

RECENT PROPOSED RULE

LABOR AND EMPLOYMENT LAW — PREGNANCY AND MEDICAL RESIDENCY — PROPOSED REGULATIONS TO THE PREGNANT WORKERS FAIRNESS ACT RELEASED. — Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714 (proposed Aug. 11, 2023) (to be codified at 29 C.F.R. pt. 1636).

Night shifts, long hours, high-stress conditions — medical residency is notoriously strenuous.¹ For residents who want to become parents, this training, practically necessary to becoming a physician,² almost inescapably coincides with prime childbearing years.³ As such, medical residents are at a higher risk for adverse health outcomes and complications related to pregnancy.⁴ While some institutions have voluntarily adopted more protective pregnant-worker accommodations policies in recent years,⁵ the Pregnant Workers Fairness Act⁶ (PWFA) may offer a new tool to legally require residencies to accommodate all pregnant residents.⁷ The PWFA requires employers to provide reasonable accommodations to employees for “pregnancy, childbirth, or related medical

¹ E.g., Pauline W. Chen, *The Impossible Workload for Doctors in Training*, N.Y. TIMES: WELL (Apr. 18, 2013, 12:01 AM), <https://archive.nytimes.com/well.blogs.nytimes.com/2013/04/18/doing-the-math-on-resident-work-hours> [<https://perma.cc/G29B-NCGT>].

² See *Bos. Med. Ctr. Corp.*, 330 N.L.R.B. 152, 153 (1999) (“While it is not necessary for a doctor to be certified in a specialty to practice medicine, some medical institutions and practices are beginning to require certification. Accordingly, a physician’s failure to be certified in a specialty may limit the employment opportunities of that physician.”).

³ See Susan Coppa, *Baby, Then Work: An Effort to Help Resident-Parents in Emergency Medicine*, STAN. MED.: SCOPE (Feb. 20, 2019), <https://scopeblog.stanford.edu/2019/02/20/baby-then-work-an-effort-to-help-resident-parents-in-emergency-medicine> [<https://perma.cc/85KW-VNQV>] (“There’s nothing new about juggling family and career. It’s just that residency is a particularly difficult time to be pregnant and/or a new parent. And the reality is we are training more female physicians than ever before, and many don’t want or cannot wait to have children.”); Janis E. Blair et al., *Pregnancy and Parental Leave During Graduate Medical Education*, 91 ACAD. MED. 972, 972 (2016) (stating that almost half of surveyed residents plan to have children during residency).

⁴ Shobha W. Stack et al., *Parenthood During Graduate Medical Education: A Scoping Review*, 94 ACAD. MED. 1814, 1818 (2019) (noting that surveyed pregnant residents had higher rates of preterm labor, preeclampsia, and fetal growth restriction compared to pregnant nonresidents); see also MASS. GEN. HOSP., THE MGH DEPARTMENT OF SURGERY GENERAL SURGERY RESIDENCY GUIDE FOR EXPECTANT AND NEW PARENTS 6 (2023), https://www.massgeneral.org/assets/mgh/pdf/surgery/mgh-surgical-residency_parental-support.pdf [<https://perma.cc/7EVT-AGM8>] (“[M]iscarriage is common and may be more common for surgical residents . . .”).

⁵ E.g., Press Release, Am. Bd. of Med. Specialties, ABMS Announces Progressive Leave Policy for Residents and Fellows (July 13, 2020), <https://www.abms.org/newsroom/abms-announces-progressive-leave-policy-for-residents-and-fellows/#policy> [<https://perma.cc/6W4H-7J9A>].

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

⁷ See Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714 (proposed Aug. 11, 2023) (to be codified at 29 C.F.R. pt. 1636).

conditions” unless doing so would cause an undue hardship.⁸ Medical residencies, however, fall into a gray zone.⁹ Though medical residents are full employees of their programs, they are also students.¹⁰ The Equal Employment Opportunity Commission’s (EEOC) proposed regulations offer little insight into how to navigate this unique context. Although the PWFA’s impact on medical residents may be restricted as courts are likely to take into account the employer’s business and education interests, the mandated interactive process could potentially result in stronger protections for medical residents.

Introduced over a decade ago, the PWFA repeatedly failed in committee until 2019, when the House Committee on Education and Labor held a hearing to discuss the legislation.¹¹ During the hearing, one theme resounded: women were repeatedly forced to contravene their doctors’ orders for the sake of their employment.¹² Dina Bakst, co-founder and copresident of the nonprofit A Better Balance, testified to the stories of women denied accommodations despite doctors’ notes.¹³ One woman, Whitney LaCount, presented her employer with a doctor’s note explaining a heavy-lifting restriction, only to be deemed a

⁸ 42 U.S.C. § 2000gg-1(1).

⁹ The dual purpose of medical residencies has previously engendered debates about the applicability of existing federal civil rights statutes, specifically Title VII and Title IX. *See* Kendyl L. Green, *Title VII, Title IX, or Both?*, 14 SETON HALL CIR. REV. 1, 18 (2017) (explaining that in cases in which the plaintiff is an employee of a federally funded academic institution, several circuits have “found Title VII to preempt Title IX”); *Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d 545, 563, 567 (3d Cir. 2017) (citing *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005); *Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995); *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 861–62 (7th Cir. 1996), *abrogated in part on other grounds by Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009) (holding that Title VII did not bar a medical resident’s Title IX claims, but noting that the Fifth and Seventh Circuits have ruled oppositely)).

¹⁰ In various contexts, parties have litigated whether residents are employees under specific federal employment laws. *See Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 60 (2011) (upholding a Treasury Department rule that treated medical residents as full-time employees but acknowledging their participation in “a formal and structured educational program,” *id.* at 48 (quoting Brief for Petitioners at 5, *Mayo Found. for Med. Educ. & Rsch.*, 562 U.S. 44 (No. 09-837))); *Bos. Med. Ctr. Corp.*, 330 N.L.R.B. 152, 159 (1999) (holding that residents are employees under the National Labor Relations Act). The PWFA includes employees who are currently covered by Title VII. 42 U.S.C. § 2000gg(3)(A). Courts have considered medical residents to be employees under Title VII. *See Mercy Cath. Med. Ctr.*, 850 F.3d at 559. As such, this comment does not assess if medical residents are covered by the term “employee” in the PWFA. Instead, assuming they are employees, it emphasizes that the dual purpose of their employment complicates applying the PWFA to medical residency.

¹¹ H.R. REP. NO. 117-27, pt. 1, at 8–10 (2021).

¹² *See generally Long Over Due: Exploring the Pregnant Workers’ Fairness Act (H.R. 2694): Hearing Before the Subcomm. on C.R. & Hum. Servs. of the H. Comm. on Educ. & Lab.*, 116th Cong. (2019) [hereinafter *PWFA Hearing*]. Testimonies also discussed how the PWFA would address gaps in coverage under the Family and Medical Leave Act of 1993 (FMLA), the Americans with Disabilities Act of 1990, and Title VII as amended by the Pregnancy Discrimination Act. *Id.* at 29. For an in-depth analysis of how the PWFA will address the gaps, see generally Note, *Finally Protected: Analyzing the Potential of the Pregnant Workers Fairness Act*, 137 HARV. L. REV. 662 (2023).

¹³ *PWFA Hearing*, *supra* note 12, at 40–74.

“liability.”¹⁴ LaCount was not alone — Bakst’s testimony was replete with examples of women forced to decide between abiding by their doctors’ orders and keeping their jobs.¹⁵ Representative Suzanne Bonamici submitted an article from the *New York Times* describing an even more egregious case where a doctor sent multiple follow-up notes to no avail.¹⁶ Ultimately, Bakst explicitly laid out the bottom line: pregnant individuals “need clear rights to accommodations so they can follow their doctors’ orders and stay healthy and on the job.”¹⁷

After years of struggle, Congress passed the PWFA in December 2022, President Biden subsequently signed the PWFA into law,¹⁸ and the Act took effect on June 27, 2023.¹⁹ The Act requires employers to reasonably accommodate “known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee” unless they can prove that such accommodations would cause an “undue hardship” to their business operations.²⁰ The PWFA regulates private and public employers with fifteen employees or more.²¹ An individual is a “qualified employee” for protection under the PWFA if they can perform the essential job functions of their role — with or without reasonable accommodations²² — or could perform those essential functions in the near future.²³ Further, the Act prohibits methods of circumventing the accommodation regime. An employer may not require an employee to accept an unreasonable accommodation,²⁴ compel an employee to take leave when another reasonable accommodation is available,²⁵ or retaliate against an employee who requests an accommodation.²⁶

In August 2023, the EEOC issued its proposed rules for enforcing the PWFA.²⁷ Under the proposed regulation, the term “reasonable accommodations” should be interpreted similarly as under the Americans

¹⁴ *Id.* at 60 (quoting LaCount v. Lewis SH OPCO, LLC, No. 16-CV-0545, 2017 WL 1826696, at *1 (N.D. Okla. May 5, 2017)).

¹⁵ *See id.* at 41, 46–48.

¹⁶ *Id.* at 106–07 (citing 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/6ZKD-FXNP>]).

¹⁷ *Id.* at 76.

¹⁸ Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714, 54772 (proposed Aug. 11, 2023) (to be codified at 29 C.F.R. pt. 1636).

¹⁹ *Id.* at 54750 n.207.

²⁰ 42 U.S.C. § 2000gg-1(1) (Supp. IV 2023).

²¹ *Id.* § 2000gg(2)(B)(i).

²² *Id.* § 2000gg(6). “Essential function” is a term of art borrowed from the Americans with Disabilities Act of 1990 and means “the fundamental duties of the job.” Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. at 54718.

²³ 42 U.S.C. § 2000gg(6) (Supp. IV 2023).

²⁴ *Id.* § 2000gg-1(2).

²⁵ *Id.* § 2000gg(4).

²⁶ *Id.* § 2000gg(2), (4)–(5).

²⁷ *See generally* Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. at 54714.

with Disabilities Act²⁸ (ADA).²⁹ The EEOC describes a reasonable accommodation as one that “seems reasonable on its face, i.e., ordinarily or in the run of cases” and appears to be “feasible” or “plausible.”³⁰ The EEOC’s regulation describes three broad categories of reasonable accommodations and provides guidance on their implementation. First, an employee may request an accommodation that will allow them to continue to perform the essential functions of the job.³¹ Second, an employee can request that their essential functions be suspended, provided that the employee can return to performing it within forty weeks.³² And third, an employee may go on temporary leave.³³ In implementing any of these accommodations, “the covered entity may have to prorate or change [the employee’s] performance or production standard so that the accommodation is effective.”³⁴

The PWFA balances an employee’s need for accommodations against an employer’s legitimate business interests by allowing employers to deny accommodations that cause an undue hardship.³⁵ Any accommodation that causes a “significant difficulty or expense for the operation of the covered entity” is an undue hardship.³⁶ To balance both parties’ interests, the employer must engage in an “interactive process” with the employee.³⁷ This process must be individualized, problem-solving oriented, collaborative, and ultimately geared toward reaching a suitable solution for both the employee and the employer.³⁸ In line with the interactive command, the regulations prohibit rigid fixed-leave policies that disallow any exceptions.³⁹

Considering one of the animating concerns in passing the PWFA was to ensure an employee’s ability to comply with doctors’ orders and stay

²⁸ 42 U.S.C. §§ 12101–12213, 47 U.S.C. § 225.

²⁹ Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. at 54723 (emphasis omitted). For examples of how the courts have evaluated ADA accommodations claims in the academic-medical context, see, for example, *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 201 (6th Cir. 2010); *Rodrigo v. Carle Found. Hosp.*, 879 F.3d 236, 241–42 (7th Cir. 2018); *Diederich v. Providence Health & Servs.*, 622 F. App’x 613, 614 (9th Cir. 2015); *Shin v. Univ. of Md. Med. Sys. Corp.*, 369 F. App’x 472, 473 (4th Cir. 2010); *Shaboon v. Duncan*, 252 F.3d 722, 737 (5th Cir. 2001); see also Alexandra Regenbogen & Patricia R. Recupero, *The Implications of the ADA Amendments Act of 2008 for Residency Training Program Administration*, 40 J. AM. ACAD. PSYCHIATRY & L. 553, 556 (2012).

³⁰ Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. at 54723.

³¹ See *id.*

³² *Id.* at 54723–24. The forty-week clock for temporary suspension of an essential function can begin once the employee has returned to work after leave. *Id.* at 54725.

³³ *Id.* at 54724. An employer is not required to provide additional paid leave under the PWFA. *Id.* at 54780.

³⁴ *Id.* at 54726.

³⁵ *Id.* at 54723; see also *id.* at 54769.

³⁶ *Id.* at 54718.

³⁷ *Id.* at 54786.

³⁸ *Id.* at 54786–87.

³⁹ *Id.* at 54744.

healthy,⁴⁰ it is ironic that medical residents have not been able to abide by the very recommendations they offer their patients. Protecting medical residents through the PWFA is necessary to address pregnancy discrimination commonly experienced by physicians and residents alike.⁴¹ While the regulations clarify and operationalize the statute by providing illustrative examples, including two in clinical settings,⁴² they do not illustrate how the Act may apply to student workers broadly — let alone residents specifically.⁴³ With little guidance from these regulations, applying the PWFA to medical residents may prove challenging given that courts will likely consider both the educational and business interests of the programs. Nonetheless, the interactive process commanded by the PWFA may be a step toward better protecting medical residents.

Courts will likely consider the educational goals of the residency-employer when assessing the reasonableness of any accommodation,⁴⁴ thus potentially weakening the PWFA's protections for medical residents. In the ADA context, courts have recognized that reasonableness is highly fact dependent.⁴⁵ And where one party is a medical-academic institution, and the other is a student, courts have unabashedly asserted a deferential approach to evaluating academic decisions — for instance, in refusing to alter course curriculums.⁴⁶ Given that the PWFA

⁴⁰ See *PWFA Hearing*, *supra* note 12, at 15, 42, 94.

⁴¹ See generally Kristin Pulatie, *Bias Against Pregnant Medical Residents*, 10 *AMA J. ETHICS* 453, 453–55 (2008); Meghan C. Halley et al., *Physician Mothers' Experience of Workplace Discrimination: A Qualitative Analysis*, *THE BMJ*, Dec 12, 2018, art. k4926, at 4–5 (2018), <https://doi.org/10.1136/bmj.k4926> [<https://perma.cc/S4D9-XNZJ>].

⁴² See Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. at 54714, 54733, 54785 (detailing how the request of a dental hygienist who asks to telework while undergoing IVF treatments may be an undue hardship because the hygienist's "essential functions include treating patients at the dental office"); *id.* at 54731, 54782 (describing a nurse assistant who requests accommodations because of weight-lifting restriction).

⁴³ Additionally, as they pertain to leave as an accommodation, the proposed regulations do not give examples of how much leave is appropriate. See *id.*

⁴⁴ For example, in *Wynne v. Tufts University School of Medicine*, 976 F.2d 791 (1st Cir. 1992), the First Circuit recognized "the unique considerations that come into play when the parties . . . are a student and an academic institution, particularly a medical school training apprentice physicians." *Id.* at 793. The *Wynne* court formulated a test to determine whether the institution adequately explored the availability of accommodations, declaring that accommodations could be forgone if it "would result either in lowering academic standards or requiring substantial program alteration." *Id.* (quoting *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 26 (1st Cir. 1991) (en banc)).

⁴⁵ See *id.* at 795. It is worth noting that this case, which involved the Rehabilitation Act of 1973, remains relevant, as courts typically treat reasonable accommodation analyses similarly in both the Rehabilitation Act of 1973 and ADA cases. See Jeffrey O. Cooper, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 *U. PA. L. REV.* 1423, 1425–26 (1991).

⁴⁶ See *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1049–50 (9th Cir. 1999) (finding that, in the accommodations context, courts should afford "great respect . . . [to] faculty's professional judgment" about "the substance of a genuinely academic decision," *id.* at 1047 (quoting *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985))); *Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1266 (4th Cir. 1995) ("We are reluctant under these circumstances to substitute our judgment for that of [the academic-medical institution]."); *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 88 (2d Cir. 2004) (citing *Ewing*, 474 U.S. at 225).

regulations rely on the ADA, these decisions are probative. Not only do residency programs seek to maintain their educational efficacy, but also courts will likely want to recognize the parameters and standards set forth by national accrediting institutions.⁴⁷ These institutions set a resident's requirements to sit for the board examination.⁴⁸ As such, some accommodations normally negotiable under the PWFA may be off the table for medical residents. For instance, it is uncertain if suspending essential duties for a maximum of forty weeks after taking leave is feasible without impeding the resident's educational advancement, as assessed by the benchmarks set by the accrediting institutions.

While some deference to academic prerogatives may be warranted, judicial review is not a rubber stamp.⁴⁹ Admittedly, given that residency serves to ensure doctors have adequate skills to handle patients' lives, courts may feel ill equipped to determine the necessary requirements to achieve this outcome. Nevertheless, as the Ninth Circuit noted in *Zukle v. Regents of the University of California*,⁵⁰ in extending deference to these institutions, the courts "must be careful not to allow academic decisions to disguise truly discriminatory requirements."⁵¹ The court acknowledged the need to balance deference to educational institutions with enforcing the ADA.⁵² Institutions must actively seek some suitable accommodations for covered individuals and provide evidence of their efforts.⁵³ Only once this obligation is met can the court defer to the medical-academic institution's decisions.⁵⁴

Still, the PWFA's protections for medical residents may be further limited by the hospital's business considerations. The undue hardship analysis, which considers the hospital's business interests in delivering care, can also limit the protections offered to medical residents. Courts may consider that the impact of a resident taking leave or not

⁴⁷ For example, the American Board of Medical Specialties was established to create "a system to assure the public that medical specialists are properly trained," which "meant creating some tough standards for education and evaluation. It also required forming a national system to enforce the standards and to identify qualified specialists in a way everyone can easily recognize[]." *Our Story*, AM. BD. MED. SPECIALTIES, <https://www.abms.org/about-abms/our-story/> [<https://perma.cc/HAD6-X7UY>]; see also *Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d 545, 550 (3d Cir. 2017) (recognizing the far-reaching role of the Accreditation Council for Graduate Medical Education (ACGME) in ensuring the quality of medical residents' educations across the United States).

⁴⁸ See, e.g., REV. COMM. FOR EMERGENCY MED., ACGME, EMERGENCY MEDICINE DEFINED KEY INDEX PROCEDURE MINIMUMS (Nov. 2017), https://www.acgme.org/globalassets/pfassets/programresources/em_key_index_procedure_minimums_103117.pdf [<https://perma.cc/N4QG-VNfy>] (noting procedure requirements that emergency medicine residents must complete); *Emergency Medicine Eligibility*, AM. BD. PHYSICIAN SPECIALTIES (July 2020), <https://www.abpsus.org/emergency-medicine-eligibility/> [<https://perma.cc/R576-MLU5>] (detailing work hour requirements).

⁴⁹ See *Dean v. Univ. at Buffalo Sch. of Med. & Biomedical Scis.*, 804 F.3d 178, 191 (2d Cir. 2015).

⁵⁰ 166 F.3d 1041.

⁵¹ *Id.* at 1048.

⁵² *Id.*

⁵³ *Id.* (quoting *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 25–26 (1st Cir. 1991) (en banc)).

⁵⁴ *Id.*

performing an essential job function might be most significant in rural areas, hospitals where residents help alleviate the effects of the national doctor shortage, or where programs are generally smaller.⁵⁵ After all, the PWFA regulations contemplate a scenario in which the inability of an employee to perform clinical responsibilities may cause undue hardship for the employer.⁵⁶

At the same time, there are reasons to be hopeful about the PWFA's ability to protect pregnant residents. Specifically, mandating an interactive process and prohibiting leave policies that deny any exceptions potentially helps ensure that pregnant residents can comply with doctors' orders.⁵⁷ For example, medical residency programs must determine on a case-by-case basis the duration of parental leave to which a resident is entitled under the PWFA — programs can take into consideration not just requirements for board certification, but also the resident's prior performance, which is easily measured under existing systems of evaluation.⁵⁸ If a given resident surpasses educational benchmarks, the interactive process should require the program to consider this when determining the length of parental leave.⁵⁹ This process

⁵⁵ See *Shin v. Univ. of Md. Med. Sys. Corp.*, 369 F. App'x 472, 473 (4th Cir. 2010) (analyzing the extent to which accommodations caused "a greater burden of responsibility on the other interns"); Jazmin Orozco Rodriguez, *Doctor Shortages Distress Rural America, Where Few Residency Programs Exist*, CBS NEWS (Apr. 10, 2023, 5:00 AM), <https://www.cbsnews.com/news/doctor-shortages-rural-health-care-elko-nevada> [<https://perma.cc/8PGQ-RJ3D>] ("[Four residents] make up more than a third of the family practice providers at a health clinic in Elko, a city of about 20,000 people in the largely rural 500-mile stretch between Reno, Nevada, and Salt Lake City."); see Kimberly A. Chernoby et al., *Flexible Scheduling Policy for Pregnant and New Parent Residents: A Descriptive Pilot Study*, AEM EDUC. & TRAINING, Apr. 2021, art. e10504, at 6, <https://doi.org/10.1002/aet2.10504> [<https://perma.cc/X5QC-VNEA>]. *But cf.* Coppa, *supra* note 3 (noting, in contrast, that emergency medicine residency programs tend to be larger and thus accommodations may be easier to administer).

⁵⁶ See Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714, 54785 (proposed Aug. 11, 2023) (to be codified at 29 C.F.R. pt. 1636).

⁵⁷ The American College of Obstetricians and Gynecologists recommends a minimum of eight weeks paid leave, and the American Academy of Pediatrics supports a twelve-week paid parental leave policy, citing research that demonstrates positive health outcomes for both parents and children. *Paid Parental Leave: Statement of Policy*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (Nov. 2023), <https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/paid-parental-leave> [<https://perma.cc/D7VF-5HG2>]; Diana J. Lu et al., *Paid Parental Leave Policies Among U.S. News & World Report 2020–2021 Best Hospitals and Best Hospitals for Cancer*, JAMA NETWORK OPEN, May 11, 2021, art. e218518, at 1, <https://doi.org/10.1001/jamanetworkopen.2021.8518> [<https://perma.cc/R84A-T4TX>].

⁵⁸ See generally Aendem Ekpenyong et al., *The Purpose, Structure, and Process of Clinical Competency Committees: Guidance for Members and Program Directors*, 13 J. GRADUATE MED. EDUC. 45, 45–48 (2021), <https://doi.org/10.4300/JGME-D-20-00841.1> [<https://perma.cc/A7EU-AVBF>]. All residencies have clinical competency committees, which are required bodies "comprising 3 or more members of the active teaching faculty that is advisory to the program director and reviews the progress of all residents." *Id.* at 45.

⁵⁹ See generally Emma B. Holliday et al., *Pregnancy and Parenthood in Radiation Oncology, Views and Experiences Survey (PROVES): Results of a Blinded Prospective Trainee Parenting and*

stands in stark contrast to the status quo. In a 2018 qualitative study documenting physician mothers' experiences of workplace discrimination during pregnancy, several participants noted that their programs rejected their accommodation requests despite the residents' high skill levels.⁶⁰ One participant requested to start clinic fifteen minutes later but, despite having been told multiple times that “[she is] faster/see[s] more patients than any of the other residents,” was rejected.⁶¹ As another resident articulated: “I was the golden child — until I got pregnant.”⁶² Now, by requiring residencies to engage in an individualized, interactive process, the PWFA better positions pregnant residents to assert their rights — even those to which they were technically entitled under existing federal legislation.⁶³

The merging of education and employment could complicate the applicability of the PWFA for more people than just residents; graduate students and student athletes may also encounter similar questions.⁶⁴ Nonetheless, protecting medical residents is particularly important. Medical residents are distinctively and almost inescapably employed in a hybrid work-education program during their prime childbearing years.⁶⁵ And failing to protect medical residents ironically undermines a foundational commitment of the PWFA: to ensure all workers can abide by doctors' orders. Ultimately, while the full force of the PWFA may be attenuated for medical residents, mandating the interactive process will at least require programs to interrogate current policies. Moving forward, the EEOC should clarify how the PWFA applies to employees who are also students. Judicial oversight ensuring that residencies are making a good faith effort to engage in the interactive process will be critical to progress. The PWFA should not become a missed opportunity to hold the medical community to its own commitment to, above all else, “do no harm” by protecting the health of pregnant residents.⁶⁶

Career Development Assessment, 92 INT'L J. RADIATION ONCOLOGY, BIOLOGY, PHYSICS 516 (2015) (noting that female radiation oncology residents who had children managed to maintain their academic progress on par with both male and nonparent counterparts).

⁶⁰ Halley et al., *supra* note 41, at 5.

⁶¹ *Id.*

⁶² *Id.* at 8.

⁶³ For instance, some residents eligible for twelve weeks of unpaid FMLA leave, *see* 29 U.S.C. § 2612, might hesitate due to fears of retaliation from program directors or concerns about delaying their education. *See* Halley et al., *supra* note 41, at 5.

⁶⁴ *See* Serv. Emps. Int'l Union, No. 01-RC-325633, at 18 (N.L.R.B. Feb. 5, 2024) (student athletes are employees); *cf.* Mass. Inst. of Tech., No. 01-RC-304042, at 11 (N.L.R.B. Mar. 13, 2023) (graduate students funded by fellowships are not employees).

⁶⁵ *See* Blair et al., *supra* note 3, at 972–73.

⁶⁶ All doctors who take the Hippocratic Oath promise that they will “do no harm.” *See Translation of the Hippocratic Oath*, NAT'L LIBR. MED., https://www.nlm.nih.gov/hmd/greek/greek_oath.html [<https://perma.cc/7U33-SL4Z>].