

NOTES

FINALLY PROTECTED: ANALYZING THE POTENTIAL OF THE PREGNANT WORKERS FAIRNESS ACT

Although she was the only woman working at the Rent-A-Center,¹ Natasha Jackson was optimistic about her career as an account executive in South Carolina.² She and her husband had just made a down payment on a house, relying on her income as the family's breadwinner.³ When she became pregnant with her third child and needed to avoid heavy lifting, Natasha figured it would not be an issue: lifting was a rare part of her job, and many workers who got on-the-job injuries had been given light duty in the past.⁴ Unfortunately, her employer disagreed.

Rather than giving her a lifting exemption, they forced her to take unpaid leave.⁵ She was fired shortly after giving birth.⁶ The loss of Natasha's income was devastating for her family: they backed out of the house sale and moved into emergency public housing.⁷

Across the country, countless pregnant workers⁸ like Natasha request accommodations as simple as a bathroom break to protect their health, and lose their jobs when their employers refuse. For these workers, the loss of income during pregnancy has devastating consequences for maternal health, fetal health, women's economic outcomes, and more. Up until very recently, all this was legal under federal law: there was no affirmative right to workplace accommodations based on pregnancy.

Work-family scholars and advocates have long championed pregnancy accommodation laws as a way to ensure pregnant workers would not be pushed out of the workforce.⁹ Advocates argued that a legal

¹ *Natasha Jackson, South Carolina*, BETTER BALANCE, <https://www.abetterbalance.org/bios/natasha-jackson> [<https://perma.cc/M3XZ-4QNL>].

² *Natasha Jackson, I Faced Pregnancy Discrimination Thirteen Years Ago — I Won't Wait Any Longer for Congress to Take Action*, MEDIUM: BETTER BALANCE (Apr. 28, 2021), <https://abetterbalance.medium.com/i-faced-pregnancy-discrimination-thirteen-years-ago-i-wont-wait-any-longer-for-congress-to-take-3845018a3fd5> [<https://perma.cc/L3N5-BRKU>].

³ *Id.*

⁴ *Id.*

⁵ *Calling for the Pregnant Workers Fairness Act on Capitol Hill*, BETTER BALANCE (Sept. 20, 2019), <https://www.abetterbalance.org/calling-for-the-pregnant-workers-fairness-act-on-capitol-hill> [<https://perma.cc/BQ6R-TL88>].

⁶ *Natasha Jackson, Opinion, New Law Will Help Pregnant Women on the Job*, POST & COURIER (Sept. 14, 2020), https://www.postandcourier.com/opinion/commentary/new-law-will-help-pregnant-women-on-the-job/article_b8a16aee-5f85-11e8-9cab-735870bod5ed.html [<https://perma.cc/C9TU-S9Z5>].

⁷ *See id.*

⁸ This Note refers to those impacted by the lack of pregnancy accommodations as "pregnant workers," to include all those who can become pregnant. When an issue or fact specifically concerns women, such as statistics on women's labor force participation rates, the Note uses the terms "women" and "pregnant women."

⁹ *See, e.g., Jennifer Bennett Shinall, Essay, Protecting Pregnancy*, 106 CORNELL L. REV. 987, 1017 (2021).

mandate for employers to accommodate pregnant workers would not only improve retention of women in the workforce and increase gender equality,¹⁰ but also combat gendered stereotypes¹¹ and chip away at the outdated and idealized archetype of a male worker (with a stay-at-home female caretaker) that still undergirds many modern-day workplace structures.¹²

This advocacy has produced considerable success. Over the past three decades, numerous states and municipalities have passed pregnancy accommodation laws, granting pregnant workers the right to accommodations in the workplace.¹³ And, after decades of advocacy, Congress passed the Pregnant Workers Fairness Act¹⁴ (PWFA) at the end of 2022 with bipartisan support.¹⁵ The statute requires covered employers to provide reasonable accommodations to pregnant workers, unless the employer can show that doing so would impose an undue hardship.¹⁶

The PWFA has been rightfully celebrated for protecting pregnant workers and facilitating their ability to keep working if they so choose.¹⁷ At the same time, a curious dissonance exists: the Americans with Disabilities Act of 1990¹⁸ (ADA), the statute that the PWFA's text largely mirrors,¹⁹ has been widely criticized as ineffective for employees and described as one of the least plaintiff-friendly civil rights statutes.²⁰

¹⁰ See, e.g., *id.*; Stephanie Bornstein, *The Politics of Pregnancy Accommodations*, 14 HARV. L. & POL'Y REV. 293, 296 (2020).

¹¹ See DINA BAKST ET AL., BETTER BALANCE, LONG OVERDUE: IT IS TIME FOR THE FEDERAL PREGNANT WORKERS FAIRNESS ACT 8 (May 2019), <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf> [<https://perma.cc/2E5M-94CH>].

¹² Cf. Joan C. Williams, *Keynote Address: Want Gender Equality? Die Childless at Thirty*, 27 WOMEN'S RTS. L. REP. 3, 11–12 (2006).

¹³ *State Pregnant Workers Fairness Laws*, BETTER BALANCE (Sept. 29, 2023), <https://www.abetterbalance.org/resources/pregnant-worker-fairness-legislative-successes> [<https://perma.cc/3RWN-PZPY>].

¹⁴ Pub. L. No. 117-328, div. II, 136 Stat. 4459, 6084–89 (2022) (codified at 42 U.S.C.A. §§ 2000gg to 2000gg-6 (West Supp. 2023)).

¹⁵ Alisha Haridasani Gupta, *A New Law Aims to Stop Pregnancy Discrimination at Work*, N.Y. TIMES (June 27, 2023), <https://www.nytimes.com/2023/06/27/well/live/pregnancy-workers-fairness-act-discrimination.html> [<https://perma.cc/DU3Y-MDM6>].

¹⁶ 42 U.S.C.A. § 2000gg-1(i).

¹⁷ Statement, A Better Balance, *Better Balance Celebrates Pregnant Workers Fairness Act & PUMP Act Inclusion in Omnibus as a Momentous Victory for Moms, Moms-to-Be, Working Families* (Dec. 23, 2022), <https://www.abetterbalance.org/statement-a-better-balance-celebrates-pregnant-workers-fairness-act-pump-act-inclusion-in-omnibus-as-a-momentous-victory-for-moms-moms-to-be-working-families> [<https://perma.cc/V8CQ-KCML>].

¹⁸ Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 and 47 U.S.C. § 225).

¹⁹ See 42 U.S.C. § 12112(b)(5)(A).

²⁰ Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999) (noting that “only prisoner rights cases fare as poorly” as ADA claims); see also Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 312 (2009) (describing the backlash to the ADA that weakened the statute).

Some scholars have warned against expanding the use of ADA-style accommodations for work-family issues like caregiver discrimination, precisely because the ADA has been so ineffective.²¹ The PWFA itself has received little coverage or attention since its passage.²² Given this backdrop, and given that protections for pregnant workers have grown increasingly vital in the wake of abortion restrictions²³ after *Dobbs v. Jackson Women's Health Organization*,²⁴ an urgent question arises: Following the widespread panning of the ADA's impact on disability accommodations, is it naive to expect the PWFA, built on the same statutory language, will achieve a different result for pregnant workers?

While scholars have commented, with varying degrees of optimism, on the application of a workplace accommodation mandate to pregnancy,²⁵ no scholarship has yet interrogated how ADA failure-to-accommodate doctrine may play out in the pregnancy accommodations context. This Note addresses that gap.

Drawing from statutory interpretation of the ADA and related doctrine, this Note argues that there is good reason to be optimistic about the PWFA, even if it mirrors language from the ADA. The hurdles that workers face under the ADA have either been accounted for by small but significant edits to the text of the PWFA's accommodations provisions or are unlikely to become issues, due to differences between pregnancy and disability as conditions in the workplace.

Part I provides an overview of the challenges that pregnant workers face and a survey of existing federal laws relevant to pregnant workers. It ends with a statutory analysis of the PWFA, which was written to mirror the ADA's Title I, specifically the provision regarding workplace accommodations. Turning to the ADA, Part II provides a summary of the statute's history before detailing the specific doctrines that have plagued plaintiffs in ADA failure-to-accommodate claims. Part III then walks through each ADA doctrinal hurdle and interrogates whether that hurdle would exist under the PWFA for pregnant workers. Using a mix of state PWFA law and ADA doctrine, this Part concludes that they largely will not.

²¹ Nicole Buonocore Porter, *Caregiver Conundrum Redux: The Entrenchment of Structural Norms*, 91 DENV. U. L. REV. 963, 978 n.127, 990–91 (2014).

²² For example, it was not until the law went into effect, six months after it was first signed into law, that the *New York Times* covered the PWFA's passage. See Gupta, *supra* note 15.

²³ See, e.g., Deborah A. Widiss, *Pregnant Workers Fairness Acts: Advancing a Progressive Policy in Both Red and Blue America*, 22 NEV. L.J. 1131, 1134–35 (2022).

²⁴ 142 S. Ct. 2228 (2022).

²⁵ See, e.g., Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 229 (2000).

I. PREGNANCY IN THE WORKPLACE

A. Challenges Facing Pregnant Workers

For many workers, the consequences of becoming pregnant while working are devastating. In the workplace, people who get pregnant are passed over for promotions,²⁶ laid off weeks before giving birth,²⁷ and even forced to work until they miscarry.²⁸ After having their first child, women in the United States face long-term earnings penalties of thirty-one percent, whereas men with children suffer no penalty.²⁹ In addition to facing discrimination, harassment, and workplace bias related to parental status,³⁰ an estimated 250,000 workers are denied workplace pregnancy accommodations each year.³¹

Consider Kimberlie Michelle Durham's story.³² After getting an order from her doctor to not lift heavy weights during her pregnancy, Durham, an EMT, asked her employer for a modified-duty job assignment (the accommodation given to workers who had been injured on the job).³³ Her request was denied.³⁴ Instead, the only accommodation her employer offered her was a six-month unpaid leave of absence.³⁵ As Durham explained, this was not an option: "[H]ow was I supposed to live for six months without income of any sort[?] How was I supposed to prepare for my son to come home?"³⁶ The company refused to schedule her for any shifts after that, but also opposed her application for unemployment benefits, "right at the time [she] needed a paycheck the most."³⁷ Durham eventually pursued a discrimination lawsuit against

²⁶ Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination Is Rampant Inside America's Biggest Companies*, N.Y. TIMES (Feb. 8, 2019), <https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html> [<https://perma.cc/WGR4-9VDE>].

²⁷ Dina Bakst, Opinion, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES (Jan. 30, 2012), <https://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html> [<https://perma.cc/PTA9-YL9C>].

²⁸ Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html> [<https://perma.cc/N66Q-6LQB>].

²⁹ Henrik Kleven et al., *Child Penalties Across Countries: Evidence and Explanations*, 109 AEA PAPERS & PROC. 122, 123–24 (2019).

³⁰ Kitroeff & Silver-Greenberg, *supra* note 26. See generally Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1369–72 (2008).

³¹ CARLY MCCANN & DONALD TOMASKOVIC-DEVEY, CTR. FOR EMP. EQUITY, PREGNANCY DISCRIMINATION AT WORK 8–9 (2021), <https://www.umass.edu/employmentequity/sites/default/files/Pregnancy%20Discrimination%20at%20Work.pdf> [<https://perma.cc/W7DV-EK4R>].

³² *Long Over Due: Exploring the Pregnant Workers' Fairness Act: Hearing on H.R. 2694 Before the Subcomm. on C.R. & Hum. Servs. of the H. Comm. on Educ. & Lab.*, 116th Cong. 14 (2019) (statement of Kimberlie Michelle Durham).

³³ *Id.* at 15.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Kimberlie Michelle Durham, *Long Overdue: Why the Pregnant Workers Fairness Act Matters*, MS. MAG. (Oct. 24, 2019), <https://msmagazine.com/2019/10/24/the-pregnant-workers-fairness-act-is-long-overdue> [<https://perma.cc/9VKT-6PLQ>].

her employer, but the trial court judge found that she was not “similarly situated” to workers who had been injured on the job.³⁸ The court concluded that under pregnancy discrimination law, Durham thus had no right to the temporary light-duty assignment she requested.³⁹

As Durham’s story illustrates, the lack of a right to accommodations can force pregnant workers out of their jobs, even in situations where they could have continued working with accommodations. This issue affects many workers: women comprise nearly half of the U.S. workforce,⁴⁰ and roughly seventy-five percent of those women will become pregnant at some point while employed.⁴¹ The lack of accommodations also disproportionately impacts Black and Latinx workers, who are overrepresented in low-wage jobs that offer little flexibility or autonomy,⁴² and in physically demanding jobs that can have the most dire effects on a pregnancy without accommodations.⁴³

Without accommodations, workers face an impossible choice between continuing to work in unsafe ways throughout their pregnancy, or possibly losing their jobs and their health insurance at a time when medical care is critical.⁴⁴ Both options carry significant negative consequences for maternal and parental health,⁴⁵ child lifetime outcomes,⁴⁶ women’s employment rates,⁴⁷ and more. Workers who must perform physically demanding work during pregnancy are more likely to suffer from miscarriage and stillbirth, and their babies are more likely to

³⁸ *Durham v. Rural/Metro Corp.*, No. 16-CV-01604, 2018 WL 4896346, at *3–4 (N.D. Ala. Oct. 9, 2018), *vacated*, 955 F.3d 1279 (11th Cir. 2020).

³⁹ *Id.*

⁴⁰ *Women in the Labor Force: A Databook*, U.S. BUREAU LAB. STAT. (Apr. 2021), <https://www.bls.gov/opub/reports/womens-databook/2020/home.htm> [<https://perma.cc/RDJ5-6K8U>].

⁴¹ MELISSA ALPERT & ALEXANDRA CAWTHORNE, CTR. FOR AM. PROGRESS, LABOR PAINS: IMPROVING EMPLOYMENT AND INCOME SECURITY FOR PREGNANT WOMEN AND NEW MOTHERS 2 (2009), <https://www.americanprogress.org/article/labor-pains> [<https://perma.cc/Q8Q7-DQ7A>].

⁴² MORGAN HARWOOD & SARAH DAVID HEYDEMANN, NAT’L WOMEN’S L. CTR., BY THE NUMBERS: WHERE DO PREGNANT WOMEN WORK? 1 (2019), <https://nwlc.org/wp-content/uploads/2019/08/Pregnant-Workers-by-the-Numbers-v3-1.pdf> [<https://perma.cc/DMA2-ATPQ>]; *see also* Bakst, *supra* note 27 (“[Workers who need accommodations] are disproportionately low-income women, often in physically demanding jobs with little flexibility.”); Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714, 54716 (proposed Aug. 11, 2023) (to be codified at 29 C.F.R. pt. 1636).

⁴³ *See* Kitroeff & Silver-Greenberg, *supra* note 26; HARWOOD & HEYDEMANN, *supra* note 42, at 5.

⁴⁴ Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. at 54752.

⁴⁵ BAKST ET AL., *supra* note 11, at 5.

⁴⁶ Hilary Hoynes et al., *Long-Run Impacts of Childhood Access to the Safety Net*, 106 AM. ECON. REV. 903, 927–30 (2016) (finding that increasing parental resources while children are in utero improves lifetime outcomes, including raising adult employment rates and health outcomes).

⁴⁷ FACT SHEET: THE PREGNANT WORKERS FAIRNESS ACT, NAT’L P’SHIP FOR WOMEN & FAMS. 4 (2021) [hereinafter FACT SHEET], <https://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/fact-sheet-pwfa.pdf> [<https://perma.cc/K2VL-C3JC>].

experience low birth weight or preterm birth.⁴⁸ Women who are pushed out of the workforce during pregnancy face an uphill battle to return to work in a job market hostile to new mothers.⁴⁹ In sum, accommodations for pregnant workers play a critical role in protecting parental and fetal health, as well as the economic security of families who depend on these workers.

B. Existing Federal Protections and Their Limits

Although there are multiple federal laws that concern pregnancy in the workplace, existing laws have fallen short in protecting pregnant workers. This section outlines the major laws that impact pregnant workers and illustrates why none of them grant pregnant workers a full right to accommodations on the basis of pregnancy.

1. *Pregnancy Discrimination Act.* — The Pregnancy Discrimination Act⁵⁰ (PDA), enacted in 1978, amended Title VII to prohibit sex discrimination “on the basis of pregnancy,” and requires that pregnant employees be treated the same as other workers “similar in their ability or inability to work.”⁵¹

In theory, then, a litigant could use the PDA to secure pregnancy accommodations. They would argue that there was another worker, similar in their ability, who was given an accommodation, and that not giving the same accommodation to the plaintiff amounts to a disparate treatment of pregnancy. But in reality, courts have been unforgiving on the question of who qualifies as a comparator.

The most recent PDA Supreme Court case, *Young v. United Parcel Service, Inc.*,⁵² is generally considered a plaintiff-friendly decision.⁵³ Yet up to two-thirds of PDA cases that followed *Young* resulted in a negative outcome for the plaintiff, often for lack of an acceptable comparator.⁵⁴ Some scholars have described the standard for a comparator as requiring a “near twin” of the plaintiff.⁵⁵ This is because the criteria for a comparator remain extensive after *Young*: to make a comparator-based argument for accommodations, a litigant must first find a nonpregnant worker, and then prove that they share the same job as the litigant, that

⁴⁸ JASMINE TUCKER ET AL., NAT’L WOMEN’S L. CTR., PREGNANT WORKERS NEED ACCOMMODATIONS FOR SAFE AND HEALTHY WORKPLACES 2 (2021), <https://nwl.org/wp-content/uploads/2021/11/Pregnant-Workers-by-the-Numbers-2021-v4.pdf> [https://perma.cc/T4YG-U9BD].

⁴⁹ FACT SHEET, *supra* note 47, at 3.

⁵⁰ Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)).

⁵¹ *Id.*

⁵² 575 U.S. 206 (2015).

⁵³ See Lara Grow, *Pregnancy Discrimination in the Wake of Young v. UPS*, 19 U. PA. J.L. & SOC. CHANGE 133, 135 (2016).

⁵⁴ See BAKST ET AL., *supra* note 11, at 5–6.

⁵⁵ Joan C. Williams et al., *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL’Y REV. 97, 102 (2015) (quoting Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1661 (2011)).

they are similarly able or unable to work, and that they were accommodated in a way the litigant was not.⁵⁶

In one case, a pregnant FedEx employee seeking a temporary reassignment identified hundreds of coworkers with her job title who had been given temporary reassignments identical to the one she wanted.⁵⁷ The court found that while those workers shared her job and had been accommodated, they were not comparators because the plaintiff had not shown that they were similar to her in their ability or inability to work.⁵⁸ Such decisions were common in the post-*Young*, pre-PWFA landscape.⁵⁹

Even if the courts loosened their definitions of comparators, the need for a comparator would still cabin the right to accommodations. Pregnant workers at smaller workplaces might be barred from making any claims simply because no comparators exist at their workplaces.⁶⁰ Similarly, employers who do not offer accommodations to any worker would technically be treating all employees the same.⁶¹ As Professor Shirley Lin points out, the nondiscrimination model for accommodations under the PDA hinges the right to pregnancy accommodations on “others’ abilities to achieve structural justice first,” a wildly “convoluted system.”⁶² Representative Jerrold Nadler describes the issue as follows: companies who “treat their nonpregnant employees terribly . . . have every right to treat their pregnant employees terribly as well.”⁶³

2. *Americans with Disabilities Act*. — Long before Congress imported the language of the ADA into the PWFA, courts considered whether pregnant workers could be protected as workers with disabilities. The answer, generally, was no.⁶⁴ Unless a worker could show that

⁵⁶ See DINA BAKST ET AL., BETTER BALANCE, LONG OVERDUE: THE PREGNANT WORKERS FAIRNESS ACT IS A CRITICAL MEASURE TO REMOVE BARRIERS TO WOMEN’S WORKPLACE PARTICIPATION AND PROMOTE HEALTHY PREGNANCIES JUNE 2021 UPDATE 9–10 (2021), <https://www.abetterbalance.org/wp-content/uploads/2021/06/Long-Overdue-June-2021-Update-Final-1.pdf> [<https://perma.cc/U9FS-5U75>].

⁵⁷ BAKST ET AL., *supra* note 11, at 18.

⁵⁸ *Id.*

⁵⁹ See *id.* at 13–16.

⁶⁰ See, e.g., *id.* at 14 (citing *Wadley v. Kiddie Acad. Int’l, Inc.*, No. CV 17-05745, 2018 WL 4732479, at *5 (E.D. Pa. Oct. 1, 2018) (granting employer’s motion to dismiss daycare assistant’s PDA claim because she could not point to a valid comparator)).

⁶¹ See, e.g., *id.* (citing *Luke v. CPlace Forest Park SNF*, 747 F. App’x 978, 980 (5th Cir. 2019) (affirming grant of summary judgment to employer, dismissing nursing assistant’s PDA claim that she was denied light duty because she could not point to other nursing assistants who were granted accommodations when they had medical restrictions on heavy lifting)).

⁶² Shirley Lin, *Bargaining for Integration*, 96 N.Y.U. L. REV. 1826, 1872 (2021).

⁶³ See Silver-Greenberg & Kitroeff, *supra* note 28.

⁶⁴ *Richards v. City of Topeka*, 173 F.3d 1247, 1250 n.2 (10th Cir. 1999) (“[N]umerous district courts have concluded that a normal pregnancy without complications is not a disability under 42 U.S.C. § 12102(2)(A).” (citing *Gabriel v. City of Chicago*, 9 F. Supp. 2d 974, 980–81 (N.D. Ill. 1998); *Gudenkauf v. Stauffer Commc’ns, Inc.*, 922 F. Supp. 465, 473 (D. Kan. 1996); *Jessie v. Carter Health Care Ctr.*, 926 F. Supp. 613, 616 (E.D. Ky. 1996)); see U.S. EQUAL EMP’T OPPORTUNITY COMM’N, EEOC-NVTA-0000-3, FACT SHEET FOR SMALL BUSINESSES: PREGNANCY

they have a severe health condition accompanying their pregnancy, they would not be afforded protection under the ADA for being pregnant.⁶⁵

However, many of the debilitating conditions of pregnancy do not qualify as a disability under the ADA, even if they limit one's ability to work. Courts across the country have found that workers with the following conditions were *not* covered under the ADA, because the plaintiffs did not meet the statute's high bar for demonstrating disability: high-risk pregnancy and emergency surgery, hyperemesis gravidarum (severe morning sickness), pregnancy-related nausea, and pregnancy-related bleeding.⁶⁶ The statute's emphasis on *existing* debilitation also means the ADA cannot grant preventative accommodations that would help workers avoid developing pregnancy complications.⁶⁷

Some scholars have argued that the ADA Amendments Act of 2008⁶⁸ (ADAAA) expanded the statute's ability to cover pregnant workers because it eased the standards for showing disability.⁶⁹ For example, the ADAAA clarified that temporary conditions, like pregnancy, are not automatically barred from ADA protection.⁷⁰ However, even if the ADAAA expanded the range of conditions that could meet the ADA definition of a disability, the reality remains that pregnancy *per se* is not covered by the statute; a pregnant worker still always has to show an impairment that substantially limits a major life activity to secure an ADA accommodation. Given that many pregnancy accommodation requests are for modest workplace adjustments, like a stool to sit on or a temporary reprieve from lifting,⁷¹ it makes little sense to require workers to show a qualifying disability to secure these accommodations.

DISCRIMINATION (2014), https://www.eeoc.gov/eeoc/publications/pregnancy_factsheet.cfm [<https://perma.cc/4DKC-UUYF>]; *see also* Tomiwa v. PharMEDium Servs., LLC, No. 16-CV-3229, 2018 WL 1898458, at *5 (S.D. Tex. Apr. 20, 2018) (“[P]regnancy and related medical conditions do not constitute a physical impairment . . .” (quoting 42 U.S.C. § 12102)).

⁶⁵ *See* Sam-Sekur v. Whitmore Grp., Ltd., No. 11-CV-4938, 2012 WL 2244325, at *8 (E.D.N.Y. June 15, 2012) (“Only in extremely rare cases have courts found that conditions that arise out of pregnancy qualify as a disability.”).

⁶⁶ *See* A BETTER BALANCE, THE PREGNANT WORKERS FAIRNESS ACT (H.R. 2694): LEGAL BACKGROUNDER 2 (2020), <https://www.abetterbalance.org/wp-content/uploads/2020/02/Long-Overdue-Primer-PWFA.pdf> [<https://perma.cc/Q65L-QNEH>] (discussing the lack of coverage for these conditions under the ADA Amendments Act (ADAAA), even though the new law was intended to broaden the ADA's coverage).

⁶⁷ NAT'L WOMEN'S L. CTR., FACT SHEET: PASS THE PREGNANT WORKERS FAIRNESS ACT: WHY THE ADAAA IS NOT ENOUGH 2 (2020), <https://nwlc.org/wp-content/uploads/2020/01/PWFA-ADAAA-Factsheet-2020-1.17.20.pdf> [<https://perma.cc/LHY5-DUFB>].

⁶⁸ Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 29 and 42 U.S.C.).

⁶⁹ *E.g.*, Williams et al., *supra* note 55, at 112. *But see* A BETTER BALANCE, *supra* note 66, at 1 (“Although the 2008 amendments broadened the ADA's definition of disability, these changes only have had a modest impact when applied to pregnancy-related conditions.” (quoting Scheidt v. Floor Covering Assocs., Inc., No. 16-CV-5999, 2018 WL 4679582, at *6 (N.D. Ill. Sept. 28, 2018))).

⁷⁰ *See* Williams et al., *supra* note 55, at 114.

⁷¹ *See, e.g.*, *supra* notes 32–39 and accompanying text.

3. *Family and Medical Leave Act.* — The Family and Medical Leave Act of 1993⁷² (FMLA) guarantees up to twelve weeks of unpaid leave for qualifying workers.⁷³ While a pregnant worker could take leave under the FMLA, unpaid leave is oftentimes a much more drastic measure than what the worker needs.⁷⁴ In many cases, pregnant workers on unpaid leave are able to and willing to continue working with a workplace accommodation.⁷⁵ The testimonies featured above make it clear as well that unpaid leave, especially for months at a time, is simply not an option for many workers who rely on their incomes to support themselves and their families. Even for pregnant workers who do need leave, there are negative consequences to using FMLA leave on pregnancy needs. FMLA leave is limited to twelve weeks a year for all qualifying reasons,⁷⁶ so taking FMLA leave during pregnancy means fewer weeks of leave left for childbirth recovery or bonding.

C. *A New Law: The Pregnant Workers Fairness Act*

The Pregnant Workers Fairness Act “establishes a pregnant worker’s right to reasonable accommodations and eliminates the evidentiary hurdles to defend that right.”⁷⁷ First introduced in 2012, the PWFA stalled in the legislative process multiple times⁷⁸ before it was finally passed in December 2022.⁷⁹ Remarkably, the bill passed with bipartisan support in both the Senate and the House.⁸⁰

Essentially, the PWFA takes the right to accommodations granted to disabled workers under the ADA and extends it to workers who face “known limitations related to [a] pregnancy, childbirth, or related medical conditions.”⁸¹ As noted in the House committee report, the PWFA intentionally mirrors the ADA.⁸² The key language requiring accommodations is virtually identical between the two laws, while the statutes’

⁷² Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 5 and 29 U.S.C.).

⁷³ 29 U.S.C. § 2612(a).

⁷⁴ See, e.g., *supra* notes 32–39 and accompanying text.

⁷⁵ See, e.g., *supra* notes 1–7 and accompanying text.

⁷⁶ 29 U.S.C. § 2612(a).

⁷⁷ H.R. REP. NO. 117-27, pt. 1, at 26 (2021).

⁷⁸ See H.R. 5647, 112th Cong. (2012); H.R. 1975, 113th Cong. (2013); H.R. 2654, 114th Cong. (2015); H.R. 2417, 115th Cong. (2017); H.R. 1065, 117th Cong. (2021).

⁷⁹ *Roll Call Vote 117th Congress — 2nd Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1172/vote_117_2_00416.htm [<https://perma.cc/SJ83-D4RD>].

⁸⁰ *Id.*; *Roll Call 143 Bill Number: H. R. 1065, 117th Congress, 1st Session*, OFF. CLERK, U.S. HOUSE REPRESENTATIVES, <https://clerk.house.gov/Votes/2021143> [<https://perma.cc/4FNZ-V7FU>]. Versions of the law had been passed at the state and local levels over the past three decades. See *State Pregnant Workers Fairness Laws*, *supra* note 13. But, as of 2022, over one million women continued to live in states without pregnancy accommodations laws. Jessica Mason & Katherine Gallagher Robbins, *Discrimination While Pregnant: Why Nearly 3 Million Pregnant Workers in the US Need the Pregnant Workers Fairness Act Now*, NAT’L P’SHIP FOR WOMEN & FAMS. (Oct. 2022), <https://www.nationalpartnership.org/our-work/economic-justice/reports/discrimination-while-pregnant.html> [<https://perma.cc/TAZ4-V9TM>].

⁸¹ 42 U.S.C.A. § 2000gg-1 (West Supp. 2023).

⁸² H.R. REP. NO. 117-27, pt. 1, at 26.

undue burden defenses, which allow employers to avoid liability for a failure to accommodate if they “can demonstrate the accommodation would impose an undue hardship on the operation of [their] business,” are identical.⁸³ The PWFA also directs readers to the definitions of “undue hardship” and “reasonable accommodation” provided in the ADA.⁸⁴

In addition to those mirrored provisions, the PWFA’s text also codifies some longstanding doctrinal practices under the ADA that have not been explicitly written into that statute.

First, although the interactive process, through which employers work with employees to identify suitable accommodations, has long been considered a part of the ADA accommodation process, it was never mentioned in the ADA itself.⁸⁵ By contrast, the PWFA expressly prohibits employers from forcing employees “to accept an accommodation other than any reasonable accommodation arrived at through the interactive process.”⁸⁶ The PWFA does not mandate the use of the interactive process, since there are likely situations where the needed accommodation is obvious and easy to grant; it simply prohibits employers from bypassing the process against the wishes of the employee.⁸⁷

Second, the PWFA also amends the ADA’s definition of a “qualified” employee — that is, someone who can claim the statute’s protections. Under the ADA, a qualified individual is someone who is able to “perform the essential functions” of the job, “with or without reasonable accommodation.”⁸⁸ The PWFA utilizes a slightly more expansive definition of a qualified employee, and includes workers who may be temporarily unable to perform the essential functions of their job but will be able to do so again in the near future.⁸⁹ In reality, ADA case law has long allowed a similar exception for disabled workers temporarily unable to perform the essential functions of their job, but the PWFA entrenches this exception in statutory text.⁹⁰

⁸³ Compare 42 U.S.C. § 12112(b)(5)(A) (stating that it is unlawful to “not mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity”), with 42 U.S.C.A. § 2000gg-1 (stating that it is unlawful to “not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity”).

⁸⁴ 42 U.S.C.A. § 2000gg(7).

⁸⁵ See 42 U.S.C. §§ 12111(9), 12112.

⁸⁶ 42 U.S.C.A. § 2000gg-1(2).

⁸⁷ See *id.*

⁸⁸ 42 U.S.C. § 12111(8).

⁸⁹ See 42 U.S.C.A. § 2000gg(6).

⁹⁰ H.R. REP. NO. 117-27, pt. 1, at 27–28 (2021) (“This language was inserted into the PWFA to make clear that the temporary inability to perform essential functions due to pregnancy, childbirth, or related medical conditions does not render a worker ‘unqualified.’ There is precedent under the ADA for the temporary excusal of essential functions and there may be a need for a pregnant worker

Finally, and perhaps most differently from the ADA, the PWFA includes a provision that prohibits employers from forcing a worker to take leave “if another reasonable accommodation can be provided.”⁹¹ There is no analogous provision under the ADA.⁹² This provision likely speaks to the romantic paternalism that pregnant workers face in the workplace, where employers purportedly concerned with harming the pregnancy remove the worker from the workplace entirely, even in situations where the worker wants to or could have continued working.⁹³

Given the textual mirroring in the PWFA, it makes sense to expect that courts will look to ADA case law to analyze the PWFA. The next Part will introduce the ADA and outline the major doctrinal hurdles that litigants face in ADA failure-to-accommodate lawsuits.

II. THE AMERICANS WITH DISABILITIES ACT AND THE ACCOMMODATIONS MODEL

A. *The ADA: “A Failure for Plaintiffs”*

The ADA was passed in 1990 to prohibit disability-based discrimination in public life.⁹⁴ Title I of the ADA guarantees that workers with disabilities have the right to “reasonable accommodations” in the workplace, absent “undue hardship” on the employer.⁹⁵ While the ADA was passed with broad ambitions, in the years since, it has been critiqued as a vague and ineffective statute.⁹⁶

Multiple forces collectively narrowed the ADA’s efficacy. First, disability is both a vague term and an extremely broad range of possible conditions. For that reason, many doctrinal debates under the ADA have doubled as sites of normative negotiation around the boundaries of disability; in other words, the definition of disability is a question of norms rather than of fact.⁹⁷ Second, following the law’s passage, and perhaps as part of that normative negotiation, backlash from employers and the courts was rampant, culminating in a series of Supreme Court decisions that severely narrowed the ADA’s coverage, mainly by cabin-ing the definition of “disability” under the law.⁹⁸ In response, Congress

to temporarily perform other tasks or otherwise be excused from performing essential functions before fully returning to her position once she is able.” *Id.* at 27).

⁹¹ 42 U.S.C.A. § 2000gg-1(4).

⁹² *See* 42 U.S.C. § 12112.

⁹³ *See supra* notes 1–6, 32–37 and accompanying text.

⁹⁴ Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 and 47 U.S.C. § 225).

⁹⁵ 42 U.S.C. § 12112(b)(5)(A).

⁹⁶ *See* Amy Knapp, Comment, *The Danger of the “Essential Functions” Requirement of the ADA: Why the Interactive Process Should Be Mandated*, 90 DENV. U. L. REV. 715, 719–20 (2013).

⁹⁷ *See* Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 412–13 (2000).

⁹⁸ *See* Linda Hamilton Krieger, *Afterword: Socio-legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 503–05, (2000) (discussing judicial backlash to the passage of the ADA).

passed the ADA Amendments Act to repudiate those decisions.⁹⁹ But even after the ADAAA's passage, workers with disabilities continue to be employed at lower rates¹⁰⁰ and continue to experience high rates of nonaccommodation: one in two workers who need accommodations does not receive them.¹⁰¹ As one commentator put it, "Legal scholarship tends to view the ADA as a failure for plaintiffs."¹⁰² The next section explores the specific doctrinal challenges that have stymied ADA litigants in court.

B. Doctrinal Challenges for Employees Under the ADA

This section will describe difficulties ADA plaintiffs often encounter in litigation. Although circuits differ on the exact elements needed to bring a failure-to-accommodate claim, in general plaintiffs must show that they have a disability under the definitions of the ADA; that they are a qualified worker able to perform the essential duties of the job at hand, with or without accommodations; and that their employer failed to give them a reasonable accommodation.¹⁰³ The employer can defend their decision to not offer a reasonable accommodation by showing that such an accommodation would have imposed an undue hardship.¹⁰⁴

i. Definitional Hurdles: Who Has a Disability? — For asymmetrical statutes like the ADA and PWFA, which protect the rights of specific groups,¹⁰⁵ definitional hurdles play a major role in determining litigant outcomes. These definitions determine at the outset who falls into the protected group and thus gets access to the law's protections.¹⁰⁶ Using disability as a screening mechanism, many courts reject ADA failure-to-accommodate claims without ever reaching the merits.

Under the ADA, an employee can be considered disabled, and thus covered by the statute's antidiscrimination provisions, through three ways: They are actually disabled, meaning they have a physical or mental impairment that substantially limits one or more of their major life activities; they have a record of such disability; or they are regarded as

⁹⁹ Americans with Disabilities Amendments Act of 2008, Pub. L. No. 110-325, §2(a), 122 Stat. 3553, 3553-54 (codified as amended in scattered sections of 29 and 42 U.S.C.).

¹⁰⁰ Jennifer Cheeseman Day & Danielle Taylor, *Do People with Disabilities Earn Equal Pay?*, U.S. CENSUS BUREAU (Oct. 28, 2021), <https://www.census.gov/library/stories/2019/03/do-people-with-disabilities-earn-equal-pay.html> [https://perma.cc/3A4X-D4XQ].

¹⁰¹ Lin, *supra* note 62, at 1835.

¹⁰² Charlotte L. Lanvers, Note, *Different Federal District Court, Different Disposition: An Empirical Comparison of ADA, Title VII Race and Sex, and ADEA Employment Discrimination Dispositions in the Eastern District of Pennsylvania and the Northern District of Georgia*, 16 CORNELL J.L. & PUB. POL'Y 381, 387 (2007).

¹⁰³ 42 U.S.C. §§ 12111(8), 12112(b)(5)(A).

¹⁰⁴ *Id.* § 12112(b)(5)(A).

¹⁰⁵ For a discussion of employment mandates that protect discrete groups of people, see generally Jolls, *supra* note 25. By contrast, a symmetrical statute like Title VII prohibits racial discrimination against all people (not just people of color) and sex discrimination against all sexes (not just females). Bagenstos, *supra* note 97, at 403-04.

¹⁰⁶ Bagenstos, *supra* note 97, at 404.

disabled.¹⁰⁷ To qualify for a reasonable accommodation, a worker must satisfy the first or second prong's definition of disability.¹⁰⁸

In the 1990s, the Supreme Court narrowed the pathway for plaintiffs to prove they are disabled. In *Sutton v. United Air Lines, Inc.*,¹⁰⁹ two pilots sued an airline for refusing to hire them because they had myopia.¹¹⁰ The Supreme Court found that the ADA did not cover the plaintiffs because they could see with eyeglasses and the statute did not cover disabilities remedied by corrective measures.¹¹¹ As the majority noted in *Sutton*, considering corrective measures reduced the number of people who were disabled under the ADA from 160 million to 43 million.¹¹² Similarly, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,¹¹³ the Court narrowed the meaning of a "major life activity" to include only tasks "that are of central importance to most people's daily lives."¹¹⁴

Although the ADAAA eventually superseded both decisions, these cases illustrate how narrow judicial readings of definitional provisions can be used to cabin the reach of a statute, especially for a term as broad as "disability." Even after the ADAAA was passed, the threat of definitional hurdles for ADA litigants continued to linger. The question of whether someone qualifies for protection under the ADA continues to be one of the main barriers for failure-to-accommodate litigants. One systematic analysis found that out of roughly one thousand post-ADAAA cases that considered the definition of disability, approximately one-fifth still erroneously found the plaintiff did not have a disability.¹¹⁵

2. *Factual Hurdles: What Is a Reasonable Accommodation or Undue Burden?* — The ADA grants qualifying workers the right to reasonable accommodations unless their employer can demonstrate that giving such an accommodation would impose an undue hardship.¹¹⁶ Both key terms, "reasonable accommodation" and "undue hardship," are loosely defined, and agencies and courts alike have struggled to further clarify their meaning. This ambiguity disadvantages employees during accommodation requests and failure-to-accommodate lawsuits.

¹⁰⁷ 42 U.S.C. § 12102(1)(A)–(C).

¹⁰⁸ *Notice Concerning the Americans with Disabilities Act (ADA) Amendments Act of 2008*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/statutes/notice-concerning-americans-disabilities-act-ada-amendments-act-2008> [<https://perma.cc/36RN-5XUZ>].

¹⁰⁹ 527 U.S. 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

¹¹⁰ *Id.* at 475–76.

¹¹¹ *Id.* at 488.

¹¹² See *id.* at 484–85 (citing Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 434 n.117 (1991); NAT'L COUNCIL ON DISABILITY, *TOWARD INDEPENDENCE 10-11* (1986)).

¹¹³ 534 U.S. 184 (2002), *superseded by statute*, ADA Amendments Act of 2008.

¹¹⁴ *Id.* at 198.

¹¹⁵ See Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL'Y 383, 385 (2019).

¹¹⁶ 42 U.S.C. § 12112(b)(5)(A).

The statutory definition for “reasonable accommodation” provides no clear bound on what is or is not reasonable, or even factors to consider in assessing an accommodation for reasonableness. Instead, it provides a short list of accommodations that *could* be considered reasonable, such as “part-time or modified work schedules, reassignment to a vacant position, [or] acquisition or modification of equipment or devices.”¹¹⁷ The Equal Employment Opportunity Commission (EEOC) has since added some explanatory regulations,¹¹⁸ and workers can also look to private resources like the Job Accommodation Network for additional guidance.¹¹⁹ But, even with these resources, the reasonable accommodation inquiry remains fact-specific, creating unpredictability that may discourage workers from seeking accommodations.

Similarly, the ADA vaguely defines “undue hardship” as a “significant difficulty or expense.”¹²⁰ The statute provides slightly more guidance for this term, including a list of factors to consider, such as the “nature and cost” of the accommodation, the “overall financial resources” of the employer, and the accommodation’s “effect on expenses and resources.”¹²¹ The EEOC later clarified that undue hardship considers not only “financial difficulty” but also whether an accommodation is “unduly extensive, substantial, or disruptive,”¹²² a reading of the ADA echoed by courts.¹²³

In litigation, this ambiguity typically gets resolved in favor of the employer. Some observers hypothesized that, after the ADAAA expanded the definition of “disability,” the reasonable accommodations standard and the undue burden defense would become the next major barriers for ADA plaintiffs.¹²⁴ But, rather than narrowing these terms the way “disability” was narrowed, “courts have [instead] struggled to give content to the terms reasonable accommodation and undue hardship.”¹²⁵ When courts have clarified, “reasonable accommodation” and “undue hardship” have often served as conduits for importing biases

¹¹⁷ *Id.* § 12111(9)(A)–(B).

¹¹⁸ U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-2003-1, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA (2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> [<https://perma.cc/76AY-RPL9>].

¹¹⁹ *Accommodation Search*, JOB ACCOMMODATION NETWORK, <https://askjan.org/soar.cfm> [<https://perma.cc/Q6GV-PYX8>].

¹²⁰ 42 U.S.C. § 12111(10)(A).

¹²¹ *Id.* § 12111(10)(B)(i)–(iii).

¹²² U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 118.

¹²³ See *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 139 (2d Cir. 1995). For an analysis of the role that cost-benefit analysis has played in judicial analyses of reasonable accommodations, see Carrie Griffin Basas, *Back Rooms, Board Rooms — Reasonable Accommodation and Resistance Under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59, 77 n.99 (2008).

¹²⁴ E.g., Hillary K. Valderrama, Comment, *Is the ADAAA a “Quick Fix” or Are We out of the Frying Pan and into the Fire?: How Requiring Parties to Participate in the Interactive Process Can Effect Congressional Intent Under the ADAAA*, 47 HOUS. L. REV. 175, 205 (2010).

¹²⁵ *Id.* at 184 (quoting *Borkowski*, 63 F.3d at 136).

against disabled workers and a reluctance to give them “special treatment.”¹²⁶ In trying to create clarity, courts have also overemphasized the financial cost of accommodations and downplayed the less tangible societal benefits of accommodations.¹²⁷

For example, in *US Airways, Inc. v. Barnett*,¹²⁸ the last Supreme Court case to directly address “reasonable accommodation,” the Court considered whether a job reassignment that violated a seniority system could be considered reasonable.¹²⁹ The Court rejected the argument that such a conflict renders the reassignment always unreasonable, but also denied that violating a seniority system is always reasonable.¹³⁰ Instead, it proposed a middle ground: such accommodation would be presumptively unreasonable, subject to contrary evidence.¹³¹ In dissent, Justice Scalia described the holding as one that “eschew[ed] clear rules” and answered a simple question with a complicated “maybe.”¹³² Commentators similarly found the holding unclear and likely to lead to more litigation.¹³³ Doctrinal ambiguities like this disadvantage workers, who subsequently struggle to articulate clear rights when advocating for themselves, and to discern what situations warrant suit.

At the lower levels of the judiciary, similarly disadvantageous ambiguity persists: both the undue hardship and reasonable accommodation inquiries are so fact specific that existing case law on each question rarely develops the doctrine further as a whole.¹³⁴ The precedent on reasonable accommodations has been described as “severely underdeveloped”¹³⁵ and even “in a state of chaos.”¹³⁶ While some scholars attribute this to the fact that most ADA cases were dismissed during the disability inquiry, which meant few cases ever reached the question of what constitutes a reasonable accommodation,¹³⁷ this lack of clarifying

¹²⁶ See Basas, *supra* note 123, at 64 (“An amorphous reasonable accommodation analysis quietly imports concerns about people with disabilities abusing the ADA . . .”).

¹²⁷ Lin, *supra* note 62, at 1840 (finding that court decisions about undue burden tended to “rest on short-term, zero-sum assumptions about cost to the employer in providing an accommodation”).

¹²⁸ 535 U.S. 391 (2002).

¹²⁹ *Id.* at 394.

¹³⁰ See *id.* at 403.

¹³¹ *Id.*

¹³² *Id.* at 412 (Scalia, J., dissenting).

¹³³ Sandy Andrikopoulos & Theo E.M. Gould, Note, *Living in Harmony? Reasonable Accommodations, Employee Expectations and US Airways, Inc. v. Barnett*, 20 HOFSTRA LAB. & EMP. L.J. 345, 379–80 (2003).

¹³⁴ See Teressa L. Elliott & Kathleen A. Carnes, *The Americans with Disabilities Act Amendments Act: What About Reasonable Accommodation? Where Are We Now?*, 38 TOURO L. REV. 551, 566–67 (2022); Michael Ashley Stein et al., *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 714 & n.136 (2014).

¹³⁵ Jeannette Cox, *Reasonable Accommodations and the ADA Amendments’ Overlooked Potential*, 24 GEO. MASON L. REV. 147, 147 (2016) (quoting Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1122 (2010)).

¹³⁶ *Id.* (quoting Nicole Buonocore Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 543 (2013)).

¹³⁷ Stein et al., *supra* note 134, at 713–14.

case law has persisted even after the definitional inquiry was no longer the main cause of ADA claim dismissal.¹³⁸

The ADA's breadth also makes it hard to create general principles for reasonable accommodations because new kinds of accommodations and disabilities crop up every day that employers and employees must account for. During the COVID-19 pandemic, the prevalence of remote work as an accommodation upended judicial understandings of reasonable accommodations and undue hardship.¹³⁹ Live debates continue to play out over whether medical leave,¹⁴⁰ paid parking,¹⁴¹ commuting exemptions,¹⁴² or reassignments¹⁴³ make for reasonable accommodations.

The vagueness of both statutory definitions and the lack of clarifying case law pose a major issue. The ambiguity around employees' and employers' respective rights and obligations impacts employees' abilities to request accommodations and their litigation outcomes.

3. Procedural Hurdles: How Is the Final Accommodation Selected? — ADA litigants face one final barrier in their failure-to-accommodate claims: it is quite difficult to show that the employer did not cooperate.

First off, the interactive process — critical to equalizing information asymmetry between workers and employers — is not mentioned in the ADA's text.¹⁴⁴ Tasked with implementing the ADA's accommodations mandate, the EEOC promulgated regulations that ask employers to engage in an “interactive process” with employees requesting accommodations.¹⁴⁵ Courts have accepted the interactive process requirement¹⁴⁶ and required employers to at least show “some sign of having considered the employee's request.”¹⁴⁷ But even so, courts have been reluctant to

¹³⁸ See Cox, *supra* note 135, at 148 (observing that questions about the scope of reasonable accommodations remain unresolved because of the lack of precedent prior to the ADAAA).

¹³⁹ See Caroline Headrick, *Remote Work “Reasonable”? Why the COVID-19 Pandemic Calls for a Reinterpretation of the “Reasonable Accommodation” Standard, And How Companies Can Respond*, 40 MINN. J.L. & INEQ. 211, 233–34 (2022).

¹⁴⁰ See Sean P. Mulloy, Note, *Accommodating Absence: Medical Leave as an ADA Reasonable Accommodation*, 118 MICH. L. REV. 1629, 1631 (2020).

¹⁴¹ See Lyons v. Legal Aid Soc'y, 68 F.3d 1512, 1515 (2d Cir. 1995).

¹⁴² See Samrah Mahmoud, Note, *Determining the Appropriate Framework for Commuting Accommodations Under the Americans with Disabilities Act*, 2 U.C. IRVINE L. REV. 1023, 1045 (2012).

¹⁴³ Charles Conway, Comment, *Ordinarily Reasonable: Using the Supreme Court's Barnett Analysis to Clarify Preferential Treatment Under the Americans with Disabilities Act*, 22 AM. U. J. GENDER, SOC. POL'Y & L. 721, 723 (2014).

¹⁴⁴ See 42 U.S.C. § 12112.

¹⁴⁵ 29 C.F.R. § 1630.2(o)(3) (1997).

¹⁴⁶ Lin, *supra* note 62, at 1843.

¹⁴⁷ E.g., Garner v. Sch. Dist. of Phila., 63 F. Supp. 3d 483, 494 (E.D. Pa. 2014) (quoting Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 317 (3d Cir. 1999)), *aff'd sub nom.* Gardner v. Sch. Dist. of Phila., 636 F. App'x 79 (3d Cir. 2015).

punish employers for not engaging in the interactive process.¹⁴⁸ In many circuits, there is no per se liability for failing to engage in the interactive process; an employee who wishes to hold their employer accountable for failing to accommodate them must show both that their employer did not try to accommodate them *and* that a reasonable accommodation was possible.¹⁴⁹ For the reasons discussed above, the fact-specific nature of reasonable accommodations makes this difficult to show at the outset.

Courts have also held that employers may choose the accommodation ultimately given, so long as it is reasonable and effective, meaning that it enables the worker to do their job.¹⁵⁰ Employers are allowed to choose the less expensive option among two accommodations without having to show that the more costly option poses any sort of undue hardship.¹⁵¹ While the EEOC urges employers to give consideration to the preferences of the worker, they also find that employers have “the ultimate discretion to choose between effective accommodations.”¹⁵²

III. PREDICTING OUTCOMES UNDER THE PWFA: GOOD REASON TO BE OPTIMISTIC

Although the PWFA mirrors the ADA, pregnant workers can likely bypass many of the challenges that disabled workers face in litigation.

A. *Definitional Hurdles*

The PWFA states that accommodations are available on the basis of “known limitations related to . . . pregnancy, childbirth, or related medical conditions,” *regardless* of whether or not those limitations meet the ADA definition of a disability.¹⁵³ The proposed regulations for the PWFA emphasize that there is no severity requirement under the PWFA — even a “modest, minor, and/or episodic problem or impediment” will warrant protection.¹⁵⁴ Given that a substantial portion of ADA cases fail because the plaintiff does not demonstrate a condition

¹⁴⁸ Valderrama, *supra* note 124, at 209 (“Courts are hesitant to impose liability solely based on failure to engage in the interactive process. They observe that the ‘ADA . . . is not intended to punish employers for behaving callously’ where no accommodation is possible.” (footnote omitted) (quoting *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997))).

¹⁴⁹ *See, e.g.*, *Lafata v. Church of Christ Home for the Aged*, 325 F. App’x 416, 422 (6th Cir. 2009) (“Employers ‘who fail to engage in the interactive process in good faith[] face liability [under the ADA] if a reasonable accommodation would have been possible.’” (alterations in original) (quoting *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1116 (9th Cir. 2000) (en banc), *vacated on other grounds sub nom.* *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002))).

¹⁵⁰ *Stewart v. Happy Herman’s Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285–86 (11th Cir. 1997) (citing *Lewis v. Zilog, Inc.*, 908 F. Supp. 931, 947–48 (N.D. Ga. 1995)).

¹⁵¹ U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 118.

¹⁵² *Id.* (quoting 29 C.F.R. pt. 1630 app. § 1630.9 (1997)).

¹⁵³ 42 U.S.C.A. §§ 2000gg(4), 2000gg-1 (West Supp. 2023).

¹⁵⁴ Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714, 54717–18 (proposed Aug. 11, 2023) (to be codified at 29 C.F.R. pt. 1636).

meeting the statute's demanding test for a disability, this will likely make a major difference in the success of PWFA cases.

To be clear, what the PWFA does is fill in a gap left by the ADA. While the ADA will continue to provide accommodations for pregnancy accompanied by serious conditions, the PWFA extends those same protections on the basis of pregnancy itself, covering a broader swath of workers. For example, because morning sickness is a "known limitation" related to pregnancy, a worker will be able to secure accommodations, even if their condition is not severe enough to be a disability.¹⁵⁵ The EEOC's proposed regulations also contend that the PWFA covers preventative accommodations,¹⁵⁶ which the ADA has never covered.

Furthermore, unlike "disability," a contested term whose boundaries are constantly redrawn, pregnancy is a straightforward condition: someone is pregnant, or they are not. The PWFA's text mandates accommodations on the basis of "pregnancy, childbirth, or related medical conditions."¹⁵⁷ This is the same language used in the PDA,¹⁵⁸ and under the PDA, claims involving workers pregnant at the time of discrimination have always been clearly covered.¹⁵⁹ It stands to reason then that workers who request accommodations related to pregnancy, during their pregnancy, will also clearly qualify for the PWFA's protections. Even if there is some negotiation on the exact boundaries of the statute's protections, such as how far the statute's protections extend after pregnancy,¹⁶⁰ they will be less contentious than the disability debates. The EEOC, in its proposed regulations, has also suggested that whether a specific limitation is "related to pregnancy, childbirth, or related medical conditions" will be a "straightforward" inquiry.¹⁶¹ In addition, the PWFA entrenches the ADA's doctrinal expansion for qualifying workers who are temporarily unable to perform the essential duties of their jobs.¹⁶² Since all pregnancies are time bound, the inclusion of workers who are temporarily incapacitated should cover all pregnant workers, so long as they were able to perform the duties of their jobs before.

This is not to say there will be no definitional debates under the PWFA. Under the PDA, there is debate as to whether the statute covers menstruation, menopause, breastfeeding, potential pregnancy, and other

¹⁵⁵ Cf. 42 U.S.C.A. § 2000gg(4).

¹⁵⁶ See Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. at 54720.

¹⁵⁷ 42 U.S.C.A. § 2000gg-1.

¹⁵⁸ 42 U.S.C. § 2000e(k).

¹⁵⁹ See, e.g., *Briggs v. Women in Need, Inc.*, 819 F. Supp. 2d 119, 127 (E.D.N.Y. 2011) ("Courts have found that an employee terminated while pregnant . . . is a member of the protected class.").

¹⁶⁰ For an analogous debate under the PDA, see *id.* (finding a worker less than nine weeks postpartum was still covered by the PDA because of "sufficiently close temporal proximity between her childbirth and related medical condition").

¹⁶¹ Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. at 54720.

¹⁶² See 42 U.S.C.A. § 2000gg(4).

conditions related to reproductive function.¹⁶³ Many of those same questions will likely carry over, although breastfeeding accommodations are already covered by a separate amendment to the Fair Labor Standards Act.¹⁶⁴ It is unclear if courts will read the PWFA to cover associational accommodations (accommodations for people associated with a pregnant person, like a spouse) or nonbiological bases for accommodations (accommodations like time off to purchase baby supplies), although if they look to the ADA or the PDA for guidance, such an expansion is unlikely. The ADA does not provide accommodations for those associated with someone with a disability,¹⁶⁵ and the PDA's definition of pregnancy-related discrimination limits claims to biological conditions of pregnancy.¹⁶⁶ But, in most PWFA cases, workers will face little resistance from courts on the definitional inquiry.

B. Factual Hurdles

The vast majority of requested pregnancy accommodations are straightforward. Most effective workplace pregnancy accommodations are low cost or no cost to the employer: common examples include being allowed to carry a water bottle, being allowed to sit, or being allowed to take restroom breaks.¹⁶⁷ While these accommodations may seem simple, many workers do not have access to these kinds of workplace changes without a statutory mandate. One of the driving motivations behind passing the PWFA was to protect low-wage pregnant workers, who have little autonomy at work and for whom even simple

¹⁶³ See Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law as It Approaches Full Term*, 52 IDAHO L. REV. 825, 832–46 (2016) (discussing how the “EEOC concluded that a contraceptive exclusion constitutes a form of pregnancy discrimination,” *id.* at 833, how potential pregnancy is protected under the PDA, *id.* at 835–37, and how some courts found lactation to be covered by the PDA as a medical condition related to pregnancy, *id.* at 845–46).

¹⁶⁴ 29 U.S.C. § 218d (as amended by the Providing Urgent Maternal Protections for Nursing Mothers Act, Pub. L. No. 117-328, div. KK, sec. 102(a)(2), § 18D, 136 Stat. 6093, 6093–95 (2022)). The EEOC’s proposed regulations purport to extend the PWFA’s coverage to limitations related to potential or intended pregnancy, pregnancy loss, abortion, and lactation. Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. at 54721. These proposals have faced some pushback in the comment process. Riddhi Setty, *New EEOC Proposal’s Broad Pregnancy-at-Work Rights Draw Ire (1)*, BLOOMBERG L. (Aug. 11, 2023, 4:58 PM), <https://news.bloomberglaw.com/daily-labor-report/new-eeoc-proposals-broad-pregnancy-at-work-rights-draw-some-ire> [https://perma.cc/93J8-KM74]. Since this Note will be published before the final regulations are issued, it will refrain from discussing whether these expansions are likely to remain in the regulations.

¹⁶⁵ See, e.g., *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1084 (10th Cir. 1997) (concluding that there is no right to associational ADA accommodations).

¹⁶⁶ According to the Senate Report for the PDA, this phrase was chosen to reflect those “physiological occurrences peculiar to women.” S. REP. NO. 95-331, at 4 (1977). For a discussion of why the PDA ought to be expanded to cover nonbiological conditions, see generally David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM L. REV. 309 (2019).

¹⁶⁷ FACT SHEET, *supra* note 47, at 2.

adjustments like bathroom breaks are difficult to individually secure.¹⁶⁸ For that reason, it is likely that in many cases, courts tasked with assessing the reasonableness of an accommodation will find it reasonable.

State-level PWFA laws support this prediction. In Massachusetts, Minnesota, and Washington, the corresponding PWFA for each state prohibits employers from requesting medical documentation or a doctor's note for certain accommodations, including water breaks or bathroom breaks.¹⁶⁹ Minnesota's law goes even further to explicitly state that certain accommodations, such as "more frequent restroom, food, and water breaks . . . seating . . . and limits on lifting over 20 pounds" can never constitute an undue hardship for employers.¹⁷⁰

Even for more involved accommodations, such as remote work, the time-bound nature of pregnancy makes these accommodations more likely to be reasonable. For example, it is settled that indefinite leave is not a reasonable ADA accommodation.¹⁷¹ However, leave can be considered reasonable when it has a definite end point.¹⁷² Similarly, indefinite reassignment is another unreasonable accommodation¹⁷³ that can be made reasonable by a definite end point¹⁷⁴ — since the PWFA defines "qualified employee" as one who is temporarily unable to perform a duty, the EEOC's proposed regulations note that temporary suspension of job duties is a reasonable accommodation.¹⁷⁵

Finally, the nature of pregnancy will likely make it easier for the EEOC, employers, and courts to create general principles about which accommodations are reasonable. One major difficulty with developing general rules under the ADA is that disability is a massive umbrella

¹⁶⁸ See *id.*; Maleaha A. Brown, Note, *The Unfair Choice: A Call for Reasonable Accommodations for Pregnant Workers*, 1 HOW. HUM. & C.R.L. REV. 133, 154 (2016–2017); TUCKER ET AL., *supra* note 48, at 4 ("Of the 25% lowest paid workers in 2020, 92% did not have access to a flexible work schedule.").

¹⁶⁹ MASS. GEN. LAWS. ch. 151B, § 4 (2023), <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter151B/Section4> [<https://perma.cc/94J6-AHHS>]; MINN. STAT. § 181.939 (2022); WASH. REV. CODE § 43.10.005 (2023).

¹⁷⁰ MINN. STAT. § 181.939 (2022).

¹⁷¹ See, e.g., *Garner v. Sch. Dist. of Phila.*, 63 F. Supp. 3d 483, 492 (E.D. Pa. 2014) ("[A] leave of absence for an indefinite duration is not a reasonable accommodation."), *aff'd sub nom.* *Gardner v. Sch. Dist. of Phila.*, 636 F. App'x 79 (3d Cir. 2015).

¹⁷² See, e.g., *Graves v. Finch Pruyne & Co.*, 457 F.3d 181, 186 n.6 (2d Cir. 2006) (noting how leave generally "may be a reasonable accommodation where it is finite").

¹⁷³ See *Alexander v. Northland Inn*, 321 F.3d 723, 727–28 (8th Cir. 2003) (finding that a reassignment was unreasonable because "it would have required [the employer] to assign [the employee's] vacating responsibilities to other employees for an indefinite period").

¹⁷⁴ *Delaney v. Township of Ocean*, 246 A.3d 188, 200 (N.J. 2021) (finding that under the New Jersey PWFA, "a temporary accommodation such as light-duty work may be required . . . while a permanent accommodation of similar light work would not").

¹⁷⁵ Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714, 54779 (proposed Aug. 11, 2023) (to be codified at 29 C.F.R. pt. 1636).

term.¹⁷⁶ By contrast, although pregnancy conditions can vary, many limitations tend to repeat: a need for less physical activity, a need to avoid repetitive motions, and so forth.¹⁷⁷ Accordingly, accommodations for pregnancy tend to be similar: exemptions from heavy physical labor, access to bathroom breaks, and ability to carry water. For that reason, it will be significantly easier for the EEOC and courts to provide more detailed principles on what constitutes a reasonable accommodation for pregnancy than it was under the ADA, and for pregnant workers to understand their rights. Employers who encounter repeated requests for the same pregnancy accommodations may also be able to develop consistent guidelines that can be shared with workers ahead of time.¹⁷⁸ In its proposed regulations, the EEOC, following in the footsteps of multiple state laws,¹⁷⁹ detailed four accommodations that are presumptively reasonable: “(1) allowing an employee to carry water and drink, as needed, in the employee’s work area; (2) allowing an employee additional restroom breaks; (3) allowing an employee whose work requires standing to sit and whose work requires sitting to stand[;] and (4) allowing an employee breaks, as needed, to eat and drink.”¹⁸⁰

C. Procedural Hurdles

Finally, unlike ADA litigants, PWFA litigants have access to mandated procedures that will help secure their choice of accommodation, as well as protect their right to negotiate for accommodations.

First, the PWFA’s text incorporates the interactive process: “It shall be an unlawful employment practice for a covered entity to . . . require a qualified employee . . . to accept an accommodation [not] arrived at through the interactive process.”¹⁸¹ While most courts recognize the use of the interactive process in ADA accommodations, the fact that it is not in the text of the ADA leaves room for debating whether it is required. The PWFA avoids this issue by directly naming the process. As in the ADA, a refusal to engage in the interactive process is not itself a violation of the PWFA, but refusing to engage in the process when a

¹⁷⁶ See Lin, *supra* note 62, at 1874; Jennifer Bennett Shinall, *Anticipating Accommodation*, 105 IOWA L. REV. 621, 627 (2020) (describing the “heterogeneity of disability” as a key barrier for employers trying to predict and provide accommodations).

¹⁷⁷ TUCKER ET AL., *supra* note 48, at 1.

¹⁷⁸ See Lin, *supra* note 62, at 1874.

¹⁷⁹ For example, Illinois defines a list of accommodations that are considered reasonable, including “more frequent or longer bathroom breaks, breaks for increased water intake, and breaks for periodic rest.” Alamea Deede Bitran, *What Is Due with a Due Date: Reasonable Pregnancy Accommodations in the Workplace*, 37 WOMEN’S RTS. L. REP. 134, 152 (2016). The PWFA laws in Connecticut, Delaware, and Louisiana also list possible accommodations. CONN. GEN. STAT. § 46a-60(a) (2023), https://www.cga.ct.gov/current/pub/chap_814c.htm#sec_46a-60 [<https://perma.cc/N44D-HAAE>]; 19 DEL. CODE tit. 29, § 710(21) (2023); LA. STAT. § 23:341.1 (2023), <https://www.legis.la.gov/legis/Law.aspx?d=1239187> [<https://perma.cc/2MNK-YXCH>].

¹⁸⁰ Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. at 54785.

¹⁸¹ 42 U.S.C.A. § 2000gg-1 (West Supp. 2023).

reasonable accommodation was possible is.¹⁸² For the reasons outlined above, since it will be easier to show a reasonable accommodation, PWFA litigants will likely also be more able to demonstrate unlawful refusals to engage in the interactive process.

Furthermore, the statute protects employees from having to accept any accommodations that were not achieved through an interactive process, but it also does not mandate the use of the interactive process. This one-way ratchet is well designed: it protects workers from being forced to accept unilaterally imposed accommodations, allowing them to better bargain for their accommodation of choice, but also maintains efficiency in cases where the right accommodation is obvious and there is no need for an interactive process. One state case interpreting the Washington PWFA even held that per se reasonable accommodations overrode the general employer choice rule: employers must grant all per se reasonable requested accommodations and cannot impose an alternative.¹⁸³

Finally, the PWFA protects workers from being pushed out of their jobs with unpaid leave if there is another suitable accommodation.¹⁸⁴ Since unpaid leave is undesirable for workers who need continued income, this restriction on the employer's discretion in selecting an accommodation will help protect workers who want to keep working.

CONCLUSION

The nature of pregnancy accommodations and the PWFA's updates to the ADA indicate that pregnant workers will fare better than disabled workers in securing accommodations. Initial studies of state PWFAs support this prediction, finding positive outcomes for pregnant workers, including higher wages and employment rates.¹⁸⁵ Of course, many open questions remain about how the ADA and PWFA will interact: Will the low cost of PWFA accommodations be used to argue against more costly ADA accommodations? How might a worker covered by both statutes navigate the two? Will the burdens of proof differ?

As the EEOC finalizes PWFA regulations this winter and as courts begin to hear cases under the law, answers to these questions will evolve. As scholars have noted, individual accommodation models for workplace equity are far from perfect.¹⁸⁶ But an initial assessment indicates that there is good reason to celebrate the PWFA.

¹⁸² Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. at 54787.

¹⁸³ *Arroyo v. Pac. Mar. Ass'n*, 529 P.3d 1, 12 (Wash. Ct. App. 2023).

¹⁸⁴ See 42 U.S.C.A. § 2000gg.

¹⁸⁵ Shinall, *supra* note 9, at 987, 1015–18.

¹⁸⁶ This accommodations model of “privatized regulation” places a heavy burden on individual employees, who have to combat information asymmetry, low bargaining power, and employer resistance to secure their right to an accommodation. See Lin, *supra* note 62, at 1835, 1867. While the PWFA is indeed subject to these pitfalls, its clarity around who qualifies and what constitutes reasonable accommodation minimizes the impact of individual bargaining on accommodation outcomes, making it more likely workers can still benefit from the law's protections.