

**October 10, 2023**

Raymond Windmiller  
Executive Officer  
Executive Secretariat  
U.S. Equal Employment Opportunity Commission  
131 M Street NE  
Washington, DC 20507

*Submitted via regulations.gov*

**RE: RIN 3046–AB30, Regulations To Implement the Pregnant Workers Fairness Act**

Dear Mr. Windmiller:

The U.S. Breastfeeding Committee (USBC) submits these comments in support of the Equal Employment Opportunity Commission’s (EEOC or Commission) Notice of Proposed Rulemaking (“NPRM”), RIN 3046–AB30, Regulations To Implement the Pregnant Workers Fairness Act, published in the Federal Register on August 11, 2023.<sup>1</sup>

As an organization dedicated to the protection, promotion, and support of breastfeeding and human milk feeding, we are committed to ensuring no worker has to choose between their job and their own or their baby’s health.

The U.S. Breastfeeding Committee represents the most unified voice advocating for breastfeeding policy and practice change in the U.S. We are a coalition bringing together 139 organizations – including federal agencies, national, state, tribal, and territorial organizations, as well as for-profit businesses – that support the USBC mission to create a landscape of breastfeeding support across the United States. The USBC coordinates national, equity-centered collaborative efforts that contribute to population-level advancements that address longstanding barriers to human milk feeding and reduce disparities in breastfeeding outcomes, and has long recognized employment as a major barrier to breastfeeding.

We thank the EEOC for issuing this strong and workable proposed rule implementing the Pregnant Workers Fairness Act (PWFA). The proposed rule provides important clarity for both workers and employers, and will fulfill the law’s purpose of ensuring people with known limitations related to pregnancy, childbirth, or related medical conditions, including lactation, can remain healthy and working.

This comment addresses the following topics:

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<sup>1</sup> 88 Fed. Reg. 54714 (Aug. 11, 2023).

1. We thank the EEOC for acknowledging workers must be able to receive reasonable accommodations without “**unnecessary delay.**” We offer further suggestions to ensure workers indeed get the relief they need, without delay.
2. We thank the EEOC for emphasizing that employers need not seek **supporting documentation**, and that if employers do seek documentation, there are limitations on doing so. Given the onerous nature of providing medical documentation, particularly for low-wage workers, we offer several suggestions to further limit when employers can seek documentation.
3. We thank the EEOC for the thoughtful framework it set out to determine whether an employee or applicant is **qualified** if they cannot perform one or more essential functions. We recommend the EEOC extend “in the near future” to one year postpartum, except with respect to lactation which should be extended to two years.
4. We appreciate the EEOC’s detailed discussion of **reasonable accommodations**, which reflects the range of accommodations workers impacted by pregnancy, childbirth, and related medical conditions need to remain healthy and earn an income. We offer several suggestions to strengthen the definition of reasonable accommodation.
5. We applaud the EEOC for rightly asserting that the **rule of construction** in the PWFA should be interpreted the same as the Title VII language.
6. We applaud the proposed rule for setting out principles that reflect the realities of how employees typically communicate their needs regarding their **limitations** to an employer and suggest some further clarification of the definition.
7. We thank the EEOC for its clear interpretation of **undue hardship** and its inclusion of predictable assessments that will rarely meet the undue hardship threshold. We offer suggestions for additional predictable assessments.

## Unnecessary Delay

We applaud the EEOC for making clear that employer delay in responding to accommodation requests “may result in a violation of the PWFA.”<sup>2</sup> Too often employers delay providing accommodations for weeks or even months. Delays can often adversely impact the health of workers and/or their pregnancies, or their ability to maintain lactation and protect their milk supply, concerns that the PWFA was meant to address.

To ensure workers are able to get the accommodations they need without unnecessary delay, we recommend the EEOC make several changes to the proposed rule and proposed appendix:

### Strengthen the “Unnecessary Delay” Definition

1. **1636.4(a)(1)** We applaud the EEOC for recognizing that unnecessary delay may result in a failure-to-accommodate violation. However, we urge the EEOC to clarify that unnecessary delays at any point during the accommodation process may result in violation, not just delays in

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<sup>2</sup> 88 Fed. Reg. 54789 & n. 98 (Aug. 11, 2023).

“responding to a reasonable accommodation request.” To that end, we recommend the EEOC amend 1636.4(a)(1) by striking “An unnecessary delay in responding to a reasonable accommodation request may result in a violation of the PWFA” and replacing it with “An unnecessary delay in responding to a reasonable accommodation request, engaging in the interactive process, or providing a reasonable accommodation may result in a violation of the PWFA.” This will clarify that employers cannot avoid a violation simply by providing an initial response to the employee’s request, but must instead avoid delay during the entirety of the accommodation process.

2. **1636.4(a)(1)(vi).** We agree that covered entities should provide interim accommodations during the interactive process if the employee’s original accommodation request cannot be immediately granted. However, providing an interim accommodation should not excuse “unnecessary delay” if employers proceed to delay the provision of the ultimate accommodation the worker requests and needs. We therefore recommend that the EEOC remove the sentence “If an interim reasonable accommodation is offered, delay by the covered entity is more likely to be excused.”
3. **1636.4(a).** We appreciate the EEOC’s inclusion of a variety of factors to be considered when evaluating unnecessary delay. We recommend the EEOC add one additional factor to the list: **“The urgency of the requested accommodation.”**

For example, lactating people who are restricted from expressing breast milk as frequently as they need can easily experience leakage, painful engorgement that can lead to infection or mastitis, and a reduced milk supply.<sup>3</sup> This additional factor speaks to the importance of immediacy when it comes to providing accommodations under the PWFA and will better assist the EEOC and courts in evaluating whether an unnecessary delay has occurred.”<sup>4</sup>

#### **State That “Unnecessary Delay” in the Interactive Process Can Violate PWFA**

1. **1636.3(k).** We respectfully ask the EEOC to add a sentence to the definition of *Interactive Process* as follows: **“Unnecessary delay, as defined in § 1634.4(a)(1), in the interactive process may result in a violation of the PWFA.”** The proposed appendix already recognizes the importance of expediency in carrying out the interactive process, stating “a covered entity should respond *expeditiously* to a request for reasonable accommodation and act *promptly* to provide the reasonable accommodation.” (emphasis added).<sup>5</sup> The regulation itself should

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<sup>3</sup> Angeletti MA. Breastfeeding Mothers Returning to Work: Possibilities for Information, Anticipatory Guidance and Support from US Health Care Professionals. *Journal of Human Lactation*. 2009;25(2):226-232. doi:10.1177/0890334408329482

<sup>4</sup> See 88 Fed. Reg. 54789 & n.97 (Aug. 11, 2023).

<sup>5</sup> 88 Fed. Reg. 54786 (Aug. 11, 2023).

underscore this directive by making clear that unnecessarily delaying the interactive process may result in a violation of the PWFA.

2. **1636.3(k).** We also request that the EEOC add an example in the proposed appendix that illustrates how quickly and informally the interactive process can occur. For example, the EEOC can include a scenario where an employee makes a simple request of an immediate supervisor, and the immediate supervisor agrees on the spot to make the requested change.

#### **Add A Definition of “Interim Accommodation” to the Reasonable Accommodation Definition**

**1636.3(h).** Providing employers with a clear understanding of the meaning of the term “interim accommodation” will encourage them to rely on such accommodations to avoid delay. To that end, we suggest adding a new subsection 1636.3(h)(6) that reads: “Interim Reasonable Accommodation means any temporary or short-term measure put in place immediately or as soon as possible after the employee requests an accommodation that allows the employee to continue working safely and comfortably while the employer and employee engage in the interactive process or the employer implements a reasonable accommodation arrived at through the interactive process.”

#### **Strengthen the Supporting Documentation Framework to Ensure Documentation Demands Do Not Contribute to Unnecessary Delays**

4. **1636.3(l) Supporting documentation:** We urge the EEOC to adopt the changes suggested below to ensure employers do not impose burdensome and unnecessary medical certification requirements that often contribute to substantial delays in accommodation.

## **Supporting Documentation**

We appreciate the EEOC’s query as to whether the supporting documentation framework the agency sets out in proposed rule 1636.3(l) strikes the right balance between the needs of workers and employers. As the EEOC recognizes in the proposed appendix, many workers face barriers in obtaining appointments with health care providers in a timely way, or altogether, posing significant barriers to obtaining medical documentation.<sup>6</sup> This is especially true for workers in rural areas and low-wage workers who may not have consistent access to health care and disproportionately lack control over their work schedules.<sup>7</sup> Furthermore, women of color, particularly Black women, often face medical

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88 Fed. Reg. 54786 (Aug. 11, 2023).  
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<sup>7</sup> See, e.g., C. Brigrance et. al, March of Dimes, Nowhere to Go: Maternity Deserts Across the U.S. 5, 11 (2022), [https://www.marchofdimes.org/sites/default/files/2022-10/2022\\_Maternity\\_Care\\_Report.pdf](https://www.marchofdimes.org/sites/default/files/2022-10/2022_Maternity_Care_Report.pdf) (noting that 4.7

racism that may inhibit or delay their ability to secure supporting documentation.<sup>8</sup> Additionally, some medical care providers impose fees to fill out forms, which can grow to significant amounts over time, as needs change and as employers request new or different documentation.<sup>9</sup>

The American College of Obstetricians and Gynecologists notes that people of color are more likely to live in under-resourced areas where access to breastfeeding support is less available<sup>10</sup> creating additional barriers to securing supporting documentation for some workers.

The PWFA recognizes the importance of workers obtaining accommodations in a timely fashion to protect their health. Several aspects of the proposed rule on supporting documentation would unfortunately impose an unnecessary financial, physical, and mental burden on workers, contribute to substantial delay in receiving reasonable accommodations, and deter workers from seeking the accommodations they need for their health and wellbeing.<sup>11</sup>

### **We urge the EEOC to modify the supporting documentation framework as follows:**

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million women live in counties with limited access to maternity care, and that half of women who live in rural communities have to travel over 30 minutes to access an obstetric hospital).

<sup>8</sup> See, e.g., Brittany D. Chambers et al, *Clinicians' Perspectives on Racism and Black Women's Maternal Health*, 3 Women's Health Rep. 476, 479 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9148644/> ("Clinicians acknowledged that racism causes and impacts the provision of inequitable care provided to Black women, highlighting Black women are often dismissed and not included as active participants in care decisions and treatment."); see also Black Mamas Matter Alliance and A Better Balance, *Centering the Experiences of Black Mamas in the Workplace* (2022), <https://www.abetterbalance.org/centering-black-mamas-pwfa/> (As part of a listening session with Black birth workers and organizational leaders on the difficulties Black pregnant people experience obtaining accommodations prior to the PWFA, one participant remarked: "How do I prioritize going to the doctor's office, when it's gonna take me forever when I get there, because I'm at a public clinic, but I need this money, and I'm gonna be in there with a doctor for 10 minutes, but I spent all day trying to get those 10 minutes. Just the entry point, the access, sometimes is an issue.").

<sup>9</sup> Kimberly Danebrock, *Charging Patients for Completing Forms*, Cooperative of American Physicians (Apr. 15, 2014), <https://www.caphysicians.com/articles/charging-patients-completing-forms>; *Can Doctors Charge Employees a Fee for Completing FMLA Certifications?*, SHRM, <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/doctorschargeformlacertifications.aspx> (last visited Sept. 18, 2023); see also Meredith Cohn and Jessica Calefati, *Johns Hopkins Medicine Joins National Move to Charge Patients for Messaging Their Doctor*, The Baltimore Banner (July 3, 2023), <https://www.thebaltimorebanner.com/community/public-health/johns-hopkins-mychart-messaging-fees-7HJ6GX7NGNE7NPYQQ7E7C5EHXE/> (discussing health care systems charging for My Chart messages).

<sup>10</sup> Barriers to breastfeeding: supporting initiation and continuation of breastfeeding. ACOG Committee Opinion No. 821. American College of Obstetricians and Gynecologists. Obstet Gynecol 2021;137:e54–62.

<sup>11</sup> The legislative record is clear that the PWFA did not intend to include a supporting documentation framework that would be onerous for workers. For example, while the Minority Views of the House Report stated that "the bill presumably allows employers to require such documentation when the need for an accommodation is not obvious," the Majority did not incorporate that analysis. H.R. Rep. No. 117-27, at 57 (2021), <https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf>; see also *Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694) Before the Subcomm. on Civil Rights Human. & Servs. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019) (Questions for the record submitted by Dina Bakst, Co-Founder & Co-President, A Better Balance, at 13, arguing against the inclusion of a medical documentation requirement because employers often seek medical notes as a "way to prolong having to provide a very simple or reasonable accommodation").

1. **1636.3(l)(1)(i). Clarifying “obvious” needs.** We agree with the Commission that employers should not be permitted to seek medical documentation when the need for accommodation is “obvious.” We are concerned, however, that employers could unilaterally impose restrictions based on paternalistic stereotypes about what pregnant or postpartum people “obviously” need, or that the proposed rule could have the unintended consequence of making the employee’s body the subject of invasive scrutiny as employers consider whether their pregnancy is “obvious.” For these reasons, we encourage the Commission to maintain this important concept in the final regulations, but to clarify how it is to be applied. We suggest replacing the current text of 1636.3(l)(1)(i) with the following: “(i) When the employee has confirmed, through self-attestation, that they have a limitation related to pregnancy, childbirth, or a related medical condition, and the need for accommodation is obvious.”

Additionally, we suggest providing guidance on how an employer may determine whether the need for accommodation is obvious: “A need for accommodation is obvious if, in light of the pregnant employee’s known limitation, the employer either knew or should have known that the employee would need or did need the accommodation.” For example, if a lactating employee self-attests that their uniform no longer fits or makes milk expression difficult, the need for accommodation is “obvious” because the employer knows, or should have known, that the employee needs a larger size or otherwise modified uniform.

Finally, we encourage the Commission to warn employers in the proposed appendix against imposing accommodations not requested by the employee based on assumptions that the need for accommodation is “obvious.”

2. **1636.3(l)(1)(iii).** We applaud the agency for making clear that employers cannot seek supporting documentation for certain straightforward accommodation requests.<sup>12</sup> We urge the EEOC to expand the list to also include:<sup>13</sup>

- Time off, up to 8 weeks, to recover from childbirth.<sup>14</sup>

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<sup>12</sup> 88 Fed. Reg. 54769 (Aug. 11, 2023) (stating that it is not reasonable to require supporting documentation beyond self-attestation when the accommodation is one listed as a predictable assessment or relates to lactation or pumping).

<sup>13</sup> In New York City, employers with 4 or more employees are not permitted to ask for medical documentation for many of the accommodations on this list. Any accommodations listed here that are not on New York City’s list are similarly minor in nature. See NYC Commission on Human Rights Legal Enforcement, Guidance on Discrimination on the Basis of Pregnancy, Childbirth, Related Medical Conditions, Lactation Accommodations, and Sexual or Reproductive Health Decisions 10 (2021), [https://www.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy\\_InterpretiveGuide\\_2021.pdf](https://www.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_2021.pdf).

<sup>14</sup> See, e.g., NYC Commission on Human Rights Legal Enforcement, Guidance on Discrimination on the Basis of Pregnancy, Childbirth, Related Medical Conditions, Lactation Accommodations, and Sexual or Reproductive Health Decisions 10 (2021), [https://www.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy\\_InterpretiveGuide\\_2021.pdf](https://www.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_2021.pdf).

- Time off to attend healthcare appointments related to pregnancy, childbirth, or related medical conditions, including, at minimum, at least 16 healthcare appointments.<sup>15</sup>
- Flexible scheduling or remote work for nausea<sup>16</sup>
- Modifications to uniforms or dress code
- Allowing rest breaks, as needed
- Eating or drinking at a workstation
- Minor physical modifications to a workstation, such as a fan or chair
- Moving a workstation, such as to be closer to a bathroom or lactation space, or away from toxins
- Providing personal protective equipment
- Reprieve from lifting over 20 pounds
- Access to closer parking

We note that this new list will diverge from the list of predictable assessments included in the “undue hardship” definition, as the principles underlying whether a particular accommodation warrants medical certification differ from the principles underlying the undue hardship question.

3. **1636.3(l)(2):** We commend the EEOC for making clear that employers may only demand “reasonable documentation.” This is critical. In the early months of PWFA implementation, some employers have imposed extremely onerous documentation requirements, similar to those under the FMLA and ADA, that far exceed “reasonable.”<sup>17</sup> As a result, many employees have not received the accommodations they need in a timely manner. We strongly encourage the agency to do the following to ensure employers request only “reasonable” documentation:
  - a. Modify the definition of reasonable documentation found in 1636.3(l)(2). It is unnecessarily invasive for an employer to demand to know their employee’s precise

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<sup>15</sup> Nearly every state paid sick time law permits employers to request a healthcare provider note only if the person needs time off for 3 or more consecutive days. See A Better Balance, Know Your Rights: State and Local Paid Sick Time Laws FAQs (last updated July 7, 2022), <https://www.abetterbalance.org/resources/know-your-rights-state-and-local-paid-sick-time-laws/>. We suggest a minimum of 16 appointments as it reflects the average number of appointments for prenatal and postnatal care for low-risk pregnancies. See Alex Friedman Peahl et. al, A Comparison of International Prenatal Care Guidelines for Low-Risk Women to Inform High-Value Care, 222 American Journal of Obstetrics & Gynecology 505, 505 (2020), [https://www.ajog.org/article/S0002-9378\(20\)30029-6/fulltext](https://www.ajog.org/article/S0002-9378(20)30029-6/fulltext) (stating that the median number of recommended prenatal care visits for a low-risk pregnancy in the United States is 12-14 visits); ACOG Committee Opinion No. 736: Optimizing Postpartum Care, 131 Obstetrics & Gynecology 140, 141 (2018), [https://journals.lww.com/greenjournal/fulltext/2018/05000/acog\\_committee\\_opinion\\_no\\_\\_736\\_\\_optimizing.42.aspx](https://journals.lww.com/greenjournal/fulltext/2018/05000/acog_committee_opinion_no__736__optimizing.42.aspx) (recommending at least two postpartum care appointments, with ongoing care as needed).

<sup>16</sup> See 29 CFR § 825.115(f) (“Absences attributable to incapacity [due to pregnancy] qualify for FMLA leave even though the employee . . . does not receive treatment from a health care provider during the absence . . . . An employee who is pregnant may be unable to report to work because of severe morning sickness.”).

<sup>17</sup> Examples on file with the Center for WorkLife Law & A Better Balance.

condition or a description of it; rather it should be sufficient for a health care provider to (1) describe the employee's limitation that necessitates accommodation, (2) confirm that the limitation is related to pregnancy, childbirth, or a related medical condition, and (3) state that they require an accommodation. For example, medical documentation need not state that a worker needs to attend an appointment related to a breast infection but can simply state that the employee needs to attend an appointment during the workday (the limitation) due to pregnancy, childbirth, or a related medical condition, and thus a modified start time (the accommodation) is recommended.

- b. Make clear in the proposed rule or proposed appendix that employers cannot require employees to submit any particular medical certification form, so long as the health care provider documents the requisite three pieces of information, as explained immediately above. Additionally, make clear that employers cannot require employees to complete ADA or FMLA certification forms in order to receive a PWFA accommodation, as such forms seek substantially more information than is "reasonable" under PWFA.
- c. We urge the EEOC to clarify that under no circumstances may an employer require an employee to take any sort of test to confirm their pregnancy or to provide documentation or other proof of pregnancy. The Commission should clarify that self-attestations of pregnancy are sufficient.

4. **1636.3(l)(3) Health care providers.**

- a. We applaud the EEOC for its comprehensive, albeit non-exhaustive, list of health care providers from whom employees can seek documentation. However, employers should not have the discretion to second guess the judgment of licensed healthcare providers due to an assumption that they are not "appropriate" for the situation. We therefore urge the Commission to remove the terms "appropriate" and "in a particular situation" from the sentence "The covered entity may request documentation from the *appropriate* health care provider *in a particular situation*" (emphasis added).
- b. We also urge the EEOC to make clear in the proposed rule or proposed appendix that employers must accept documentation from telehealth care providers.
- c. We applaud the Commission for making clear that employers cannot require employees to be examined by the employer's healthcare provider, as this employer practice invades privacy, could lead to differential evaluations based on race, imposes unnecessary delay, and is a significant deterrent to seeking accommodation. We also applaud the EEOC's emphasis on ensuring employers maintain employee privacy when seeking documentation.

5. **1636.3(l)(1)(iv) Supporting Documentation.** We applaud the agency for making clear that employers cannot seek supporting documentation for accommodations needed for lactation or pumping.

6. We appreciate that the EEOC mentioned in the proposed appendix that it is a best practice for employers to provide interim accommodations if an employee is delayed in obtaining



supporting documentation.<sup>18</sup> We suggest the agency strengthen this provision by clarifying that the interim accommodation provided must be an accommodation that meets the employee's needs and would not constitute an adverse action, such as forced unpaid leave, against the employee.

## Temporary Excusal from Essential Functions

**§1636.3(f)(2) Qualified employee or applicant.** We thank the EEOC for the thoughtful framework it set out to determine whether an employee or applicant is qualified if they cannot perform one or more essential functions. We recommend that the definition of “in the near future” post-pregnancy be one year rather than forty weeks, except with respect to lactation, which we believe should be extended to 2 years.

Furthermore, we support the EEOC's approach to not combine periods of temporary suspension of an essential function during pregnancy and post-pregnancy.

- (a) **The definition of “in the near future” should be extended to one year postpartum, except with respect to lactation which should be extended to two years.** We strongly recommend that the Commission extend the “near future” timeframe in the postpartum context to one year. The Commission cites to important medical findings and Medicaid extension all pointing to the importance of one year for postpartum reasonable accommodations.<sup>19</sup> Allowing a temporary excusal of an essential function for generally one year postpartum is critical for maternal and infant health. It is especially important for pregnant people who are at a higher risk, including Black women, who are three times as likely to die of pregnancy-related causes than white women.<sup>20</sup>

In addition to extending the definition of “in the near future” to one year following childbirth, we urge the Commission to extend it to two years for lactation-related accommodations. The American Academy of Pediatrics recommends parents breastfeed for at least two years following childbirth for both maternal and infant health.<sup>21</sup> Apart from these two

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<sup>18</sup> 88 Fed. Reg. 54787 (Aug. 11, 2023) (“[T]he Commission encourages employers who choose to require documentation, when that is permitted under this regulation, to grant interim accommodations as a best practice if an employee indicates that they have tried to obtain documentation but there is a delay in obtaining it...”).

<sup>19</sup> 88 Fed. Reg. 54724-25 (Aug. 11, 2023).

<sup>20</sup> *Working Together to Reduce Black Maternal Mortality*, Centers for Disease Control and Prevention (Apr. 4, 2023), <https://www.cdc.gov/healthequity/features/maternal-mortality/index.html>.

<sup>21</sup> Joan Younger Meek, Lawrence Noble, and the Section on Breastfeeding, *Policy Statement: Breastfeeding and the Use of Human Milk*, 150 *Pediatrics* 1, 11 (2022), <https://publications.aap.org/pediatrics/article/150/1/e2022057988/188347/Policy-Statement-Breastfeeding-and-the-Use-of?autologincheck=redirected>. Employers can still raise a defense that accommodating lactation-related needs for two years would impose an undue hardship.

recommendations, we believe the general approach adopted by the Commission comports with the PWFA’s statutory language, legislative intent, and the real-life experiences of pregnant and postpartum workers.

Breastfeeding plays an essential role in establishing good nutrition and healthy weight, reducing the risk of chronic disease, and improving maternal and infant health outcomes. The pregnancy, birth, and postpartum periods through the child’s first 1,000 days are pivotal moments for securing and establishing lifelong health for both mothers and babies. The evidence for the value of human milk on overall health for infants, children, and mothers is scientific, robust, and continually reaffirmed by new research. Breastfed infants are at lower risk of certain infections and sudden unexplained infant death. A recent CDC study of over 3 million U.S. births found that ever breastfeeding is associated with a 26% reduction in the odds of post-perinatal (between 7-364 days) infant death.<sup>22</sup> Breastfed children have decreased risk of obesity, type 1 and 2 diabetes, asthma, and childhood leukemia. Women who breastfeed reduce their risk of specific chronic diseases, including type 2 diabetes, cardiovascular disease, and breast and ovarian cancers.<sup>23</sup>

While the vast majority of babies start out breastfeeding, barriers in healthcare, community, and employment settings continue to impede breastfeeding success.<sup>i</sup> There are also persistent breastfeeding rate disparities by racial, geographic, and socioeconomic factors.<sup>24</sup> Low breastfeeding rates in the United States cost our nation millions of dollars through higher health systems costs, lost productivity, and higher household expenditures.<sup>25</sup> Employers see significant cost savings when their workers are able to successfully breastfeed.<sup>26</sup> Strong protections for lactating workers that extend through two years, as recommended by medical authorities, are critical for the health of individuals, the public, and our economy.

- (b) We recommend keeping the proposed rule’s framework of restarting the time frame for excusing an essential function, precisely for the reasons stated in the proposed appendix—that pregnant workers very often cannot possibly anticipate what needs or limitations may occur postpartum. The same may be true during pregnancy itself, and thus, each accommodation request should be considered based on the specific “limitation” at issue. We strongly urge the EEOC to state in the regulation the principle found in the Interpretive Guidance that the

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<sup>22</sup> Li, R., Ware, J., Chen, A., Nelson, J. M., Kmet, J. M., Parks, S. E., . . . Perrine, C. G. (2022). Breastfeeding and post-perinatal infant deaths in the United States, a national prospective cohort analysis. *The Lancet Regional Health - Americas*, 5, 100094. doi:10.1016/j.lana.2021.100094

<sup>23</sup> Making the decision to breastfeed | womenshealth.gov. womenshealth.gov.

<https://www.womenshealth.gov/breastfeeding/making-decision-breastfeed/#1>. Published 2020. Accessed December 20, 2022.

<sup>24</sup> *Breastfeeding Report Card, 2020*. Centers for Disease Control and Prevention; 2020. <https://www.cdc.gov/breastfeeding/data/reportcard.htm>. Accessed March 24, 2021.

<sup>25</sup> Cost of Not Breastfeeding: USA. (n.d.). Retrieved March 13, 2023, from <https://www.aliveandthrive.org/en/country-stat/usa>

<sup>26</sup> *Business Case for Breastfeeding* (Publication). (2008). U.S. Department of Health and Human Services, Health Resources and Services Administration (HRSA), Maternal and Child Health Bureau.

timeframe restarts with each new accommodation request and following return from childbirth leave.

## Reasonable Accommodation

We appreciate the EEOC's detailed discussion of reasonable accommodations, which reflects the range of accommodations workers impacted by pregnancy, childbirth, and related medical conditions need to remain healthy and earn an income.

**1636.3(i). We suggest three ways the Commission can better emphasize that reasonable accommodation includes modifications or adjustments to alleviate pain and discomfort and to avoid health risks.**

1. **We urge the EEOC to add a new subsection to 1636.3(i) that provides as an additional example of reasonable accommodation: “modifications that alleviate pain or discomfort and reduce health risks for the employee or applicant or their pregnancy.”** We appreciate the EEOC highlighting in the proposed appendix the critical nature of accommodations that alleviate increased pain and health risks.<sup>27</sup> We suggest that the EEOC make this category of accommodation more prominent in the rule itself and add additional examples to the proposed appendix.

Employers have historically denied pregnant workers accommodations due to a lack of “evidence” of a measurable and diagnosable complication, and many healthcare providers believe they are not allowed to recommend accommodations without the same evidence.<sup>28</sup> Highlighting the law's purpose as it relates to risk and pain avoidance, therefore, is critical. This is especially true for women of color, who are more likely both to work in physically demanding jobs,<sup>29</sup> and to have their employers and healthcare providers underestimate their pain and apply higher levels of risk tolerance toward them.<sup>30</sup>

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<sup>27</sup> 88 Fed. Reg. 54779 (Aug. 11, 2023).

<sup>28</sup> ACOG Committee Opinion 733: *Employment Considerations During Pregnancy and the Postpartum Period*, 131 Obstetrics & Gynecology 115, 119 (2018), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/04/employment-considerations-during-pregnancy-and-the-postpartum-period> (stating that it is generally safe to work during pregnancy without adverse effects to the pregnant person or fetus, but that accommodations are needed for workers whose jobs expose them to toxins, “very physically demanding” work, or “an increased risk of falls or injuries,” as well as to address pregnancy complications like gestational diabetes).

<sup>29</sup> National Latina Institute for Reproductive Health and National Women's Law Center, *Accommodating Pregnancy On the Job: The Stakes for Women of Color and Immigrant Women* (2014), [https://nwlc.org/wp-content/uploads/2015/08/the\\_stakes\\_for\\_woc\\_final.pdf](https://nwlc.org/wp-content/uploads/2015/08/the_stakes_for_woc_final.pdf).

<sup>30</sup> Jamila Taylor et al., Center for American Progress, *Eliminating Racial Disparities in Maternal and Infant Mortality* 4-6 (May 2019), <https://www.americanprogress.org/article/eliminating-racial-disparities-maternal-infant-mortality/>; Molly R. Altman, et al. *Information and Power: Women of Color's Experiences Interacting with Health Care Providers in Pregnancy and Birth*, 238 Soc. Sci. & Med 112491 (2019), <https://doi.org/10.1016/j.socscimed.2019.112491>; see also Saraswathi Vedam et al., *The Giving Voice to Mothers*

2. **Additionally, we strongly urge the EEOC to delete the language in 1636.3(i)(2) which qualifies that “adjustments to allow an employee or applicant to work without increased pain or increased risk” must be “due to the employee’s or applicant’s known limitation.”** This language is unnecessary. No other example in the paragraph contains such a clause, and everything in the paragraph is necessarily qualified by a link to a known limitation. Treating this category of accommodation differently may create confusion about the legal standard by suggesting that the employee or applicant must make some additional showing.
3. **Include lactation needs in 1636.3 Example #12.** In this example of an accommodation that alleviates risk, a pregnant person is temporarily excused from one of the essential functions of her job: working with chemicals. Fed. Reg. 54780. Certain chemicals, such as lead, can get into breast milk and be toxic to babies.<sup>31</sup> We urge the EEOC to expand Example #12 to also include temporary excusal from toxic exposure after the employee returns from leave, until she is no longer breastfeeding her infant, to avoid breast milk contamination risks.

**Personal Use.** The Commission notes that under PWFA, like the ADA, employers are not required to provide accommodations that are primarily for the personal benefit of the individual with a known limitation. The Commission correctly distinguishes this from accommodations that “might otherwise be considered personal,” but which “are specifically designed or required to meet job-related rather than personal needs.” We urge the Commission to include a second example from the lactation context where an employer is required to furnish a refrigerator or a cooler with ice, absent undue hardship, for an employee who is working in person and must safely store pumped breast milk. The example might also point out that the employer is not required to purchase a breast milk warmer for the employee’s home, as that would be strictly for personal use.

**1636.3(i)(3): We commend the Commission’s thoughtful treatment of leave as a reasonable accommodation and suggest modifications.** PWFA’s purpose *could not be realized* without access to leave as an accommodation. The most at-risk workers have zero sick days and are ineligible for FMLA. For them, before PWFA’s passage, taking a few days off to attend health care appointments put them at risk of lawful termination. While the U.S. desperately needs a comprehensive paid leave program, leave provided as an accommodation under PWFA will provide a lifeline to many who would have otherwise been fired for seeking basic medical care or taking time to recover from childbirth and establish a strong breastfeeding relationship. Further, leave as a PWFA accommodation will protect the employment of the many workers who have access to state-administered paid leave, but previously had inadequate job protection.

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*Study: Inequity and Mistreatment During Pregnancy and Childbirth in the United States*, 16:77 Reproductive Health (2019), <https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-019-0729-2>.

<sup>31</sup> Centers for Disease Control and Prevention: Breastfeeding and Your Job - Reproductive Health, available at <https://www.cdc.gov/niosh/topics/repro/breastfeeding.html>.

Research clearly shows that access to paid leave makes a world of difference for lactating parents and their families, but only a small portion of workers in the United States have access to paid leave.<sup>32</sup> It is essential that new parents have adequate time to establish breastfeeding after birth.

**We suggest two modifications to the proposed rule regarding leave as an accommodation in 1636.3(i)(3).**

In its discussion on leave, the Commission notes one potential accommodation as “The ability to choose whether to use paid leave ... or unpaid leave *to the extent that the covered entity allows employees using leave not related to pregnancy... to choose...*” 1636.3(i)(3)(iii). Similarly, the Commission notes in the proposed appendix that “an employer must continue an employee’s health insurance benefits during their leave period *to the extent that it does so for other employees in a similar leave status.*” Fed. Reg. 54780-81. We respectfully suggest that, under PWFA, whether these potential accommodations should be provided turns on the question of undue hardship, not on how other employees are treated. Accordingly, we urge the EEOC to modify its treatment of these leave-related accommodations by deleting the comparative reference to other employees.<sup>33</sup> As with all accommodations, employers may be obligated to modify standard practices to accommodate people with limitations related to pregnancy, childbirth or related medical conditions, even if a particular benefit is not routinely offered to other employees.<sup>34</sup>

**Additionally, we strongly urge the Commission to include “continuation of health insurance benefits during the period of leave” in 1636.3(i)(3) as another potential leave-related accommodation that must be provided absent undue hardship.** For many workers, the opportunity to access leave as a reasonable accommodation is hollow without continuation of health benefits, as access to uninterrupted healthcare is vital during pregnancy and the postpartum period.<sup>35</sup> This interpretation is supported by the intent of the PWFA,<sup>36</sup> which not only has the goal of continued employment, but also the goal of promoting maternal and child health.<sup>37</sup> Indeed, the House report on the PWFA clearly stated

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<sup>32</sup> Kortsmit K, Li R, Cox S, Shapiro-Mendoza CK, Perrine CG, D'Angelo DV, Barfield WD, Shulman HB, Garfield CF, Warner L. Workplace Leave and Breastfeeding Duration Among Postpartum Women, 2016-2018. *Am J Public Health*. 2021 Nov;111(11):2036-2045. doi: 10.2105/AJPH.2021.306484. Epub 2021 Oct 22. PMID: 34678076; PMCID: PMC8630484.

<sup>33</sup> Of course, if other employees receive a particular accommodation, that may be evidence of no undue hardship.

<sup>34</sup> Similarly, we respectfully suggest that employers may be required to “provide reserved parking spaces” as a PWFA reasonable accommodation, even when it is not the case that “*the employee is otherwise entitled to use employer provided parking.*” 88 Fed. Reg. 54779 (Aug. 11, 2023).

<sup>35</sup> Centers for Medicare and Medicaid Services, Improving Access to Maternal Health Care in Rural Communities 6 (“A lack of access to maternal health care can result in a number of negative maternal health outcomes including premature birth, low-birth weight, maternal mortality, severe maternal morbidity, and increased risk of postpartum depression”), <https://www.cms.gov/About-CMS/Agency-Information/OMH/equity-initiatives/rural-health/09032019-Maternal-Health-Care-in-Rural-Communities.pdf>.

<sup>36</sup> H.R. Rep. No. 117-27, at 22-24 (2021), <https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf>.

<sup>37</sup> ADA guidance from 2002 states that employers must continue insurance benefits when an employee is on leave as an ADA accommodation only to the same extent they do so for other employees. See EEOC, Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, at text after n. 59 (2002),

that pregnant people “want, and oftentimes need, to keep working during their pregnancies, both for income and to retain health insurance.”<sup>38</sup> The reasonableness of providing continued health insurance benefits during a period of leave is also supported by the FMLA requirement that employers do so for up to 12 weeks every year,<sup>39</sup> as well as state laws that require continued health benefits during leave taken for pregnancy or other health reasons.<sup>40</sup>

**1636.3(i)(4). We urge the Commission to expand the examples of reasonable accommodation for lactation.** We appreciate the EEOC’s highlighting the reasonable accommodations often needed by lactating workers who are pumping milk. While we wholeheartedly celebrate the recent passage of the PUMP for Nursing Mothers Act, that law is limited to providing reasonable break time and private space for only one year following the birth of an employee’s child.<sup>41</sup> However, many lactating employees require other reasonable accommodations, including the pumping accommodations identified by the Commission in 1636.3(i)(4)(ii), as well as accommodations that are unrelated to pumping. We encourage the Commission to highlight some of these other lactation accommodations by adding a new section 3(i)(4)(iii): “Any other job modification, including those identified in 1636.3(i)(2), that would remove barriers to producing or expressing human milk, breastfeeding, or chestfeeding; avoid or alleviate lactation-related health complications; or reduce the risk of contaminating human milk produced by the employee.”

In order to produce adequate milk to feed their baby, a lactating parent must breastfeed or express milk on a regular basis. In some cases, such as a baby refusing to feed from a bottle or a lactating parent struggling to express milk with a breast pump, direct breastfeeding or chestfeeding may be essential for

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<http://www.eeoc.gov/laws/guidance/enforcementguidance-reasonable-accommodation-and-unduehardship-under-ada>. However, the statutory text of the ADA and its implementing regulations support the principle that providing continued health benefits during leave may be a reasonable accommodation, even if other employees do not receive the same benefit, where the continued benefits can be provided without undue hardship. The longstanding ADA principle that gives employees with disabilities an affirmative right to receive the same health insurance benefits as are provided to other employees stems from the ADA’s prohibition on “limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability” See 42 U.S.C. § 12112; 29 C.F.R. pt. 1630 app. 1630.5 (“this part is intended to require that employees with disabilities be accorded equal access to whatever health insurance coverage the employer provides to other employees.”). But this non-discrimination concept should not be conflated with the standard for providing reasonable accommodation, which does not turn on how other employees are treated. Even if the principle from the 2002 guidance were supported by the ADA, it would not be instructive in the PWFA context, given the clear legislative intent of the PWFA to promote healthy pregnancies and reproductive health and to allow employees to take leave following childbirth, all while maintaining their health insurance.

<sup>38</sup> H.R. Rep. No. 117-27, at 24 (2021), <https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf>.

<sup>39</sup> Family and Medical Leave Act, 29 U.S.C. § 2614(c); 29 C.F.R. § 825.209.

<sup>40</sup> For example, under the California Pregnancy Disability Leave Law and the California Family Rights Act, employees have a right to take up to 7 months of leave *with continued health insurance benefits* during pregnancy and following childbirth. Cal. Code Regs., tit. 2, § 11044(c) (employer must continue to provide health insurance benefits during 4 months of pregnancy disability leave); Cal. Code Regs., tit. 2, § 11092(c) (continued health insurance benefits for up to 12 weeks for leave taken to bond with a new child).

<sup>41</sup> Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) (Pub. L. 117–328 Division KK).

the continuation of human milk feeding as well as the most efficient way to empty their breasts. Reasonable accommodations for lactating workers, in this case, could include permission for the workers to visit their baby at a nearby childcare facility, for a caregiver to bring the baby to the job site, or to work remotely to allow for direct breastfeeding. These accommodations may also be necessary for mothers and parents attempting to reestablish breastfeeding (known as relactation) due to an infant developing an allergy to commercial infant formula, or in the event of an infant formula shortage, as occurred last year.

Lactating workers report needing uniform adjustments to make it easier to pump or to reduce compression on the breast, reducing exposure to occupational toxicants in order to avoid passing toxins to the baby through breast milk, avoiding extended travel away from their baby, and the need to take time off to take care of complications (like mastitis or a clogged duct) or to attend appointments with a lactation support provider. In addition, lactating workers report the need for adjustments to productivity quotas in order to reflect time spent pumping breast milk.

Additionally, we urge the Commission to include as an example of a lactation-related accommodation “permission to take a pumping break in a *non*-private space, when an employee requests to do so in order to meet their lactation needs.” For example, even when an employer provides a private lactation space, as required by the PUMP Act, some employees need to express milk at their workstation or in a public space, like a lobby or break room. This may be because, for example, the employee feels claustrophobic in the employer-provided space or is able to pump milk more effectively at their workstation where they feel more relaxed and comfortable. We urge the EEOC to make clear that it may violate PWFA, as well as the Pregnancy Discrimination Act, to prohibit an employee from pumping milk in a space where they otherwise have permission to work or to be present, unless doing so would impose undue hardship. Further, the EEOC should make clear that coworker discomfort about being in the same room with another employee who is expressing milk is not a valid ground for denying accommodations.

**1636.5(f)(2) Prohibition against coercion.** We urge the EEOC to provide an additional example of unlawful coercion concerning a lactating employee exercising her right to express milk in the presence of her coworkers. Employees who express milk, whether in a private space or a public space, often face derogatory remarks, unwelcome touching, and other forms of harassment<sup>42</sup> which—if not immediately and effectively addressed by the employer—would constitute unlawful coercion under PWFA.

**1636.3(i)(4)(i)-(ii) Modify language on pumping accommodations to avoid inadvertently suggesting that the PUMP Act does not require certain measures that ensure “functional” lactation space.** In its Field Assistance Bulletin No. 2023-02, the Department of Labor Wage and Hour Division states that lactation spaces provided by employers pursuant to the PUMP Act “must be functional as a space for pumping.” WHD describes that employees must have a place to sit, a flat surface on which to place the pump, and the ability to safely store the milk at work. The WHD also states that the space must be clean

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<sup>42</sup> Exposed: Discrimination Against Breastfeeding Workers, Center for WorkLife Law (2018), pages 18-19, available at <https://www.pregnantatwork.org/wp-content/uploads/WLL-Breastfeeding-Discrimination-Report.pdf>.

and safe for producing milk (e.g., free of bacteria). The concept of functionality is critical to ensuring lactating workers are able to pump milk for their infants without jeopardizing their economic security.

The EEOC's proposed regulations may inadvertently undermine this concept of functionality by suggesting that the accommodations listed in 1636.3(i)(4)(ii) are *not* required by the PUMP Act, including "regularly cleaned," "appropriate seating," and "a surface sufficient to place a breast pump," all of which may be necessary to make a space "functional." While we assume this was not the Commission's intention, we suggest the EEOC make clear that the accommodations listed in 1636.3(i)(4)(ii) may also be required under the PUMP Act. This can be accomplished by making two modifications:

1. Delete from 1636.3(i)(4)(ii) the introductory phrase "Whether the space for lactation is provided under the PUMP Act or paragraph (i)(4)(i)" and
2. Add the following two examples to the list of pumping accommodations in 1636.3(i)(4)(ii): "space that is shielded from view and free from intrusion" and "breaks, as needed, to express milk." By including two requirements widely recognized as key provisions of the PUMP Act, the regulation will make clear that it is, in part, restating what is already required by the PUMP Act.

**1636.3(h).** We recommend the following changes to the proposed appendix regarding 1) penalizing employees for utilizing accommodations; and 2) compliance with production standards:

- a) The Commission seeks comment on whether there are other situations where ordinary workplace policies operate to penalize employees for using reasonable accommodations. We suggest highlighting that the application to pregnant people of "no-fault" attendance/tardy control policies may cause employers to violate PWFA as such policies are applied universally without consideration of individual circumstances.<sup>43</sup>
- b) Additionally, with regard to production standards and quotas, the Commission notes that under the ADA, "a reasonable accommodation cannot excuse an employee from complying with valid production standards that are applied uniformly to all employees."<sup>44</sup> We encourage the Commission to recognize that this principle is grounded in the ADA's requirement that employees must be able to perform the essential functions of the job, with or without a reasonable accommodation, to be qualified. Indeed, the cited Enforcement Guidance on Reasonable Accommodation cites to the ADA's definition of "essential functions" for support. In the PWFA context, because the statutory language specifically discusses how essential job

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<sup>43</sup> See, e.g., A Better Balance, *Misled & Misinformed: How Some U.S. Employers Use "No Fault" Attendance Policies to Trample on Workers' Rights (And Get Away With It)* 17 (2020), [https://www.abetterbalance.org/wp-content/uploads/2020/06/Misled\\_and\\_Misinformed\\_A\\_Better\\_Balance-1-1.pdf](https://www.abetterbalance.org/wp-content/uploads/2020/06/Misled_and_Misinformed_A_Better_Balance-1-1.pdf) (discussing story of pregnant worker who was terminated after leaving work to rush to the hospital due to bleeding and fearing she was miscarrying).

<sup>44</sup> 88 Fed. Reg. 54780 & n. 49 (Aug. 11, 2023) (citing Equal Employment Opportunity Commission, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, at text accompanying n. 14 (2002), <http://www.eeoc.gov/laws/guidance/enforcementguidance-reasonable-accommodation-and-unduehardship-under-ada>).



functions can be temporarily suspended, so too must any production standards associated with suspended functions. Therefore, we respectfully ask the EEOC to delete this reference to the ADA citation, or alternatively, note that it differs in the PWFA context. We also ask the Commission to consider adding to the section in the proposed appendix on ensuring workers are not penalized for using accommodations an example of a situation where an employee is excused from a production standard that was not met because of the temporary suspension of an essential function.

## Related Medical Conditions

The definition of “pregnancy, childbirth, and related medical conditions” is appropriately expansive. In expressly seeking to supplement the protections currently afforded to workers under the Pregnancy Discrimination Act (PDA), the PWFA is properly read to incorporate the case law interpreting the PDA’s parallel language.<sup>45</sup>

**1636.3(b) Definition of Pregnancy, Childbirth, and Related Medical Condition:** We applaud the EEOC for including various conditions related to lactation in the definition of “related medical conditions” that must be accommodated under PWFA, including low milk supply, engorgement, plugged ducts, mastitis, or fungal infections. We recommend also adding “inability to pump milk.”<sup>46</sup>

**Include “chestfeeding” throughout the Regulations and Interpretive Guidance.** We suggest the EEOC include the term “chestfeeding” throughout the Regulations and Interpretive Guidance. “Chestfeeding” is a term used by many masculine-identified trans people to describe the act of feeding their baby from their chest. While we know the EEOC is careful to use gender-neutral language throughout the proposed rule (apart from quoting sources), using explicit language in the Regulations and Interpretive Guidance will recognize, in no uncertain terms, the full range of lactation experiences and provide clarity to employers and trans parents that all lactating employees have a right to receive reasonable accommodations, regardless of gender identity.

## Known Limitation

We applaud the proposed rule for making clear that a “limitation” can be “modest, minor, and/or episodic.”<sup>47</sup> We also appreciate that the EEOC set out principles that reflect the realities of how

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<sup>45</sup> See 168 Cong. Rec. H. 10528 (2022) (statement of Rep. Nadler), <https://www.congress.gov/117/crec/2022/12/23/168/201/CREC-2022-12-23.pdf> (“The Pregnant Workers Fairness Act aligns with Title VII in providing protections and reasonable accommodations for “pregnancy, childbirth, and related medical conditions”, like lactation.”)

<sup>46</sup> Physician’s Guide to Breastfeeding, “4 Reasons Milk is Not Coming Out When You Pump & How To Fix It, available at <https://physicianguidetobreastfeeding.org/lactation/pumping/no-milk-when-pumping>.

<sup>47</sup> 88 Fed. Reg. 54767.

employees – who are rarely trained in law– typically communicate their needs to an employer and suggest some further clarification to the definition.

**1636.3(c).** The PWFA is clear that a “representative” of the employee or applicant can communicate the employee’s limitation and need for accommodation on the employee’s behalf.<sup>48</sup> We support that the proposed rule defines “employee representative” to include a family member, friend, and health care provider. We suggest the EEOC add “co-worker,” “union representative,” and “manager” to this list.<sup>49</sup> The proposed rule also states the employee’s representative can include an “other representative.” We suggest the EEOC replace “other representative” with a more descriptive definition, e.g, a “a person who communicates to the employer the needs of the employee or applicant.” It is critical that the EEOC make clear in the proposed rule that third parties cannot communicate the employee’s limitation and need for accommodation to the covered entity without the employee’s consent in order to ensure third parties are not stereotyping or making assumptions about employees’ needs.

We also recommend that the EEOC include an example in the proposed appendix of a third party communicating the employee’s limitation to the covered entity and illustrating how the covered entity should respond to the request. The example should make clear that once the third party has made the covered entity aware of the employee’s need for accommodation, the employer must engage in the interactive process directly with the employee who is in need of accommodation (not their representative).

**1636.3(d)(1).** We applaud the proposed rule’s specific directives that oral notice is sufficient to make a worker’s pregnancy-related limitation “known” to the employer, and that an employer may not require written notice before responding to a request for accommodation. We further support the proposed appendix’s recognition that a worker need not use any “specific words or phrases” or legalese like “reasonable accommodation” to make their limitation “known.”

**Strengthening 1636.3(d) & 1636.3(d)(3).** Despite correctly recognizing that workers often express the need for accommodation in indirect ways – for instance, by telling a supervisor, “I’m having trouble getting to work at my scheduled time because of morning sickness”<sup>50</sup> – the proposed rule states that “communicated to the employer” means a worker “has made [a] *request for accommodation*.” Section 1636.3(d) (emphasis added). The proposed rule then states that to “[r]equest an accommodation,” the worker “need only communicate to the covered entity that the employee . . . (i) Has a limitation, and (ii) *Needs an adjustment or change* at work.” Section 1636.3(d)(3) (emphasis added). Framing the mandated communication as a “request” assumes a worker’s knowledge of the right to such modifications, and demanding that the worker convey a “need” for a modification similarly assumes that the worker believes they are entitled to have their “needs” met by the employer. But most workers – and especially low-wage workers, people who are new to the workforce, immigrants, and/or non-native English

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<sup>48</sup> 42 U.S.C. 2000gg(4).

<sup>49</sup> We ask the EEOC to make clear that only a manager who is not an employee’s direct supervisor can act as the employee’s third party representative.

<sup>50</sup> 88 Fed. Reg. 54722.

speakers – do not even know they are entitled to such accommodation, much less feel empowered to request one.

**As such, a better approach to defining “Communicated to the employer” would be to:**

- a) Revise § 1636.3(d) to read, “‘Communicated to the employer’ means an employee or applicant, or a representative of the employee or applicant, *has communicated to the covered entity that the employee or applicant: (i) Has a limitation that (ii) Necessitates an adjustment or change at work.*”
- b) Revise the list of employer representatives to whom the employee may communicate their limitations. The proposed appendix appropriately states that employees may communicate their needs to “the people who assign them daily tasks and whom they would normally consult if they had questions or concerns.” However, the language used in the proposed regulation itself—“communicating with a supervisor, manager, [or] someone who has supervisory authority for the employee” 1636.3(d)—doesn’t accurately capture as broad of a range of individuals to whom the employee may communicate their limitation. We therefore suggest replacing the phrase “who has supervisory authority” with “who plays a supervisory role.”

## Undue hardship

**1636.3(j)(4).** We support the proposed rule’s explanation of “predictable assessments,” meaning examples of accommodations requested by employees due to pregnancy that will, in nearly all instances, not be considered to impose an undue hardship. This is based on the fact that many pregnancy- and childbirth-related limitations are temporary, common, and predictable and require only “simple and straightforward” workplace adjustments.

The Commission seeks comment on whether more accommodations should be included under this category. In response, we urge the EEOC to 1) make clear that predictable assessments with respect to undue hardship should be extended to also include accommodations requested due to childbirth and related medical conditions; and 2) add the following accommodations to the list of predictable assessments:

- Modifications to uniforms or dress code
- Minor physical modifications to a workstation, such as a fan or chair
- Allowing rest breaks, as needed
- Moving a workstation, such as to be closer to a bathroom or lactation space, or away from toxins
- Providing personal protective equipment
- Access to closer parking
- Eating or drinking at a workstation
- Time off to attend appointments related to pregnancy, childbirth, or related medical conditions, including lactation

The above accommodations are similar to the four accommodations the EEOC included in the proposed rule as “predictable assessments” as they, too, are simple and straightforward.

We also support the discussion in the proposed rule and proposed appendix regarding elements that *cannot* form the basis of an undue hardship defense, and make these additional suggestions:

1) **1636.3(j)(5).**

- a) We applaud the EEOC for stating in the proposed rule that an employer may not establish an undue hardship defense based on its “mere assumption or speculation that other employees might seek a reasonable accommodation, or even the same reasonable accommodation, in the future.” This language should be strengthened so as to not suggest that an employer can establish such a defense in situations where it has *more* than a “mere assumption or speculation” that other employees will request an accommodation. Regardless of its level of certainty, an employer should never be allowed to deny an accommodation requested by any individual employee based on fears that it will have to provide reasonable accommodations to other employees in the future - whether the employer’s belief is speculative or grounded in fact. Each accommodation decision must be made based on the need of the individual employee requesting the accommodation and the circumstances at hand.
- b) We applaud the EEOC for making clear “that a covered entity that receives numerous requests for the same or similar accommodation at the same time...cannot deny all of them simply because processing the volume of current or anticipated requests is, or would be, burdensome or because it cannot grant all of them.”<sup>51</sup> However, we urge the EEOC to remove the assertion that “The covered entity may point to past and cumulative costs or burden of accommodations that have already been granted to other employees when claiming the hardship posed by another request for the same or similar accommodation”<sup>52</sup> and replace it with the following language: “The covered entity may not point to cumulative costs of accommodations that have already been granted to other employees when claiming the hardship. The undue hardship analysis must be done on a case by case basis.”
- c) We also encourage the Commission to add that 1) other employees’ fear or prejudice regarding the employee’s pregnancy, childbirth, or related condition, or; 2) the possibility that the accommodation would negatively impact other employees’ morale, cannot constitute an undue hardship. These examples are similar to examples explicitly included in the ADA’s Interpretive Guidance.<sup>53</sup>

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<sup>51</sup> 88 Fed. Reg. 54786 (Aug. 11, 2023).

<sup>52</sup> 88 Fed. Reg. 54786 (Aug. 11, 2023).

<sup>53</sup> Equal Employment Opportunity Commission, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, at text accompanying n. 117-18 (2002), <http://www.eeoc.gov/laws/guidance/enforcementguidance-reasonable-accommodation-and-unduehardship-under-ada>).

- d) Moreover, the PWFA intentionally avoided including “direct threat” language from the ADA, and the EEOC should make clear that any claims of undue hardship based on claims of direct threat are invalid.<sup>54</sup>
- e) Finally, the fact that an employee has or has previously received an accommodation for pregnancy, disability, or both should not be a valid reason to claim undue hardship. Allowing such claims would violate the purposes of both PWFA and the ADA by penalizing qualified employees for using the accommodations they are entitled to under the law.

We applaud the EEOC for its comprehensive proposed rule on the Pregnant Workers Fairness Act, which fairly balances the interest of employers with the interest of employees to protect their pregnancy and reproductive health without compromising their health or their family’s economic security. Thank you for the opportunity to comment on the proposed regulation.



U.S. Breastfeeding Committee  
Cheryl Lebedevitch  
Senior Policy & Communications Manager

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<sup>54</sup> See *Long Over Due: Exploring the Pregnant Workers’ Fairness Act (H.R. 2694) Before the Subcomm. on Civil Rights Human. & Servs. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019) (Questions for the record submitted by Dina Bakst, Co-Founder & Co-President, A Better Balance, at 12).