20-million-settle-nationwide-eeoc-disability-suit.

[44] The States commend the Commission for including telework as a reasonable accommodation for in-person workers who cannot, because of a pregnancy-related condition, perform their work at their usual jobsite.

[45] *See, e.g.*, 88 Fed. Reg. 54732-33.

workplaces, workers increasingly have the option to work all or part of their hours remotely. *The Commission should make clear through the inclusion of specific examples in the definition, and in the preamble and Interpretive Guidance, that reasonable accommodations including more frequent breaks, schedule adjustments, and time off for doctor visits and lactation apply to workers who are teleworking just as they apply when workers are physically present in the workplace. Moreover, the Interpretive Guidance and examples should make clear that reasonable accommodations for these and other pregnancy-related conditions must be available on the same terms to workers when they travel for work, such as attending conferences.*

b. "Known limitation"

The States suggest one change to the proposed definition of "known." The States support that the Proposed Rule makes clear either an employee or their representative can communicate the limitation to the covered entity, as is true under the ADA.[46] The Proposed Rule states a representative can include a "family member, friend, health care provider, or other representative."[47] The States further generally endorse the broad interpretation of "limitation" proposed. The definition appropriately recognizes that a pregnancy-related limitation "may be modest, minor, and/or episodic," and that it may relate to maintaining the worker's own health "or the health of the pregnancy."[48] Moreover, because workers may confront situations that present risks tolerable for an average person but unacceptable for a pregnant person, the Proposed Rule allows workers to seek reasonable accommodations to alleviate increased pain or increased risk to health attributable to their pregnancy-related limitation.[49]

The PWFA states that a worker's limitation must be "known" to their employer to trigger the statute's protection, and the proposed definition mirrors this.[50] Paragraph (d)(3) of this section of the Proposed Rule sets out what an employee or applicant must communicate to the employer to request an accommodation under the PWFA. Under the Proposed Rule, such a communication has two parts. First, the employee or applicant (or their representative) must identify the limitation that is the physical or mental condition and that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. Second, the employee or applicant (or their representative) must indicate that they need an adjustment or change at work.

As to the first part of this requirement, the States appreciate the Proposed Rule's specification that, as with the ADA, to request an accommodation, an employee or applicant may use plain language. They need not mention the PWFA; use the phrases "reasonable accommodation," "known limitation," "qualified," or "essential function"; use any medical terminology; or use any other specific words or phrases. And they need not put requests in writing or use any particular forms. Such flexibility is necessary to ensure workers' requests are addressed without imposing unnecessary and unjustified barriers.

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[46] 88 Fed. Reg. 54722.

[47] *Id.*

[48] *Id*. at 54717-18, 54719, 54767.

[49] Id. at 54767 (§ 1636.3(a)(2)), 54715.

[50] 42 U.S.C. § 2000gg; 88 Fed. Reg. 54722.

However, to further ensure the goals of the statute are met, the States recommend two modifications to the definition of "communicated to the employer." First, *the States recommend that the Proposed Rule and Interpretive Guidance make clear that the employee need not disclose to the employer the nature of the pregnancy-related condition necessitating an accommodation* to satisfy this standard. Such information is not necessary to enable employers to understand the nature of the employee's limitation or to assess whether providing an accommodation would pose an undue hardship. Moreover, requiring employees to share such sensitive health information implicates important privacy rights. For example, an employee may not wish to reveal that they have experienced a miscarriage or stillbirth, that they are experiencing post-partum depression, that they are undergoing IVF, or that they have had to cease taking medications to treat ADHD as a result of their pregnancy, nor is knowing that the specific condition necessary for articulating the limitation. Further, protecting employee privacy has taken on particular importance in light of the new legal risks associated with certain types of reproductive health care. *The Final Rule's definition, Interpretive Guidance, and examples should therefore clarify that employees are not required to communicate to the employer the underlying condition*. *Rather, the Rule should specify that employees only need to identify the* limitation *(e.g., a lifting restriction, being placed on bed rest, a medical appointment during the workday), and convey that the limitation is related to pregnancy or childbirth.*[51]

Second, the Proposed Rule imposes a requirement that the employee not only *communicate* the *limitation*, but also must explicitly *request an accommodation* to address their limitation.[52] No such requirement appears in the statute.[53] This additional requirement is an unwarranted departure from both the text and purpose of the PWFA itself and imposes an unnecessary burden on workers. Many will not be aware that they have any right to a workplace modification or know the precise nature of the accommodation that might address their limitation. When an employer learns, either directly or indirectly, that an individual has a pregnancy-related limitation that is causing them to have issues at work, then the need for an accommodation should be obvious, and the knowledge of that need should be imputed to the employer. Accordingly, the employer has an affirmative obligation to engage in the interactive process to explore potential accommodations that would enable the employee to continue working. The Rule provides no justification for an added obligation to be placed on workers. *The States urge the Commission to eliminate this additional requirement that the employee expressly request an accommodation to address their pregnancy-related limitation, which will make it more difficult for employees to seek accommodations, frustrating the statute's purpose. The States further recommend that this clarification be added to the discussion of what constitutes "reasonable documentation."*

c. "Pregnancy-related conditions"

The States commend the Commission's proposed definition of "pregnancy, childbirth, or related medical conditions." The non-exhaustive list of common pregnancy-related conditions

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[51] The States offer a parallel recommendation with respect to the definition of "reasonable documentation." *See infra* at pp. 19-21.

[52] 88 Fed. Reg. 54722.

[53] 42 U.S.C. § 2000gg.

illustrates that this definition is an appropriately expansive one. The commonsense inclusion of conditions such as infertility, lactation, menstruation, and abortion as pregnancy-related conditions reflects longstanding interpretations of this term's definition under parallel civil rights laws by the Commission,[54] other agencies,[55] and federal courts.[56] Adopting this longstanding understanding into the definition will facilitate employers' understanding of the PWFA's requirements and permit employers to easily adapt their existing policies and procedures.

The States offer two recommended additions to the Proposed Rule's definition of "pregnancy-related." First, the States recommend that the definition specify that "pregnancy related conditions" may include *common pregnancy symptoms*, including symptoms that may or may not be subject to a formal medical diagnosis, such as morning sickness, fatigue, or back or joint pain. Second, as suggested by many of the legal authorities cited in the explanation of the Proposed Rule,[57] the definition should further specify that *menstruation, amenorrhea/dysmenorrhea, perimenopause, and menopause are similarly pregnancy-related*. Such conditions plainly concern the reproductive cycle and, like infertility, implicate in different ways the capacity to become pregnant. At the same time, situations in which workers need accommodations caused by these conditions are likely to arise exceedingly rarely, and in many such cases would likely already be protected by the ADA. Recognizing these conditions as pregnancy-related would allow PWFA to address the myriad of common, pregnancy-related conditions employees might face over the course of their lives, including those that may not be medically treated or diagnosed, while at the same time not creating a significant added burden on employers.

The States are also concerned that several of the examples provided by the Proposed Rule of conditions that may not be pregnancy-related are inapt and medically inaccurate. The examples ignore the medical fact that pregnancy causes systemic changes that frequently exacerbate preexisting conditions, often with serious health implications. Such decontextualized analysis is therefore inappropriate for health conditions that are inextricably linked to pregnancy. For instance, the examples and Guidance point to high blood pressure as a condition that can preexist the pregnancy and therefore not necessarily related to pregnancy.[58] But high blood pressure in a pregnant worker always relates to and affects pregnancy and should therefore be

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[54] *See, e.g.*, 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 ("pregnancy, childbirth, or related medical conditions" protected under Title VII include abortion, lactation, use of contraception).

[55] For example, the regulations implementing Title IX (which prohibits sex discrimination by covered educational institutions, including discrimination based on pregnancy or related conditions) define "pregnancy and related conditions" as including "termination of pregnancy or recovery therefrom". 34 C.F.R. § 106.40(b)(1).

[56] *See, e.g.*, *Doe* v. *C.A.R.S. Protection Plus, Inc.,* 527 F.3d 358, 364 (3d Cir. 2008) (employer violated Title VII's prohibition on pregnancy discrimination when it fired an employee for having an abortion); *Turic* v. *Holland Hospitality, Inc.,* 85 F.3d 1211, 1214 (6th Cir. 1996) (employer violated Title VII's prohibition on pregnancy discrimination when it fired an employee for contemplating an abortion); *Hicks v. City of Tuscaloosa*, 870 F.3d 1253, 1259–60 (11th Cir. 2017) (lactation and breastfeeding covered as conditions "related to pregnancy" under the PDA).

[57] *See* 88 Fed. Reg. 54721 n.51, 54774 n.11 (collecting cases).

[58] 88 Fed. Reg. 54721, 54775.

eligible for an accommodation under the PWFA. Hypertensive disorders in pregnancy include both pre-pregnancy chronic hypertension and pregnancy-associated hypertension.[59] The perils of allowing an employer to refuse accommodations for limitations related to high blood pressure cannot be overstated. High blood pressure is a leading cause of maternal morbidity and mortality.[60] High blood pressure in pregnancy can lead to death and numerous dangerous medical conditions including preeclampsia, eclampsia, placental abruption, and stroke.[61] Similar risks are present postpartum.[62] For these reasons, employers should not be permitted to deny accommodations for limitations caused by high blood pressure, and certainly not on the basis that it is not a pregnancy-related condition. The same is true for conditions such as wrist and knee pain.[63] *The States therefore urge the Commission to revise the examples provided under this section in line with sound medical practice. The Guidance should further clarify that because of pregnancy's systemic nature, the vast majority of conditions occurring during pregnancy are pregnancy-related and that exceptions are exceedingly rare (e.g., a broken bone from an unrelated fall), and should caution employers against second-guessing workers' own attestation regarding their condition or attempting to parse conditions linked to pregnancy.*

Finally, with respect to lactation, it is particularly important to establish a clear standard in line with the evolving legal understanding of this condition, and to clarify employers' parallel obligations under Title VII, the Break Time law as amended by the PUMP Act, and the PWFA. The Guidance clarifies that employers may be required to offer accommodations under PWFA that are not specifically required under the Break Time law, whether due to exemptions or due to the types of accommodations necessary.[64] The States commend the way the Proposed Rule alerts employers to these overlapping, but in some cases distinct, obligations.

d. "Qualified"

The PWFA gives two definitions for the term "qualified." If an applicant or employee meets one of the two definitions, the employee is qualified within the meaning of the PWFA. First, it imports the ADA definition, stating that "an employee or applicant" is qualified if, "with or without reasonable accommodation, [the employee or applicant] can perform the essential functions of the employment position."[65] Second, it includes workers who *cannot* perform the

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[59] Nicole D. Ford et al., *Hypertensive Disorders in Pregnancy and Mortality at Delivery Hospitalization*, Ctrs. for Disease Control & Prevention (April 29, 2022), https://www.cdc.gov/mmwr/volumes/71/wr/mm7117a1.htm.

[60] *Id*.

[61] *High Blood Pressure During Pregnancy*, Ctrs. for Disease Control & Prevention (June 19, 2023), https://www.cdc.gov/bloodpressure/pregnancy.htm.

[62] *Id*.

[63] 88 Fed. Reg. 54780 (examples 1636.3 #10, 1636.3 #13).

[64] *See, e.g.*, *Hicks v. Tuscaloosa*, 870 F.3d 1253, 1259-60 (11th Cir. 2017) (recognizing that refusal to accommodate lactating police offer's light duty request could violate Title VII and thus serve as legitimate grounds for constructive discharge claim); 29 U.S.C. §§ 207, 218c(d)-(f) (exempting airline employees and limiting protection for workers in other transportation industries).

[65] *Compare* 42 U.S.C. § 2000gg(6) *with* the ADA, 42 U.S.C. § 12111(8) (defining "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires").

essential functions of the job as long as the inability is temporary, the essential function could be performed in the near future, and the inability to perform the essential function can be reasonably accommodated.[66] By allowing workers who will only temporarily be unable to fulfill essential job functions to remain "qualified," the PWFA promotes flexible approaches to accommodation and helps workers maintain their paychecks and routines as their families grow. Nonetheless, several clarifications are needed to the Proposed Rule with respect to the analysis of whether a worker is "qualified."

i. The definition of "essential functions" should be limited to the time for which an accommodation will be needed.

Both proposed definitions of "qualified" first consider whether a worker can perform the essential function or functions of the role. The Proposed Rule adopts the ADA regulations' definition of "essential function": "the fundamental job duties of the employment position the individual . . . holds or desires," excluding "the marginal functions of the position."[67] *The States urge the Commission to redefine essential function, as suggested in the Proposed Rule's preliminary statement, to "consider whether the function is essential to be performed in the limited time for which an accommodation will be needed."*[68] This change appropriately recognizes that most limitations addressed under the PWFA will be temporary, and some functions that may be essential may not be essential for the worker to perform during the time period when the accommodation is actually needed.

ii. The Commission should revise the definition of "in the near future" to mean generally one year before or after childbirth, and up to two years with respect to lactation-related accommodations.

The Proposed Rule defines "temporary" as lasting for a limited time, not permanent, but maybe lasting beyond the near future. It defines "in the near future" as generally within 40 weeks from the start of the temporary suspension of the essential function, pegging that timeframe to the typical duration of a full-term pregnancy.[69] The Commission explains that each condition must be evaluated separately and that a new request for accommodation restarts the 40-week clock.[70] At the same time, the Commission specifically sought comments on whether this time period was appropriate.

The States applaud the Commission for making clear that a worker who can perform the essential functions of their position, with or without a reasonable accommodation, can be qualified without regard to the duration of their need for the reasonable accommodation.[71] We commend the Commission also for defining the terms "temporary" and "in the near future" with pregnancy-related conditions in mind that may occur before and after, as well as during,

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[66] 42 U.S.C. § 2000gg(6).

[67] 88 Fed. Reg. 54726.

[68] *Id*. at 54748.

[69] *Id.* at 54767.

[70] *Id.* at 54725.

[71] *Id*. at 54723-24.

pregnancy, and for specifying that pregnancy-related conditions be treated as "stackable" in recognition that workers may suffer from multiple pregnancy-related conditions that arise at different times and require different accommodations.

The States urge the Commission, however, to revisit its definition of "in the near future" to better address the need to accommodate pre-pregnancy and postpartum conditions. Limiting the definition of "in the near future" to 40 weeks, the duration of pregnancy itself, makes little sense as applied to pre-pregnancy and postpartum conditions. Pre-pregnancy conditions including infertility may interfere with a worker's essential functions intermittently over a period of years if, for example, the worker undergoes multiple rounds of in vitro fertilization. Similarly, the Commission provides no explanation for why a *post*partum condition should be expected to interfere with essential job functions for only 40 weeks. In fact, apparently contrary to its own preliminary conclusion that a 40-week definition of "in the near future" is adequate, the Commission notes the well-documented, heightened risk for postpartum complications during the first year after giving birth.[72] And the Commission lists lactation as a pregnancy-related condition, but, as written, the Proposed Rule would not adequately protect a worker who is lactating from being denied a reasonable accommodation if lactation interferes with an essential function, because lactation is not tied in any manner to a period of 40 weeks after childbirth. On the contrary, U.S. and international authorities, including the American Academy of Pediatrics and the World Health Organization, recommend that children be breastfed for two years,[73] and the Break Time law grants workers the right to a reasonable time and place to express breast milk for one year after the child's birth.[74] With this in mind, in answer to the Commission's directed question regarding the definition of "in the near future,"[75] *the States strongly support a change from within 40 weeks to one year before or after childbirth, and up to two years with respect to lactation-related accommodations*.

iii. The Proposed Rule's inclusion of "undue hardship" in the analysis of "qualified" under the second definition is misplaced.

The Proposed Rule correctly reflects that even if a worker is not able to perform the essential functions of the job with or without reasonable accommodations, they can still be "qualified" if "[a]ny inability to perform an essential function is for a temporary period" and "the inability to perform the essential function can be reasonably accommodated."[76] This provision is

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[72] *Id.* at 54724-25; *see also Four in 5 Pregnancy-Related Deaths in the U.S. Are Preventable*, Ctrs. for Disease Ctrl. & Prevention (Sept. 19, 2022), https://www.cdc.gov/media/releases/2022/p0919-pregnancy-related-deaths.html (noting that more than half of "pregnancy-related deaths" occur "between 7 days to 1 year after pregnancy"); Eugene Declercq & Laurie C. Zephyrin, *Maternal Mortality in the United States: A Primer*, The Commonwealth Fund (Dec. 16, 2020) (defining "[d]eath while pregnant or within one year of the end of the pregnancy" as "the starting point for analyses of maternal deaths"); *Postpartum Care for Women Up to One Year After Pregnancy*, Agency for Healthcare Resch. & Quality (Feb. 24, 2022) (explaining that the postpartum period is "a critical time for postpartum individuals . . . to mitigate immediate and lifelong health risks by addressing pregnancy-related, mental health, and chronic conditions, and promoting healthy behaviors").

[73] Ctrs. for Disease Control & Prevention, *Frequently Asked Questions (FAQs)* (Aug. 4, 2022), https://www.cdc.gov/breastfeeding/faq/.

[74] 29 U.S.C. § 218d.

[75] 88 Fed. Reg. 54748.

[76] *Id*. at 54723 (discussing §§ 1636.3(f)(ii), (iii)).

consistent with the statute's terms. However, the Guidance accompanying the Proposed Rule, as well as some of the examples provided, risks creating confusion by inappropriately incorporating the undue hardship analysis into the threshold question of whether a person is *qualified* notwithstanding the need for reasonable accommodations.

Specifically, the explanation accompanying the Proposed Rule suggests that the analysis of whether a worker is "qualified" under the second definition—accounting for whether a worker who is temporarily unable to perform the essential functions of the job can be reasonably accommodated—must be decided in reference to whether or not the accommodation would cause an "undue hardship" to the employer.[77] As the Guidance explains, "[i]f the employer establishes that all possible accommodations that would allow the employee to temporarily suspend one or more essential functions would impose an undue hardship, then the employee will not be qualified under the PWFA's second definition of qualified."[78] However, incorporating the analysis of whether an accommodation poses an undue hardship into the definition of "qualified" is not mandated by the language of the statute or of the Proposed Rule itself, conflates the various steps in the analysis, and could frustrate the purposes of the statute in several ways.

First, because undue hardship is considered later in the broader analysis, the incorporation of undue hardship into the determination of a worker's *qualification* to seek the accommodation in the first instance allows the undue hardship analysis to be considered twice, giving it outsized weight. Second, it has the potential to subvert the interactive process mandated under 42 U.S.C. § 2000gg-7 and its implementing regulations, which the Proposed Rule appropriately incorporates.[79] As a practical matter, suggesting that employers may consider undue hardship at the outset in determining whether an employee is qualified to do the essential functions of the job risks short-circuiting the process entirely, as it would provide a justification for employers to refuse to engage in the interactive process triggered by an accommodation request from a "qualified" employee, based on a preliminary, unilateral judgment that the requested accommodation poses an undue hardship. Here, the treatment of pre-PWFA pregnancy accommodation cases in the courts is instructive. In several such cases, employers were able to successfully argue that plaintiffs had not satisfied the "qualified" prong of their *prima facie* case based on "a kind of circular reasoning that, by virtue of needing accommodation in the first place, the pregnant employee was not 'qualified' to work without accommodation."[80] In the context of a request for accommodation based on the employee's temporary inability to perform the essential functions of the job, this risks cutting off the employee at the outset from one of the key pathways to receiving accommodations—a process that is intended to prompt dialogue

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[77] *Id*. at 54724, 54788.

[78] *Id*. at 54724; *see also id.* at 54726 ("The proposed rule also explains that to satisfy the PWFA's second definition of 'qualified,' the covered entity must be able to reasonably accommodate the inability to perform one or more essential functions without undue hardship."); 54777 (example 1636.3 #7); 54778 ("To satisfy the PWFA's second definition of 'qualified,' the covered entity must be able to reasonably accommodate the inability to perform one or more essential functions without undue hardship.").

[79] *Id*. at 54724.

[80] Joanna Grossman & Gillian Thomas, *Making Sure Pregnancy Works: Accommodation Claims After Young v. United Parcel Service, Inc.*, 14 Harv. L. & Pol'y Rev. 319, 326 (2020), citing *inter alia Spivey v. Beverly Enterprises, Inc*., 196 F. 3d 1309, 1312 (11th Cir. 1999) (affirming summary judgment for employer on grounds that plaintiff was not "qualified" for purposes of the *prima facie* case due to her need for accommodation).

between employer and employee in order to identify alternative means to effectively accommodate the employee's limitations. As the Interpretive Guidance appropriately recognizes elsewhere, it is only if the employer determines after the interactive process that all possible accommodations would pose an undue hardship that any accommodation may be refused.[81]

The Commission should therefore revise the Guidance accompanying the Proposed Rule along with corresponding examples to specify that, for purposes of analyzing whether an employee is "qualified" under the second definition, the "reasonableness" of the accommodation should be understood without reference to the undue hardship analysis, which employers—and courts—must assess subsequently in the analysis. This change to the Guidance and accompanying examples is necessary to avoid the risk that workers' accommodation requests will be denied at the outset for failure of being considered "qualified" (or, in the litigation context, at the *prima facie* stage), flouting the principle contained elsewhere in the Proposed Rule specifying that it is the employer's obligation to engage in an interactive process to identify other potential accommodations prior to denying a request for accommodation.

e. "Undue hardship"

In accordance with the PWFA, the Proposed Rule does not require employers to grant an accommodation if doing so would pose an "undue hardship." The PWFA imports the ADA definition of undue hardship, which generally means "significant difficulty or expense for the operation of the covered entity."[82] The States commend the Commission for its acknowledgement that any potential undue hardship under the PWFA must be considered with an eye toward its temporary nature.

The States are also pleased that the Commission has offered a non-exhaustive list of reasonable accommodations and several "predictable assessments," which presumptively do not create an undue hardship and should be granted in "virtually all cases."[83] The inclusion of the predictable assessments is incredibly valuable and will help to expedite the process of securing accommodation for many workers with common, pregnancy-related conditions, while at the same time allowing employers the flexibility to demonstrate undue hardship in the exceptional case. The list will also help to educate workers on the baseline rights guaranteed to them by the PWFA. *The States recommend adding to the list of predictable assessments the following common, low-cost accommodations: permission to eat or drink on the job; changes to any dress code or uniform; minor physical modifications to work stations, such as provision of a fan or a stool; access to personal protective equipment; relocation of a work station to be closer to restrooms or further from exposure to harmful toxins; and access to a closer parking spot where parking is otherwise available to employees.* In the States' experience, these forms of modifications are frequently necessary and extremely low-cost, and accordingly should be deemed to be feasible and to not pose an undue hardship in virtually all cases.

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[81] *See, e.g.,* 88 Fed. Reg. 54733, 54784 ("[A] covered entity that claims that a reasonable accommodation will cause an undue hardship must consider whether there are other reasonable accommodations it can provide, absent undue hardship.").

[82] 88 Fed. Reg. 54718, 54733.

[83] *Id*. at 54734.

In addition to the predictable assessments, as the Guidance recognizes, "[i]f . . . an employer denies a pregnant worker's request to join its light duty program as a reasonable accommodation, arguing that the program is for workers with on-the-job injuries, it may be difficult for the employer to prove that allowing the worker with a known limitation under the PWFA to use that program is an undue hardship."[84] This is consistent with the holding of *Young v. United Parcel Service*.[85] The Interpretive Guidance should make clearer that workers should be able to point to comparable reasonable accommodations that the employer granted previously after having determined it did not pose an undue hardship. To promote efficiency and fairness in this regard, *the States suggest that the Commission revise the Interpretive Guidance to specify that although the PWFA does not require workers to point to a comparator, the fact that the employer makes available or has provided a given accommodation for other employees strongly indicates the accommodation should not be considered an undue hardship*.[86]

Conversely, the suggestion in the Interpretive Guidance that "past and cumulative costs or burden" of accommodating other employees may be taken into account in assessing undue hardship[87] is misguided and risks confusing employers. As just noted, past accommodation of others should indicate that provision of such an accommodation does *not* pose an undue hardship, and in any event, each accommodation request must be evaluated on a case-by-case basis. *The States recommend that this contradictory statement be removed from the Interpretive Guidance.*

f. "Interactive process"

The States commend the Commission for incorporating the interactive process required under the ADA by prohibiting the practice of "requir[ing] a qualified employee or applicant . . . to accept an accommodation other than any reasonable accommodation arrived at through the interactive process . . . ", while at the same time tailoring it to the issues unique to pregnancy-related conditions.[88] The interactive process is time-tested and well-understood; employers have accumulated decades of knowledge and experience in implementing the ADA. The process is also flexible and informal, allowing workers and employers to work together to decide on a reasonable accommodation that effectively addresses the worker's known limitation without posing an undue hardship to the employer.[89] It is also critical that the Proposed Rule expressly prohibits employers from unilaterally imposing restrictions or modifications, such as forced leave, based on paternalistic assumptions about workers' abilities or needs relating to pregnancy.[90]

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[84] 88 Fed. Reg. 54794.

[85] Young v. United Parcel Serv., Inc., 575 U.S. 206, 229 (2015).

[86] 88 Fed. Reg. 54731 (revising pt. 3 of Example 1636.3 #19).

[87] *Id*. at 54735, 54786.

[88] 88 Fed. Reg. 54770; 42 U.S.C. § 2000gg(7); *see also* 88 Fed. Reg. 54735.

[89] *See* N.Y.C. Comm'n on Human Rights, *Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy* (2016), https://www.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_2016.pdf.

[90] 88 Fed. Reg. 54770.

Yet, as the Interpretive Guidance recognizes, it is essential to ensure pregnant and postpartum workers can obtain reasonable accommodations on the compressed timelines often inherent to their conditions. The States therefore strongly support the provision specifying that unnecessary delay in responding to a request for a reasonable accommodation may constitute a de facto denial, in violation of the interactive process requirements, and the inclusion of consideration of whether interim reasonable accommodations were made available to workers while the interactive process plays out in the determination of whether delay was "unnecessary."

Further, the States offer two recommendations to address these concerns. First, *they urge the Commission to include the urgency of the need for accommodation requested as one of the factors considered in determining whether a delay is reasonable.* For example, a worker may develop a rapid-onset condition (for example, bleeding or faintness requiring immediate medical attention, or engorgement that requires immediate ability to pump milk). A delay that might be reasonable under other circumstances would not be justified in such cases and could lead to tragic consequences.

Second, the States caution that employers could rely on a defense that they have provided interim accommodations to force workers to accept measures such as unpaid leave that do not enable them to continue working, to unnecessarily prolong the interactive process, or to effectively deny reasonable accommodations. *The States therefore recommend a definition of "interim reasonable accommodations" be added to the definitions to make clear that any such interim measures should be designed to enable the affected employee to continue working during the interactive process. Further, the Rule should specify in or following* § 1636.4 *(a)(1)(vii) that only meaningful interim accommodations made in good faith should be taken into consideration, and the provision of interim accommodations should never excuse unwarranted delay in engaging in the interactive process or ultimately failing to provide reasonable accommodations absent undue hardship.*

g. Prohibition on unreasonable documentation requirements

The Proposed Rule prevents employers from "justify[ing] denial or delay of a reasonable accommodation based on a worker's failure to provide supporting documentation." The related definitions further specify that employers are only permitted to require medical documentation where it is reasonable to do so, and only if that documentation is itself "reasonable documentation."[91] This prohibition is especially crucial. Many common, pregnancy-related conditions often require no medical attention (*e.g.*, fatigue, morning sickness, and lactation), and therefore go undocumented altogether. Conversely,[92] as the Proposed Rule acknowledges, other common pregnancy-related conditions can manifest quickly and are often urgent. Yet many pregnant people have limited access to prenatal and other pregnancy-related health care, which can be expensive, far away, and require long wait times. In fact, 36% of counties nationwide are "maternity care deserts," meaning they have no obstetric hospitals, birth centers, obstetric

[91] *Id*. at 54737.

[92] Rachel Treisman, *Millions of Americans Are Losing Access to Maternal Care. Here's What Can Be Done.*, NPR (Oct. 12, 2022), https://www.npr.org/2022/10/12/1128335563/maternity-care-deserts-march-of-dimes-report.

providers, nor certified nurse midwives.[93] Many workers lack health insurance coverage for pregnancy-related health care, especially preconception and postnatal care.[94] Black women and other marginalized racial groups face especially acute challenges in accessing pregnancy-related care, and when they do seek maternal care, the care that they receive is more likely to be low-quality and their concerns are more likely to be dismissed by providers[95]

Given this troubling reality, this approach to "reasonable" documentation largely strikes the right balance. The Rule provides necessary flexibility by specifying that a range of medical providers may provide the requested documentation. Moreover, it is particularly vital that the Proposed Rule encourages employers to offer interim accommodations where documentation is required but there is a delay in obtaining it, and to permit the employee to provide the documentation at a later date.[96]

The Proposed Rule further promotes clarity by including several examples of where it is *per se* unreasonable to request documentation: where the need for accommodation is "obvious," where a worker is seeking one of the "predictable assessment" accommodations discussed above, or where the condition is pregnancy itself or lactation or pumping.[97] The States appreciate these concrete examples, but *recommend that, in addition, the Final Rule provide explanation of when the need for accommodation should be considered "obvious." The Final Rule should further explicitly specify that self-attestation is sufficient for the following common pregnancy-related conditions:[98] morning sickness; edema; fatigue; back pain; the need to attend pre- and post-natal visits; lifting restrictions of up to 20 pounds; and time off of up to eight weeks to recover from childbirth.* These conditions are extremely common during pregnancy and are ones for which pregnant people either typically do not seek treatment from a medical provider and are therefore unlikely to have documentation, or ones that are experienced by the vast majority of pregnant workers and are therefore foreseeable. *Moreover, as previously discussed, the States recommend that the definition of "reasonable documentation" and the Interpretive Guidance*

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[93] March of Dimes, *Nowhere to Go: Maternity Care Deserts Across the U.S.* (2020), https://www.marchofdimes.org/maternity-care-deserts-report. This situation is worsening in the wake of *Dobbs*, as numerous states have criminalized provision of abortion care. *See, e.g.*, Randi Kaye & Stephen Samaniego, *Idaho's murky abortion law is driving doctors out of the state*, CNN (May 13, 2023), https://www.cnn.com/2023/05/13/us/idaho-abortion-doctors-drain/index.html.

[94] One study found that, even after the Affordable Care Act expanded Medicaid coverage, "26.8 percent of new mothers with Medicaid-covered prenatal care were uninsured before pregnancy, 21.9 percent became uninsured two to six months postpartum, and 34.5 percent were uninsured in either period." Emily M. Johnston et al., *Post-ACA, More Than One-Third of Women with Prenatal Medicaid Remained Uninsured Before or After Pregnancy*, 40(4) Health Affairs 571 (2021), https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2020.01678.

[95] *See, e.g.*, Jamie Smith, *Physicians More Likely to Doubt Black Patients*, Hopkins Medicine (June 5, 2021), https://www.hopkinsmedicine.org/news/articles/2021/06/physicians-more-likely-to-doubt-black-patients; Seraswathi Vedam et al., *The Giving Voice to Mothers Study: Inequity and Mistreatment During Pregnancy and Childbirth in the United States*, 16 Reproductive Health (June 11, 2019), https://doi.org/10.1186/s12978-019-0729-2.

[96] 88 Fed. Reg. 54736.

[97] *Id*. at 54737.

[98] The States are not suggesting that these conditions be added to the list of "predictable assessments," in recognition that the accommodations necessitated by some of these conditions may pose undue hardship to employers in specific circumstances. However, they are sufficiently common that employers should be prohibited under *any* circumstances for seeking documentation to deem them valid pregnancy-related conditions for purposes of evaluating a need for accommodation.

make clear that it is not considered "reasonable" to require the employee's medical provider to specify the medical condition underlying the need for accommodation in any required documentation.

Similarly, the recognition in the Guidance that unnecessary documentation requests can be retaliatory is essential. Many workers face such retaliatory requests, and are forced to submit to unlawful, unwarranted invasions of their privacy in order to keep their jobs or are discouraged from seeking an accommodation at all. And in response to the Commission's directed question on the subject,[99] the States assert that there are *no* circumstances in which an employer should be permitted to require an employee to be examined by a health care provider of the *employer's* choosing in connection with a pregnancy-related accommodation request. This would be an unacceptable intrusion on the employee's privacy and bodily autonomy.

Finally, the documentation provisions dovetail with the discussion in the Interpretive Guidance specifying that the Proposed Rule incorporates the ADA requirement that all medical information obtained in support of accommodation requests be kept confidential.[100] Protecting employees' private medical information is of paramount importance, particularly as certain states criminalize reproductive health care.[101] Accordingly, as previously discussed, *the States recommend that the Interpretive Guidance specify that the documentation employers may reasonably request is limited to the minimum information necessary to (a) assess the condition's relation to pregnancy or childbirth, without requiring the employee to identify the condition itself (e.g. that the employee "must miss work to attend a medical appointment in connection with a condition related to pregnancy"), and (b) explain the nature of the limitation (e.g. that the employee has "a prohibition on lifting over 50lbs for the duration of her pregnancy").*[102]

h. Requirement of "effective" accommodations and promotion of workplace equity

The States commend the Commission for including in the Interpretive Guidance that, as in the ADA context, a reasonable accommodation must be "effective," and must enable the employee or applicant "to enjoy equal benefits and privileges of employment."[103] With this language, the Commission makes clear that the PWFA and the regulations promulgated thereunder will guarantee meaningful accommodations to workers who are pregnant or

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[99] 88 Fed. Reg. 54738.

[100] *Id*. at 54738.

[101] *See, e.g.*, Carrie N. Baker, *Congressional Resolution Condemns Criminalization of Abortion, Contraception and Gender-Affirming Care*, MS. MAGAZINE (June 29, 2023), https://msmagazine.com/2023/06/29/congress-abortion-crime-trans-healthcare-birth-control/; Sandhya Dirks, *Criminalization Has Already Been Happening to the Poor and Women of Color*, NATIONAL PUBLIC RADIO (Aug. 3, 2022), https://www.npr.org/2022/08/03/1114181472/criminalization-of-pregnancy-has-already-been-happening-to-the-poor-and-women-of.

[102] California's regulations implementing PWFA provide a model on this point, specifying that medical certification is sufficient so long as it contains a description of the reasonable accommodation needed, a statement describing the medical advisability of the accommodation, and its anticipated date and duration. *See* Cal. Code Regs. tit. 2, § 11050, subd. (b)(6).

[103] 88 Fed Reg. 54779.

postpartum, equipping them to continue working and advancing in their careers while also protecting their health.

In furtherance of these provisions, the Interpretive Guidance could benefit from a discussion of the interplay of the PWFA with Collective Bargaining Agreements (CBAs) to specify that CBAs cannot waive or reduce protections afforded by the PWFA. *Further, the Guidance could clarify that the stated relationship of the PWFA to other laws under § 1636.7—such that the PWFA does not limit Federal, State, and local laws that provide greater or equal protections relative to the PWFA—applies equally to CBAs and other contractual rights. .*

i. Clarification of remedies and enforcement available under the PWFA

In addition to providing substantive protections, the Proposed Rule clarifies the remedies and enforcement mechanisms provided by the PWFA. The States are pleased that the Proposed Rule includes a clear prohibition on retaliation and coercion that covers a broad range of PWFA-protected activities, including both requesting and using an accommodation.[104] It is also heartening to the States that the prohibition covers "coercion, intimidation, threats, [and] interference with any individual in the exercise or enjoyment of rights under the PWFA[.]"[105] Women and other people who can become pregnant have long been disproportionately subjected to workplace discrimination. The Proposed Rule's broad prohibition on retaliation and coercion stands to benefit low-wage workers in particular, many of whom have a great need for reasonable accommodations and little bargaining power vis-à-vis their employers absent legal protections.

j. Rule of construction

The PWFA contains a provision incorporating section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–1(a), which provides that ''[Title VII] shall 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." The Commission has sought input on whether to include a more detailed discussion of the rule of construction and its applications. The States are well-positioned to weigh in as several of the undersigned were parties to litigation challenging a rule purporting to implement section 702 along with other related provisions of federal law.[106] Courts have generally interpreted this provision as narrowly limited to exempting religious institutions with respect to employment decisions reflecting a preference for coreligionists, rather than as a blanket exemption for religious entities from Title VII's other substantive protections.[107] The legislative history makes clear that Congress intended for the PWFA to incorporate this same narrow interpretation: both the House and the Senate

[104] *Id*. at 54719.

[105] *Id*.

[106] New York v. United States Dep't of Health & Hum. Servs., 414 F. Supp. 3d 475 (S.D.N.Y. 2019).

[107] *See Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985); EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980).

rejected amendments aimed at broadly exempting religious employers from the law's requirements.[108]

It is difficult to imagine a scenario in which a request for a pregnancy-related accommodation would implicate this provision; in the States' experience, pregnancy-related limitations almost never relate to or result from the employee's religion, and the exemption would not otherwise excuse religious employers from addressing reasonable accommodations requests from workers, regardless of their religion, absent undue hardship. The issues covered by section 702 are therefore highly unlikely "to arise with such regularity that, to facilitate compliance with this provision, the public would benefit from the Commission providing a more detailed interpretation" of the provision's application.[109] The States are further concerned that "a more detailed rule" and/or discussion of this provision in the Proposed Rule could be viewed as *expanding* the potential applications of the provision beyond the settled, and limited, applications courts have recognized. Accordingly*, any further discussion should merely outline the strict limits courts have drawn around the application of section 702 in the context of Title VII and clarify that its application in the context of pregnancy accommodation requests would be expected to be exceptionally rare, if it would apply at all*.

Another matter that could be clarified is the interplay of the PWFA with Bona Fide Occupational Qualifications ("BFOQs") under Title VII. The Guidance currently states that "claims by employers that workers create a safety risk merely by being pregnant (as opposed to a safety risk that stems from a pregnancy-related limitation) should be addressed under Title VII's [BFOQ] standard and not under the PWFA."[110] The States are concerned that without further explanation, directing employers to BFOQ standards could create unnecessary confusion and potentially undermine the aims of the PWFA. While it is valuable to emphasize that "fetal protection policies" are barred under Title VII,[108] there is a risk that employers will attempt to skirt PWFA requirements by arguing that not being pregnant (or not having a pregnancy-related condition, such as lactation) is a BFOQ. But in the vast majority of such cases, the true, underlying basis for such a position would be a presumed pregnancy-related *limitation* that purportedly prevented the worker from safely performing the essential functions of the job. *The Guidelines should therefore affirmatively state that the individualized undue hardship analysis mandated under the PWFA, and not Title VII's categorical BFOQ, should be the controlling framework for evaluating accommodation requests by workers with pregnancy-related conditions in all or nearly all circumstances, even where safety considerations are at play.*

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[108] *See* 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; S. Amdt. 6577, 117th Cong. (2022); *see also* Cong. Record, at H10528 (statement of Sen. Nadler), https://www.congress.gov/amendment/117th-congress/senate-amendment/6577/text.

[109] 88 Fed. Reg. 54746.

[110] *Id*. at 54785 (citing *UAW v. Johnson Controls*, 499 U.S. 187 (1991)).

CONCLUSION

The PWFA's passage in 2022 was the culmination of years of advocacy by and on behalf of pregnant and postpartum workers to obtain the right to reasonable accommodations on the job. The Proposed Rule faithfully interprets the text and purpose of this groundbreaking civil rights law and will provide much-needed clarity regarding the legal protections for pregnant and postpartum workers. The States urge the Commission to consider and incorporate the above modifications into the Final Rule and accompanying Guidance. We further request that the Commission issue the final rule expeditiously, as its substantive provisions will have an immediate impact on the economic and personal health of the approximately one million workers who are expected to be newly eligible for accommodations under the PWFA.[111]

Sincerely,

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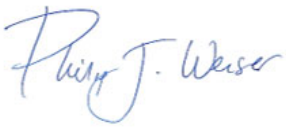

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[111] 88 Fed. Reg. 54757-58, Tbls. 3-5 (adding expected newly eligible workers in the private sector, state and local government, and federal government).

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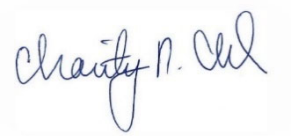

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