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PATRICIA L. GATLING
Commissioner and Chair

Written Testimony of Patricia L. Gatling
Regarding Intro. No. 974-A for
The Committee on Civil Rights
June 18, 2013

Madam Chair, members of the Council, I apologize that I can not appear in person to testify regarding Intro. No. 974-A, which would amend the New York City Human Rights Law to provide that employers must consider and make reasonable accommodations for the needs of an employee due to pregnancy, childbirth, or a related medical condition. This amendment is in line with position that the Commission has already taken with regard to protecting the rights of pregnant women.

Since 2002, the Commission has filed 154 complaints on behalf of pregnant women who alleged that they were discriminated against due to their pregnancy. The Commission routinely files these cases under gender and disability discrimination theories. To date, we have obtained over $500,000 in damages for complainants and $12,000 in fines to the city.

The following are some examples where the Commission filed cases on behalf of women who had normal pregnancies and the negotiated

settlements:

- Receptionist who was denied a stool behind the counter at a sports club - $15,000 in damages (2012).
- Sales person at a retail clothing store – doctor recommended that she not lift more than 10 pounds and not stand more than eight hours without a break to sit - $17,000 in damages (2010).
- Two cases where the employees' hours were reduced to part-time upon the employer finding out the employees were pregnant. The employees had not requested any accommodation $25,000 in damages (2012) and $22,000 in damages (2011).
- Two cases where the employees were denied time off - $30,000 and $15,000 in damages (both in 2012).

The Administration and the Commission support the Council's effort to clarify these protections under the New York City Human Rights Law. We do; however, have concerns about the posting requirements since there is no enforcement mechanism. Let me state clearly that the Commission is not in a position to enforce the posting provision; nor do we believe that we should expend our resources investigating and enforcing such administrative violations of the law. We merely believe

that when legislation imposes a requirement, it must also clearly define the penalty for failure to comply.

Once again, I thank you for the opportunity to be heard on this issue and apologize that I am not present to answer questions.

THE CITY OF NEW YORK
OFFICE OF THE PRESIDENT
BOROUGH OF MANHATTAN

FOR THE RECORD

SCOTT M. STRINGER
BOROUGH PRESIDENT

Testimony of Manhattan Borough President
Scott M. Stringer

Before the Committee on Civil Rights

Regarding Intro 974-A, A Local Law to amend the administrative code of the city of New York, in relation to prohibiting discrimination in employment based on pregnancy, childbirth, or a related condition

June 25, 2013

I want to thank Chairperson Rose, the lead sponsor of Intro 974-A, Councilmember James Vacca, and all the members of the Civil Rights Committee for the opportunity to testify today. I strongly support Intro 974-A, which prohibits discrimination against pregnant working women in the workplace and directs employers to provide reasonable accommodations that will enable women to continue contributing to New York's economy during and after their pregnancy.

Today, nearly half of American workers are women and four in 10 American households with children under age 18 include a mother who is either the sole or primary earner for her family. And Census data shows that between 2006-2008, over 3.4 million American women worked during their pregnancies.

Intro 974-A will give pregnant women the opportunity to continue working and provide important resources to their families, without significant burden to employers. In this economy, discrimination against pregnant workers has serious ramifications on their health and livelihoods. Simple and reasonable accommodations, such as additional bathroom breaks and assistance with manual labor, will ensure that pregnant workers are not prevented from having the same opportunities as other workers.

The sad truth is that 35 years after the Federal Pregnancy Discrimination Act, pregnancy discrimination is a widespread problem in the workplace. In the last three years, the Equal Employment Opportunity Commission has received nearly 12,000 pregnancy discrimination charges.[1] Pregnant workers face unfair discrimination and treatment in the workplace, including being fired or given reduced schedules because of their need for reasonable accommodations. With this climate of discrimination against pregnant workers in the workplace, New York must do its part to uphold fair employment practices for its citizens.

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[1] http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy_new.cfm.

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Seventy-five percent of all new female entrants into the labor force will become pregnant over the course of their career. It is essential that employers provide reasonable accommodations for the medical needs of pregnant working women. Intro 974-A would, in fact, provide advantages to employers, including keeping down the high cost of turnover and improving the performance and efficiency of workers.

The proposed bill acts as a critical second layer of defense against regressive court rulings that limit the effect of the Pregnancy Discrimination Act and similar federal statutes. By enshrining the New York City Commission on Human Rights' interpretation of pregnancy discrimination into City law and clarifying workplace standards for pregnant workers, Intro 974-A will ensure that pregnancy discrimination must never be tolerated in New York City, regardless of the politics in Washington or the actions of a conservative Court.[2]

At least seven other states have passed laws that guarantee reasonable accommodations to pregnant workers. New York City should join them by passing Intro 974-A.

Thank you again for the opportunity to testify today.

[2] Since 2002, the New York City Human Rights Commission has filed 127 pregnancy discrimination claims against employers, obtaining more than $350,000 in damages for complainants in addition to job reinstatement. *See*: http://www.nytimes.com/2012/02/14/opinion/pregnancy-discrimination.html.

LEGAL momentum
The Women's Legal Defense
and Education Fund

Testimony of Michelle Caiola, Acting Litigation Director Legal Momentum

Hearing of the Committee on Civil Rights on Proposed Intro. No. 974-A

June 25, 2013

I. Introduction

Thank you for inviting me to testify today. My name is Michelle Caiola and I am the Acting Litigation Director and a Senior Staff Attorney at Legal Momentum. Legal Momentum, founded in 1970 as the NOW Legal Defense and Education Fund, is the oldest national non-profit organization dedicated to the personal and economic security of women and girls. For over forty years, we have used the power of the law to define and defend women's rights. Legal Momentum has focused on pregnancy discrimination occurring in the workplace, particularly against women in low wage jobs and those attempting to make inroads in occupations from which females historically have been excluded. Recently, we have represented a firefighter, a police officer, and an airline baggage handler in their claims of pregnancy discrimination.

By now it is old news that women are the sole or primary breadwinners in forty percent of households with children, reflecting a quadrupling of the rate since 1960.[1] More than one-

[1] Wendy Wang, et. al, *Breadwinner Moms: Mothers Are the Sole or Primary Provider in Four-in-Ten Households with Children; Public Conflicted about the Growing Trend*, Pew Research Center (May 29, 2013), http://www.pewsocialtrends.org/2013/05/29/breadwinner-moms/.

third of those women make more money than their husbands and the rest are single mothers.[2] Regardless of marital status, the stereotype that mothers are in the workplace just to earn extra spending money has been put to rest and women's economic importance to their families can no longer be underestimated. As such, it is incumbent on us to focus on how to best support women in the honorable endeavor of maintaining a paycheck while also ensuring a healthy pregnancy and childbirth. Providing for reasonable workplace accommodations, not only due to pregnancy complications, but also during the course of a normal pregnancy is crucial. New York City's Proposed Intro. No. 974-A specifically addresses the shortcomings of existing law and Legal Momentum urges its passage.

II. Federal Law Does Not Provide Adequate Protection

The federal law prohibiting pregnancy discrimination, the Pregnancy Discrimination Act (PDA), will be 35 years-old in October of this year.[3] We will celebrate that anniversary as the PDA was a landmark piece of legislation that no doubt assisted many women since then who have entered the workforce in record numbers.[4] However, pregnancy discrimination in the workplace remains prevalent,[5] indicating that work on this front remains.

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[2] *Id.* (citing the unit of analysis for the study as the household head, and therefore single mothers who are not the head of household (e.g., single mothers living with parents) and married couples in which neither of the spouses is a household head are not included in the count).

[3] 42 U.S.C. § 2000e-(k).

[4] U.S. Census Bureau, *Women More Likely to Work During Pregnancy* (Feb. 25, 2008), http://www.census.gov/newsroom/releases/archives/employment_occupations/cb08-33.html (reporting that "[t]wo-thirds of women who had their first child between 2001 and 2003 worked during their pregnancy compared with just 44 percent who gave birth for the first time between 1961 and 1965").

[5] Equal Employment Opportunity Commission, *Pregnancy Discrimination Charges* (2011), http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm (recording a steady increase in pregnancy discrimination complaints filed with the EEOC and partnering state and local agencies from 1997 (3,977 complaints) to 2011 (5,797 complaints)).

The real and perceived gaps in the PDA have become glaringly apparent. The 1978 law was drafted and passed with an eye toward equality and parity with men,[6] and as such, does not clearly and affirmatively set out provisions addressing the unique limitations even normal pregnancies can entail. Federal court decisions under the PDA, most recently the Fourth Circuit Court of Appeals ruling in *UPS v. Young*,[7] have narrowed the scope of the law even further than what the drafters intended.[8] Unfortunately, a line of adverse case law is growing, holding that pregnant women are not entitled to job accommodations even when others with injuries or disabilities in the same workplace are so entitled.[9] Instead of relying on broken federal law, we look to state and city governments to lead the way in this progressive and important movement to ensure substantive equality for working pregnant women.

III. The New York City Human Rights Law Does Not Currently Provide Adequate Protection

The Commissioner of the New York City Commission on Human Rights (NYCCHR) has asserted that the New York City Human Rights Law (NYCHRL) already requires employers to

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[6] H.R. REP. 95-948, 3, 1978 U.S.C.C.A.N. 4749, 4751 (citing Congress's mandate to provide equal access to employment and its benefits to female and male workers as the impetus to pass the PDA).

[7] *Young v. United Parcel Serv., Inc.*, 707 F.3d 437, 448 (4th Cir. 2013) (holding that since the PDA is an antidiscrimination statute, not a requirement to provide "preferential treatment" to pregnant employees, a policy that treats a pregnant worker "whose restrictions arise from her (off-the-job) pregnancy" and a nonpregnant worker, who is denied an accommodation as a result of an off-the-job injury or illness, alike has complied with the PDA).

[8] *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 684 (1983) ("The 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions.").

[9] *See Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) ("The Pregnancy Discrimination Act does not, despite the urgings of feminist scholars . . . require employers to. . . take other steps to make it easier for pregnant women to work. Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees . . . ." (citation omitted)); *see also Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548-49 (7th Cir. 2011); *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 641 (6th Cir. 2006); *Spivey v. Beverly Enter., Inc.*, 196 F.3d 1309, 1312-13 (11th Cir. 1999); *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 207-08 (5th Cir. 1998) ("By defining sex discrimination under Title VII to include pregnancy, Congress intended to do no more than 're-establish principles of Title VII law as they had been understood prior to the *Gilbert* decision,' and ensure that female workers would not be treated 'differently from other employees simply because of their capacity to bear children.'" (citations omitted)); *but see Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996) ("[W]hen a Title VII litigant alleges discrimination on the basis of pregnancy in violation of the PDA, in order to establish a prima facie case of discrimination, she must demonstrate only that another employee who is similarly situated in her or his ability or inability to work received more favorable benefits.").

provide accommodations to pregnant employees via the disability provisions of the city law.[10] While this broad interpretation of disability to include pregnancy has apparently worked for a number of employees, seeking adjudication from NYCCHR is not always feasible or the best alternative for a charging party. In order to be an effective protection against pregnancy discrimination for New York City residents, the law must translate to protection in state and federal court, where most employment discrimination claims are heard. Yet both recent and past court rulings show that this is not the case.

For example, just last month a decision was handed down that belies the protection the city law currently provides pregnant workers. In *Krause v. Lancer Loader Group LLC*, a sales manager for a wholesaler located in New York city alleged pregnancy discrimination under state and local law. In assessing her city claim under the disability statute, the New York state court first noted the liberal and expansive definition of disability under the NYCHRL, but still held that the plaintiff in the case could not use the law to support a pregnancy discrimination cause of action where the plaintiff had not alleged she suffered any complications during the pregnancy or asserted the pregnancy impaired her normal bodily functions.[11] The court expounded further saying, "[t]his court has found no cases in this or other departments, nor does plaintiff cite any, holding that a [normal] pregnancy qualifies as a disability within the meaning of the State or City Human Rights Law."[12]

In the federal court, in *Kennebrew v. New York City Housing Authority*, a pregnant secretary with gestational diabetes required time off for prenatal care due to her condition.[13] Her discrimination

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[10] Patricia L. Gatling, *Pregnancy Discrimination,* New York Times (Feb. 13, 2012), http://www.nytimes.com/2012/02/14/opinion/pregnancy-discrimination.html?_r=0.

[11] *Krause v. Lancer & Loader Grp., LLC*, 965 N.Y.S.2d 312, 322 (Sup. Ct. 2013).

[12] *Id.*

[13] 2002 WL 265120 (S.D.N.Y. 2002).

claims under the Americans with Disabilities Act were dismissed along with her disability claims under the NYSHRL and NYCHRL disability laws because "mere pregnancy is not a disability."[14]

In *Wunning v. Johnson*, a police officer requested sick leave upon the advice of her physician, concerned that too much physical activity and heavy lifting could result in injury to her fetus, but her request was denied and instead she was transferred to inside duty from street patrol.[15] The Court ruled against her disability claim, summing up its view of prophylactic safety measures related to a normal, healthy pregnancy:

> Wunning simply provided no evidence to support her claim of disability. If Wunning had been ill due to her pregnancy or was near the end of her term, it would seem that she would have a legitimate claim to disability. However, she was only two months pregnant and was suffering from no complications.[16]

Although *Wunning* is an older case, New York courts continue to cite to it and rely on its precedent.[17] Importantly, there appear to be no reported court cases at the state or federal level holding that the NYCHRL provides necessary protections for a worker stemming from a normal, healthy pregnancy.

IV. Proposed State Legislation Will Not Provide Adequate Protection

Similarly, the pregnancy plank of the Women's Equality Act, if reintroduced and passed next year, does not alleviate the problem many pregnant women encounter on the job either. The New York State bill would clarify that employers must "provide reasonable accommodations to employees

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[14] Her federal pregnancy discrimination claim "barely survived summary judgment" and she subsequently lost her jury trial on that issue. *Kennebrew*, 2002 WL at *16.

[15] 114 A.D.2d 269, 273 (N.Y. App. Div. 1986).
[16] *Id.* at 272.
[17] *See Kennebrew*, 2002 WL at *19; *Cheektowaga Cent. Sch. Dist. v. Graziadei*, 700 N.Y.S.2d 334, 335 (N.Y. App. Div. 1999); *Card v. Sielaff*, 586 N.Y.S.2d 191, 196 (N.Y. Sup. Ct. 1992).

with pregnancy-related conditions"[18] which codifies the New York State Division of Human Rights' (NYSDHR) current interpretation of disability under the New York Human Rights law (NYHRL).[19] Yet, based on case law previously cited, state and federal courts are not apt to recognize broad interpretations of disability.[20]

So, while the recently defeated state bill moved in the right direction, it still failed to squarely address the needs of a working pregnant woman who needs accommodation prior to suffering a pregnancy-related "impairment" or "condition." She still is not guaranteed a reasonable accommodation for a normal, healthy pregnancy.[21]

V. Conclusion

The City proposal, on the other hand, allows accommodations for an employee due simply to pregnancy, including healthy ones. Therefore, Legal Momentum strongly endorses Proposed Intro No. 974-A, a law that would set out explicitly and in plain language an employer's obligation to reasonably accommodate the temporary demands and limitations of pregnancy.

The need for this law is clear. It is no longer enough to only ensure protection against pregnancy discrimination when a woman can "work at full capacity, uninterrupted by the

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[18] Celeste Katz, "Document Drop: NY Equality Act," *New York Daily News* (June 4, 2013), http://www.nydailynews.com/blogs/dailypolitics/2013/06/document-drop-ny-womens-equality-act

[19] Disability has been applied very broadly; for instance, NYDHR has held that pregnancy-related morning sickness is a disability (*Marziliano v. BWD Group,* D.H.R. No. 1010667 (New York June 10, 2009)).

[20] *See Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 684 (1983); *Wunning v. Johnson* 114 A.D.2d 269, 273 (N.Y. App. Div. 1986); *Krause v. Lancer & Loader Grp., LLC*, 965 N.Y.S.2d 312, 322 (Sup. Ct. 2013); *DeFrancesco v. Metro-North R.R.*, Index No. 113453-09 (N.Y. Sup. Ct. 2012) (recognizing that while "disability" under NYSHRL was expansive, it denied that fertility issues were a disability); *see also Marziliano*, D.H.R. No. 1010667 (stating that a woman must be suffering medically diagnosable pregnancy-related condition, even under the broad disability interpretation taken by the Division).

[21] *Marziliano*, D.H.R. No. 1010667.

physical effects of pregnancy and childbirth..."[22] This paradigm especially doesn't cut it for women working in low wage jobs or those jobs requiring physical capacity. Ensuring women's equal opportunity in the workplace requires recognition of and protection of the unique role of childbearing. The accommodation provision being considered today will do just that.

Also here to speak with you today, is one of Legal Momentum's clients, Angie Welfare, who would likely have benefited from the protections of this proposed law. Her story helps illustrate why it is crucial to ensure women are treated fairly in the workplace, which includes allowing them to maintain a paycheck, and often benefits, that are vital during their child-bearing years.

Thank you.

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[22] Joanna L. Grossman, Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 Yale J.L. & Feminism 15, 18 (2009).

Testimony of Angie Welfare

Hearing of the Committee on Civil Rights on Proposed Int. No. 974-A

June 25, 2013

THANK YOU FOR ALLOWING ME TO SPEAK TO YOU HERE TODAY. MY NAME IS ANGIE WELFARE. I AM AN EIGHTEEN YEAR VETERAN OF A MAJOR AIRLINE. I WORK AT NEW YORK'S JFK INTERNATIONAL AIRPORT AS A FLEET SERVICE CLERK IN THE FREIGHT DEPARTMENT ALTHOUGH I AM CURRENTLY ON A MEDICAL LEAVE OF ABSENCE.

ON MAY 31, 2006 I WAS PUT OUT OF WORK BECAUSE MY EMPLOYER WOULD NOT LET ME WORK WHEN I WAS PREGNANT. I WAS ONLY EIGHT WEEKS PREGNANT WHEN I WAS FORCED TO TAKE AN UNPAID SICK LEAVE OF ABSENCE. ALTHOUGH MY DOCTOR SAID I COULD WORK A LIGHT DUTY POSITION, AND LIGHT DUTY JOBS WERE AVAILABLE, MY MANAGER SAID, "WE DO NOT HAVE LIGHT DUTY FOR PREGNANT WOMEN, LIGHT DUTY IS ONLY FOR PEOPLE WHO HAVE BEEN INJURED ON THE JOB." HE GAVE ME A FOR

INSTANCE, HE SAID, "IF AN EMPLOYEE WAS IN A CAR ACCIDENT AND WAS INJURED OFF DUTY AND CAME BACK TO WORK, WE WOULD NOT PUT HIM ON LIGHT DUTY, WE ARE NOT RESPONSIBLE FOR WHAT HAPPENS TO AN EMPLOYEE OFF THE JOB."

I TOLD MY MANAGER THAT I WAS NOT SICK AND HAD NOT BEEN INJURED. I WAS PREGNANT AND I WAS VERY HEALTHY AND FIT. I COULD DO MY JOB, BUT I HAD TO BE MINDFUL OF MY UNBORN CHILD. I PROPOSED TO MY MANAGER THAT I BE REASSIGNED TO A JOB LOCATION WHERE THE WORK IS LESS STRENUOUS. HE SAID, "NO." I WAS THEN SENT HOME. THIS WAS WHEN I KNEW I MUST BE EXPERIENCING PREGNANCY DISCRIMINATION.

WHEN I WAS SENT HOME I WAS FIRST IN SHOCK THAT THIS INJUSTICE WAS DONE TO ME. I FELT LOST AND DEFEATED. I WAS AFRAID I WOULD LOSE MY HOME. IMAGINE PLANNING TO HAVE A BABY WITH NO JOB OR INCOME. HOW DO YOU PLAN? I

COULDN'T. I CRIED MYSELF TO SLEEP, AND I CRIED MYSELF AWAKE.

MY CIRCUMSTANCES FORCED ME TO APPLY FOR FOOD STAMPS, WHICH IS A VERY HUMILIATING EXPERIENCE. MY HOME WENT INTO FORECLOSURE. I FEARED I WOULD NOT BE ABLE TO CONTINUE MY PRENATAL CARE OR HAVE A SAFE DELIVERY IN A HOSPITAL SETTING BECAUSE MY MEDICAL COVERAGE RAN OUT. IT IS NOT AN EXAGGERATION TO SAY MY LIFE BECAME A LIVING HELL.

MY EMPLOYER IS A VERY POWERFUL AND IMPORTANT COMPANY. SO WHAT DO YOU DO WHEN YOU HAVE A FEELING IN THE PIT OF YOUR STOMACH THAT SOMETHING IS WRONG, BUT DON'T HAVE THE KNOWLEDGE OR THE RESOURCES THAT ARE NEEDED TO CHALLENGE WHAT WAS DONE TO YOU? HOW DO YOU DEFEND YOURSELF WHEN YOU BECOME SPEECHLESS AT THE MOST CRITICAL AND VULNERABLE TIME IN YOUR LIFE? YOU LITERALLY LOSE YOUR VOICE BECAUSE YOU FEEL LIKE THE WORLD RANKS YOU LOWER THAN YOUR EMPLOYER.

IN SPITE OF MY LACK OF KNOWLEDGE, GOD LED ME TO BEGIN MY FIGHT. I PRAYED TO GOD THAT THERE WOULD BE LIGHT AT THE END OF THE TUNNEL. I FOUND SOME HOPE AFTER CONTACTING DEBORAH KARPATKIN, AN EXPERIENCED NEW YORK CITY TRIAL ATTORNEY, AND LEGAL MOMENTUM. TOGETHER THEY ADVOCATED FOR ME ON MY COMPLAINT OF DISCRIMINATION TO THE EEOC, AND IN A COMPLAINT TO THE NEW YORK STATE ATTORNEY GENERAL'S OFFICE. BUT THE WHEELS OF JUSTICE GRIND SLOWLY. IT TOOK YEARS FOR EEOC TO INVESTIGATE AND DETERMIN THAT I HAD BEEN DISCRIMINATED AGAINST ON THE BASIS OF PREGNANCY, AND FOR THE ATTORNEY GENERAL ALSO TO MAKE A FINDING AGAINST THE AIRLINE. MY EMPLOYER FILED BANKRUPTCY BEFORE I FILED A LAWSUIT IN COURT. NOW IT APPEARS THAT BECAUSE OF THAT I WILL NEVER RECEIVE FAIR COMPENSATION FOR THE UNFAIR TREATMENT AMD ECONOMIC LOSS I AND MY CHILDREN SUFFERED.

IF THE PREGNANCY ACCOMODATION LAW YOU ARE CONSIDERING HAD BEEN IN PLACE THIS SITUATION MAY HAVE ENDED DIFFERENTLY. I WISH I HAD BEEN ARMED WITH A LAW THAT SO CLEARLY STATED THAT THE COMPANY HAD A DUTY TO ACCOMMODATE ME WHILE I WAS PREGNANT. IF I COULD HAVE POINTED TO THIS LAW WHEN SPEAKING TO MY MANAGER TO SHOW HIM THAT THEY HAD TO PROVIDE ME A LIGHT DUTY POSITION JUST LIKE THEY PROVIDE TO OTHER WORKERS WHO NEED AN ADJUSTMENT TO THEIR DUTIES FOR A TEMPORARY PERIOD OF TIME – I WOULD NOT HAVE SUFFERED A LOSS OF PAY, BENEFITS, OR ALL THE EMOTIONAL TRAUMA OF THAT FOLLOWED AS A RESULT OF BEING SENT HOME UNPAID FOR SO MANY MONTHS OF MY PREGNANCY.

IT DOES NOT FEEL GOOD WHEN YOU ARE DISCRIMINATED AGAINST AND HAVE TO PURSUE YOUR RIGHTS THROUGH GOVERNMENT AGENCIES AND LAWYERS. IT DOES NOT FEEL GOOD WHEN YOU WAIT YEARS HOPING JUSTICE WILL BE DONE BUT HAVING NO GUARANTEES. I HOPE THIS LAW IS PASSED AND FUTURE WOMEN IN MY SITUATION WILL BE HELPED.

THANK YOU FOR LISTENING TO MY TESTIMONY TODAY. GOD BLESS YOU.

ACOG
THE AMERICAN CONGRESS OF OBSTETRICIANS AND GYNECOLOGISTS
District II

For the record

Statement from ACOG District II
Supporting NYC Pregnant Workers Fairness Act

Albany, NY – June 18, 2013 - The New York State District of the American Congress of Obstetricians and Gynecologists (ACOG District II) supports the New York City Pregnant Workers Fairness Act – which would protect pregnant workers in the five boroughs by enabling them to stay on the job with minor modifications. As an organization dedicated to combating sex discrimination and promoting the health and economic security of families, we applaud this effort, which would amend the administrative code of the City of New York, in relation to prohibiting discrimination in employment based on pregnancy, childbirth or a related condition.

Three-quarters of American women entering the workforce will be pregnant and employed at some point. Since the federal Pregnancy Discrimination Act (PDA) became law in 1978, there has been a dramatic demographic shift in the workforce. Women now make up almost half of the workforce, resulting in more pregnant workers than ever before who are working later into their pregnancies. However, at some point in their pregnancies, some of these women—especially those in physically strenuous jobs—will face a conflict between their duties at work and the demands of pregnancy.

Under the Pregnancy Discrimination Act, employers cannot discriminate based on pregnancy, childbirth, or related medical conditions. This means that employers cannot fire, refuse to hire, or otherwise treat an employee adversely because of pregnancy and must treat pregnant workers at least as well as those similar in their ability or inability to work. Despite these existing protections, there are loopholes in the current law that have allowed for pregnant workers to be forced out of their jobs unnecessarily. Employers will deny minor modifications to job duties, job rules or job policies to be made that would enable them to continue working and instead require women to choose between jeopardizing the health of their unborn child and maintaining their current employment. Some of these types of actions by employers have included:

- A pregnant retail worker was rushed to the emergency room when she fainted on the job because her boss would not let her drink water.
- A desk clerk at a hotel was not allowed to sit for just a few minutes during her 9-hour shift.

- An airline worker at JFK airport was pushed onto unpaid leave after her doctor gave her a lifting restriction, despite the fact that light duty was available for non-pregnant temporarily disabled employees.[1]

ACOG District II supports the New York City Pregnant Workers Fairness Act, which would require employers to provide a reasonable accommodation to pregnant women and those who suffer conditions related to pregnancy and childbirth, unless doing so would provide pose an undue hardship for the employer. A reasonable accommodation may include bathroom breaks, leave for a period of disability arising from childbirth, breaks to facilitate increased water intake, periodic rest for those who stand for long periods of time, and assistance with manual labor, among other things. Additionally, employers would have to provide written notice to pregnant employees about their workplace rights.

ACOG's National Office has recognized and is supporting the federal Pregnant Workers Fairness Act, HR 1975, introduced by Rep. Jerrold Nadler (D-NY), with the Senate companion S 942 introduced by Sen. Bob Casey (D-PA). The New York City Pregnant Workers Fairness Act closes resembles this federal legislation through its inclusion of clear definitions for "reasonable accommodation" and "undue hardship". These clear definitions provide an essential protection not only to the working mother and unborn child but also to the businesses that employ these women.

ACOG District II also recognizes and appreciates the education provision included in the New York City proposal. Ensuring that all parties are informed about the protections and requirements that are needed to comply with this law everyone can be assured that they act within the scope of the law. It is only through the awareness of these allowances and education regarding the options of pregnant women and employers can the health of a woman and her child be fully protected.

Minor job modifications for pregnant women are a public health necessity. A choice between working under unhealthy conditions and potentially losing income is no choice at all. Women who cannot perform some aspects of their usual duties without risking their own health or the health of their pregnancy, but are in need of income, may have to continue working under dangerous conditions. There are health consequences to pushing women out of the workforce as well. Stress from job loss can increase the risk of having a premature baby and/or a baby with low birth weight. In addition, women who can continue to work during pregnancy may be able to take a longer period of leave following childbirth. A longer leave after childbirth will allow a mother's body to fully recover from the delivery, provide for a greater bond to be developed between mother and baby and allow for a longer duration of breastfeeding without the need for bottle feeding or formula supplementation. The extensive health benefits associated with breastfeeding and a longer recovery time is not only beneficial for mothers and

[1] *Why We Need the Pregnant Workers Fairness Act: Stories of Real Women*, http://www.abetterbalance.org/web/images/stories/Documents/fairness/Why_We_Need_the_Pregnant_Workers_Fairness_Act_-_Stories_of_Real_Women-2.pdf; shortened link: http://bit.ly/PHaDQT.

infants, but would be advantageous for employers by reducing and/or avoiding the work absences associated illness related to pregnancy and infant illness.

Pregnancy-related adjustments at work also promote family economic security. In this difficult economy, workers cannot afford to be pushed out or terminated from their jobs because of pregnancy and childbirth. By continuing to work, pregnant women can maintain income and seniority at work, while forced leave sets new mothers back with lost wages and missed advancement opportunities. When pregnant women are fired, not only do they and their families lose critical income, but they must fight extra hard to re-enter a job market that is especially brutal on the unemployed and on pregnant women. Similarly, new mothers often confront mounting hiring bias. On the other hand, providing reasonable accommodations carries benefits for employers, including reduced turnover and increased productivity. Ensuring equal opportunity for working women is vital to the health and economic security of families in New York City.

For the above-mentioned reasons, ACOG District II supports the New York City Pregnant Workers Fairness Act.

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The American Congress of Obstetricians and Gynecologists, District II (ACOG) represents over 4,000 members who deliver health care to New York's women. Our Albany office offers its resources as a scientific and educational organization dedicated to quality health care for women. Our commitment to professional excellence, combined with our choice to be a strong public advocate for New York women, has made District II one of the state's most trusted and credible voices on all aspects of health care for women.

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FOR THE RECORD

PARTNERSHIP for New York City

WRITTEN COMMENTS TO THE COMMITTEE ON CIVIL RIGHTS OF THE NEW YORK CITY COUNCIL

HEARING ON INTRO. 974-A

TUESDAY, JUNE 25, 2013

The Partnership for New York City represents the city's business leadership and its largest private sector employers. We have reviewed Intro. 974-A and have concluded that, while well-intentioned, the bill is largely unnecessary and, when coupled with similar bills emanating from the Council, may contribute to the undermining of efforts to create jobs and grow our economy.

First, the language that workplace discrimination against pregnant women happens "regularly" is unsubstantiated and potentially offensive to the overwhelming majority of employers who are doing right by their employees. To our knowledge, there is no evidence indicating that this is a widespread problem in New York. To the contrary, employers are often competing with one another for the best talent and go to great lengths to accommodate and retain their pregnant employees.

Further, New York law currently defines "disability" in such broad terms that there is no way that a pregnant woman would not already be protected if such discrimination were to occur. This bill seems to be a solution looking for a problem. Unfortunately, it is not without negative consequences, as it requires employers to prove "undue hardship" in the event that an employee files a complaint, meaning businesses would have to win approvals to make certain staffing decisions (i.e., yet another hoop to jump through when current law would suffice). Moreover, it would provide disgruntled employees with an additional avenue to sue their employers, which is costly and burdensome even if the employer is ultimately vindicated.

A recent survey of over 6,000 small business owners nationwide ranked NYC among the least friendly places to start a business because of the high taxes and burdensome regulations, particularly in the areas of employment, labor and hiring. We face steep competition not just from other countries, but also from other American cities like Austin and Atlanta, which are implementing strategies to lure away our jobs, businesses and residents. Unfortunately, proposals like Intro. 974-A add to the cost, burden and annoyance level of starting and operating a business here. Taken together, bills like these appear to help workers until you see their cumulative impact on business and the loss of jobs in NYC. Until there is evidence pointing to a clear need for this bill, which we have yet to see, the negative consequences appear to outweigh any potential benefits of moving forward.

We urge the Council to hold this legislation. Thank you.

Employment Law Unit
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HEARING OF THE COMMITTEE ON CIVIL RIGHTS
NEW YORK CITY COUNCIL
June 25, 2013, 10 a.m.

Good morning, my name is Katherine Greenberg, and I am a Staff Attorney in the Employment Law Unit of The Legal Aid Society. My practice focuses on employment issues affecting pregnant women, caregivers, and workers with disabilities.

I am here to speak in favor of the proposed amendment to the administrative code of the City of New York, which would make it an unlawful discriminatory practice for an employer to refuse to reasonably accommodate the needs of an employee arising from pregnancy, childbirth, or a related medical condition.

The Legal Aid Society is the oldest and largest not-for-profit public interest law firm in the United States, working on more than 300,000 individual legal matters annually for low-income New Yorkers with civil, criminal, and juvenile rights problems in addition to law reform representation that benefits all two million low-income children and adults in New York City. The Society delivers a full range of comprehensive legal services to low-income families and individuals in the City. Our Civil Practice has local neighborhood offices in all five boroughs, along with centralized city-wide law reform, employment law, immigration law, health law, and homeless rights practices. The Employment Law Unit provides representation, community education, and advice to low-wage workers regarding employment issues, including: unemployment insurance benefits; minimum wage, overtime and other wage and hour laws; and employment discrimination based on any proscribed category, including gender and disability.

Legal Aid is frequently contacted by pregnant women who are having trouble at work or have lost their jobs. For example, we recently met with a woman named AS, who lost her job shortly after giving birth to a baby boy. AS worked in customer service at a bank, where her job consisted mostly of desk work. However, AS was also expected to walk around the bank and engage customers in conversation. Throughout her pregnancy, AS experienced periods of severe morning sickness, including nausea and vomiting, that made it difficult for her to perform job tasks that required standing and walking. AS spoke with her manager multiple times about her morning sickness and asked if she could be relieved from job duties that required standing and walking, or if she could swap those duties with a coworker in favor of increased desk work. Her manager refused. As a result, AS used up

all of her sick time and was forced onto unpaid leave months before her due date. When AS returned to work following the birth of her son, she was told that she had no remaining sick time and was fired after missing three days of work to care for her son, who was sick with a cold.

JM is another Legal Aid client who lost her job after her employer refused to provide a minor accommodation JM needed as a result of her pregnancy. JM worked for a small employer that didn't offer health insurance to its employees. As a result, JM obtained prenatal care at a clinic that accepted Medicaid. The clinic was only open during regular business hours, which were the same hours that JM worked. Although JM always gave her employer advanced notice of her appointments and scheduled her monthly prenatal checkups as early in the morning as possible so as to minimize any missed work, she inevitably arrived at the office a few hours late on days when she had prenatal checkups. Rather than accommodate JM's need for a few hours off work each month – time for which JM was not being paid – JM's employer harshly reprimanded her for her late arrivals and threatened her with termination if she continued arriving late. Scared to lose her job, JM stopped attending prenatal appointments, endangering both her own health and that of her unborn child. Despite JM's efforts, she was fired while at the hospital in labor after she called her employer to report her absence.

As these examples illustrate, low-wage pregnant workers are in a particularly vulnerable position. Many work at small employers and are not protected by the federal Family and Medical Leave Act. And many employers refuse to offer even minimal accommodations that would enable their pregnant employees to maintain both their health and their jobs. This is why the proposed amendment is so important. With this law in place, pregnant women in New York City wouldn't have to fear losing their jobs simply because they need a modest, temporary accommodation at work during their pregnancy. Accordingly, The Legal Aid Society is in favor of the proposed amendment to the New York City Administrative Code.

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Testimony before the New York City Council Civil Rights Committee Regarding Intro 974-A

June 25, 2013

Submitted by Dina Bakst, Co-Founder & Co-President and Elizabeth Gedmark, Law Fellow
A Better Balance: The Work & Family Legal Center

Good morning. My name is Dina Bakst, and I am the Co-Founder and Co-President of A Better Balance: The Work & Family Legal Center. A Better Balance is a New York City-based 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, where we partner with the prominent New York employment law firm, Outten & Golden, to assist low-income working New Yorkers with pregnancy discrimination, caregiver discrimination, pay discrimination, and other related issues. We receive calls from men and women across the tri-state area as well as from individuals all over the nation in response to our advocacy efforts.

I want to start by thanking Councilmember Rose for convening this hearing and Councilmember Vacca for introducing this bill, which is critically necessary to combat pregnancy discrimination and promote the health and economic security of New York City women and families.

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NEW YORK CITY NEEDS STRONGER LEGAL PROTECTIONS

FOR PREGNANT WORKERS

New York City's economy and wellbeing depend on women. Women make up almost half of the workforce[1] and families rely on women's salaries to make ends meet: Women are the primary or co-breadwinners in almost two-thirds of families[2] and a recent Pew Research study found that 40% of American families have a woman as the primary or sole breadwinner.[3] This research confirms that New York City's families and New York City's economy depend on women being treated fairly in the workplace.

Unfortunately, despite our nation's civil rights laws, workplace discrimination against pregnant women and caregivers is on the rise. All too often, pregnant workers, especially low-wage women in physically demanding jobs, are removed from their positions, placed on unpaid leave, or fired when they seek a work modification such as relief from heavy lifting, increased access to water, a chair, or minimal time off for a pre-natal appointment or childbirth. This form of discrimination is pushing New York City women out of the workforce at a time they need financial security the most.

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[1] Catalyst, *Statistical Overview of Women in the Workplace*, (Dec. 2011), http://www.catalyst.org/publication/219/statistical-overview-of-women-in-the-workplace.
[2] Heather Boushey & Ann O'Leary, *The Shriver Report: A Woman's Nation Changes Everything: Executive Summary*, (Oct. 2009), http://www.americanprogress.org/issues/2009/10/womans_nation.html.
[3] Wendy Wang, Kim Parker, & Paul Taylor, *Breadwinner Moms: Mothers Are the Sole or Primary Provider in Four-in-Ten Households with Children; Public Conflicted about the Growing Trend*, (May 2013), http://www.pewsocialtrends.org/files/2013/05/Breadwinner_moms_final.pdf.

- A pregnant retail worker in Manhattan was rushed to the emergency room when she fainted on the job because her boss would not let her drink water.
- A supermarket worker with a lifting restriction was sent home and onto disability insurance, which ended a month before she gave birth. She lost her health insurance and had to go on Medicaid.[4]
- An airline worker at JFK airport was pushed onto unpaid leave after her doctor gave her a lifting restriction, despite the fact that light duty was available for non-pregnant temporarily disabled employees.[5]

No pregnant woman should be forced to choose between her job and a healthy pregnancy. [6] Discrimination that prevents pregnant women from staying at their jobs or advancing at work poses a significant threat to family economic security. When a pregnant woman is fired, she loses out on much-needed income and benefits. And for many low-wage women, job loss often has devastating consequences. For example, one woman who came through A Better Balance's free legal clinic wound up in a homeless shelter after being denied a modest workplace accommodation during her 17th week of pregnancy.

This important bill would codify and clarify that the New York City Human Rights Law protects pregnant women who need minor adjustments at work. Pregnant women

[4] National Women's Law Center & A Better Balance, *It Shouldn't Be A Heavy Lift: Fair Treatment for Pregnant Workers*, pg. 11, 12 (June, 2013), http://www.abetterbalance.org/web/images/stories/ItShouldntBeAHeavyLift.pdf.
[5] *Why We Need the Pregnant Workers Fairness Act: Stories of Real Women,* http://www.abetterbalance.org/web/images/stories/Documents/fairness/Why_We_Need_the_Pregnant_Workers_Fairness_Act_-_Stories_of_Real_Women-2.pdf; shortened link: http://bit.ly/PHaDQT.
[6] Dina Bakst, *Pregnant, and Pushed Out of a Job*, New York Times, January 31, 2011.

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desperately need clear legal protections, like those afforded other workers, which will promote healthy pregnancies and the economic security of families. Although the New York City Commission on Human Rights interprets the New York City Human Rights Law to cover most pregnancy limitations, legislation is still necessary and desirable. Agency interpretation is not set in stone and could change with a new administration. In addition, a lack of clarity in the law often means employers fail to understand their obligations and routinely treat pregnant workers worse than other similarly situated workers. Int. 974-A is necessary to provide a proactive tool for pregnant women and ensure equal treatment under the law. Moreover, pregnant women cannot afford to wait crucial weeks or months for an agency investigation that may or may not afford them much needed relief. The proposed law would provide clarity and certainty for employees and employers alike.

The need for greater legal clarity has been recognized across the country. California's decade-old law guaranteeing pregnant women reasonable accommodations in the workplace has been used countless times to help workers stay healthy and keep their jobs.[7] Connecticut, Hawaii, Louisiana, Alaska, Texas, and Illinois also explicitly require certain employers to provide some accommodations to pregnant employees.[8] Proposed federal legislation (the Pregnant Workers Fairness Act) has garnered broad support from over 100 organizations.[9] And

[7] Noreen Farrell, *Expecting A Baby, Not a Lay-Off: Executive Summary* (May 2012), http://www.equalrights.org/media/2012/PWFA-ExecSummary.pdf.
[8] Conn. Gen. Stat. § 46a-60(a)(7); Haw. Admin. Rules § 12-46-107; La. R.S. 23:342(4); Alaska Stat. § 39.20.520(a); Tex. Local Gov't Code § 180.004(b); Ill. Comp. Stat. Ann. § 775 5/2- 102(H).
[9] Pregnant Workers Fairness Act Letter of Support (May 23, 2013), http://www.nationalpartnership.org/site/DocServer/Pregnant_Workers_Fairness_Act_Sign-On_Letter_1-14-2013.pdf?docID=11681.

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Governor Cuomo's groundbreaking Women's Equality Act includes a similar provision that has generated broad bipartisan support.

Legislation will benefit working women, their families, their employers, and the public. Women who need income but lack accommodations are often forced to continue working under unhealthy conditions, risking their own health as well as the health of their babies.[10] Stress from job loss can increase the risk of a premature baby and/or a baby with low birth weight;[11] risks that may be avoided with a simple modification to keep a woman on the job.

The proposed bill would also promote women's economic security during a critical time that is often filled with financial hardship,[12] and would save taxpayers money in the form of unemployment insurance and other public benefits. Employers benefit too, from reduced turnover and increased productivity.[13] Legislation would also provide clarity so employers can anticipate their responsibilities and avoid costly litigation. After California passed similar legislation, litigation of pregnancy discrimination cases actually decreased, even as the number

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[10] Renee Bischoff & Wendy Chavkin, *The Relationship between Work-Family Benefits and Maternal, Infant and Reproductive Health: Public Health Implications and Policy Recommendations*, (June 2008), pg. 13-17, http://otrans.3cdn.net/70bf6326c56320156a_6j5m6fupz.pdf; *see also* Mayo Clinic Staff, *Working During Pregnancy: Do's and Don'ts*, http://www.mayoclinic.com/health/pregnancy/WL00035; *see also* Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 Geo. L.J. 567, 582-84 (March 2010).

[11] March of Dimes, *Stress and Pregnancy* (January 2008/January 2010), http://www.marchofdimes.com/pregnancy/lifechanges_indepth.html.

[12] Almost half of all babies born in the United States are born to families receiving WIC food supplements. *See* Kimberly Brown, *Shocking Need: American Kids Go Hungry*, ABC News, (August 24, 2011), http://abcnews.go.com/US/hunger_at_home/hunger-home-american-children-malnourished/story?id=14367230#.Tu-55mC4Iy4.

[13] Job Accommodation Network, *Workplace Accommodations: Low Cost, High Impact*, pg. 3, http://www.jan.wvu.edu/media/LowCostHighImpact.doc.

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of pregnancy discrimination cases around the country were increasing.[14] The Hawaii Civil Rights Commission recently reported a similar reduction in pregnancy discrimination complaints and litigation after enactment.

CONCLUSION

New York City should be a progressive leader on passing legislation that would provide critical protections for women and their families. We look forward to working with you on passing this incredibly important legislation and thank you for your consideration.

[14] Equal Rights Advocates, *Expecting A Baby, Not A Lay-Off*, pg. 25, http://www.equalrights.org/media/2012/ERA-PregAccomReport.pdf.

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December 3, 2012

VIA U.S. MAIL & ELECTRONIC SUBMISSION

City Council Speaker Christine C. Quinn
250 Broadway
Suite 1856
New York, NY 10007

Re: Legislative Memo: The New York City Pregnant Workers Fairness Act

Dear Speaker Quinn:

As organizations concerned with women's health, economic security, and fairness in the workplace, we urge you to support the New York City Pregnant Workers Fairness Act introduced by lead sponsor Councilmember Vacca in the New York City Council. The Pregnant Workers Fairness Act would enable pregnant women to stay healthy and on the job with only minor adjustments from their employers. Specifically, the new law would provide reasonable accommodations for pregnancy and childbirth when a worker's healthcare provider says they are necessary, unless doing so would be an undue hardship for the employer.

It is already illegal under city, state, and federal law to fire or demote a woman because of her pregnancy, but for women in need of a few simple modifications at work, the law is silent on the issue of accommodations for pregnancy. This confusion has led to pregnant women being fired, reprimanded, pushed onto unpaid leave, or given reduced schedules because they needed more restroom breaks, a few hours off for prenatal appointments, or had lifting restrictions. Others have had no choice but to jeopardize their health because leaving work was not an option—forgoing a much-needed stool or water bottle to stay hydrated. Low-income women and those in traditionally male workplaces are the most affected.

This bill would not make new law or create a new legal framework. Instead, it would explicitly protect pregnancy and pregnancy-related conditions under the city's expansive human rights law, much like religious observances and workers with disabilities are protected.

The Pregnant Workers Fairness Act is essential even though the New York City Human Rights Commission currently interprets the city human rights law's disability provision to cover pregnancy. Current agency interpretation is not set in stone and could change with a new administration. This law would merely codify agency interpretation and would provide a critical proactive tool for pregnant women so they can get the minor accommodation they need to stay healthy and on the job. Without it, pregnant workers are limited to seeking remedies through the

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Commission, and potentially waiting crucial weeks or months for an agency investigation that may or may not get them the relief they desperately need.

Employers would also benefit from the clarity this law would provide. Employers would be able to informally resolve issues without interference from a government agency. Many New York City employers already accommodate pregnant workers and know that temporary accommodations reduce costly turnover.

This legislation does not in any way limit the rights of pregnant women under current city, state, or federal law, but instead simply clarifies and codifies their right to a reasonable accommodation for pregnancy, childbirth, and related medical conditions into law. Most employees and employers do not regard pregnant women as "disabled" and women should not have to misidentify their condition in order to get treated fairly on the job.

No pregnant woman should be forced to choose between her job and a healthy pregnancy. At a time when families are struggling to make ends meet, it is critical that New York City makes every effort to combat pregnancy discrimination and promotes equal opportunity. This issue is gaining ground across the country and other localities will look to New York City as a model for fair employment practices.

We welcome the opportunity to provide you with more detailed information and to speak with you further about the critical needs of pregnant workers.

For more information, please contact: Dina Bakst, Co-Founder & Co-President of A Better Balance (212) 430-5982; dbakst@abetterbalance.org.

Sincerely,

A Better Balance: The Work & Family Legal Center
Center for Reproductive Rights
Choices in Childbirth
inMotion, Inc.
Institute for Family Health
Latin@s At Work ("L@W") Project of LatinoJustice PRLDEF
Legal Momentum
NARAL Pro-Choice New York
National Organization for Women - New York City
New York Union Child Care Coalition
NY Paid Leave Coalition
Planned Parenthood of NYC
Public Health Association of NYC
Restaurant Opportunities Center of New York (ROC-NY)
St. Rita Center for Immigrant and Refugee Services

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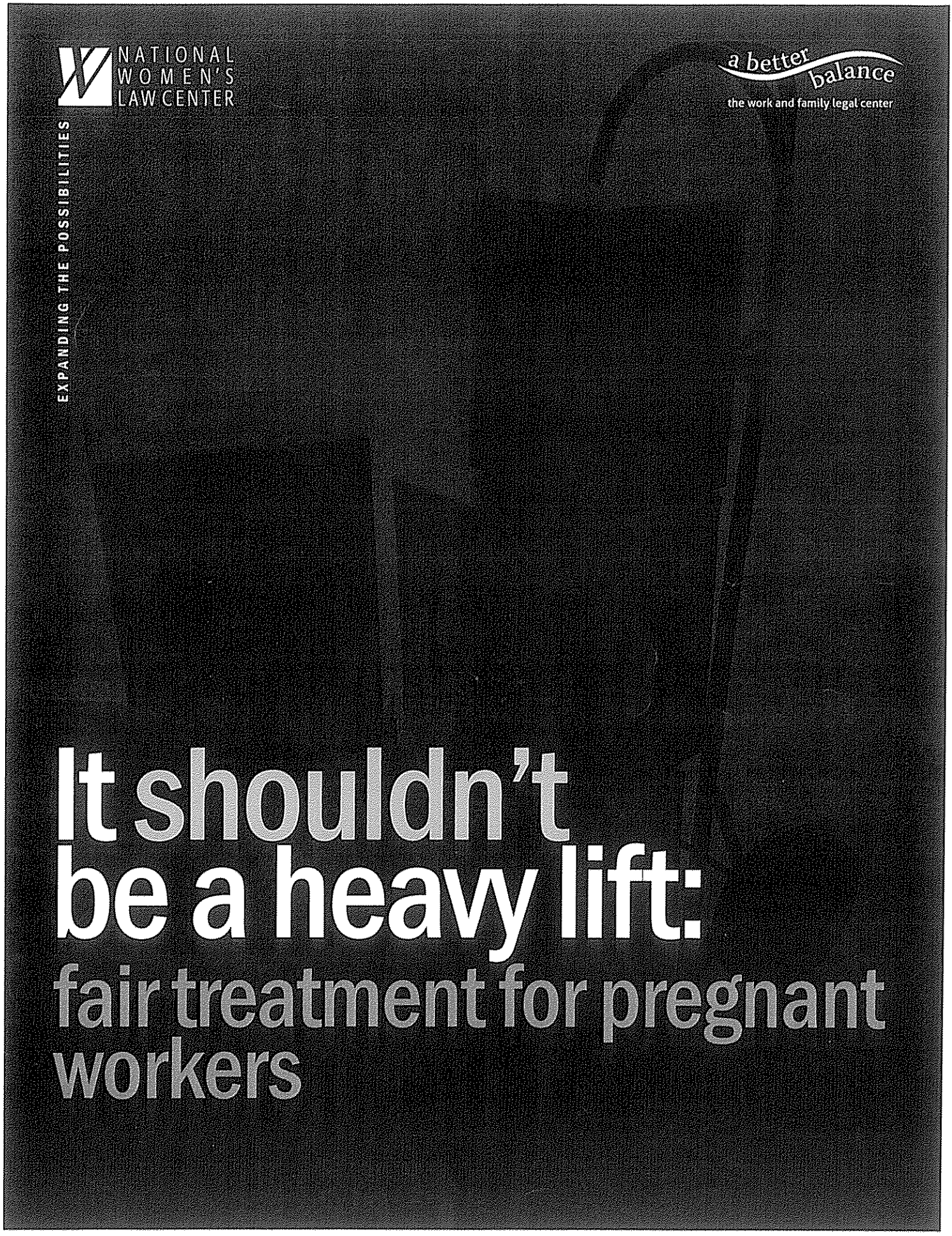
The Legal Aid Society
The What To Expect Foundation
UFCW Local 1500
Women's City Club of New York
[List in formation]


NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES
a better balance
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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.

DISCLAIMER

While text, citations, and data for the indicators are, to the best of the authors' knowledge, current as of the date the report was prepared, there may well be subsequent developments, including recent legislative actions, that could alter the information provided herein. This report does not constitute legal advice; individuals and organizations considering legal action should consult with their own counsel before deciding on a course of action.

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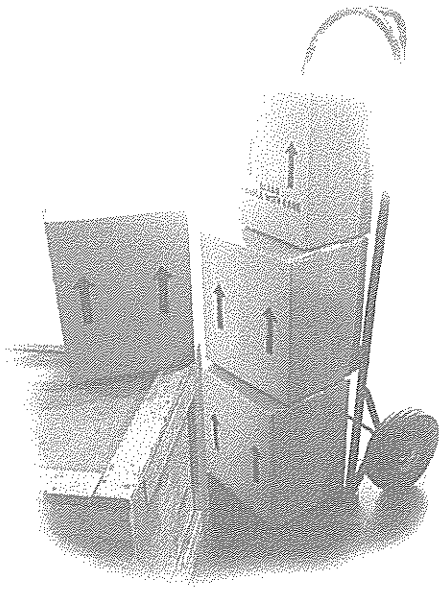

It shouldn't be a heavy lift:

fair treatment for pregnant workers

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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.

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.

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 Guzzman's story on page 13 for an example of potential consequences when accommodations are refused.)

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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.

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.)

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.

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.)

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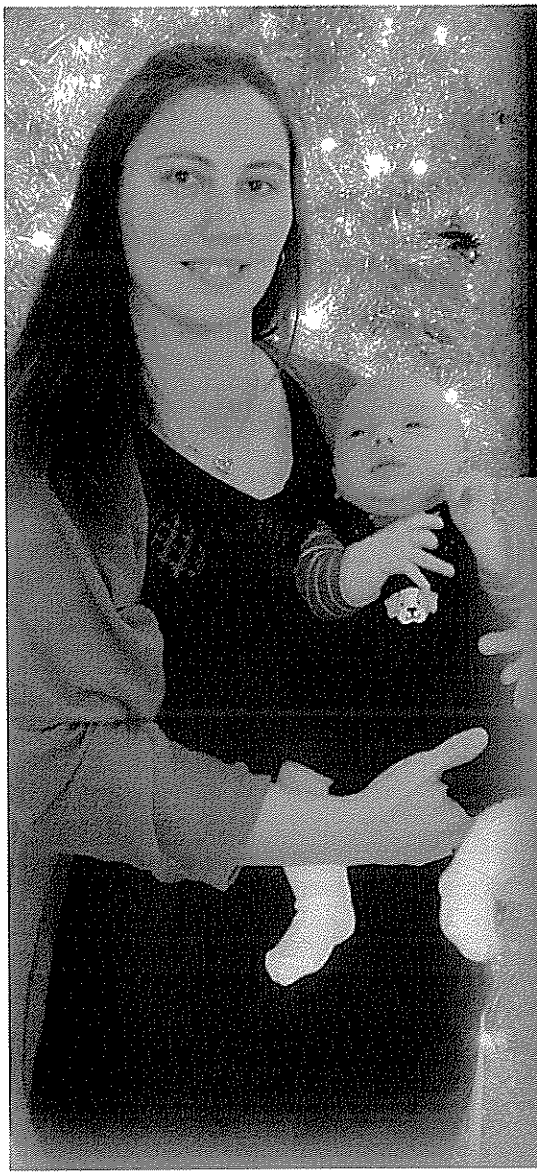
When pregnant workers have to use their limited leave time because their employers refuse to make accommodations, this valuable benefit will no longer be available when they need it most—to recover from childbirth and bond with a new baby.



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 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.

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 employees[42]—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 Iowa[60] and Maine[61] 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* ftp://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 CONVERSATION19(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/70bf6326c56320158a_6i5m6tupz.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 83 (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).

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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.

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